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MINISTRY OF JUSTICE CONSULTATION PAPER CP/22/2011:

CHARGING FEES IN EMPLOYMENT TRIBUNALS AND THE EMPLOYMENT APPEAL TRIBUNAL

SUBMISSION BY THE EMPLOYMENT LAWYERS ASSOCIATION

29 February 2012

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Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents in the Courts and Employment Tribunals, and a number of members who are also fee-paid Employment Judges. It is not ELA's role to comment on the political merits or otherwise of proposed legislation, but rather to make observations from a legal standpoint. The ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposals for legislation in the field of employment law and procedure.

A sub-committee, chaired jointly by Peter Wallington Q.C. of 11 KBW Chambers and Paul Statham of Pattinson and Brewer was set up by the Legislative and Policy Committee of the ELA to consider and comment on the consultation on the introduction of fees in the Employment Tribunals ("ETs") and Employment Appeal Tribunal ("EAT"). There was exceptional interest amongst ELA members in this consultation, and over 40 practitioners were involved in preparing responses through six working groups. The report of the sub-committee, incorporating the conclusions of the working groups, is set out below. This consists of a summary of the principal points made, followed by specific replies in turn to each of the questions asked in the Consultation Paper, and then responses to the questions asked about the Equality Impact Assessment which accompanied the Consultation Paper.

SUMMARY OF PRINCIPAL CONCLUSIONS

The ELA notes the Government's decision to introduce a fee regime for ETs and the EAT. We make no comment on this, both because the Consultation Paper does not seek views on the principle and because we regard it as a matter for Government policy on which it would not be appropriate for ELA to express a particular view.

Neither does the ELA express a preference for either Option 1 or Option 2. We believe it is a matter for Government to balance the respective advantages and disadvantages of the Options put forward, and indeed of other possible models which we identify as worthy of consideration. The responses below seek to highlight what the sub-committee has identified as problems likely to be caused by the adoption of one option or the other, and the steps we have identified which we consider would avoid or mitigate the adverse consequences identified.

The ELA welcomes the recognition in the Consultation Paper of the importance of not impeding access to Employment Tribunals by those of limited means. However we have serious concerns as to how the fee regime (under either option) will work in practice, in particular with regard to the following points:

- We consider that the practical difficulties for claimants (many of whom have no realistic prospect of obtaining advice prior to commencing ET proceedings) will have in identifying the category of fee applicable to their claim, assessing their eligibility for full or partial remission of the fee and providing documentary evidence to support their application for remission have been seriously underestimated.

- By the same token we consider that the administrative burden on the ETs in dealing with payment of and remission of fees has equally been seriously underestimated.

- We are concerned that there is considerable potential for satellite litigation on time limits, and risk of the unjustified exclusion of legitimate claims, if time runs against claimants who fail to pay the correct fee or complete an acceptable application for remission at the time of presenting their claim.

- We consider that the levels of fees proposed at the higher end of the range are such that (notwithstanding the availability of remission, which will not always be understood by potential claimants) fees will present an inappropriate deterrent to claiming. Moreover we are concerned that one consequence of the level of fees to be charged will be to drive some of the lower value ET cases (particularly breach of contract/non-payment of wages) into the Small Claims tracks in the County and Sheriff Courts, despite these Courts being less well equipped to deal with such cases.

- A further concern is that the levying of a hearing fee on the Claimant under Option 1 will reduce the opportunities and incentives for Respondents to settle cases early, and thus prove counter-productive on the Government's own measures of the success of the policy.

- We consider the approach to the charging of fees in multiple cases has not been adequately thought through and is likely to produce unintended and sometimes unfair outcomes.

- The introduction of a fee regime for the ETs and EAT will in ELA's view inevitably lead to entirely legitimate expectations of users of a standard of service that the ETs are unable, through insufficiency of resources, to provide. In particular we consider that it is wholly unacceptable that there should in no circumstances be refunds of fees paid even when the service (such as a hearing) is no longer required or is not offered as listed through the fault of the ET in overbooking cases.

- ELA considers that the charging of a fee for judicial mediation (particularly one payable by the respondent) will be counter-productive, effectively destroying a worthwhile procedure which saves the ETs (and hence the taxpayer) considerable sums and provides a viable alternative to a trial, very much in line with the Government's wish (which ELA shares) to promote Alternative Dispute Resolution.

- ELA consider that some of fees proposed compared with the Civil Courts are disproportionate. An extreme example is that the higher fee proposed under Option 2 for claims for more than £30,000 (£1,750) exceeds that incurred for obtaining permission to appeal to the Supreme Court and that Court's Hearing fee combined (£1,600).

ELA also considers that in the draft Equality Impact Assessment, the Government has underestimated the degree of disadvantage likely to be suffered by members of some protected groups (within the meaning of the Equality Act 2010), particularly those with disabilities, and women (especially those about to go on or just returning from maternity leave).

RESPONSES TO SPECIFIC QUESTIONS

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

1.1 ELA has some preliminary observations about the proposed success criteria, and the assumptions that they are based on.

1.2 We note that one of the stated purposes of the proposal is to increase efficiency and the effectiveness of the ET system. In ELA's view one of the major causes of inefficiency and ineffectiveness currently is the 26 week target scheme. In order to maximise compliance with those targets, ETs are listing matters for trial regardless of whether they have the judicial resources or space available to hold the trials. Parties are therefore routinely given artificially early trial dates to prepare for. ELA is aware that in some Employment Tribunals over 80 cases are listed for trial a week, even though only 10 judges are available to hear them.

1.3 The consequences of this practice is that cases are frequently adjourned at the last minute by the Tribunal office, typically by phoning the parties at 4 or 5pm on the day before the hearing is due to start. Sometimes parties will have to attend the ET, only to be told that they are "floating" and then have to wait until their cases are formally adjourned. In ELA's experience as many as half of all cases being heard by some ET offices are adjourned or "floating" nowadays, although this varies between different ETs.[1] It is not known whether these adjournments are recorded in the ET statistics or not.

1.4 The result of this practice is that both parties (employees, and employers) may have to incur significant amounts of wasted legal fees (in some cases, for example when 20 day cases are adjourned at the last minute, which has happened to ELA members, these wasted legal costs may be in excess of £100,000), as well as wasted time and cost as a result of lawyers, witnesses and others making wasted trips to the ET. The practice of last minute adjournments is particularly difficult for claimants, who may not be able to afford to pay two sets of legal fees, and may not be able to continue their claims. It also means that some employers are more likely to settle unmeritorious cases, because they are aware that they face the risk of having to pay for two hearings, or not settle meritorious cases because they are aware there is a real possibility of a hearing being postponed by several months. The experience of ELA members is that County Courts and the High Court have a different, fairer and more efficient listing system, and do not adjourn cases at the last minute or have "floating" cases in the same way.

[1] In our experience, this practice is particularly problematic in the South East. The listing practice in Scotland is somewhat different, and cases are not listed as "floaters" and last minute cancellations are avoided whenever possible; this suggests that the English practice is not an inevitability.

1.5 ELA considers that if ETs charge fees in a similar way to the ordinary courts, and in some cases significantly in excess of those charged by the ordinary courts[2], then ET users will expect a higher standard of service than they currently enjoy. ELA members currently advise their clients in some cases to pursue maladministration claims against HM Court and Tribunals Service in order to recover wasted costs. ELA expects that the number of such maladministration claims will increase, as parties have to pay more to use the ET system and will be anxious to recover those costs from someone.

1.6 Further, if the ET system does not become more efficient and effective, this will simply lead to more employment related litigation being brought on the Small Claims track in the County Court or Sheriff Court where fees are in many cases lower than those proposed for ETs and litigants have a better chance of having a trial listed which will actually take place. We note that a full refund of the hearing fee is available under the Small Claims Track if the court is notified of settlement or discontinuance at least 7 days before the hearing. Nothing similar is currently proposed in the ET system (see further our answers to question 14 below).

1.7 In ELA's view, the introduction of fees payable by the Claimant is unlikely to encourage the parties to settle. A more likely way of encouraging early settlement would be extend time limits and introduce a requirement for parties to act reasonably in exchanging information with a view to resolving any dispute without the need for proceedings. In our view the current time limits of three months are too short, especially because they do not take into account the time taken up by internal appeals, which can often last 4-6 weeks post dismissal. If there were longer time limits, for example 6 or even 12 months, then parties would have more information available to them before they had to issue proceedings, fewer claims might be brought and there would be more time available before proceedings were started to explore settlement, resulting in more settlements.[3]

1.8 Turning to the suggested criteria, we do not think that they are the correct success criteria. The suggested criteria assume that settlement is the best outcome for any litigation. This ignores the fact that some litigation is necessary in order to have judicial interpretation of new legislation. Further, some litigants wish to have a judicial determination of their rights and are not interested in financial reward. Finally, employment legislation offers employees a range of non-financial remedies including declarations and recommendations which can apply to an entire workplace. These statutory remedies would be rendered ineffective if settlement, particularly on purely financial basis was always the ultimate goal of litigation. In addition claims are also sometimes brought as 'test cases' affecting a much wider constituency than the actual parties.

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[2] ELA note that it is difficult to compare the two systems. The ordinary courts charge fees according to the value of claims, whereas what is proposed in the Employment Tribunal is based on a categorisation of claims by reference to complexity and the likely resource they will use. An extreme example of disparity is that the higher fee proposed under Option 2 for claims for more than £30,000 (£1,750) exceeds that incurred for obtaining permission to appeal to the Supreme Court and that Court's Hearing fee combined (£1,600).

[3] The ELA recognises that reforms already announced, and which should be in place before fees are introduced, will require the initial presentation of claims to ACAS. This will provide an opportunity for settlement, but without prior exchange of information settlements are unlikely to be achieved in many cases, and we are concerned that many employers will refuse to entertain settlement until the prospective claimant has shown that he or she is serious by paying the claim fee.

1.9 The government's aim should be to maintain access to justice for all – not just for those on limited means, although it should specifically maintain access to justice for those on limited means. Indeed, any other aim would be inconsistent with the government's obligations under Article 6 of the European Convention on Human Rights.

1.10 We believe that the suggested criteria of improving efficiency should be expanded to become "contribute to improving the effectiveness and efficiency of the system by encouraging users to resolve issues as early as possible by way of settlement, not least through ACAS", with an expected rise in ACAS settlements signifying success in this area.

1.11 We also consider that the Government's suggested purpose and success criteria should include a commitment to making a measurable improvement to the services offered by HMCTS and the ETs. This is no more or less than a corollary of charging users for the service.

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

2.1 No. At paragraph 19 of the Consultation Paper, the Government proposes that all types of claims that may be brought before the ET and the EAT are subject to a fee. The Government is of the view that this is a fair approach (provided there are appropriate safeguards to protect access to justice) for the following reasons:

- The cost of the service is borne across all users;
- It will allow users to make informed decisions when deciding whether to make a legal claim or use an informal route to resolve their dispute; and
- It reflects the long-standing approach taken in the civil courts.

2.2 The alternative to the proposed approach is to exclude some claims from fees, either on the basis of the type of claim in question or the on the basis of the low value of a claim. The Government states that this alternative is not proposed because:

- Exempting certain types of claim may encourage users to seek redress under an exempt route which will perversely increase demand for it;
- Establishing a robust definition for the types of claim that should be excluded is not possible without creating unfairness for some users; and
- Cost is incurred irrespective of the type of claim or the value of the claim and, therefore, claims should not be exempt from fees or consideration of the consequences of taking legal action.

2.3 Although the Government's suggested approach appears logical on the face of it, ELA considers that this blanket approach to fees is in relation to some categories of claim neither fair nor practically workable.

