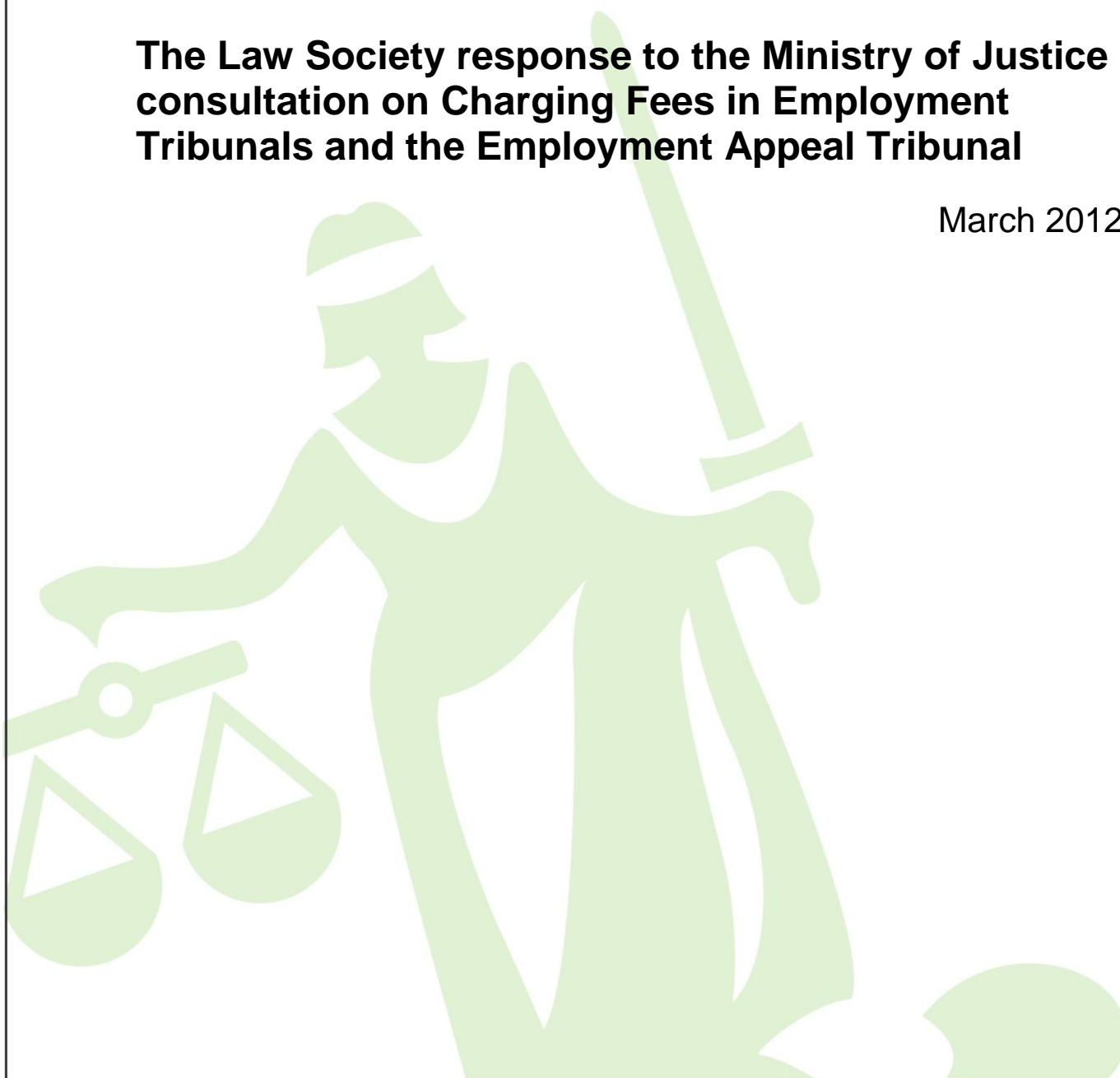




The Law Society

**The Law Society response to the Ministry of Justice
consultation on Charging Fees in Employment
Tribunals and the Employment Appeal Tribunal**

March 2012



The Law Society

The Law Society is the representative body for more than 140,000 solicitors in England and Wales ('the Society'). The Society negotiates on behalf of the profession, and lobbies regulators, government and others.

This response has been prepared by the Society's Employment Law Committee ('the Committee'). The Committee is made up of senior and specialist employment lawyers from across England and Wales. Committee members provide advice and representation to employers and employees through practice in City and regional firms, local government, industry, trade unions and law centres. Some Committee members are fee-paid employment judges.

Introduction

The government's goals in introducing fees in the Employment Tribunal and the Employment Appeals Tribunal are to relieve pressure on the taxpayer by transferring some of the costs of running the system to the user, and to encourage parties to think about resolving disputes in other ways.

The proposals seem to rest on the premise that there has been an increase in the number of Tribunal claims arising from the prevalence of weaker cases. The statistical evidence does not support this. Whilst we recognise that justice must be delivered to a budget, the introduction of Employment Tribunal fees cannot be justified on the evidence, and will have a damaging impact on access to justice. The Society has a long standing position of opposing the government policy to recover court costs through fees because in our view this undermines access to justice, particularly for people on low incomes, who typically include many women, people from non-English speaking backgrounds and people with disabilities.

The Tribunal process provides access to remedies which safeguard the statutory rights of people who, for want of resources, are very often the weaker party. Plans to remove legal aid funding from most employment cases already present a threat to access to justice. It is essential that access to justice is not further reduced by inappropriate fee levels.

In responding to this consultation we have tried to constructively assess ways in which this impact can be minimised. However, ultimately we remain deeply concerned that the proposed fee structures will prevent people with legitimate claims from accessing justice in the Employment Tribunal and the Employment Appeals Tribunals.

We do not believe that this impact will be offset by the proposed exemptions through fee remissions. The level at which fee remissions tail off is far too low to be of any assistance to the majority of claimants: the remission level is below even the threshold for eligibility for legal aid.

The assertion that fees will have the effect of encouraging Tribunal users to resolve disputes as early as possible is flawed. Fees will not act as incentives for claimants who qualify for remission, wealthier claimants or claimants with financial backers such as insurance companies to resolve a dispute before hearing. This assertion fails to recognise the many existing opportunities for resolution (such as mediation, pre-claim conciliation or settlement) that will already have occurred. Fees will not necessarily deter people from making a claim or deter people from continuing onto a hearing because despite all the previous opportunities to resolve a dispute, there are a number of disputes that are complicated and need to be resolved by the Tribunal.

The consultation seeks to persuade the reader that these proposals are simple when in fact they are not. In this response we indicate complexities which will arise in practice, and which will cause difficulties to those concerned with their application and administration. Even adopting the existing

fees remission system is fraught with problems since the government's own research shows that it operates with widespread failures.

The risk is that Tribunals are likely to be involved in far more work and cost in determining the incidence of fees, and disputes as to those issues than they will save by charging them. It may also lead to claimants' representatives presenting claims in a way in which is advantageous in terms of calculating fees and which could undermine effective case management. It is also likely to result in displacement of equal pay claims from the Employment Tribunal to the civil courts.

We believe that the stated aims of the proposals will not be met in a way which is even handed and fair. Better solutions exist, and we urge the government to rethink the proposals. Such solutions could include fees being recovered out of damages awarded in full Tribunal hearings, having a lower initial fee borne by greater numbers, levying the fee later in the process, or payment by instalments. The Law Society would welcome dialogue with Government over possible alternatives.

A further point is that Mr Justice Underhill is currently leading a fundamental review into Employment Tribunal rules. Until that review is complete, there seems little sense in introducing any model for fee charging which reflects the current rules. It would be much more logical to await Mr Justice Underhill's proposals and revisit possible fee structures.

We believe that the introduction of fees will operate as a disincentive to the early resolution of claims, for reasons we explain in our response. The government has put forward welcome proposals for the early conciliation of claims using ACAS. Early conciliation should be given an opportunity to bed down and become a familiar part of the industrial resolution process before fees are introduced.

Q.1 Are these the correct success criteria for developing the fee structure? If not, please explain why.

The Society considers that the proposed success criteria are problematic for the following reasons.

Criterion 1: Recover a contribution towards the costs from users which will be used to support and fund the system.

Recovering a contribution towards costs is an inadequate measure of success. It also fails to account for any ongoing qualitative analysis of the monetised cost of administering the systems. The government estimates that Option 1 will annually bear a monetised cost £17m with a net monetised yield of £7m, and that Option 2 would cost £25m and yield £9m¹, with no account made for inflation. We question whether the proper balance is struck between access to justice and costs recovery when up to 74p in every £1 of monetised benefit is lost. Option 2 makes no attempt to distinguish between users of the system and the fee they pay save in respect of interim applications which as stated in response to other Qs is not necessarily logical.