2.4 It is not clear what the position would be, for example, in the case of claims involving large numbers of multiple claimants (such as equal pay claims). Although there are some initial proposals on how these are to be dealt with (explored in paragraphs 82 to 95 of the Consultation Paper in relation to the Option 1 fee structure), the administrative burden of calculating the fee involved (including, for example, what would happen if more claimants join a particular set of proceedings as it progresses through the system after the claim has been issued, or if claimants drop out of a set of proceedings) would appear to defeat any benefit generated by the fees. In such cases, a simpler approach would be to exclude them from the fee system altogether.

2.5 With regard to collective claims involving protective awards (in redundancy cases or cases involving a failure to comply with the information and consultation obligations under TUPE), ELA questions whether the application of fees to such claims is appropriate given the particular characteristics of this category of claims. Awards made in such cases are essentially punitive, not compensatory[4]. Further, only a limited class of persons have the right to issue such proceedings, in most cases only unions or employee representatives. It would in ELA's view be particularly unfair to charge employee representatives who are bringing claims on behalf of those they represent (the latter being excluded from bringing the claims themselves) a fee for doing so. It is also difficult to see how a fee could fairly be calculated without reference to either the numbers of prospective beneficiaries of the claim or their means, and whether the representatives bringing the case would themselves qualify through lack of means for fee remission would appear to be purely a matter of happenstance.

2.6 Although ELA notes the Government's point regarding the possibility of users seeking redress under an exempt route perversely increasing demand for it, it is of the view that there are some claims where it would seem disproportionate to apply a fee and that the possibility of having an exempt category of claims (a new "Level 0" category under the HMCTS categories) should be explored. Further examples of claims which could fall within such a category are those which have such a low value that payment of a fee would be disproportionate (e.g. where the value of the claim is less than the fee payable to issue the claim). We note from the Government's recent response to the consultation on "Resolving Workplace Disputes"[5] that they are considering further a proposal for the rapid resolution of certain employment disputes. This may partially resolve this issue.

2.7 Similarly, it might be better to exclude claims (or at least claims for sums below a fixed value) involving clearly quantifiable sums (akin to a debt) e.g. for holiday pay, unpaid commission etc. These categories of claim are more likely to be brought by lower paid workers, and are often disposed of by default judgment or after a brief short-track hearing, and are the kind of claim that we are concerned would increasingly be brought in the County or Sheriff Court rather than the ET for the reasons given in our response to Question 1, if made subject to a fee in the ET. We would also refer you to our response to the Questions on the Equality Impact Assessment and our concerns that the remission system alone will not alleviate the disproportionate effect on some equalities groups of the introduction of fees. Some members of the committee have suggested that the exclusion of certain vulnerable equality groups from paying fees would remove this concern.

[4] *Susie Radin Ltd v GMB* [2004] ICR 893.

[5] Section 8 Paragraph 16-18. 23 November 2011

2.8 In relation to claims involving the National Minimum Wage, given the fact that such claims will be brought by individuals claiming to have received less than the NMW, such individuals are much less likely to be in a position to afford paying the fee involved in bringing a claim (whether under the Option 1 or Option 2 structure), which raises the serious question of whether the proposals will have an adverse impact on access to justice. Very little revenue is likely to be generated by charging fees in cases where most claimants will qualify at least for partial remission of fees. Although it is noted that there will be a fee remission system in place, given the amount of the proposed fees, it is questionable whether individuals would be in a position to pay the relevant fee and bring their claim "in time" pending the outcome of their application for remission.

2.9 Further, many persons bringing such cases do not understand the complexity of the law, for example in relation to piece work schemes. To incur a fee where a party believes they have not been paid the minimum wage but are mistaken would be unreasonable. The existing power to award costs in such cases for unreasonable conduct or a misconceived claim is more than enough to deal with any cases of this nature in relation to the minimum wage. We are not convinced that the above concerns would be addressed by the proposal that the losing party may be ordered to bear the cost of the fees to bring the claim (Paragraph 44 of the Consultation Paper).

2.10 As to claims brought by HMRC Compliance Officers, ELA cannot see any advantage in one agent of the state charging another agent of the state to use its facilities to enforce the law.

2.11 One further category of claims we consider should not be subject to a fee is claims against the Secretary of State (effectively the Insolvency Service) to enforce rights to payment where the claimant's employer has become insolvent.

2.12 ELA notes the Government's points in paragraph 21 of the Consultation Paper stating that since appeals against decisions of the State are subject to fees in the civil courts, the same should be the case in the ET fee structure. The Government proposes that such claims will attract the lowest level of fees and refers to the remission system to address concerns in relation to individuals who cannot afford to pay that fee. However reasonable this may appear on paper, our concern is as to whether individuals who cannot afford to bring such claims would be deterred from doing so notwithstanding the remission system given the time limits to bring claims and the fact that the fee to do so will be payable on issue of the claim.

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

3.1 At paragraphs 26 et seq of the Consultation Paper, the Government proposes that the costs to be charged to parties (initially the Claimant) are, under Option 1, to be charged at two stages in the process, namely:-

- At the point of making a claim (the issue fee); and
- Before the case is heard (the hearing fee).

3.2 The purpose behind this is, the Government says, to reflect the increasing costs of dealing with the case as a claim progresses. The Government sees an advantage in this in that it is simple to understand, keeps down the costs of administration and encourages users to consider settlement before and during the Tribunal process. However, it points out that having fees at two points will mean that users will not know at the start of the process whether they will need to pay a second fee because payment will only be due if the case requires a hearing. It may also make the matter more complex.

3.3 The alternative option mooted, which is not favoured by the Government, is to charge a fee once the case has been concluded or to charge at more stages in the process.

3.4 We can see advantages and disadvantages in having a single charging point for fees, either at the start or conclusion of the process. We see no advantage at all in having more than two charging points. We make the additional comments below in amplification of this conclusion.

3.5 As well as making it more simple to understand (than a host of different charges at different stages for different cases), keeping the cost of administration down and encouraging settlement during the process, a single fee, payable at the outset, would enable funds to be received by the HMCTS early and in a simple and workable way. Against this, unless the fee charged were considerably lower than the level proposed in Option 2, initial fees could well act as a deterrent to litigants bringing legitimate claims, make settlement prior to the issuing of a claim more difficult, and in some cases, e.g. where the claim is disposed of by a default judgment or settled soon after proceedings are issued, be in breach of the Treasury Guideline that the fee charged should not exceed the cost of providing the service.

3.6 The option of charging a fee once the case is concluded has some attractions in terms of simplicity and the fee to be collected only once. The deterrent effect on claimants of a substantial fee is also likely to be less if payment only arises at the end. However, in addition to the problems outlined at paragraph 29 of the consultation paper there would of course be enforcement problems which could result in further administration costs for the Tribunal Service and the risk of not being able to close a file.

3.7 A further option suggested by some members was to charge a fee only after a Case Management Discussion ("CMD"). This has the following advantages:-

- an Employment Judge is able to assess whether the case has been allocated to the correct category and can assess the length of hearing and so likely final cost to the Tribunal Service if the case proceeds to hearing;

- the correct fee is more likely to be paid;

- the CMD provides an opportunity for the parties to meet/have contact over the phone and try to settle the case particularly if an ACAS conciliation officer is present at the CMD- we understand such a practice is being piloted at present in some tribunals;

- there is an incentive to the paying party to settle as they would not have to pay a fee.

A modification of the above would be to make the fee payable by both parties, subject to remission, giving even more incentive to settle. Whilst the Employment Judge's role would not be to conciliate or mediate, by identifying the issues to be determined at the final hearing, the strengths and weaknesses of each sides case would inevitably be highlighted, providing a further incentive to settle.

3.8 The disadvantages of such a proposal include

- An additional requirement for the use of judicial resources, as CMDs are currently not normally listed in unfair dismissal claims;
- the Government's expressed intention of relieving pressure on the taxpayer by transferring part of the cost onto users will only be met by some not all users;
- the Government's expressed intention of resolving disputes early and encouraging parties to think more carefully about alternative options may be undermined as progress to settlement at or soon after the CMD may become the norm;
- vexatious and unmeritorious claims cannot currently be dealt with at the CMD.

3.9 ELA does not support the suggestion for charging fees at more stages in the process, as outlined in paragraph 30. There would in our view be logistical and practical hurdles to this, for the reasons mentioned in the Consultation paper, resulting in increased administration charges, and difficulty in choosing at what level to impose the charges and what charges to impose at each level. Satellite litigation is likely to result if this option is pursued.

3.10 In relation to the two stage approach under Option 1, one of the questions not addressed by the Consultation paper is at what point the fee for a hearing is to be paid. As to this we make two points. The first is that it would be impracticable to link the fee to the listing of the case for hearing, since this would prevent the (in our view wholly desirable) practice of tribunals listing short track cases for hearing at the time the claim is notified to the respondent. Moreover the costs incurred by the ET in providing a hearing are almost entirely attributable to the hearing itself (i.e. the salaries and fees of the panel, the use of premises and the time of the tribunal clerk), and the ETs routinely over-list in the expectation that most cases will settle after listing, or hearings will be postponed. There is therefore (subject to the points in paragraph 3.11 below) no compelling administrative reason for requiring payment significantly in advance of the hearing. In ELA's view for the sake of certainty the Government should set a date in time (ie number of days) prior to the hearing by which the fee has to be paid and have clear rules to deal with non payment etc.

3.11 Another question which needs to be addressed is if a Claimant, having paid the issue fee, is unable to pay the hearing fee would his or her claim be struck out? Alternatively would they be allowed time to pay up to the actual hearing date, or thereafter, or be allowed to apply for the fee to be remitted? It is ELA's understanding that the question of eligibility for remission of the hearing fee would have to be addressed by reference to the claimant's means at the time of application for remission (usually, when payment is due). We envisage complications arising if an application for remission is refused and there are delays in dealing with any appeal, and respondents will need to know sufficiently far in advance if a hearing is not going

to happen because the payment of the hearing fee has not been resolved. A further complication will arise if, as we propose should be considered, the liability for the hearing fee is divided between claimant and respondent. If these considerations lead to an early deadline for payment of the fee being set, it will be all the more important that the fee is refunded if the hearing is then taken out of the list before the costs of providing it are incurred by HMCTS.

3.12 These are points which will need to be carefully thought about and addressed before the legislation to introduce fees is finalised.

Question 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.

4.1 In paragraphs 32 to 38 of the Consultation Paper, in relation to the particular complexity of a case, the Government refers to how claims are currently allocated into one of three categories for the purposes of administration and listing cases as follows:

- Level 1 – generally claims for sums due on termination of employment e.g. unpaid wages, payment in lieu of notice, redundancy payments.
- Level 2 – generally claims relating to unfair dismissal.
- Level 3 – all discrimination complaints, equal pay claims and claims arising under the Public Information Disclosure Act.

4.2 Further, the Government proposes that cases in Levels 2 and 3 should attract higher fees mainly because such cases are likely to be more complex i.e. require a legal as well as a factual decision and will take up more administrative and judicial time such as pre-hearing reviews and longer hearings. At Annex A, an extensive list of over sixty types of Employment Tribunal claims is provided with their track allocation and the proposed fees for them.

4.3 ELA's response is:

(1) The three levels appear rational. However, direct comparisons with the Court system could be misleading as particularly in Court cases involving debt recovery/breach of contract the value of the claim is usually known, whereas it can often be difficult to quantify an ET claim particularly at the outset and where the Claimant has no representation and has not received any legal advice.

(2) It is accepted that Level 1 claims should attract the lowest fees as they are likely only to require a factual decision and will take up the least administrative and judicial time.

(3) In relation to Annex A, the list of claims at Level 1 seems broadly appropriate.

(4) Failure to provide a written statement or an adequate pay statement should also be considered at Level 1 as such claims can be resolved on the factual evidence of the parties and are low value claims.

(5) Unfair Dismissal at Level 2 is generally appropriate.

(6) The claims listed at Level 3 are generally appropriate.

4.4 In responding to this question in this way, ELA does not intend to indicate that it necessarily accepts the premise that claims should be allocated to fee bands according to the particular statutory right involved. Such an approach also has disadvantages, in particular in creating difficulties for claimants (and administrative staff dealing with the receipt of fees) in knowing precisely how their claim fits within a lengthy and complex list of causes of action and adding to the complexity of subsequent applications to add claims by amendment, and it is a blunt instrument for identifying which claims are most likely to consume judicial resources: many unfair dismissal claims, for instance, result in longer hearings than quite a few discrimination claims. We address this further in our response to Question 5.

Question 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.

5.1 The Consultation Paper proposes that claims are allocated to one of three fee levels according to their complexity, and that the fees are payable at two stages, on issue and prior to a hearing. All claims would be allocated to one fee level. Where multiple claims are brought raising more than one cause of action, the applicant would pay a fee based on the claim which fell within the highest fee category. The logic informing the distribution of claims is that more complex claims require greater judicial intervention and carry a greater administrative burden. This accords with the aim of transferring the costs of the system from the taxpayer to the tribunal users so that those incurring greater costs pay higher fees.

5.2 We agree in principle that the approach of charging three levels of fees is a feasible approach in light of the Government's aims to transfer some of the burden of employment tribunal costs from the taxpayers to the users, without precluding access to justice. However, for reasons set out in our reply to Question 3, we are not convinced of the practicalities of having two stages for payment rather than one, as this is likely to lead to a number of complexities and practical challenges.

5.3 We agree that complex claims and multiple claims will, on the whole, require a higher amount of case management and consequently, a greater administrative burden. In addition, charging higher fees for claims which may, at face value, appear to offer higher compensation may deter applicants from bringing vexatious or otherwise misconceived claims for discrimination or whistle-blowing purely to force higher settlements from their employers. We also agree that categorising claims within three bands is preferable to the alternative of allocating a different fee to each individual claim, as this would be administratively burdensome and confusing to applicants.

5.4 ELA has however identified several concerns with this approach which will need to be given consideration in relation to the drafting and implementation of applicable legislation:

(1) The ET system was designed with the intention that claimants may represent themselves. It may be difficult for claimants who do not have resources to access legal assistance to identify correctly the nature and category of their

claim and which fee is applicable. In order for claimants to be able to identify the nature of their claims, some form of coherent explanation of the legal issues will need to be provided prior to issuing proceedings so that they can correctly identify the applicable fee; failing this, some form of judicial assessment of poorly pleaded claims may be required to identify the claims and the applicable fee. This may incur further administrative costs and result in satellite litigation.

(2) It may not be possible for unrepresented claimants to identify whether their claim has any legal merit on the basis of the facts. It is more difficult for claimants to assess the merits of their case where the legal issues are more complex. Consequently, claimants may make a claim which falls into a higher fee category without appreciating that it cannot succeed. While this is less of a consideration at the issue stage, if such a claim progresses to a hearing, the claimant will make a more substantial loss. The Government should therefore consider how claimants can have access to pro bono services, ACAS advice or at least basic legal advice, in order to avoid claimants without access to advice incurring fees for claims which are unlikely to succeed. In this respect we note with regret the current proposal in the Legal Aid Bill to withdraw Legal Help in employment cases.

(3) It is not clear how the fee charging process will operate in the event that a claim is amended. Would this incur a further fee in terms if the amended claim fell within a different category? Our experience is that there is a degree of judicial flexibility in judges' approach to amending claims where claimants are unrepresented. It would not in our view be desirable for the question whether a higher fee has been circumvented to be an issue in deciding applications to amend claims, but we are concerned that this may be what happens in practice.

(4) There is a concern that the claims which have fundamental public policy objectives as well as provision for personal remedy, such as discrimination and whistle-blowing claims will attract the highest level of fees. While it is possible that such claims will attract greater administrative costs than other claims, this may also serve to deter genuine claims where there is a wider public policy issue at stake from being brought, particularly in cases where an applicant is unable to afford representation. This raises a concern amongst some of our members as to whether the proposals are consistent with the UK's obligations under the various EU Equality Directives to provide an effective means of redress.

(5) As there is very limited provision for legal aid in ET cases, there is a risk that genuine, meritorious claims of this nature will not be pursued due to the higher fee levels. Consequently, employers will be less vulnerable to such claims and discouraged from adopting robust policies and procedures in respect of the same. There is a concern that applying differing fee levels according to the complexity of a claim will cause confusion to employment tribunal users, particularly those with poor English comprehension skills, and that this may in turn impact on the ethnic diversity of employment tribunal users.

5.5 The ET system differs from the civil courts in that it is designed for claimants to represent themselves, and there is no rigid costs regime, to prevent those who have been deprived of their employment rights from affordable access to justice. The Government will need to ensure that the fee system is accessible and coherent, so that claimants are not prevented from using the system.

Question 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.

6.1 Yes, as a general principle, the unsuccessful party should bear the fees paid by the successful party.

6.2 This is the general rule in the civil courts where costs including disbursements such as court fees "follow the event". However, in the civil courts there is a general discretion and the court may make a different order (*CPR 44.3(2)*).It is considered appropriate that the general principle can similarly be departed from in the employment tribunals at the discretion of the tribunal where justice and fairness so dictate. It is noted that paragraph 46 of the Consultation Paper states:

> *"... it is proposed that the tribunals will have the power not to order reimbursement in any case where it considers that it is not appropriate given the circumstances".*

This proposal would be in line with a discretionary "just and fairness" caveat. However we have identified a number of points that will require consideration and clarification as to how this approach will operate in practice.

6.3 It is not clear whether it is proposed that the unsuccessful party's means will be taken into account in any order to pay the successful party's fees or a proportion thereof. There is precedent for doing so in awarding costs in the ETs. Not all respondents have substantial means; claims may be made against sole traders and small businesses which have very limited resources and/or may be struggling to avoid insolvency. They may also be individual respondents in a discrimination case under the Equality Act where the employer successfully defends a claim but the individual respondent is found liable. It therefore would be appropriate to consider the respondent’s means in making any order in respect of reimbursement of fees.

6.4 As to the definition of "success", it is considered appropriate that the tribunal considers the definition given the facts and circumstances of the particular case, rather than adopting a prescriptive statutory definition. This is the approach adopted in the civil courts (*CPR 44.3(2))*, where "the successful party" has been interpreted to mean "which party has really won at trial" (see *Fleming v Chief Constable of Sussex Police Force* [2004] EWCA Civ 643). This is often not an easy determination in the civil courts and likewise, it may not be straightforward for employment tribunals. The employment tribunals should however be equally equipped to make such a determination. The tribunal may determine that a finding of 100% Polkey deduction or a finding on liability on a small part of the claim would not warrant an order against the respondent for reimbursement. The tribunals should be open to arguments to make percentage or proportionate orders instead of purely issue-based orders on reimbursement of fees.

6.5 Further to the comments above regarding the definition of "success", in cases where a claimant succeeds on liability but remedy is dealt with separately, it would be appropriate for the issue of fee reimbursement to be dealt with as part of the overall assessment of success by the tribunal based on the facts and circumstances of the particular case. We anticipate that if there is a separate remedy hearing the issue of fee reimbursement would be addressed at that stage. However we anticipate the matter being more difficult to assess by the tribunal where the parties are left to deal with remedy following a liability hearing. The parties may seek to address the issue of fee reimbursement as part of their dealings on remedy without an order from the tribunal, but where agreement is not reached we anticipate this could result in more cases requiring a remedy hearing.

6.6 If Option 2 is chosen and a claimant who has paid the enhanced fee succeeds on liability but is awarded less than £30,000 (or the applicable threshold for the enhanced fee), under the general principle proposed the respondent would be required to reimburse the claimant for the enhanced fee. We consider that in such cases, or in other cases where the initial fee paid does not reflect the fee applicable to the claims on which the claimant has succeeded, the tribunal would have discretion to determine what is payable by the respondent, based on the facts and circumstances of the particular case.

6.7 On settlement, it would be for the parties to agree who should bear the fees[6]. It would be for the parties to determine whether they wanted to go to tribunal purely to receive a determination on fee reimbursement. However, the tribunal would be able to award costs if they consider a party has taken an unreasonable stance in litigating the issue of reimbursement of fees.

Question 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? If not, please explain why.

7.1 ELA accepts that as it is the choice of the claimant to institute proceedings, it should be the claimant who meets the initial cost, subject of course to an acceptable set of criteria for remission of the issue fee.

7.2 If a separate fee is to be paid for the hearing, the position is less clear-cut. In particular, it is not possible before the case is heard to say whose fault it may be that the case has not settled, and therefore needs to proceed to trial. Many of ELA members' respondent clients would say that it is not their choice to be brought before the ET, and they should not therefore have to incur a cost for doing so. However inevitably respondents do incur costs, and time costs, in defending claims. Moreover if the hearing fee is at all significant (as it certainly is in level 2 and 3 cases under the current Option 1 proposals) we are concerned that employers may in some cases adopt an intransigent attitude to settling meritorious cases (and especially those in the higher categories but where the value of the claim is relatively modest) because they

[6] If the hearing fee has been paid before the case settles, it is unlikely that many claimants will accept terms of settlement that do not include reimbursement of the hearing fee (and probably also the issue fee). This is one reason why the absence of any provision for refunding the hearing fee in these circumstances would be counter-productive, in making it more difficult for parties to settle at that stage, resulting in more cases proceeding to a hearing. In these circumstances, it is the respondent, rather than the claimant, who would bear the cost of a service not in the event needed.

believe the claimant will not be able or willing to pay the hearing fee. This could lead some claimants to be deprived of justice.

7.3 We therefore consider that there is a legitimate case to be made for the fee to be payable by each party equally, with a facility for remission for the respondent if an individual, as well as for the claimant, and a power for the ET to order the claimant to pay the respondent's share of the hearing fee on similar grounds to its power to award costs against a claimant under the current Rules. We would also refer back to our proposal at paragraph 3.7 where we suggested the option of levying fees after a CMD. Such a proposal would be a more effective incentive to settlement if liability for the fee were split between the parties.

7.4 If this approach is adopted, there would have to be a sanction for non-payment by either party; in the claimant's case, subject to a reasonable opportunity to pay and judicial consideration of any reasons for non-payment, this would be the striking out of the claim (possibly with an order for repayment of the respondent's share of the fee). In the case of default by the respondent the sanction would be the striking out of the response (again subject to judicial consideration of any representations by the respondent, and consequential orders for repayment of the claimant's share of the fees).

7.5 The ELA does not have a concluded collective view on whether the liability for the hearing fee should be split in this way beyond saying that there is considerable merit in the proposal; we therefore put forward the foregoing points as an option, and as points that would need to be resolved if the option is adopted.

Question 8- Do you agree that specific applications should have separate fees?

8.1 The first two applications listed are a counterclaim in a breach of contract case and an application to set aside a default judgment. It is consistent with the principle of charging fees that both of these applications should also have separate fees. However, there would need to be some allowance for repayment of that fee where the default judgment has been entered through an error of the tribunal; for example, where a response form has been received in time but mislaid (which is not unknown).

8.2 The third application listed is an application for dismissal following settlement or withdrawal. We are strongly of the view that no fee should be charged for this. Usually this would be an application by a respondent for dismissal where a claim or part of claim has been withdrawn (or by a claimant in respect of a counterclaim) or by either party where the claim has been settled.

8.3 It is in the interests of justice that there is finality in litigation and, in employment tribunal claims that have been withdrawn or settled, that is obtained through an order for dismissal. There is no obvious logic behind charging a respondent (who has not been unsuccessful) for seeking this finality where a claimant has withdrawn the claim. The respondent, who did not initiate the claim, is effectively being penalised for seeking finality.