Criterion 2: Develop a simple, easy to understand and cost-effective fee structure.

This must be seen as a bare minimum criterion. If it is not met then the weaknesses in the first criterion become even more relevant.

¹ Impact Assessment TS 007, page 7

Criterion 3: Maintain access to justice for those on limited means.

The inevitable effect of introducing fees will be to limit access to justice. Maintaining access for those on limited means ignores those thousands who earn too much to benefit from remission, and too little to afford the fees. It is a serious weakness of these criteria that no attempt is made to measure the adverse effect on the 'squeezed middle'.

Criteria 4: Contribute to improving the effectiveness and efficiency of the system by encouraging users to resolve issues as early as possible.

The assumption that fees will have the effect of encouraging Tribunal users to resolve disputes as early as possible is fundamentally flawed. Firstly, a claimant who qualifies for full remission has no financial incentive to settle due to the fees, and the government anticipates that 26.4% of all claimants will receive a full remission.² The effect will be variable for those receiving type 3 remission but the government's figures estimate that 46.3% of claimants would benefit from this for fees up to £1,000.³ The wealthy, or those with financial backers such as insurance companies or trade unions, will be similarly disincentivised. For remaining claimant groups the potential settlement becomes an issue of credit-worthiness as much as justice.

Secondly, whilst an issue fee may deter issue, and a set-down fee may deter a hearing, any decision taken for that reason will be masked by the efforts made by previous opportunities for resolution that will already have occurred including:

1. A disciplinary or grievance stage that parties are obliged to follow to avoid a reduction in compensation under s.207A *Trade Union and Labour Relations (Consolidation) Act 1992*;
2. A month of early conciliation through ACAS;
3. Attempts to settle by one of the parties; and
4. Post-claim conciliation by ACAS.

It is difficult to see how this criterion could be measured in any meaningful way.

The fact is that some cases will not settle, regardless of the fees level. Claims proceeding to the tribunal will be, by definition, the more intractable disputes, and less easily resolvable.

The government's research into settlement behaviour with particular reference to non-settled claims (i.e. the type being targeted by these proposals) says:

In non-settled cases, an offer by either party was more likely to be proposed in cases that went to full tribunal (33 per cent) than in those that were withdrawn (24 per cent) or dismissed (15 per cent).⁴

² Impact Assessment, paragraph 4.14, page 28

³ Impact Assessment, paragraph 4.14, page 28

⁴ *Findings from the Survey of Employment Tribunal Applications 2008* (March 2010) BIS Employment Relations Research Series No. 107, page 81

Based upon an analysis of those cases which did not settle, the research shows that offers are more likely to be made in cases where a hearing was going to happen, than in cases where no hearing was going to happen.

If the imposition of a hearing fee is going to make hearings less likely, then it is possible that fewer offers to settle will be made. If there are fewer offers to settle, then there is a reduced likelihood of either early or alternative resolution, meaning that in at least some cases a hearing fee may in fact impede resolution than facilitate it.

It is fair to infer that there will be some claims abandoned due to financial difficulties. Unless one assumes that all such claims are unmeritorious, this is simply access to justice denied.

The same study looked at settlement motivation. For employers it found,

Saving money and time were the main reasons why employers favoured settling their cases. Of those who made an offer, one half (51 per cent) cited factors related to saving money (for example, keeping costs to a minimum, more cost effective to settle) and one-quarter (25 per cent) said that they had done so for convenience and to save time.⁵

For claimants it found,

Claimants who were made an offer, but did not accept it, were asked why this was the case. Three in ten (29 per cent) said it was because they felt that not enough money was offered. Six per cent said that their claim had never been about money or that money was not important to them.⁶

This research clearly shows that most settlements are about making realistic offers in order to save expense and are prompted by having the cost of a hearing to avoid. However, it is also true that some respondents take advantage of the fact they generally have bigger 'war-chests' than the recently unemployed, and take an attritional stance to litigation to wear the claimant down so that they abandon their claim, or accept what offer they can.

It is also a common concern among respondents not to be seen to settle too quickly as it might encourage others to claim, and this will persist into these changes.

On the claimant side it is worth remembering that once a fee has been paid, it has no deterrent effect, and in the absence of any costs penalty, a claimant may simply feel that they have bought and paid for a right to a hearing. With total fee levels set at levels higher than many claimants will pay for their car, there is likely to be a strong temptation to 'get their money's worth'.

The Society is concerned that what the government actually means by early resolution is actively preventing claims being issued. That is not dispute resolution but is simply denial of rights. For this reason a further success criterion should be developed which seeks to monitor the extent to which, (if any), any reduction in claims is caused by people not being able to afford to lodge a claim.

Q.2 Do you agree that all types of claims should attract fees? If not, please explain why.

There are particular claims where it is difficult to see any justification for charging fees. These include:

- **A claim for written reasons for dismissal, under s.92 *Employment Rights Act 1996***

⁵ Ibid, page 83

⁶ *Findings from the Survey of Employment Tribunal Applications 2008* (March 2010) BIS Employment Relations Research Series No. 107, page 84

A claimant simply needs to show that they had one year's continuous employment. If a respondent cannot, or will not produce reasons this claim need be no more than an administrative function.

- **Most Level 1 claims where money has been withheld by the respondent**

Typically these are resolved with a hearing lasting no longer than two hours with an Employment Judge sitting alone. They are straightforward and are claims where the claimant's ability to pursue a remedy is directly affected by the need for a remedy in the first place.

- **An application by an employee that a respondent has failed to pay a protective award as ordered by the Employment Tribunal, under s.190 *Trade Union and Labour Relations (Consolidation) Act 1992***

This is a claim that arises because the respondent is already in breach of an Employment Tribunal order. Whether or not they have paid is a simple matter of fact and this claim need be no more than an administrative function.

- **An application by an employee that a respondent has failed to pay a protective award as ordered by the Employment Tribunal, under regulation 15(10) *Transfer of Undertakings (Protection of Employment) Regulations 2006***

This is a claim that arises because the respondent is already in breach of an Employment Tribunal order. Whether or not they have paid is a simple matter of fact and this claim need be no more than an administrative function.

- **Claims against insolvent respondents**

Claims against insolvent respondents are generally made as a necessary precursor to an application to the Redundancy Payments Office (RPO). The claimant's fee is unlikely to be reimbursed by either the RPO or respondent and the fees are likely to reduce the value of a claim either to nil, or to a level that would bring the process into disrepute.

Q.3 Do you believe that two charging points proposed under Option 1 are appropriate? If not, please explain why.

An **issue fee** will certainly deter some claimants, especially for low value claims. We are less sure about its ability to promote settlements. We anticipate that it will become standard practice for the cost of fees to be routinely borne by respondents in settlement agreements. Any other approach would be a bar to settlement, especially where fees are high, or claim values are low. The question is the extent to which avoiding an issue fee is an incentive to a respondent to settle.

Some context is helpful. The British Chamber of Commerce reports that the cost of defending an Employment Tribunal claim (including lost management time) can be between £15,000 and £125,000 or more⁷. 71% of respondents seek advice⁸ and usually consult a lawyer⁹. Even the maximum issue fee of £250 is a tiny fraction of what respondents are prepared to spend upon legal fees to defend a claim. It is, for instance, just 30 minutes of a Grade A solicitor's time in central London at the court approved rate.¹⁰

⁷ *Employment Regulation: Up to the Job?* British Chambers of Commerce, March 2010, page 9

⁸ *Findings from the Survey of Employment Tribunal Applications 2008* (March 2010) BIS Employment Relations Research Series No. 107, page 48

⁹ *Findings from the Survey of Employment Tribunal Applications 2008* (March 2010) BIS Employment Relations Research Series No. 107, page 46

¹⁰ *Solicitors Guideline Hourly Rates 2010* - www.judiciary.gov.uk/publications-and-reports/guidance/index/guideline-hourly-rates-2010. Hourly rate of £409 plus VAT

Given the insignificant impact on those figures that £250 represents, the tactically aware respondent may choose to sit out the limitation period and wait and see whether the claimant is prepared (or able) to pay the fee, and settle only if they proceed. One unique aspect of the Employment Tribunals and employment relationships is that a respondent can adversely influence the claimant's ability to pay a fee; examples include paying them little or nothing until limitation has passed or by undermining/delaying their benefits application which may narrow the availability of fees remission and income.

We have concerns about the interplay between remission, limitation and the issue fee. Most claims have a three month limitation period. If that is missed then either no extension is available (equal pay claims), or it is subject to the just and equitable or reasonably practicable tests (discrimination and most other cases). The result could be enormous scope for satellite litigation and uncertainty.