8.4 Although a settlement might have included some payment by the respondent in respect of tribunal fees, that is not necessarily the case. It is probably unlikely that

having to pay a fee where a case has been settled would discourage a respondent from settling, but it is also unlikely to be an encouragement. [7]

8.5 Under rules 25 and 25A of ET Rules, where a claim has been settled through ACAS, the COT3 can be worded in such a way that the claim will be automatically dismissed on withdrawal by the Claimant. It is not clear whether this would constitute an application by the Respondent to dismiss on withdrawal. However, given that the rules were specifically amended to allow for automatic withdrawal, it does not make sense to impose payment of a fee in this circumstance either.

8.6 Further, the process of dismissing a claim is an administrative one, which requires a judicial signature. In real terms, its cost is minimal compared with – for example – the processing of a new claim.

8.7 It is also proposed that there will be a fee for requesting written reasons for a decision. We are equally strongly opposed to this proposal. It is already the duty of the ET to give reasons for its decision, in compliance with Rule 30(6). Reasons may be given orally at the end of a hearing, when the decision is announced. Often, there is not enough time for this on the day, and reasons are reserved; so too if the ET requires time to consider its decision. This is most likely in longer cases, where the time needed to produce written reasons is likely to be greatest.

8.8 For these reasons it is effectively little more than chance whether written reasons have to be provided without a request; and the cases in which requests are needed are typically not the cases where the cost of complying is most significant. The fairness of charging a fee in these circumstances is not apparent to us.

8.9 Moreover, it is frequently the practice in England and Wales[8] to give oral reasons dictated into a tape recorder recorded by the judge. The only further cost of written reasons is the cost of typing them up and having the judge check and sign them. This hardly merits an additional fee beyond that already paid for a hearing.

8.10 The entitlement of parties to litigation to know why a decision has been made is fundamental. Charging parties for written reasons, where the administrative burden is slight, is disproportionate given that entitlement. Moreover the written reasons are a public document of record, and although not binding in other cases, are often referred to, particularly judgments in cases dealing with relatively new jurisdictions where there is as yet no higher judicial authority by those advising clients as to their rights and responsibilities under new legislation. The availability of such documents is a public benefit which should not depend on the willingness of a party in the litigation to pay a fee. It is also the case that many employers (such as public bodies) routinely ask for written reasons so that the reasons can be used as a learning exercise, and a fee might discourage this process.

[7] In ELA members' experience it is also quite common that compromise agreements settling ET cases contain a provision requiring the claimant to write to the ET withdrawing the claim and applying for it to be dismissed. This is a convenient arrangement and the time involved in dealing with it at the ET minimal, and to charge a fee for such applications would merely serve to make settling cases more complicated.

[8] The usual practice in Scotland is to reserve the decision; hence a fee for requesting reasons is much less to be exigible north of the border.

8.11 As a final point, written reasons are required for an appeal to the EAT; where a request has to be made, charging a fee for this would add to the already significant cost of taking an appeal to the EAT. We would refer you further to our answers to questions 30 on fees in the EAT.

8.12 The last step for which it is proposed that a fee will be charged is applications for a review. Charging a fee where a party applies for a review is consistent with the principle of charging fees, although the very short time in which an application must be made (14 days) may be an issue where a party does not have funding. This could be addressed by allowing the applicant for a review time to pay (or obtain remission), or by extending what is in our experience an artificially short time limit, or both. The experience of ELA members is that applications for review are made too often, particularly by litigants in person, on no more sound basis than that they consider that the ET has reached the wrong decision. A fee might discourage the significant number of unmeritorious applications for which there is under the present Rules no sanction.

Question 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.

9.1 It is proposed that the Respondent would initially pay £750 for the judicial mediation. ELA opposes the introduction of any fee for judicial mediation. If however a fee is to be imposed, it is our view that £750 is far too high, and that the parties should share the cost (subject to remission for lack of means to pay).

9.2 Our principal concern is that the fee would be a real deterrent to using a service which in our experience has been a very useful addition to the range of means for resolving employment disputes without the cost and inconvenience of a full hearing. Successful mediations save the ETs (and hence the taxpayer) the cost of what would otherwise often be lengthy hearings. Respondents are in our view much more likely to agree to mediation if it is a free service, since it is inevitably a matter of some uncertainty whether the claimant is intending to attend in a spirit of compromise, or the mediation will prove to be a waste of time; for it to be a waste of time and of a substantial fee would add considerably to the deterrent effect of that uncertainty.

9.3 We note that in the Impact Assessment no value is given to the income expected to be received for fees for mediation, presumably on the basis that there will not be any significant use of the facility. We are amazed that the Government should be contemplating a step which, for no financial gain, will jeopardise a service performing exactly the kind of diversion of cases from full hearings that is central to its approach to employment disputes.

9.4 The comments which follow address the position if, contrary to our primary position, the Government decides that a fee will be charged. The fee of £750 case seems disproportionately high for a judicial mediation. Mediations take up the time of a judge for a day, with some, but not very much, time for pre-reading and modest administrative support. £750 comes close to the full cost of these resources (in contrast to the overall level of recovery of costs proposed, which is only 1/8 of the total cost of the service). The figure given in the Impact Assessment of the cost of a mediation, at £2,650, bears no relationship that we can identify to the likely cost of judicial time and the use of tribunal premises.

9.5 Where one party pays for private mediation outside the judicial mediation scheme it is usually entitled to or asserts entitlement to a greater degree of control as to the choice of mediator and timing of the mediation. We assume that respondents will not have a choice of judicial mediator; this may encourage, at least in higher value claims, the use of private mediation. We question whether this is a gain for the ET system.

9.6 The rationale that the respondent should pay the fee because this is what normally happens in external mediations is weak. This plays on a stereotype that all respondents are companies or firms with deep(er) pockets. This is not the case and the circumstances of respondents can vary widely, so to impose a blanket rule that the respondent pays is not just.

9.7 Further it is not clear which data were used to support the proposition that respondents normally pay for mediations. It is possible that any such figures have not taken into account whether respondent-led (and hence paid for by the respondent) mediations are those which take place when the claimant is still in employment or afterwards, as this may affect the analysis.

9.8 There is no proposal for the recovery of mediation fees so the respondent bears the entire cost risk of the mediation failing even if this is down to the unreasonable conduct of a claimant. This regime could be used by a cynical claimant to rack up costs on the other side, when he or she has no real intention of reaching a sensible agreement.

9.10 The proposal also does not provide for multi-party litigation, e.g. with several respondents, possibly including individual employees for whom vicarious liability is not admitted. It is entirely unclear who in these circumstances would pay the fee, or how it might be apportioned. It may be thought that to require each of the parties to contribute to the mediation, unless otherwise agreed between the parties, will ensure a degree of commitment from each of them, which may not otherwise be present. It may also be thought inherently fairer to do so.

9.11 A further situation not addressed in the Consultation Paper is where the mediation takes place after the fee for the hearing has become due. If there is agreement to hold a judicial mediation, we consider that this should automatically lead to deferral of the hearing fee at least until a reasonable time after the mediation has taken place; if the mediation is successful, the fee will not then need to be paid.

9.12 There is also no provision for cases where the mediation fee is paid, but both parties, or one party decides not to proceed before the mediation takes place (in many cases this will be because the case has been settled privately). ELA considers that if the decision not to mediate is notified to the ET a reasonable amount of time before the mediation takes place, and therefore before any significant judicial resource is engaged, the fee paid should be refunded.

9.13 In the event that mediation is successful, so that no hearing is required at all, there is an argument that the paying parties should obtain at least a partial fee rebate reflecting the saving in court time. This could act as an incentive to mediate and to resolve the dispute at that stage.

9.14 Where mediation takes place and fails, due to the unreasonable conduct of a party, and the same party fails at the substantive hearing, and the other party has paid the mediation fee, that party may well feel that they should be able to recover the mediation fee along with the hearing fee if they paid it; however it would not be possible to base any recovery on the unreasonable conduct of a party in the mediation without destroying the essential confidentiality of the mediation process. We regard this as a further consideration against the charging of any mediation fee.

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

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

10.1 These two questions can best be addressed together.

10.2 The ELA considers that it is essential, in order to preserve the principle that ETs are accessible to anyone with a legitimate case within the ET's jurisdiction, and given the Government's decision to introduce fees for ET claims, that there should be provision for the remission of fees for those who cannot reasonably be expected to afford the fees, and partial remission for those who cannot reasonably be expected to meet the full fees. Without provision for remission, the right of access to an impartial tribunal to determine the civil rights and obligations of less well-off claimants, in accordance with Article 6 of the European Convention on Human Rights, would be jeopardised.

10.3 The principle of remission of fees based on an assessment of means is therefore fully accepted. ELA also accepts the categories of eligibility for fee remission, and the levels of income currently used, as broadly appropriate for the task of protecting those unable to pay whilst not exempting those with the means to pay, subject to the important qualification that the rates of gross and disposable income need to be indexed to average earnings to ensure that the proportion of claimants eligible for remission does not decline through inflation. This is subject to the important points made in our response on the Equality Impact Assessment as to the disproportionate adverse impact of fees on certain minority and disadvantaged sections of the community. We also raise in the second part of the response to these questions a number of points about the precise criteria for remission and how they should be applied.

10.4 Respondents equally have a right to a fair determination under Art 6, and if and to the extent that respondents will be liable to pay fees under the Government's proposals, there is no reason of principle why they should not be eligible for remission of those fees. In practice we consider that this could only apply to those respondents who are individuals, but see no reason why the remission system should exclude these individuals if they have limited means. This is a point of particular importance in relation to appeals, where it may be the respondent to the ET proceedings who is the appellant in the EAT, and liable to potentially very substantial fees, particularly if the appeal proceeds to a full hearing.

10.5 We also have a number of practical concerns as to the way that the HMCTS remission scheme would apply and be operated in the rather different context of employment tribunals[9]. We consider that there are at least three significant differences between the civil courts and the employment tribunals relevant to the operation of a fee regime, and in particular the remission of fees:

- A significantly larger proportion of claimants are not professionally represented, and many do not have ready access to professional advice.

- Most claimants will have recently lost their job, resulting in a significant change in financial circumstances immediately prior to the point at which remission would be assessed.

- Tribunals operate under much shorter time limits for presenting claims, and a strict regime for the application of time limits.

10.6 In addition, the experience of those ELA members who also sit judicially is that a significant minority of claimants simply do not have the documentation that would be needed to prove financial means, either because of failures by employers to provide payslips or because payslips have not been retained; in addition, in an appreciable number of cases the termination of employment was preceded by a period of non-payment or erratic payment of wages, making it particularly difficult to establish an accurate picture of annual earnings[10]. The experience of ELA members who regularly act for claimants in civil proceedings is that even without the difficulties likely to be caused by the particular characteristics of tribunal procedure and tribunal claimants mentioned above, the provision of sufficient documentary evidence of means for fee remission claims is often problematic, even with the assistance of a professional adviser. One practitioner acting regularly for disadvantaged claimants in civil cases describes the completion of the paperwork required to secure remission under the HMCTS scheme as a "nightmare"; for those without professional assistance it will be worse.

10.7 The existence of different levels of fee for different categories of case, however justifiable, will inevitably confuse many unrepresented claimants and add to the proportion of cases where claims are not accompanied by the correct fee; the experience of ELA members who also sit judicially is that it is not uncommon that errors are made by tribunal staff in the initial coding of claims by jurisdiction, so it should not be a surprise that lay litigants will make similar errors.

10.8 This leads us to anticipate that a significant proportion of claims will initially not be correctly supported by the fee or a properly documented claim for remission. We are concerned that the estimate of the cost of administering the fees regime given in paragraphs 4.53-4.57 of the Impact Assessment has been significantly understated. We consider it essential that the tribunals' administration is sufficiently well

[9] We also note that it appears to have been assumed by those drafting the proposals that the HMCTS scheme applies equally in Scotland. However it does not, an the equivalent does not provide for partial remission, which will mean that there is not the experience amongst advisers and Court staff of the working of such a system to call on in implementing the third category of remission in the Government's proposals.
[10] See further the data on families without bank accounts in our response to Questions 10 and 11 on the Equality Impact Assessment.

resourced to be able to deal promptly and efficiently, as well as fairly, with errors and disputes over fees.

10.9 ELA members are also concerned that the introduction of a fee regime might have the (unintended) consequence of generating satellite litigation in a number of areas. In particular, if claims which are not accompanied by either the correct fee or a duly documented and valid claim for remission are not accepted and registered as claims, we foresee that there will be significant numbers of cases where the claim is initially presented just in time, but is out of time when validly re-presented, leading to a requirement for a Pre-hearing Review to determine whether time should be extended; this would not only add to the burdens and costs of the tribunal system (and thus run directly contrary to one of the main stated policy aims behind the introduction of Tribunal fees) but also incur avoidable costs for respondents having to attend the PHR to argue against an extension of time. Many ELA members would also question the justice of denying a claimant the right to have his or her claim adjudicated when the claim was originally presented in time, and either the relevant fee has since been paid or an entitlement to remission has been demonstrated.

10.10 A further concern is that claimants will have a perverse incentive to delay presenting their claims to the last moment because this will enable them to rely on being in receipt of an exempting benefit or reduced annual income, following dismissal, to avoid liability for the fee for presenting a claim. The best interest of most clients of ELA members, be they claimants or respondents, is that tribunal proceedings, if unavoidable, are delayed no more than necessary. We consider that the details of the fee remission scheme should so far as practicable be based on this consideration.

10.11 In the light of these points ELA considers that the following specific points need to be addressed for the HMCTS remission scheme to work fairly and efficiently in the context of employment tribunals; these points are additional to our proposal that consideration be given to extending the primary time limits for the most common ET claims, for reasons developed in our answer to Question 1.

(1) Claims presented with neither the required fee nor a duly supported and valid application for remission, should nevertheless be treated as received by the tribunal on the date of actual receipt, and recorded as such, so that the running of time will not affect the tribunal's jurisdiction to hear the claim if the fee issue is subsequently resolved (by payment or grant of remission).

(2) Such claims should then be made the subject of an immediate stay (sist in Scotland) for such period as necessary until payment or a valid remission application has been received, or (failing either) a decision on whether the claim is to be struck out has been taken.

(3) Respondents should be notified of claims treated as received on this basis (because otherwise they might be unaware of the claim until after the expiry of the limitation period and might then proceed to destroy relevant documentation to comply with Data Protection Act requirements) and should be sent a copy of the claim form at that stage so that they are aware of the nature of the claims made; but they should be informed that no response will be required unless and until they are so notified.

(4) Claimants should be required by the tribunal administration to pay the fee, or provide whatever documentation to support an application for remission may be specified, within 14 days of being sent notification to that effect. The letter informing them of these requirements should make it clear that the claim may be struck out if there has not been compliance within the 14 day period.

(5) Once a claimant has complied with the requirement to pay a fee, or been granted remission, the case should proceed in the usual way.

10.12 Different considerations will apply, if Option 1 is adopted, where an initial fee has been paid and the Hearing Fee becomes due[11]. Claimants who are not eligible for remission, or full remission, may nevertheless quite legitimately need time to raise the money to pay. Whilst a claim would clearly not proceed to a hearing without the fee having been paid (or remission granted), we consider that the only proper grounds on which a claim could be struck out for non-payment of the fee would be either that it is not being actively pursued or that the claimant's conduct of the proceedings is scandalous, vexatious or otherwise unreasonable; before an employment judge could strike out a claim on any of these grounds the claimant would have to be given an opportunity to make representations (in writing, but subject to the right to ask for a hearing, with a judge deciding whether a hearing is required in the circumstances).

10.13 There are four further aspects of the process of acceptance or rejection of claims on which ELA wishes to comment.

(1) The first is the procedure for appealing against a decision to decline an application for remission of fees. We note that the HMCTS scheme provides for two levels of appeal, both on paper and each to a more senior level of official within the HMCTS administration. We make no comment on whether this is acceptable within the context of the civil courts, where we believe that disputed decisions on fee remission are relatively rare. There will be many more appeals in relation to ET claims, and the issues are likely to be more complex, both in cases where documentary evidence is lacking and because of the complications created by having different categories of fee for different causes of action and in relation to multiple claims. The consequence of an unsuccessful appeal will be that the claimant is denied the right to pursue a claim to have his or her civil rights determined, and therefore an infringement of the claimant's Article 6 rights that requires justification. Such justification can more readily be provided, in ELA's view, if an employment judge decides the appeal, or at least the second appeal, if two stages of appeal are provided. We do however consider that, unless exceptionally the judge directs otherwise, appeals can and should be dealt with on the papers.

(2) The second point is the disposal of those cases where a claimant has not paid the fee or demonstrated an entitlement to remission, either initially or on appeal. We consider that the claim should remain stayed or sisted until any rights of appeal have been exhausted (with the important corollary that appeals should be brought, and determined, within reasonably strict time limits). Thereafter, or if there is no appeal, the case should be referred to an employment judge to determine whether it should be struck out. As with final

[11] Please see also paragraphs 3.8 and 3.9 above on the question *when* the hearing fee should become payable.

appeals, we consider that it would be proportionate for decisions to be taken without a hearing unless the employment judge directs otherwise; but claimants should at least have the right to submit representations before a decision is taken. We also consider that if the matter does proceed to a hearing, respondents should be notified and permitted, if they so choose, to appear at the hearing.

(3) The third point is that there needs to be a procedure for cases where a claim is initially accepted because the fee has apparently been paid, by cheque, but then payment is refused by the bank. In many such cases the claim will have been notified to the respondent: for instance it will take several days before a cheque is returned marked 'insufficient funds' by the bank.

ELA recognises that the handling of such cases (which we believe will be relatively rare) presents disadvantages however the matter is approached. Our view is that the claim should be accepted on the assumption that the cheque is good, and the respondent should therefore be served with the claim at that point. If the cheque is subsequently refused, the claim should immediately be stayed or sisted, and the respondent notified accordingly[12]. However we also consider that in such cases, in fairness to the claimant, he or she should be given time to rectify the situation – we suggest 14 days - by making an effective payment, failing which the claim would be referred to an employment judge with a view to it being struck out, subject to consideration of any representations by the claimant. There should also be an opportunity for the claimant to apply at this point for remission of the fee; we anticipate that some claimants will not have understood their entitlement to claim remission. A point of importance is that respondents be notified promptly of any stay, so that they do not continue to incur potentially unnecessary cost in preparing a response to the claim.

(4) Finally there will be cases where a claimant obtains remission of fees only because he or she has under-declared his or her income (or that of his/her spouse or partner). HMCTS staff do not have the facilities to investigate possible cases of under-declaration of income, or the means of identifying potential cases, but ELA anticipates that respondents will in many cases be sufficiently aware of claimants' financial circumstances to be in a position to question entitlement to remission, and may use this as a tactic in the litigation.

We note that the explanatory leaflet for the HMCTS scheme does not identify the under-declaration of means as a criminal offence, and ELA does not propose the creation of an offence for ET claimants, not least because many instances of under-declaration will be due to genuine errors or oversight. However we do consider that there should be a procedure for reopening cases where evidence of undeclared income is drawn to the attention of HMCTS. We consider that the appropriate course in such cases would be reference of the papers to an employment judge to determine whether the claimant be required to show cause why the claim should not be struck out. The likelihood that issues of fact will need to be resolved in such cases indicates that

[12] We understand that this is the procedure in the County Court, in the rare cases where cheques are not honoured.

claimants so required would have to be given the right to ask for the matter to be determined at a hearing (at which the respondent would be entitled to participate, if not otherwise debarred from the proceedings).

Whilst in practice respondents will often come to know that a claimant has sought or been granted remission of fees, we do not consider it would be appropriate for officials to release information to respondents about claimants' applications for remission or what remission has been granted (save where this is a necessary consequence of informing respondents that a stay has been imposed, or lifted). Apart from general considerations of confidentiality, such action would potentially, in the absence of specific statutory authority, entail a breach of the Data Protection Act 1998.

Specific points about the criteria for remission

10.14 Whilst ELA agrees that receipt of any of the benefits covered by the HMCTS remission scheme should lead to full remission of the fee, we need to raise a number of concerns about whether this will be effective to ensure that those most in need of remission are granted it.

10.15 Employees who have the required record of NI contributions are entitled to contribution based Job Seeker's Allowance on losing their employment. This is awarded without a means test, but it does not indicate that the particular individual would not qualify for Income-based JSA. The question is simply not considered. ELA is concerned that those recently unemployed and in receipt of JSA may be disadvantaged by the fact of having a good record of NI contributions. We do not however have any specific proposal to address this point; it is recognised that some claimants in receipt of contribution-based JSA will have the means to pay the relevant fees. An additional point is that in the experience of one of us who deals regularly with applications for remission in court proceedings, documents issued by the Department of Work and Pensions confirming entitlement to JSA often fail to make it clear which category of JSA has been awarded. We consider it important that claimants should not be disadvantaged by sloppy practice by another Government Department.

10.16 Additionally, employees who are dismissed for misconduct are liable to be disqualified from JSA for a period extending beyond the deadline for presenting a claim to the ET in relation to their dismissal. The issue whether there was misconduct (at least sufficient to justify the termination of a claimant's employment) may be the very issue the subject of the claim. Appeals against disqualification from JSA may not be resolved until after the deadline for presenting a claim to the ET (and indeed such appeals are often deferred until the outcome of the tribunal claim is known). Fairness to claimants requires that fees paid to HMCTS should be refunded if there is at any later stage a determination of the Social Entitlement Tribunal that the claimant should have received income-based JSA for the period including when the fee was incurred. In this respect no time limit should apply for a claim for a refund of the fee.

10.17 A further concern is that if an employee is dismissed with pay in lieu of notice, eligibility for benefits which would attract exemption from fees under the HMCTS scheme may be affected. For longer serving employees payment may be for up to 12 weeks, almost the length of the period within which a tribunal claim must be

presented. ELA considers that special consideration should be given in the scheme for remission to such cases, and that there should be at least an express discretion to remit fees where the claimant has met the conditions for entitlement to one of the qualifying benefits (Income Support or income based JSA or Employment and Support Allowance) but only from the expiry of a period covered by pay in lieu of notice. If this is not provided for, employers will have an incentive to use payment in lieu of notice to create obstacles to employees presenting claims which would distort the balance of fairness between the parties.[13]

10.18 The ELA also considers it very important that the assessment of a claimant's means is based on his or her current means, particularly where these will have been significantly affected by recent loss of employment, as will be the case for very many, probably a significant majority, of claimants. It is our understanding that disposable income is assessed on a monthly basis, and on the basis of the most recent evidence. This will mean that any claimant whose circumstances have been adversely affected by loss of his or her job will have a financial incentive to delay making a claim to the ET until he or she can provide evidence of means over a full month post-dismissal. This is a regrettable but probably unavoidable consequence of the introduction of fees with means-based exemptions. The introduction of a requirement that claims first be submitted to ACAS (with payment of the fee therefore deferred until the claim is submitted to the tribunal if not resolved by conciliation) will to some extent lessen the adverse impact of this point.

10.19 The position with regard to remission based on gross annual income is potentially more significant. We note from the worked examples at pages 81-2 of the Consultation Paper that the assumption appears to be that gross annual income is calculated on a current, rather than historic basis, but the information about supporting documentation in the HMCTS leaflet EX160A appears to indicate that historic documentation over a period of at least three months will be required. If the remission scheme is to work fairly in assessing gross annual income it will need to be made clear that it is the rate of income being received at the time of the application that matters, and the documentary evidence to be required will need to be tailored to this end (eg by requiring evidence of gross income for the last complete calendar month before the date of application).