Our understanding is that it will be possible for a claimant to lodge a claim and provide proof of entitlement at the time or within five working days.¹¹ If the tribunal rejects the remission claim, then the ET1 would be rejected and returned. The claimant would then have the option of appealing (we understand there are two appeal processes under the remissions scheme) or at that point paying a fee. This then raises issues around the effect of administering the remissions system, including any right of appeal against a decision. If the claim is by then out of time, then the claimant is locked into making applications to lodge out of time (assuming it is possible), and appealing the decision, and paying a review application fee for £100 - £350 for the process. We fear that such a scenario is very akin to the much criticised jurisdictional bars arising from the statutory grievance procedure. Ultimately, the potential for satellite litigation risks discrediting the system and defeating the goal of obtaining a contribution to its administration of the system.

Clear guidance would have to be given on the impact of remission disputes on time limits. Otherwise, this would introduce a huge amount of uncertainty for respondent employers who could not have confidence that because a limitation period had passed, that was the end of any potential dispute with an employee.

The Society is similarly concerned about a **hearing fee**. The consultation suggests that a hearing fee would be payable between four and six weeks ahead of the hearing date.¹² Level 1 cases are generally listed on receipt of the ET1, before the ET3 is received and the hearing is generally about eight weeks on. For these cases the fee would be payable before the ET3 is filed in most cases. This would strip it of any incentive value and would effectively make it an extension of the issue fee.

We would also be concerned about a regime whereby the hearing fee was payable before witness statements were exchanged. This is a key point in a case as, often for the first time, the whole picture can be seen at this point, and fully informed decisions can be made about whether to continue. The four to six weeks trigger date runs a real risk of colliding with witness statements, especially where there is timetable slippage. We repeat the observation that once paid, a fee loses any value as a means of encouraging settlement.

We note that the intention is that no refunds would be made where hearings do not occur¹³. The justification given is that, "The behaviour of those who wait until the hearing day to consider settlement must be changed." We agree that this behaviour must be changed but this is a maladroit way of doing so. It is the claimant who must pay the hearing fee, and so where the failure to settle sooner is down to the claimant, this might be viewed as 'polluter pays'. However, where the failure is down to the respondent, this approach does not bear scrutiny. In the absence of any obligation upon a settling respondent to pay the fees, a resentful respondent could refuse to do so as a sting

¹¹ Consultation document, paragraph 68

¹² Consultation, paragraph 107, page 36

¹³ Consultation, paragraph 107, page 36

in the tail. The claimant is then forced into either pressing on to a hearing in circumstances where a settlement would otherwise be achieved, or absorbing a loss.¹⁴

In the circumstances we query the wisdom of a no refunds policy for the hearing fee. There is existing authority for awarding costs against a party that accepts an offer late in the day, when it was made well before¹⁵ and we suggest that this would be a better approach to modifying behaviour.

Q.4 Do you agree that the claims are allocated correctly to the three Levels (see Annex A)? If not, please identify which claims should be allocated differently and explain your reasons.

We query whether the following claims have been correctly allocated:

- **Insolvent Respondents**

We query whether any fees, let alone, level 2 or 3 fees can be justified where the respondent is insolvent. Such respondents rarely participate in the claim, or defend it beyond filing a token ET3. Hearings are short, judgements are virtually 'on the nod' and the expense cannot realistically be passed onto the wrongdoer.

- **Secretary of State Agency applications (Level 1)**

Whilst we have no experience of these claims we would expect them to involve fully contested hearings and query whether Level 1 accurately reflects this.

- **Flexible Working detriment claims (Level 2)**

These are straightforward factual issues that can be resolved with a short hearing. We query why level 2 is selected.

- **Written Pay Statements (Level 2)**

These are straightforward factual issues that can be resolved with a short hearing. We query why level 2 is selected.

- **Written Reasons for Dismissal (Level 2)**

These are straightforward factual issues that can be resolved with a short hearing. We query why level 2 is selected.

- **Failure to allow accompaniment (Level 2)**

These are straightforward factual issues that can be resolved with a short hearing. We query why level 2 is selected.

- **Interim Relief (Level 2)**

No separate fees should be payable for this claim. A claim for interim relief can only be brought as part of an unfair dismissal claim¹⁶ which sets up a double fee situation. The claim is also classed as an interim hearing to which the rule relating to pre- hearing reviews apply.¹⁷ Furthermore, tribunals are statutorily obliged to list the hearing as soon as practicable after receiving the application¹⁸

¹⁴ Range based on indicative issue and hearing fees for a level 1 case and level 3 multiple of 200+ claimants, Consultation paragraphs 112 and 114 at page 37ff

¹⁵ See *G4S Security Services Ltd v Rondeau* 13th October 2009, UKEAT/0207/09

¹⁶ Section 128 *Employment Rights Act 1996*

¹⁷ *Employment Tribunals Rules of Procedure*, Rule 18A

¹⁸ Section 128(3) *Employment Rights Act 1996*

thereby making a nonsense of the claimed distinction between the purpose of issue and hearing fees.

Q.5 Do you think that charging three levels of fees payable at two stages proposed under Option 1 is a reasonable approach? If not, please explain why.

We agree that it is appropriate to make distinctions between claims which are inherently simple or complex given the difference in Tribunal time required to resolve such cases. We query however whether that distinction is relevant to the issue fee, given that the cost of processing an ET1 and ET3 does not relate to the claim being made, but rather to administrative elements such as photocopying and postage.

Q.6 Do you agree that it is right that the unsuccessful party should bear the fees paid by the successful party? If not, please explain why.

The fact that a party has fought and lost, does not necessarily mean that it was unreasonable for that party to have proceeded.

By the time a case reaches a conclusion and the issue of costs arises, the parties will have passed through a number of stages aimed at facilitating settlement. The fact that a case has not settled does not necessarily mean that either or both parties have not tried to achieve resolution without a full hearing. In some cases, one party will have been willing to settle, but the other party may have proved intransigent. The option faced by the conciliatory party may be to proceed with a risk of costs, settle on unfavourable and unreasonable terms or, in the case of claimants, to withdraw the claim altogether.

It may be seen as an appropriate means of controlling the volume of cases proceeding to a contested hearing, but requiring unsuccessful parties to bear the fees paid by the successful party assumes that the outcome of all cases is capable of prediction with a reasonable degree of certainty. Experience shows that this is not so.

All litigation carries with it a risk, even when an evaluation of the merits has assessed the chances of success as high. Certain types of claim present risks which can be difficult to quantify even following exchange of witness statements. There may be, for example, a factual dispute which can be determined only by weighing oral evidence. This can be particularly so in discrimination claims or claims for constructive unfair dismissal, rather than cases which are more procedural in nature.

Requiring the unsuccessful party to bear the fees paid by the successful party could serve as a deterrent, particularly for claimants of limited means (but above the remission threshold) for whom bringing the claim has already caused a degree of financial hardship. It is a deterrent that will operate at all stages, but the effect is likely to increase as the case progresses and with it the potential costs risk. In cases where the claimant benefits from remission, there could be no costs penalty and such claimants could, therefore, proceed in even the most unmeritorious cases. The sanction of such a "costs follow the event" provision, will, therefore, apply to some and not others resulting in an unjust system which is governed by the ability to take a financial risk.

The current costs provisions already provide a sanction against the most unreasonable litigants and could be continued to be used in appropriate cases without the deterrent effect described above.

A further adverse effect is the advantage to a respondent in refusing to enter meaningful settlement negotiation or delaying the same, in the hope that the burden of fees proves too much for the claimant to bear.

The proposal that the unsuccessful party bears the cost of the fees paid does not square with the recommendations of Lord Justice Jackson in relation to civil costs. The rationale for moving in a markedly different direction in employment cases is not clear.

Q.7 Do you agree that it is the claimant who should pay the issue fee and, (under Option 1), the hearing fee in order to be able to initiate each stage of the proceedings? If not, please explain why.

The effect of introducing fees for claimants, particularly at the point of entry to the system, will be to limit access to justice. There will be many with meritorious claims for whom an issue fee will prove an absolute bar. These will most likely be claimants of limited means who nevertheless earn too much to benefit from remission, the so-called 'squeezed middle'. There may be a disproportionate impact on Claimants bringing discrimination claims, many of whom will be in employment, but perhaps earning a lower than average wage.

The introduction of a hearing fee will have the same effect, simply further down the line, after the claimant will have incurred the expense of the issue fee and any other preliminary fees or expenses.

By the time the question of the hearing fee arises, the parties will have passed through various stages designed to promote settlement and resolution (see response to Q1). The claimant is then faced with the prospect of a further fee for a hearing which may be necessary due to the refusal by the respondent to enter into meaningful negotiation or to make a reasonable offer by way of settlement. Alternatively, the case may be finely balanced on the merits and either party is justified in wishing to have their case determined by a tribunal.