10.20 ELA assumes, but the point should be made clear, that where a second fee becomes payable under Option 1, or for an application in the course of the proceedings, entitlement to remission will depend on the claimant's means at that point, and means will therefore have to be disclosed and assessed again.

Claimants with legal expenses insurance

10.21 In response to the supplementary question at paragraph 81 of the consultation document, ELA does not have statistics of the numbers of claimants who rely on legal

[13] If, as we propose for consideration in our response to Question 1 above, time limits for claims are extended, it will be easier for those who have lost their job to wait until their benefit position has been resolved before presenting claims. However the disadvantages of this are that claimants may delay seeking or taking new jobs to ensure they do not have to pay the ET fee, and that claims may be presented later, and hence come for trial more stale. Better than both of these would be for remission to be available to those eligible for income related JSA, even if they are receiving contribution based JSA, and those who are only ineligible because of a temporary disqualification due to receiving pay in lieu of notice or having been dismissed for (alleged) misconduct.

expenses insurance to und their representation. We believe that numbers may be of the order of 5%. Insurers would no doubt meet the cost of fees charged to claimants in the ETs whose claims they cover in the same way that they do in civil actions, but we anticipate that, particularly for relatively low value claims, insurers may impose rather stricter criteria for funding the claim, leading to a slight reduction in the number of legally represented claimants. This would not be welcomed by respondents, as dealing with litigants in person is often more time consuming and costly than dealing with professional representatives; and it would place a somewhat greater burden on the tribunals for the same reason.

10.22 However our principal concern is that claimants are all too often not aware of the fact that they may have legal expenses insurance covering employment disputes, and do not therefore claim on their policies. Any steps taken to publicise to prospective claimants the possibility that they may have insurance would mitigate some of the adverse effects on claimants of the introduction of a fees regime.

Summary of reply to questions 10 and 11

10.23 In summary, ELA's response to questions 10 and 11 is:

- The principle of a means-based scheme for remission of fees is accepted.

- In principle the HMCTS scheme is appropriate. Rates of income within the scheme should be indexed annually to average earnings.

- A much higher level of errors and disputes is to be expected by comparison with the experience of the scheme in civil courts, and the tribunals need to be resourced accordingly

- Claimants should not be prejudiced by the passing of time limits after a claim has been presented by issues about payment of the fee or entitlement to remission. In ELA's opinion, this is separate to and does not undermine the principle that claimants who can pay for the ET's services should pay. As well as preventing undue prejudice to claimants, ELA's response on this point recognises the very real risk, in the view of practitioners, of satellite litigation arising and tribunals becoming unnecessarily overburdened in the determination of such jurisdictional issues.

- Appeals about entitlement to remission should be decided by a judge.

- Remission should be available to respondents who are individuals if required to pay a fee, and in particular as appellants in the EAT

- Failure to pay the hearing fee should not automatically lead to striking out, but failure to pay after a reasonable time should lead to consideration by a judge of a strike out because the claim is not being actively pursued.

- HMCTS should not inform respondents of applications for remission or their outcome except to the extent necessary to inform them of a stay or the lifting of a stay.

- Evidence of under-declaration of means should be referred to a judge for consideration of requiring the claimant to show cause why the claim should not be struck out.

- Consideration needs to be given to the position of claimants receiving contribution based JSA and whose entitlement to income based-benefits is deferred because of a payment in lieu of notice or who have been disqualified for a period because the reason for their dismissal has been given as misconduct. Claimants who successfully appeal against disqualification for JSA after having paid a fee should receive a refund of the fee.

- The assessment of gross annual income and monthly disposable income should be based on current financial circumstances not income prior to dismissal, and the information issued about remission of fees and documentation required to support an application should reflect this.

- Means should be reassessed at the time that the hearing fee becomes payable.

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

12.1 The ELA recognises that multiple claims are likely to consume greater administrative and judicial resources than single claims, in large part because hearings in multiple cases typically take longer than those involving a single claimant. Therefore ELA accepts that there is a case that the fee for a multiple claim should be greater than for a single claim, and should rise further for the largest multiples. Subject to our comments on the level of fees proposed generally, we accept as realistic the tiers of fees proposed in paragraph 87.

12.2 The ELA also considers that the appropriate way to calculate the fee due is to take the number of claimants in the multiple at the time the fee is due, i.e. on presentation, and separately (under Option 1) at the time the hearing fee becomes payable (by which time other claims may have been combined into the multiple, and/or some claimants will have withdrawn).

12.3 However we are concerned that the level of fee is to be determined by reference to whichever is the highest category of *any* of the claims made by any of the claimants within the multiple. We can see the logic of this as a theoretical approach, but in practice it may produce unfairness to those claimants who have not brought the higher category claims, particularly, under Option 2, if only one or a handful of claimants has a claim for more than £30,000.

12.4 For purposes of addressing entitlement to remission and the consequences of some claimants securing remission, we propose below that each claimant should only be liable to his or her share of the total fee. We also consider that the unfairness identified here can best be addressed by making each individual liable only for the proportion of what the total fee would be if only claims of the kind/amount made by that claimant were raised. Thus in a 10 claimant multiple arising from an alleged TUPE transfer, two of the claimants may have only claims for unpaid wages, the others also for redundancy pay and/ or unfair dismissal. The share payable of the total fee would be, for the eight, 1/10 each of the tier 2, 10 claimant fee, and for the two,

1/10 each of the tier 1 10 claimant fee (under option 1, respectively £60 and £45 at presentation, and £300 and £75 for the hearing fee).

12.5 An alternative approach, if it is concluded that the proposals indicated are too complex, and likely to be unduly expensive to administer, is to exempt multiple claims from liability to pay fees, or at least to pay the fee for issuing a claim. This is canvassed in our response to Question 2 above. Here we make the point that it is important that a fee structure is not created which provides a perverse incentive for individuals to present their claims individually, rather than as a multiple, for instance so that full remission can be obtained for claimants with limited means. That would add considerably to the cost to HMCTS of the case management of multiple claims, possibly to the extent of exceeding net revenue from multiple fees. If that is at all likely, the simpler option of not charging a fee at all for multiple claims, or only charging the same fee as for single claims, would become much more attractive.

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

13.1 Please see our response to Questions 10 and 11 on the remission system generally.

13.2 It is noted that in 2010/11 there were over 157,000 claimants in multiple claims, compared to around 60,000 single claimants[14]. However ELA does not regard this as a reason for less favourable treatment of claimants in multiple cases with regard to remission of fees, for a number of reasons:

13.3 There is a strong public interest in encouraging litigants whose claims arise from the same or similar circumstances and are against the same respondents to combine their claims as multiples, since despite these factors, multiple claims are more cost effective to deal with what could otherwise have been a large number of single claims covering the same or similar issues. Therefore the fee structure, including remission criteria, should not act as a disincentive to claimants bringing their claims as multiples. For that and other reasons ELA considers there is merit in either excluding multiples from the fee regime altogether or limiting the fee to that charged for a single case. The observations which follow are based on the proposals as they stand as to the rate at which fees will be charged.

13.4 The great majority of multiple claims involve no more than 10 claimants (84.9%, according to the analysis at paragraph 3.8 of the Regulatory Impact Assessment; over 60% have no more than 4 claimants). Claimants in these smaller multiples will still, if the fee structure adopted incorporates the fee levels proposed, face having to pay a fee which many cannot reasonably pay.

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[14] This figure, whilst factually correct, can easily lead to a misleading impression of the position. The multiples included bulk submissions on behalf of airline flight crew, which until the litigation in *Williams v British Airways* is resolved will continue to accumulate at a rate of over 40,000 cases a year, this small group alone accounting for a quarter of all the multiple claimants. The number of new large multiple equal pay claims against local authorities and NHS bodies is now in sharp decline. The Regulatory Impact Assessment at para 3.8 gives a total of 4,823 multiples presented in 2009-10, less than 10% of the total of single claims; of these 60% had 2 to 4 claimants and so would attract double the issue fee for singles, and less than 2,000 would attract a higher fee. This indicates that the proportion of revenue that would be generated by charging fees for multiples is a modest proportion of the whole; it may also be seen to show that the loss of revenue if all multiples were treated as single cases for fee purposes would be small, and easily balanced by more cases suitable to be presented as multiples being presented in that way rather than as singles.

13.5 Claimants in smaller multiples are, in the experience of ELA members, more often unrepresented than those in the larger multiples and the processing of claims for remission of fees by such claimants will not add significantly to the administrative cost of processing payments by individuals (and it cannot be expected that a group of unrepresented claimants will co-ordinate the payment of a joint fee).

13.6 In the light of the foregoing, for multiples with up to 10 claimants, ELA considers that the fee should be treated as payable in equal shares by each claimant, with each claimant entitled if meeting the means criteria to a full or partial exemption from his or her share of the fee. We do not accept that the fee thus remitted should have to be paid by the other claimants in the multiple, even with the cap proposed of no claimant being liable for more than the single claim rate of fee. It is in our view unfair to claimants that they should have to pay more than their share of fees simply because their co-claimants are entitled to remission of their share. Apportionment in this way would also make it easier to charge each claimant only the fee applicable to the highest level of claim that claimant wishes to make, not the fee for the highest level *any* of the claimants wishes to make.

13.7 Thus in a 10-claimant multiple, if four of the claimants are entitled to remission, they would pay nothing, and the other 6 would pay 1.8 x the single fee between them (60% of 3 x the single fee). Wherever possible parties should be encouraged to make a single joint payment, but this should not be mandatory as it would tend to discourage claims being presented as multiples if the financial arrangements are made too complex for unrepresented parties. However, as between themselves, the liability to pay would be divided equally between those not entitled to remission.

13.8 On the other hand, ELA accepts that in the larger multiples, the fee payable by or on behalf of each claimant will not exceed, and in most cases will be much less than, 40% of the full fee for single claims. We accept that it is unlikely that real hardship will be caused by not offering remission of fees for the larger multiples. If any individual would suffer real hardship through having to contribute to the multiple fee, this can be avoided by presenting a separate claim, seeking remission of the fee, and then applying for the claim to be joined into the multiple. Accordingly we accept that remission of the fee payable should not apply if there are more than 10 claimants.

13.9 Elsewhere in this submission the point is made that the applicable fee for the hearing under Option 1 should be calculated according to the number of claimants in the multiple at that stage (which may be more or less than at presentation). We consider that the rules as to remission should also apply or not according to the number of claimants at that stage. However, the maximum fee that would be payable by a claimant for a category three hearing in a multiple of 11 would be 1/11 of (£1250 x 4), or £450. That is too high for there to be no facility for remission in cases of inability to pay. We propose that where (at any stage in the proceedings: a similar point would arise under Option 2 if the fee for claims of £30,000+ is payable) an individual claimant would be liable to pay a share of £200 or more, remission should be available on the same criteria as for fees in single claims.

13.10 In paragraph 89 views are invited on what we see as the role and responsibilities of unions and representatives in paying fees in multiple claims. We agree that in multiple claims in which all of the claimants are legally represented, it would be administratively advantageous if the representatives were responsible for payment of

the fee on behalf of their clients. It would then be for the representatives to look to their clients for repayment. We imagine that this is how it will work in practice, with the tribunal fee being treated as a disbursement. For those represented by trade unions, we also agree that it would be administratively advantageous if the fee was paid by the union; whether it looks to its members to pay their individual share would then be a matter for the union in each case. We do not accept, however, that the fact of either legal or union representation should deprive needy claimants of a right to remission of their share of the fee: it cannot simply be assumed that the legal or trade union representative will meet the cost and there is therefore no need for a scheme of remission, particularly in the absence of any evidence that trade unions in particular are willing, or in a position, to bear this additional expense as well as providing free representation to their members. They may decide to rewrite their terms to exclude fees from Legal Scheme cover. Generally the right to advice and/or representation under union legal schemes is expressed to be discretionary. They may insist on members who qualify should seek a remission. They may advise their members to make their own claims and only take over conduct of the claims as and when a fee remission has been granted.