There must be a risk in any given case that the respondent will refuse to negotiate in reliance on the likelihood that the claimant will not be able to afford a hearing and will simply abandon the claim or accept what offer they can. The burden of the hearing fee and its implications will be borne by only a proportion of claimants and the introduction of these fees means that access to justice is governed by the ability to pay or to take a financial risk rather than the merit of the claim.

Q.8 Do you agree that these applications should have separate fees? If not please explain why.

It would be inappropriate to charge fees for respondents to apply to set aside a default judgment or to apply for dismissal of the proceedings following settlement or withdrawal.

The fact that there has been a default judgment may have arisen as a result of something as innocuous as an incorrect address given by a claimant. In the experience of practitioners, it is not usual for respondents who receive a claim to simply ignore it, so the reasons for a default judgment are usually administrative errors by the claimant or the Tribunal itself. The question of dismissal following settlement or withdrawal need be no more than an administrative function.

A counterclaim has an independent existence once issued, and can be pursued even if the claimant withdraws all of their claims. We cannot see any justification for the fact that there is no hearing fee for a counterclaim.

We fundamentally disagree with the proposal to charge a fee (for either party) to apply for written reasons where reasons have been issued orally at a hearing. It is settled law that,

...the decision of an [Employment] Tribunal ... must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises; and it is highly desirable

*that the decision of an [Employment] Tribunal should give guidance both to employers and trade unions as to practices which should or should not be adopted.*¹⁹

It is therefore an obligation on the tribunal to provide written reasons, and the Society is against levying a charge for this. It flows from the hearing and should be considered part of the hearing fee.

Furthermore, a party cannot appeal without written reasons so charging £100 – £250 for them is an additional appeal cost. Either way it should be considered part of the hearing, or of the appeal, and no separate fee should be raised.

For clarity, we have no objection to detailed reasons being provided only upon request.

An application for a review may only be lodged on one of the following grounds²⁰:

- a) the decision was wrongly made as a result of an administrative error;*
- b) a party did not receive notice of the proceedings leading to the decision;*
- c) the decision was made in the absence of a party;*
- d) new evidence has become available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at that time; or*
- e) the interests of justice require such a review.*

In our members' experience most applications are made on grounds (a), (b) or (e). The first two are situations where the review is necessary in order to correct a mistake made by the Employment Tribunal. We can see no good reason for charging a party to correct a tribunal's mistake.

Q.9 Do you agree that mediation by the judiciary should attract a separate fee that is paid by the respondent? If not, please explain why.

We fundamentally disagree with the proposal that there should be a fee payable for judicial mediation.

This proposal is contrary to the stated aim of encouraging judicial mediation. Whilst it is arguable that the cost of a service which is available only in certain types of claim should not be borne by all litigants, this must be balanced against the indirect benefit to all users of the system resulting from the potential release of tribunal time and resources through the settlement of cases which would otherwise take up substantial hearing time.

In any event, mediation is by its very nature a conciliatory and consensual process and so both parties should be treated equally. We question, therefore, the imposition of a fee on the respondent only. One possible effect of this may be that a respondent will see no point in expending the fee in cases where either the claimant cannot afford to litigate in any event (so the respondent may as well just 'sit it out' and wait for the claimant to give up) or is unlikely to settle anyway. The imposition of any fee at all is counter to the spirit of mediation. If mediation is to be encouraged and seen as a viable and desirable alternative to litigation, there should be no fee payable as this only serves to introduce a potential disincentive.

¹⁹ Per Bingham LJ, *Meek v City of Birmingham District Council* [1987] IRLR 250, Court of Appeal

²⁰ *Employment Tribunals Rules of Procedure*, Rule 34(3)

Q.10 Do you agree that the HM Courts & Tribunals Service remission system should be adopted for employment tribunal fees across Great Britain? If not, please explain why.

There are a number of problems with this system as presently applied in the civil courts, which we submit would be compounded by the particular factors affecting employment tribunal claims. These factors are either not present in civil cases, do not have the same impact or they are simply not relevant.

In the employment tribunal, there are two main factors which distinguish cases from those in the civil jurisdiction:

1. Significantly shorter time limits, in most cases three months;
2. Many potential claimants will have recently lost their job.

As to the first factor, the time limit for bringing a claim in the employment tribunal is, in most cases, three months. There can be uncertainty as to when time begins to run, for example continuing acts in discrimination or constructive dismissal cases. By contrast, in civil cases the limitation period is usually a matter of years rather than weeks or months, three years for personal injury claims and six years for most other claims. In family cases, there may be no relevant limitation period or a time limit may be dependent on other procedural stages in the case but, in any event, the preservation of the right to make the claim is unlikely to be dependent upon any time limit in the same way or to the same degree.

As to the second factor, potential claimants will in many, and probably most, cases have recently lost their job, resulting in a significant change in circumstances immediately prior to the point at which remission will be assessed. This will inevitably complicate and delay any such assessment for a number of reasons. The potential claimant will, in almost all cases, be eligible for some type of benefit. The waiting period for processing of applications for these may be six weeks at the very least. That process will in some cases be complicated by an individual's family circumstances and any housing/accommodation issues. Other cases may involve an application for benefits relating to sickness, which are currently facing significant delays due to the time taken to complete medical assessment.

In reality, the practical effect of these factors combined, with or without the other difficulties discussed below, could, if the remission system is adopted in the employment tribunals, prove fatal to some claims, resulting in injustice.

To be eligible for Remission 1 (full remission) an applicant must be in receipt of a prescribed benefit. This requires proof by production of relevant documents and these must be provided at the time the application is made or at the time any fee is due. By the time a potential claimant in the employment tribunal has received confirmation of the relevant benefit, together with the necessary documentary evidence, the expiry of the limitation period will, at the very least be ominously close and in many cases could well have expired.

Thus, a claimant who may have a meritorious case and would have been entitled to full remission of fees may be denied access to justice

This problem is not addressed, adequately or at all, by the provision for emergency relief subject to provision of proof or payment of the fee within five working days. In most cases, this additional time will make no practical difference. So too the provision for a refund in eligible cases, which will do nothing to assist the applicant who could not find the money to pay the fee in the first place.

Neither is the appeals process a fair and realistic way of dealing with appropriate cases. This will inevitably involve delay, which in the tribunal may be fatal to the claim, and may also suffer from the same problems in relation to accurate assessment discussed below.

The scenario set out above might not be uncommon in practice. Remissions 2 and, in particular, Remission 3 may see the same problems.

Remission 2 also provides full remission, but involves an assessment of income, the level depending on the number of children in the household. This too requires documentary evidence and the application may still cause delay, which may be too long in the context of such a short limitation period.

Remission 3 presents all the same problems, but is arguably worse with a greater risk of error and injustice. It provides full or partial remission based on an income and expenditure means test to calculate the household's monthly disposable income and involves a number of thresholds and 3 fixed allowances. In practice this appears to have proved challenging for some court staff involved in the assessment of these claims. This is not simply a problem of potential delay in the particular context of employment tribunal claims, but also an issue of accuracy in the actual assessment. Additionally, the cost of carrying out such assessments may prove to be disproportionate.

The government must have regard to the research on the remission regime in the civil justice system. In 2008, the Ministry of Justice (MoJ) commissioned PricewaterhouseCoopers (PwC) to conduct research on the fee remission system introduced in October 2007, to investigate whether the system was being applied consistently across all civil and family courts and to examine court users' views and experiences of the system. The findings were published in December 2009.

The study revealed that court staff had difficulty with processing applications for remission, with applications for Remissions 2 and 3 causing particular issues. These applications were more likely to be processed incorrectly and, significantly, this was more likely to result in a rejection of an application which should have been granted. Evidence indicated that approximately two-thirds of staff found processing applications for remissions complex or very complex, with the main issues relating to applications for Remission 3, verifying evidence and applicants' understanding (or lack thereof) of the supporting documentation required. Whilst the findings suggested that staff were more likely to make the correct decision where a case was eligible for Remission 1, in cases where Remissions 2 or 3 should be granted, staff were more likely to make the wrong decision. The indications were that overall the processing of applications was incorrect in some 30% of cases on average. Allowing for the higher degree of accuracy found in relation to the more straightforward Remission 1 cases, this must mean that an even greater proportion of Remission 2 and 3 applications are likely to be incorrectly processed.

Whilst overall the study found that there was good awareness amongst remission **recipients** of the system at the outset, 60% of those interviewed who had **not** been granted a remission, were unaware of the remission system. The base for the interviews was small, however, and the researchers stated that further research would be required to ascertain the significance of the problem. The study found some evidence that those in receipt of Remission 1 were more likely to be aware of the system as a direct or indirect result of their receipt of benefits. This suggests that those who may be entitled to Remissions 2 or 3 may not apply for the remission to which they would be entitled, as a result of this lack of awareness. Such potential Claimants may be deterred from issuing claims in the first place, which means that they never enter the court system at all. In consequence, the denial of access to justice is impossible to quantify and may be far greater than ever imagined.

This may also be an issue in respect of those who have only very recently become entitled to benefits (and therefore full remission) as a result of the circumstances giving rise to their potential claim in the employment tribunal. Such individuals will have very recently lost their job, possibly in distressing and unjust circumstances and may never bring a claim if they believe, erroneously, that this is not an option open to them for financial reasons. Those who do decide to bring a claim may abandon the idea in the event that their remission application is delayed (with implications for time limits) or rejected (in which case they may not necessarily appeal). Those who do appeal may find themselves in breach of time limits even if they are ultimately successful in their application for remission. The problems created by lack of awareness compound the problems and the injustice created by incorrect processing and vice versa.

The study also identifies possible issues concerning users with relatively low literacy levels or with particular special needs, who may find the application forms and guidance difficult to understand. Such applicants arguably require additional support and may find the difficulties associated with application, provision of evidence in support and any appeal process, an insurmountable obstacle.

Other problems identified by the study included: multiple applications for the same case; lack of clarity around documentation required and information and guidance; the level of detail required on forms and the nature of the documentation required; time taken to process applications; lack of access to court staff, inconsistent advice provided by court staff and, in some instances, documentation lost by court staff.

Such problems will only be compounded by errors made by court staff in processing applications and all issues identified by the study will be of greater significance in the employment tribunals due to the time limit factor already discussed.

Given the shortcomings highlighted by the previous PwC report remain, to import these deficiencies into the Employment Tribunal where considerably harsher limitation rules apply would undermine access to justice to a startling degree.

At the very least, it is premature to even consider introducing such an evidently flawed system into the employment tribunals, a jurisdiction with significantly reduced time-limits and, in most cases, a greater number of (recently) unemployed potential claimants. In the employment tribunals, the ability to pay court fees usually arises from the very heart of the issue, which has brought the potential claimant to the tribunal in the first place. It cannot be right, that potential litigants are at risk of being denied access to justice for the very same reason that they are in need of a remedy from the courts.

Satellite litigation

We have great concern about satellite litigation in relation to time limits and how the remission system will work in practice. On the face of it, claimants applying for remission are at risk of finding themselves out of time if their application is rejected for whatever reason and the relevant deadline has passed. This then raises issues around the effect of administering the remissions system, including any right of appeal against a decision. This is a problem peculiar, in the main, to the Employment Tribunal, due to the shorter time limits which apply, as opposed to, say, the County Court where limitation periods will usually be in terms of years rather than weeks or months. If in response to this concern, the proposal would be to effectively give such a claimant a right to 'extend' the time limit, the prospect of satellite litigation by respondents raising objections to such an extension depending on particular circumstances is a probable outcome. It is not within the realm of possibility for example that a claimant up against a time limit may strategically assert that they are entitled to remission to get a claim 'lodged' within a certain time limit which when 'rejected' by the ET on the basis that they are not in fact entitled to remission, they (the claimant) then pay the fee. If by then they are 'out of time' is it right that they should get an extension of time?

Q.11 Are there any changes to the HM Courts & Tribunals Service remission system that you believe would deliver a fairer outcome in employment tribunals?

Given the potential failings of the system as presently structured, a more flexible and more generous system should be considered with a view to achieving the objective of access to justice for all, regardless of ability to pay. A mechanism for closing the gap through which a proportion of claimants inevitably fall should be devised and implemented.

We query why a respondent faced with a successful claimant who has issued on the basis of remissions, would not be ordered to pay (albeit to the Tribunal system) the issue fee that would have been payable by the claimant had they not been entitled to remission.

Q.12 Do you agree with the fee proposals for multiple claims under Option 1? If not, please explain why.

The task of responding to this question is made difficult by the fact that the assertions/suggestions made in the consultation paper in respect of the cost of multiple claims appear somewhat contradictory.

On the one hand, it is suggested that multiple claims consume greater administrative and judicial resource than single claims and that the hearings take longer. This is cited as the basis for the proposed structure for fees in multiple claims. On the other, it is stated that multiple claims are more cost effective for HM Courts & Tribunals Service as resources are used to deal with what would otherwise be a number of single claims covering the same or similar issues on one occasion rather than many. If multiple claims are more cost effective, then there can be no justification for any increased fee, rather the opposite.

We are particularly concerned by the comment that individuals within a multiple claim will have to consider carefully the implications of commencing their case as a multiple set of claims. This comment is made in the context of the proposal that the fee is payable in relation to a case rather than individually by each claimant and that if the full fee is not paid, the whole set of claims would be lost. This is fundamentally unfair. Whilst this may not be an issue in practice where claimants are represented and funded, in cases where claimants are representing themselves, misunderstanding and confusion could result in injustice. Indeed, some may pay but others may not.

Equal pay litigation

We wish to highlight some of the practical issues raised by the proposals with particular reference to equal pay litigation. The Court of Appeal has determined that equal pay claimants have an undoubted right to institute equal pay proceedings in the civil courts instead of the ET; *Birmingham City Council V Abdulla & ors* [2011] EWCA Civ 1412. Multiple cases account for a significant part of the Employment Tribunal workload. A harsher and unworkable fee regime in the Employment Tribunal is likely to lead to forum shopping in multiple cases and to a greater number of equal pay claims being pursued in the civil court. This is likely to result in a greater overall cost to the justice system.

Multiple claims are defined in the consultation paper at Para 82 as being, "claims against the same respondent arising out of the same circumstances". At Para 84 it is stated that, "every person within a multiple claim ultimately gains the same benefit as an individual bringing a single claim. If the lead case succeeds then all claimants covered by that lead case succeed". On that basis it is, "appropriate that all claimantsshould pay". The statements in the consultation document rest on a number of flawed assumptions and fail to reflect the reality of equal pay litigation.

First it is assumed that all claimants in the same multiple will succeed if the lead case succeeds. This is not correct. In many cases matters of entitlement of individual members of the multiple will remain to be determined after the conclusion of the lead case. In a local authority equal pay case for instance, there will normally be a complex claimant comparator structure with claimants seeking to compare themselves with different comparators on different remuneration. The only common feature in multiple equal pay claims which can be used to define them is the basis upon which the employer seeks to defend the pay of the comparators. There may be defences available to the employer in relation to some claimants but not others. It is therefore impossible to say at the outset of proceedings that the claimants in the multiple will all stand to gain or lose together. As noted different claims within a multiple may be defended on a variety of grounds, which will only be apparent after proceedings have been commenced, and often long after.

PHR hearings may be needed to resolve issues which would apply to a part of the multiple only. It is not clear from the Consultation paper whether the fee for hearing proposed in Option 1 relates to a final hearing (in these circumstances taken to be the remedy hearing) or interlocutory ones. If the former there are very few such hearings in multiple equal pay claims. The issues between the parties are not normally to do with remedy. If the latter, will the fee be charged for each hearing if not which hearings? There is the prospect of different levels of fees for different hearings as some or all of the claimants in a multiple will be involved in particular hearings.

Claimants could find themselves being required to pay fees for more than one hearing. Normally PHR hearings occur because the Respondent raises a particular defence which the Tribunal decides to hear as a preliminary issue, yet it is the claimants to which the hearing applies who would be required to pay the fees. It would be more equitable for the Respondent to pay such hearing fees. Of course those whose claims were the subject of a fee on commencement but then adjourned could rightly complain that they were paying for nothing. Similarly those who faced a hearing fee in relation to a PHR in circumstances where the outcome would in fact even if not in law determine the issue within the multiple as well as for claims stayed (for instance a PHR to determine an employers defence of material factor), would rightly complain that they were paying for the benefit of others.

Equal pay cases join and are allocated to multiples at various stages. In long running litigation, cases may be added to multiples months and on occasion years after the initial cases have been commenced - in one not atypical set of claims, new claims were being added seven years after the first claims were initiated. The consultation assumes that the numbers in the multiple are fixed at the outset as that is the time when, under each option, the size of the fee is determined. This will almost never be the case with equal pay claims. Because there is normally no time limit for claims where the claimants remain in employment it is common for claims to be submitted in relation to the same issues over a number of years and often after the principal issues to which the claims relate have been determined or otherwise resolved during the course of earlier proceedings. Accordingly it will be impossible to levy payment according to the numbers involved. Determining the fee at issue on the basis of the multiple to which the case belongs will therefore be an artificial exercise.

Once allocated to a multiple, Tribunals frequently 'slice and dice' the claims in a variety of ways and allocate them to different multiples. While a claim may form part of one multiple at issue, by the time of hearing, it may form part of another. Different Tribunals adopt differing case management procedures for equal pay claims. Some define a multiple on a time basis, closing a multiple off on a cut off date and staying all subsequent claims pending the outcome of that multiple. Others operate open multiples, defining issues by reference to lead claimants for each of the issues litigated within the multiple. Whilst not commenting on which method is better, and much will depend on the facts of the particular claims, it should not be the case that Tribunals are driven to adopt particular forms of case management to accommodate a fees structure.