13.11 In cases where some but not all claimants are represented, or there are different representatives for different groups of claimants, the responsibility for payment of the appropriate share of the fee, and submitting claims for remission if applicable, would have to lie separately with each representative (and each individual claimant if applicable) since there is no mechanism for directing otherwise until the ETl is seised of the claim. This is inconvenient, as we acknowledge, but unavoidable; any alternative would be likely to lead to the fragmentation of what could more conveniently be presented as multiple claims. A direction imposing responsibility for fee issues on one representative would be possible in relation to the Hearing Fee under Option 1, but that is essentially a matter of case management for the ET.

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

14.1 HCMTS proposes in relation to both Option 1 and Option 2, that there should be no refunding of fees, including when a case is settled, or withdrawn, before hearing. Question 27 in the Consultation Paper covers refunding in relation to Option 2. In the view of ELA this is unreasonable, likely to produce injustice and also counter-productive in discouraging settlements in the period after fees have been paid covering the hearing. Specifically, we consider that both fairness and the interests of efficiency require that refunds be available where:

- The fee is for the hearing, and no hearing takes place, provided that reasonable notice has been given of the withdrawal or settlement of the case: we propose a minimum of 7 days before the date scheduled for the start of the hearing.
- The fee has been incurred because of an error by the ET (e.g. in the circumstances mentioned in paragraph 14.3 below).
- The wrong fee has been charged to the party due to an error of the ET staff
- The party paying the fee has incurred unnecessary cost due to the last minute cancellation of a hearing.

- As a matter of discretion, there are cases where a claimant presents a weak case, or a case in a higher fee bracket, and then, before significant costs are incurred on the case by the ET, withdraws. Discretionary refunds should be available in such cases (see paragraphs 14.6 and 14.7).

- There should be discretion to refund fees incurred in pursuing successful claims where the compensation awarded cannot be recovered from the respondent (typically because it has become insolvent).

14.2 If the hearing does not take place, either because of a settlement or withdrawal of the claim, virtually none of the costs to be covered by the hearing fee are in fact incurred[15]. The proposal may not therefore be compatible with Treasury Guidelines that fees should not exceed the cost of providing the service. This is implicitly recognised within the fee structure for the High Court and County Court, where refunds are given if the hearing is removed from the list a reasonable time before it is due to take place.

14.3 As noted in our response to Question 8, there may be occasions where a fee has been incurred through an error of the Tribunal. The example given there is where a default judgment turns out to have been entered because the Tribunal mislaid the response form, as can happen, or the ET served the claim form at the wrong address, leading to it not being received by the respondent in time to respond. A Respondent (or Claimant responding to a counterclaim) might then have to pay a fee to apply to set aside the judgment, when it turns out the default judgment does not arise from their error.

14.4 In our response to Question 1 above we draw attention to the burden on parties caused by the unacceptably frequent practice of last minute cancellation of hearings and cases being assigned as “floaters”. Remission of the hearing fee, on evidence that costs have been thrown away because of the failure to provide the scheduled hearing, would be a start toward compensation for the party which has paid the fee. A more consumer-focussed approach, under which users are entitled to expect the service for which they have paid, at least necessitates that failure to deliver what is legitimately expected should necessitate a reduction in the price. The introduction of fees for ET claims entails precisely that shift in focus.

14.5 It will be inevitable that those litigants in person who do not have access to the internet, or ability to pay on-line, will have to be able to pay fees in person at Tribunal offices. It is possible that Tribunal staff may request the wrong fee from a litigant in person, requiring a refund. A blanket policy of no refunds would operate unfairly in such situations.

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[15] Although hearings are listed well in advance, the almost universal practice in the ET for all but the longest cases is that the case is not allocated to a judge and members until a day or so before the hearing (even where, as in Scotland, a judge is assigned to the case form an early date there is neither the time nor the incentive to prepare for a hearing before it starts, as so many cases settle shortly before the hearing. ET offices actively discourage the lodging of bundles of documents before the day of the hearing; fee-paid judges will not know until at earliest the working day before the hearing which case they are assigned to and lay members do not normally see any information about the case until the morning of the case. Hence the costs of the hearing are not incurred (beyond the minimal cost of sending out notices of hearing and dealing with pre-hearing correspondence) until the hearing is about to start.

14.6 The current nature of Tribunals and the difficulty of obtaining legal advice in such cases, mean large numbers of litigants in person start cases in the Employment Tribunals, without the benefit of prior legal advice. Claimants subsequently receiving legal advice that their claim is weak on the merits in whole or in part, may have an incentive to withdraw in good time, when a mechanism for refunding fees, or a proportion of fees is available. Withdrawals save the Tribunals costs. Where there is no such a mechanism, some Claimants may be more inclined to continue with all claims, or to proceed all the way to hearing, taking the view that as they have paid an issue fee and if relevant hearing fee, they may as well proceed.

14.7 Claimants may bring applications including both level 2 and level 3 claims. If they can get subsequent legal advice, they may be advised to withdraw claims, if they are unmeritorious at level 3 and continue only with the level 2 claims. They will have paid a fee at the higher level for level 3, but the proposal will not allow a refund of the extra level 3 fee, even though the decision was made without the benefit of legal advice and even though the Tribunal will not have to undertake work at level 3, but only at level 2. This will cause injustice and may result in satellite litigation. There should in these circumstances (and those outlined in paragraph 14.6) at least be a discretion to refund all or part of the fee, or the additional element of the higher band fee, on application, following a timely withdrawal of the claim or higher level claim, as the case may be.

14.8 There is a particularly high incidence of non-payment of Tribunal awards by a number of Respondents. In many other cases the Respondents are insolvent already, or go insolvent. For many Claimants in such circumstances, who have to proceed without legal advice and assistance and who may be on low incomes, or vulnerable through disability or language problems, this can result in considerable injustice, in that they have had to incur a fee, which will never be recovered. Their position is very different from a commercial litigant. A discretionary power to refund fees in such situations would be just.

Question 15: Do you agree with the Option 1 Fee Proposals? If not, please explain why

15.1 ELA makes the following points in addition to the specific points made in answer to the questions above about the operation of Option 1.

15.2 There are a number of matters, as explained in our earlier responses which will require consideration in implementing legislation to make these proposals work in practice:

- Whether and how to provide access to legal advice services or resources in order to assist applicants to understand the type of claim they have and the applicable fee structure.

- Whether and how public policy considerations arising from the institution of higher fees for discrimination and whistle-blowing cases should be addressed.

- Whether there is a conflict between the targets set for employment tribunals to list cases within a narrow time frame and the principle of a two stage hearing fee to allow time for a case to settle. In recent years, ELA members have noted the increasing time pressure to conclude cases within a short time-table, even where

the cases are complex and involve substantial preparation. If a hearing fee is also to be introduced, consideration will need to be given to the extension of existing time-frames, and the abandonment of the artificial and often counter-productive 26 week hearing date target. Consideration should also be given to a provision, as in the case of the civil courts, for an automatic stay for a period of one month on request by either party to allow for conciliation or mediation, thus potentially avoiding a hearing (and a hearing fee being incurred).[16]

15.2 While it is in principle sound that the unsuccessful party should pay the court fee, consideration should be given to how this should be enforced, to avoid unrepresented applicants having to pursue the fees through enforcement proceedings where the respondent refuses to pay, or becomes insolvent.

Time limits and miscellaneous points:

15.3 Other issues which these aspects of the proposals raise, which are not the subject of specific questions but which ELA considers require to be addressed, include:

- Should fees be subject to indexation? If so on what basis? Whilst recognising that over time it will be necessary to review fees in the light of inflation and changes in the cost of the ET service, we consider that revising the rates of fees annually would over-complicate matters and add to confusion, particularly when fee rates change

- It is our understanding that "hearing" does not include Pre-hearing Reviews Will the introduction of a second fee for the hearing impact on the use of PHRs?

- Default judgments will not attract a further fee but in most unfair dismissal and discrimination cases default judgments are limited to liability with a short hearing listed to determine remedy. Will such hearings be classed as "hearings" for fee purposes? If so, should they attract any fee? It is ELA's view that any fee for such a hearing would need to be much lower than the hearing fee proposed, both since such hearings are usually much shorter than full hearings to determine issues of liability (and are further shortened by the respondent being debarred from participating) and because in many cases the reason for the default judgment is that the respondent has become insolvent, so that the prospect of recovering whatever compensation the ET awards is poor. To require a claimant to pay a full hearing fee, possibly as much as £1,250, in such circumstances would be grossly unfair (and would almost always represent more than the cost to HMCTS of affording the hearing).

- Should claims including an application for interim relief be dealt with any differently as regards the requirement to pay the claim fee on presenting the claim? The time limit for such claims is only 7 days, and we consider it would be oppressive to expect payment at the time of presenting such a claim as a condition for accepting the claim.

[16] We note, in particular, that it is proposed at paragraph 107 that a hearing fee will be payable 4-6 weeks prior to a hearing. In some employment tribunals, claims are being listed for hearing within two to three months of issue, which would not offer adequate time for settlement before the hearing fee becomes payable.

- Should *Calderbank* offers be taken into account by the tribunal in deciding whether to order the fee to be repaid? If so is there a risk that more remedy hearings will be necessary, particularly when the decision on liability is reserved?

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

16.1 The wider aims attributed to Option 2 in the Consultation Paper (Claimants making informed judgments as to claim values and greater employer certainty as to liability) are supported by ELA[17]. Requiring Claimants to make a more informed judgment about the value of their claim should help temper employee expectations and provide employers with information, early in the claim, to make informed risk management decisions, including whether to settle.

16.2 However, it is doubtful whether the aim of "giving greater certainty to employers over their likely level of liability" is an accurate description of the Option 2 fee structure. What is currently offered to employers is certainty as to whether a claim value is above or below a £30,000 threshold. Whilst that is helpful, it only goes so far and, as noted in Question 18, currently the great majority of claim values fall below the threshold.[18] Apart from the threshold valuation, employers are unlikely to rely on Claimants' own assessments of their claims.

16.3 In addition, if both aims are to be realised, the mechanisms and structure proposed to achieve them under Option 2 require considerable fine-tuning. Discussion of some of these mechanisms, such as the operation of the threshold and higher fee for higher value claims, overlaps with the questions that follow and we do not go into further detail on them at this point.

16.4 It is also noted that a key aspect of achieving Option 2's wider aims is the provision of guidance and support to Claimants; the Impact Assessment suggests that this will be via web-based information and a calculator. Given the sometimes complicated nature of tribunal compensation, much will depend on whether a web-based solution is capable of helping Claimants to determine whether their claim is above or below the threshold. In addition, the question arises as to the extent to which Claimants have access to the internet.[19]

16.5 Whether Option 2 or Option 1 is the preferred outcome, we urge the MoJ to continue to prioritise the provision of better advice and guidance to Claimants. In other words, the wider aims of Option 2 should continue to be pursued, even if some of the mechanisms proposed under Option 2 fall by the wayside.

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

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[17] For example, an ELA member law firm conducted round-table meetings with approximately 150 employers during 2011 in relation to dispute resolution and a recurring problem discussed was how to better manage Claimants' realistic expectations as to the Employment Tribunal process and likely compensation.

[18] A range of relevant statistics of levels of award in different categories of cases is given in our responses to the Equality Impact Assessment, below.

[19] As noted in our response to Question 10 on the Equality Impact assessment, over 8 million adults have never used the internet. The closure of many local public libraries will mean that free public access to the internet is likely to be an increasing problem in the future.