The consultation proposes that fees should be levied on claims which will result in the same outcome, and hence involve the Tribunal system in the same burden of work. This is misconceived. Some equal pay claims within the same multiple will involve the use of independent experts to determine equivalence whilst others will be Work Rated as Equivalent claims. The burden of Tribunal time will be significantly greater for the former than the latter.

The issues are further complicated by the fact that claimants in the same multiple are commonly represented by more than one representative, and sometimes with none. It would be a difficult task to allocate responsibility for fees amongst different representatives and at different times in the course of litigation, in the context of the issues above.

In summary, calculating fees in this context will take up inordinate amounts of Tribunal staff time.

The reality is that Tribunals are likely to be involved in far more work and cost in determining the incidence of fees, and disputes as to those issues than they will save by charging them. It may also lead to claimants' representatives presenting claims in a way in which is advantageous in terms of

calculating fees and which could undermine effective case management. It is also likely to result in displacement of equal pay claims from the Employment Tribunal to the civil courts.

A simple and fair mechanism is needed to deal with fee adjustment where an individual is placed into a multiple claim by the tribunal or where a multiple claim is split apart. Otherwise, there will inevitably be injustice in individual cases. In principle the individual should not suffer a financial detriment as a result of any such intervention. Further consideration and clarification of this proposal is required.

Q.13 Do you agree that the HM Courts & Tribunals Service remission system should be adopted for multiple claims? If not, please explain why.

We agree that it would be highly inequitable for one individual in a multiple claim to pay more than the single fee in circumstances where others in the multiple claim have been given a remission. The problem will be compounded in cases where the tribunal joins claims or splits an existing multiple. As with issue and hearing fees in multiple cases, there is also a risk of severe injustice to individuals if this were to occur.

Q.14 Do you agree with our approach to refunding fees? If not, please explain why.

We do not agree with the approach to refunding fees outlined in the consultation paper. If a fee is non-refundable, a party may take the view that they have made the investment and, therefore, may as well proceed. This is counter to the objective of encouraging settlement where possible. The proposal that an issue fee will not be refundable in any circumstances compounds the problem that this fee, borne by the claimant in advance, is an obstacle to justice and places the claimant at a substantial disadvantage *vis a vis* the respondent.

The limits on refunds of hearing fees also run counter to the objective of encouraging settlement. Settlement should always be encouraged, at any stage, as it will always result in some saving of time and often costs. It also avoids the stress to both sides of a full contested hearing, which, whilst perhaps not a direct financial consideration, is arguably of value as a matter of principle in the judicial system. Further, there may often be a greater opportunity or desire for settlement once a case has been listed for hearing and as this hearing draws closer, as this causes parties to focus on the issues, the risks of litigation and the reality of fighting the case to a conclusion before the tribunal. It is the final chance to agree the outcome as opposed to submitting to the determination of a third party, in this case the tribunal. If the fee is not refundable, this removes one incentive to continue to try to settle and may encourage the opposite. Further, not all cases proceed as originally listed, resulting in further delay during which time the parties should still feel that it is potentially worth trying to reach an agreement.

A more flexible system of refunds might alleviate some of the potential problems we have outlined, but over-complication would need to be avoided, otherwise such a system would be ineffective. Any increased cost involved in a more flexible or graduated refund system should be balanced against the saving of judicial and administrative time, which would still be achieved even with very late settlement, in addition to the benefits of encouraging settlement in principle.

Q.15 Do you agree with the Option 1 fee proposals? If not, please explain why.

We do not agree with the proposals for the reasons already set out in the preceding questions. We reiterate our observation that the changes are premature given that a fundamental review is underway and the outcome as yet unknown.

The requirement for claimants to pay fees in advance (some of which are non-refundable) in order to bring a claim is contrary to the fundamental principle of 'equality of arms'.

Notwithstanding the proposed remission system (the shortcomings of which are set out above) a significant proportion of potential claimants, many of whom will be from vulnerable groups with protected characteristics, will be effectively denied access to justice.

The proposals are somewhat arbitrary and it is difficult to see the justification for fees in certain claims and for certain applications (see response to Question 2 above). We have particular concerns with fees which are charged in order that an error of a tribunal can be corrected. This is fundamentally unjust and we cannot understand the reasoning behind such a proposal.

Q.16 Do you prefer the wider aims of the Option 2 fee structure? Please give reasons for your answer.

The wider aim of Option 2 states that through the provision of underlying advice, the gap should be narrowed between an individual's expectation of what they might be awarded by a Tribunal and their actual entitlement. It is suggested that this will mean that both employers and employees better understand the likely level of the award that the Tribunal can make if the claim is successful. It is suggested that this gives the business greater certainty over the likely of liability.

Whilst this is a laudable aim, it will not be achieved by linking the cost of issuing proceedings to the potential value of the claim being issued. Asking someone to assess the value of their claim is not the same as asking them to rationally consider the true value of their claim. Nor is it the same as providing advice to them on how to quantify their claim. Requiring them to do so therefore creates a barrier to issue and thus creates access to justice concerns.

It will be almost impossible for claimants to assess the right level of fee on the basis of the descriptor provided at Annex A. This can be illustrated by the following example:

Suffering a detriment as a result of a failure to allow an employee to be accompanied to a disciplinary hearing is a level 2 claim which attracts an issue fee of £200 under Option 1 and £500 under Option 2. A breach of contract claim is a level 1 claim which attracts the fee of £150 under Option 1 to issue and £200 under Option 2.

Imagine a scenario when a Claimant complains that they were refused the right to be accompanied to a disciplinary hearing and asserts a breach of contract claim. On the face of it this is a multi-level claim and therefore the issue fee would be £200 under Option 1 or £500 under Option 2.

It then transpires that the employee's complaint about not being allowed to be accompanied to a disciplinary hearing is a complaint that they were not permitted to take their mother to the disciplinary hearing with them. This means they do not in fact have a level 2 claim. If in the interests of saving costs, the Respondent does not seek to strike out that claim, what happens if the Respondent then loses the breach of contract claim but wins the detriment /accompanied claim (on the basis that it was ill founded)? Will the Respondent have to repay an issue fee for a level 1 or a level 2 claim?

Further, what will happen if a claimant brings a discrimination claim and a claim for unpaid holiday where they lose the discrimination claim but win on the unpaid holiday? What fee will the respondent have to pay? Why should it make any payment in relation to the claim that has been lost? If the respondent successfully applies to strike out part of a claim, what is the impact of that on the fee that it might have to pay if the claimant is ultimately successful on the remaining parts of their claim? Who will be advising claimants on the level of 'Vento' damages they would be entitled to for injury to feelings? Short of getting advice, they would at the most only be able to do internet research and find the 'bands' and presumably, as a cautionary measure at the very least they are likely to put themselves in the middle bracket of £6,000 to £18,000 which when added to their net loss of salary is going to bring them over the proposed threshold very easily.

Finally, if a claimant lodges a level 1 claim and then at the Case Management Discussion it transpires that there is a level 2 claim that arises out of the same pleaded facts but it's not 'ticked' on the ET1 and a level 2 fee was not paid, can it be right that they are then barred from bringing the level 2 claim? If no, this means that no additional certainty has been introduced through the fees structure.

Given the time limits, claimants will be valuing their claims at time when emotions in relation to the complaint still run high and when they are likely to be out of work if a dismissal has taken place. In the circumstances, particularly when coupled with the suggestion that once issued, they will be barred from claiming any sum in excess of the value band for which they issued, claimants (assuming they can afford it) are likely to overestimate value as a precautionary measure. This will not create the certainty that is hoped for.

Q.17 Do you think one fee charged at issue is the appropriate approach? Please give reasons for your answer and provide evidence where available.

Whilst the simplicity of one charging point is attractive, care must be taken to ensure that it does not have the effect of requiring claimants (and their respondents if those claimants are successful) with a modest straightforward claim to effectively subsidise other claims that have a low value but absorb a disproportionately large amount of Tribunal time and resources. That would be fundamentally unfair. As stated in response to question 18, it would seem more logical for fees to be linked to the Tribunal time taken by the proceedings which is not necessarily determined by the value of the claim. Whilst we note that it is stated that level 4 claims are set to recover full costs, in practice that may not be the case. For example, in practice there may be no differential in terms of Tribunal time between an unfair dismissal claim for £25,000 and an unfair dismissal claim for £50,000.

If a single fee is introduced, we also emphasise that it needs to be kept at such a level that those claimants who are not eligible for a remission (or who indeed face barriers to accessing the remission system) will not be prevented from bringing a claim simply because they cannot afford the fee.

We also query why the fee needs to be charged at issue. The fee could be charged at the end of the hearing, i.e., the losing party would pay which would address our concerns about access to justice. Such a fee could be used as an incentive for early resolution, particularly if the fee scale is based on time in the tribunal. A fee could also be used to sanction poor behaviour. Indeed most of the stated objectives are more effectively met by imposing a fee regime at the end of the process. It is understood that the main objection to introducing fees at that stage is that the Tribunal would not be able to 'enforce' the payment of that fee. What research has been undertaken to estimate that extent to which a Respondent would not/does not pay awards which might therefore result in a failure to pay a fee and what enforcement costs that would incur? We have proposed at Q29 a method by which that concern in relation to 'enforcement' may be addressed.

Q.18 Do you think it is appropriate that a threshold should be put in place and that claims above this threshold attract a significantly higher fee? Please give reasons for your answer.

In the context of the wider aim of encouraging claimants to be realistic about the value of their claims, it is inappropriate for the higher value claim to attract a higher fee, as claimants who do not qualify for remission may suppress the value of their claim to avoid the higher fee and then be barred from being awarded the proper amount of compensation.

In the circumstances, the stated aim (changing behaviour in terms of valuing claims) should not be addressed by a higher fee because of the possible adverse consequences. The aim could be achieved by requiring claimants to value their claim when issuing their ET1, and providing that if

they over value either by a % or at the determination of the judge, they are not awarded their issue fee even if they are successful.

Please note however our response to Q16 above in which we question the ability of claimants to accurately value their claims at the time of issue.

If the burden of cost is to be spread across users of the system, it would seem more logical for fees to be linked to the Tribunal time taken by the proceedings, which is not necessarily determined by the value. For example, there could be a relatively straightforward unfair dismissal claim for a high earner where the hearing can be disposed of in one day but the compensation awarded may be at the cap for unfair dismissal as compared to a claim for equal work of equal value where the differential and thus potential award is modest but where the claim takes a substantial amount of Tribunal time in comparison to the straightforward unfair dismissal claim.

Q.19 Do you think it is appropriate that the tribunal should be prevented from awarding an award of £30,000 or more if the claimant does not pay the appropriate fee? Please give your reasons and provide any supporting evidence.

We assume that what is meant here is that the claimant is 'stuck' with the value of the claim they attribute through the value threshold given at the time of issue, and that it is not proposed that the claimant could pay a 'top up' fee as matters progress if their assessment of the value increases over the course of the proceedings. We would be opposed to such a 'top up' proposal, which would become common practice and defeat entirely the stated aims.

It is highly inappropriate that the amount of any award that a Tribunal could award, should in any way be curtailed by the fee paid by the claimant. In our submission there is a fundamental Human Rights Act 1998 Article 6 issue that would arise, inevitably leading to challenges in the courts.

Q.20 Fewer than 7% of ET awards are for more than £30,000. Do you think £30,000 is an appropriate level at which to set the threshold?

Requiring claimants to make a judgement as to the value of any potential award as at the date of issue is an inappropriate way of determining the relevant issue fee.

Whilst it may be that fewer than 7% of ET awards are for more than £30,000, that does not necessarily reflect a claimant's understanding or appreciation of the value of their claim as at the date of issue. If claimants were of the view that their claim was or was potentially worth more than £30,000 under current proposals, they would have incorrectly paid a higher fee. There are inherent difficulties with the valuation of claims by the claimants as at the date of issue and it is anticipated that the default position will be to overvalue their claim. Who for example is going to inform an individual with a discrimination claim where they may fall with the 'Vento' band for injury to feelings?. It would be relatively easy and accessible for claimants however to be informed of any relevant statutory cap that applies to their claim or any part of it (for example the Vento band for injury to feelings) or for them to determine that by relatively straightforward personal research. For those reasons if a value threshold is going to be set, it seems more logical that it should be set at those statutory caps in respect of any particular claim. It would provide a straightforward, easy way for claimants to obtain relevant information as to the right level of fee with the minimum amount of research. Any other value assessment would involve a much higher level of engagement and exchange of information in terms of losses and mitigation.

Q.21 Do you agree that Option 2 would be an effective means of providing business with more certainty and in helping manage the realistic expectations of claimants?

Because of the inherent difficulties with the valuation of claims by the claimants as detailed above, the default position will be to over value and (where they can afford it, pay the higher fee). Further, if as we anticipate to avoid any Article 6 challenge, the claimant would have to have an entitlement to pay an increased fee where their compensation is in excess of the value threshold they attributed to it on issue, there is no further certainty for respondents.

Q.22 Do you agree with our view that it is generally higher income earners who receive awards over £30,000? Please provide any evidence you have for your views.

Awards in excess of £30,000 can be achieved by lower earners in the following circumstances:

- those who have lost a final salary pension scheme; and
- those who are discriminated against and have complete career loss (i.e., most commonly race and disability).

Q.23 Do you agree that we should aim to recover through fees a greater contribution to the costs of providing the service from those who choose to make a high value claim (and can afford to pay the fee)? Do you have any views on impacts you think this would have on claimants or respondents? Please provide any supporting evidence for your statement.

As outlined in our response to Q.18 above, we do not agree that the costs of high value claims should be recovered through fees because of the possible adverse consequences.

Q.24 Do you agree with the Option 2 fee proposals? If not, please explain why.

We do not agree with the proposals, for the reasons set out in response to questions 16 - 23.

In the context of the wider aim of encouraging claimants to be realistic about the value of their claims, it is inappropriate for the higher value claim to attract a higher fee. This may be particularly problematic where claimants do not qualify for remission, and may suppress the value of their claim to avoid the higher fee and then be barred from being awarded the true and proper amount of compensation.

Q.25 Do you agree with our proposals for multiple claims under Option 2? Please give reasons for your answer

We refer to our answers to Q. 21 – 24 above in respect of the general structure of adopting the approach under Option 2.

Further difficulties arise in respect of the proposals for multiple claims under option 2. It is not clear if the intention is that the greater multiple fees table set out in paragraph 140 of the consultation document will apply where any individual applicant is seeking above £30,000. If so, this would seem to be difficult and/or unfair in practice.

For example, in the case of a claim for a protective award under TUPE or s.188 TULR(C)A brought by employee representatives, a 90 day award could amount to more than £30,000 for well paid employees (i.e., those earning above £120,000 per annum). The presence of one such claim would mean the entire claim would fall within the more onerous level 4 band – even if the majority of employees were paid much less (and therefore were seeking compensation below the £30,000 limit).

The suggestion at paragraph 140 of the consultation that, "any claimant who is not seeking an award above £30,000 may choose to submit a single claim" would clearly not be workable where the claim was brought by elected employee representatives under TUPE or s.188 TULR(C)A – since only employee representatives could ordinarily bring the claim in the first place.

In other cases (for example equal pay claims), multiple claims are often brought by trade union organisations on behalf of their members – in such claims it is not reasonably practical to assume that individual employees will be able to opt in or out of a multiple claim and bring their own claim for less than £30,000. The conduct of such claims has by necessity to be dealt with in a collective manner.

Q.26 Do you agree with our proposals for remissions under Option 2? Please give reasons for your answer

We reiterate our concerns about remissions under Option 1 (see Q.10), namely that the HM Courts and Tribunals Service adequately ensure access to justice for people on lower incomes. Further, we highlight our answer to Q.13 that the proposals for remission in multiple claims are too complicated and likely to be unworkable in practice. We also emphasise the complexity of administering remissions schemes within the context of a multiple claim.

Q.27 Do you agree with our approach to refunding fees under Option 2? If not, please explain why.

We reiterate our answer to Q. 14 that the limits on refunds of hearing fees run counter to the objective of encouraging settlement. As higher fees are charged up front under Option 2, these issues are compounded.

Q.28 What sort of wider information and guidance do you think is needed to help claimants assess the value of their claim and what issues do you think may need to be overcome?

The issue here is access to legal advice and expertise to claimants at the point at which fees become payable. For high value claims, claimants may be able to seek (and be able to afford to seek) independent legal advice.

Claimants in unionised industries, may be able to seek legal advice or support from their trade union officials (although it should be noted that trade unions do not have unlimited resources and often their officials often have to pick and choose which claims to support).

The greatest issue is therefore again the 'squeezed middle' in non-unionised industries where there is very limited ability to obtain free or low cost legal advice to assess the merits and value of a claim before lodging papers.

Taking this from the other perspective, employers often complain that a lack of knowledge amongst employees about the likely level of damages that they are likely to recover – especially in claims where discrimination is alleged - leads claimants to seek unrealistic damages in Tribunal proceedings. This tendency could lead to claimants seeking the highest level of fee.

Often in the case of unrepresented claimants the true issues at play in a claim will not be known until a judge has reviewed the papers and case at a case management conference. Any attempt (i.e. under both Options one and two) to determine the value of a claim before that time may be counterproductive. This is especially the case if the claimant is fixed with the value going forward – i.e. once the fee has been paid the proposals appear to limit the ability of a claimant to reconsider this approach once the nature of the case is decided.

Clear information from the Tribunal about the heads of damages under which claimants can receive an award in relation to each type of claim would assist both unrepresented claimants and respondents in placing a value on the claim. Further, guidance from the Tribunal as to the level of awards made in certain cases (e.g. details of the average length of ongoing loss that may be awarded, or examples of what type of treatment will fall within the different Vento bands) may assist both parties but the Society questions the ability for this guidance to be given accurately and succinctly; in essence legal advice from an experienced practitioner is what is required to enable claimants to accurately value their claims.

Unrealistic expectations by claimants are a significant barrier to settlement and in some cases can make it cost effective for a respondent to proceed with a claim.

Q.29 Is there an alternative fee charging system which you would prefer? If so, please explain how this would work.

Fees could be recovered out of damages awarded in full Tribunal hearings. This would allow for fees to be paid automatically by the losing side, or split in cases where the Tribunal finds it is just and equitable to do so. To encourage settlement the fees could alternatively be paid by a winning party where they have failed to receive an award in excess of a previous offer made by the other party.

The issue of the majority of cases that do not proceed to a full tribunal hearing could be dealt with by allowing parties to agree who would pay the fee in cases of settlement (whether or not achieved via ACAS). This could be policed by ensuring no withdrawal / dismissal of a claim (which would usually be insisted upon by the Respondent as a condition of settlement) would be allowed until the fee had been paid.

The majority of cases are dealt with early on before a hearing and in the vast majority of cases long before any substantive costs or effort (e.g., witness statements) have been incurred by either side. Therefore, fees introduced under an alternative fee charging system should be minimised.

On that basis, the above suggestion could be allied with a small administrative fee (say £20 per individual claim, £40 for a multiple claim) that is levied on all claims (ET1s) and defences (ET3s) registered in the Tribunal.

Given the volume of claims listed is in the region of 218,100 (60,600 individual claims and 157,500 multiple claims), this low value approach would generate immediate income of approximately £2.5m just from individual claims brought (i.e. not including fees from multiple claims and any filing fee for responses) which would go a considerable way to mitigating the cost of claims in the early stages whilst maintaining the right to recover a greater fee in accordance with the 'loser pays' principle outlined above.

Q.30 Do you agree with the simplified fee structure and our fee proposals for the Employment Appeal Tribunal? If not, please explain why and provide any supporting evidence.

The flat rate fee assumes all hearings before the EAT are of equal complexity and importance.

We refer to our answer to Q 2 in respect of applications for a review. In reality, the number of claims brought before the EAT tend to divide into appeals against mistakes made in Tribunals, appeals where the law is unsettled or unclear and appeals for tactical reasons (for example to put pressure on one side to settle). In the case of the former two the imposition of a fee could operate to allow errors of law to pass unchallenged and place a price on access to justice.

Q.31 What ways of paying a fee are necessary e.g. credit / debit cards, bank transfers, direct debit, account facilities? When providing your answer please consider that each payment method used will have an additional cost that will be borne by users and the taxpayer.

For individuals the easiest way to pay is likely to be online at the time of filing the claim by debit/credit card, although representatives such as lawyers may find it easier to file and pay by cheque or use an account facility. However, flexibility should be afforded to those paying fees so as not to place an additional barrier to access the Tribunal System.

Given the relatively short limitation period and that claims can at present be filed outside of office hours, consideration should be given to separating the date of receipt of claim with the date for payment of a fee – for example, that fees must be paid within seven days of filing to allow individuals and representatives to make the necessary arrangements to pay fees (for example, by setting up an account facility or by visiting the Tribunal Office).

Extending the period for payment of fees beyond the limitation period will potentially allow the choice of payment method to be limited as those paying fees will always have a period of time in which to make the necessary arrangements.

Q.32 What aspects should be taken into account when considering centralisation of some stages of claim processing and fee collection?

When centralising the handling of claims and payments care must be taken to ensure that the process of informing the parties that a claim has been accepted is not delayed. If a claim has to be received centrally and then sent out for processing at a local tribunal office, an additional period of time will be taken up by the transfer and informing the Respondent that a claim has been made. This could be avoided by centralising the handling of claims until after an ET3 is filed and it is necessary for directions on the progression of the case to be made.

Equality Impact Assessment.

Q.1 What do you consider to be the equality impacts of the introduction of fees both under Option 1 and Option 2 (when supported by a remission system) on claimants within the protected groups?

The proposed introduction of fees (under either option 1 or 2) would in principle have more of an impact on claimants within the protected groups than the HMCTS, the tax payer and respondents. We query whether this strikes the right balance.

Our reason for saying this is that protected groups who have been traditionally disadvantaged in the workplace are more likely to bring claims of discrimination (including equal pay). For instance, the impact assessment itself states that 82% of those bringing sex discrimination and equal pay claims are women. This could be extended to include claims in respect of part-time working, which is predominantly carried out by women.

The introduction of fees, even with remission, is likely to affect these groups disproportionately as it will act as a hurdle to bringing claims to enforce their rights.

In this context, we note the obligation under the Equality Act 2010 to “foster good relations between different groups”. Although paragraph 3.10 of the equality impact assessment concludes that this is not relevant to the proposals, we believe that it is relevant. Legal prohibitions on discrimination have a role to play in fostering good relations, in that they discourage behaviour that might interfere with good relations and provide individuals with a remedy where such behaviour occurs. Measures which restrict or inhibit an individual’s right to bring such claims (such as the introduction of fees) will not encourage and reinforce good relations.

Q.2 Could you provide any evidence or sources of information that will help us to understand and assess those impacts?

The Law Society does not possess such data.

Q..3 What do you consider to be the potentially positive or adverse equality impacts on employers under Options 1 and 2?

None other than (as referred to in answer 1) the prospect that some employers may feel that they are more able to 'get away with' discriminatory behaviour if an individual has to pay a fee to enforce their rights.

Q.4 Do you have any evidence or sources of information that will help us to understand and assess those impacts?

The Law Society does not possess such data.

Q.5 Do you have any evidence that you believe shows that the level of fees proposed in either option will have a disproportionate impact on people in any of the protected groups described in the introduction that you think should be considered in the development of the Equality Impact Assessment?

The Law Society does not possess such data.

Q6 In what ways do you consider that the higher rate of fees proposed in Option 2 for those wishing to take forward complaints where there is no limit to their potential award (the level 4 fee) if successful, will be deterred from accessing justice?

None other than acting as a further disincentive to individuals from enforcing their rights under discrimination law, particularly in the most serious cases where likely compensation would be most substantial.

Q7 Are there other options for remission you think we should consider that may mitigate any potential equality impacts on people with protected characteristics while allowing us to keep the levels of fees charged under either option to the level we propose?

The remissions systems proposes that the Lord Chancellor should have a residual discretion to waive or reduce fees in individual cases. It may be appropriate for the lord Chancellor to invite representations from the Equality and Human Rights Commission where any such application appears to raise issues or equality between various protected groups.

Q8 Do you consider our assumption that the potentially adverse effects of the introduction of fees together with the remission system will mitigate any possible adverse equality impacts on the groups covered by the analysis in our equality impact assessment to be correct? If not, please explain your reasons.

We do not believe that the remission system will address the potential deterrent effect of the fees on discrimination claims brought by those groups that have been traditionally disadvantaged in the workplace. This is because firstly, individuals who fall in the 'squeezed middle' may not qualify for remission in the first place, and secondly, if they do qualify for remission, they may face significant

barriers arising from the administrative process for claiming remission. For example, language barriers and other access to justice issues arising from health or disability issues, may make it harder for people with some protected characteristics to successfully apply for a remission.

Q9 Further to Q8 could you provide any information to help us in understanding and assessing the impacts?

Please refer to Q.1.

Q10 Could you provide evidence of any potential equality impacts of the fee payment process described in Annex B of the Equality Impact Assessment you think we should consider?

The requirement to pay a fee for written reasons is, by its very nature, likely to have an adverse impact on those with either a physical or mental disability or where English is not their first language whereby it is difficult or impossible for them to hear or understand reasons given orally at a tribunal hearing.

Q11 Further to Q 10 do you have any suggestions on how those potential equality impacts could be mitigated?

The Society has a long standing position of opposing the introduction of fees in courts and tribunals. However, where fees are introduced, they should be at the minimal possible level and there should be specific provision for the waiver of fees in circumstances where written reasons are requested owing to a disability or where understanding is hampered by a language barrier.

Q12 Where, in addition to any of the question that have been asked, you feel that we have potentially missed an opportunity to promote equality of opportunity and have a proposal on how we may be able to address this, please let us know so that we may consider it as part of our consultation process.

We have nothing to add here.