17.1 The Impact Assessment and Consultation Paper already highlight a number of advantages and disadvantages resulting from this approach. Most of the advantages appear to benefit the State, for example, it is simpler to administer and less costly. Whilst this is important, we suggest that both employers and claimants will value the existence of more incentives to settle, not less. Therefore, the one-fee approach as currently proposed under Option 2, which it is acknowledged offers no further opportunities to incentivise parties to settle before a hearing (and may encourage Claimants to have a hearing to "get their money's worth"), is less attractive than the two-stage approach under Option 1.

17.2 There are also practical difficulties associated with Option 2's one-fee approach, in particular, the difficulty that Claimants and their lawyers will encounter in knowing the value of the claim at the time they pay the issue fee (please see our response to Question 28 for further discussion of this point).

17.3 We note that the MoJ proposes that there will be no refunds of fees by HMCTS. However, if the hearing does not take place, either because of a settlement or withdrawal of the claim, virtually none of the costs to be covered by the fee are in fact incurred. We doubt whether this is compatible with the Treasury Guidelines relied on by the MoJ i.e. that fees should not exceed the cost of providing the service. Whilst we would accept that refunding of the whole fee would not be justified, as distinct from the refunding of the separate hearing fee under Option 1 in these circumstances, refunding of part (we would propose a half) of the fee paid would largely meet our concern about compatibility with Treasury guidelines, and would provide at least *some* incentive to settle.

Question 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.

Are claims over £30,000 more complex? Do they use more ET resources to resolve?

18.1 The average awards[20] by the Employment Tribunal in 2010/2011 were:

	Average Award	Median	Maximum
Unfair Dismissal	£8,924	£4,591	£181,754
Race Discrimination	£12,108	£6,277	£62,530
Sex Discrimination	£13,911	£6,078	£289,167
Disability Discrimination	£14,137	£6,142	£181,083
Religious Discrimination	£8,515	£6,892	£20,221

[20] Employment Tribunal and EAT Statistics, 1 April 2010 to 31 March 2011.

Sexual Orientation	£11,671	£5,500	£47,633
Age Discrimination	£30,289	£12,697	£144,100

18.2 Less than 7% of claims which succeed in the ET result in an award higher than £30,000. The number of clams leading to awards over £30,000 in 2010/2011, broken down by type of claim, were as follows:

	£30,000 – £39,999	£40,000 – £49,999	£50,000+
Unfair Dismissal	71	31	51
Race Discrimination	2	3	3
Sex Discrimination	9	3	5
Disability Discrimination	0	3	4
Religious Discrimination	0	0	0
Sexual Orientation	0	1	0
Age Discrimination	2	2	4

18.3 The first point to be made about these figures is that only 191 cases in a year (less than one for every thousand claims presented) led to an award of over £30,000. Employers' concern that they face ruinous litigation is understandable by reference to the way that a tiny minority of claims and awards are publicised in the media. The best thing the Government could do to ally those fears is to publicise much more vigorously a balanced picture of the awards typically made by ETs.

18.4 It should be recognised that awards made by ETs may not have matched the Claimant's expectations at the time of issue. It should also be noted that only 40% of claims for unfair dismissal reaching a hearing before the ETs in 2010/11 were successful[21].

18.5 Not all claims over £30,000 are more complex or use more resources than claims under £30,000. The bulk of claims resulting in awards of over £30,000 are for unfair

[21] Equivalent statistics for 2010-11 for discrimination cases are not available, but we believe the success rate to be considerably lower. The statistics do not of course provide details of the value of cases settled by the Parties.

dismissal. Higher quanta in those claims are likely to be due to the higher salaries of the claimant or poor prospects of finding alternative employment. The resources of the ET used by such claims are less likely to have a correlation with the value of the claim than the type of claim.

18.6 In discrimination claims the complexity and demands on the resources of the ET are more likely to have a correlation with the value. Awards for unfair dismissal are based on the earnings of the claimant, whereas compensation in discrimination claims are often higher due to having to add awards for injury to feelings and, potentially, damages for injury to health, aggravated and/or exemplary damages as well as loss of earnings. Injury to feelings and aggravated damages awards are based on the incidents of discrimination, which can be numerous, complex and lengthy.

18.7 Since claims for more than £30,000 are more likely to be made in unfair dismissal cases, the proposed threshold is unlikely to meet the wider objective of passing the cost of administering the ET to those who use most resources.

Will a threshold encourage settlement or provide greater certainty to businesses as to their maximum liability?

18.8 A threshold set at £30,000 has the potential to self limit claims to a maximum £30,000. The tables above demonstrate the wide range of awards made, even making a simple comparison of average, median and maximum awards. The threshold therefore provides no real certainty to a business save to allow it to set a maximum reserve for the business. Taking into account our response to Question 19 below, if the ET is allowed to make an award in excess of the threshold or in excess of the valued placed on the claim by the claimant at the time of issue, then any certainty that might be created will be undermined.

18.9 We would question whether the value of the claim is the best basis for assessing the appropriate fee. An alternative method of assessment might be more bands of fees charged based on the type of claim with or without reference to the value of the claim. However we would not support this because of the complexity, and opportunity for error, disputes and appeals, that a range of fee bands would create.

18.10 If the desired outcome of the introduction of a threshold is to give employers a better idea of the claim value at issue then the introduction of the requirement for a schedule of loss to be provided at issue of the claim would assist achieving this aim without the need for a threshold. However, if respondents are to be expected to rely on Schedules of Loss, unrepresented claimants in particular will need assistance in calculating the value of their claim. It will be extremely difficult to produce a mechanism for calculating awards for injury to feelings, or for loss of earnings where there is a requirement for mitigation. Pension losses are an extremely complicated calculation, which many claimants may not understand. Any loss calculator will have to be extremely sophisticated to take account of these factors.

18.11 The fact that ET claims have, in the main, to be issued within 3 months of the dismissal or act of discrimination, gives Claimants/their advisers relatively little time to calculate a claim's value compared to claims brought in the civil courts where the claimant often has, between 3 to 6 years to issue a claim. . In discrimination claims, the act of discrimination has, more often than not, already occurred prior to the

claimant leaving any employment or obtaining legal advice. This often leaves less than 3 months for claims to be valued and issued. This may be seen as a further reason for relaxing the time limits for presenting claims.

18.12 This question also asks whether claims involving more than £30,000 should attract a "significantly higher" fee, the amount proposed being £1,750. The Impact Assessment records that 90% of claimants are expected to qualify for at least partial remission of this fee. That in ELA's view calls into question the purpose of imposing such a fee. Whether or not it is fair to characterise this as an attempt to frighten claimants away from making large claims, as some commentators have suggested, a point on which we express no view, there is a danger of the opposite outcome in cases brought by impecunious claimant entitled to a full remission of fees: they will have every incentive to claim more than £30,000, at no cost, to "raise the stakes" with the respondent. This however will make it more difficult to settle such cases, leading potentially to hearings that could have been avoided if a perverse incentive to over-value claims had not been created.

18.13 For all of these reasons, ELA does not support the proposal for a significantly higher fee for claims stated to have a value over £30,000, with the ET being prevented from awarding more if the higher fee is not paid.

Question 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.

19.1 There are various situations that might lead to a change of circumstances that would increase the value of a claim from that considered at the date of issue:

- Expectations of alternative employment being found not being realised in practice.
- Loss of the alternative employment that had been found.
- Prognosis of psychiatric injury changing.
- Claimant receiving advice which was not available at the time of presentation

19.2 The value of a claim, particularly for claims involving dismissal, is directly linked to a claimant's ability to mitigate their loss. It is impossible for claimants to calculate their loss of earnings accurately when the calculation has to be based on an estimate of how long it will take to obtain alternative employment and what will be their level of pay. In addition, there are instances where a Claimant obtains alternative employment fairly quickly after dismissal but is then quickly made redundant from that job, or is only employed on a temporary basis. If claims are calculated at a time when the claimant has alternative work the estimate of loss of earnings will be lower. However, if they then lose that alternative employment, and continuing loss can still be attributed to the dismissal, the value of the claim will increase. This would not necessarily have been foreseeable, or foreseen, by the claimant when issuing the claim.

19.3 In light of the above and in the interests of fairness we consider that Claimants should be able to amend the value of their claim, on payment of the balance of the higher fee,

during the course of proceedings. Without this facility, it is arguable that this proposal, as far as it effects discrimination, could be in breach of EU legislation because it prevents claimants obtaining an effective remedy – see *Marshall v Southampton & SW Hants Area Health Authority (No.2)* [1993] IRLR 445[22]. We note that in the civil courts there is the facility to re-allocate a case between the fast track and multi-track when the value of the claim increases.

19.4 The Employment Tribunal system was set up for employees to be able to assert their contractual and statutory rights and capping the level of compensation, in the manner currently proposed by Option 2, potentially limits the ability of employees to do this. Furthermore, there is a risk that claimants will be driven to paying a lower fee solely on the basis of cost saving without a true understanding of the value of the claim and the limitation placed on them by paying a lower fee.

19.5 We have considered how claimants might be enabled to access higher compensation, not having claimed it (and paid the fee) when issuing their claim. We suggest that Case Management Discussions should be used to identify any potential issues as to the valuation of a claim at an early stage, and this issue should form part of the standard agenda for CMDs. If the matter is not dealt with at a CMD or PHR, but arises at the hearing of the claim, and the ET considers that making an award in excess of the limit, the ET could ask the Claimant if he/she wishes to amend their case, and invite representations from the Respondent. The Employment Tribunal could then take into account the relevant circumstances in reaching a decision whether to permit an amendment, for example:

- That the claimant is, or was, not legally represented.
- That the claimant had, or has, a disability.
- Evidence that has been adduced at the hearing (or in late disclosure) that changes the nature and/or value of the claim, e.g. leading to aggravated and punitive damages.
- Default by the respondent that prevented proper calculation of the claim prior to the hearing.

19.6 The ET could require the payment of an additional amount to bring the fee paid to the higher level. The ET could also decide which of the parties should pay that additional amount. The ET could be given if appropriate. The ET, as an extension of the power to order that issue fees be paid by the respondent, could have the power to order that the respondent repay to the claimant both the issue fee and any additional fee required to enable the ET to make a higher award.

19.7 It is noted that a power for the ET to override the £30,000 threshold negates the objective of providing the employer with certainty as to the value of the claim. However, given the relatively low percentage of claims that are valued over the £30,000 threshold (see our reply to Question 18 above), we consider that power to

[22] It could be argued that unless claimants can seek to increase the level of compensation that they can receive a ‘cap’ is being put on what they can be awarded. ELA considers that any cap on recovery in discrimination claims will be capable of challenge, at least where the claimant only became aware during the course of proceedings that the value of the claim was potentially higher than the threshold imposed.

override the threshold will cause limited detriment and have an impact in relatively few cases. Potential ways of minimising this detriment would be to:

- Hold a CMD to consider whether the claim is pleaded at the appropriate fee level. CMDs are already scheduled as a matter of course in discrimination claims and claims under the Public Interest Disclosure Act. This approach would however potentially require CMDs to be listed more often in unfair dismissal claim, which is likely to increase the demand on the resources of the ET.

- Issue a direction that within 14 days of disclosure the claimant is to confirm whether their claim remains below the threshold, with leave to apply to amend the value of the claim on payment of the appropriate fee.

Question 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?

20.1 The proposed threshold has been put forward on the basis that these cases:

- involve highly paid claimants who are therefore more likely to be able to pay the additional fee; and

- use much more of the ET's resources.

For reasons already set out in our response to question 18 above, we do not agree that the above assumptions are necessarily correct.

20.2 In our experience, claims involving discrimination (either as a stand alone claim or together with other claims e.g. unfair dismissal) are those most likely to make heavy demands on the ET's resources. In such cases a CMD is now always held to clarify the issues and set down a timetable for the future conduct of the case; in most, but by no means all, cases, hearings last longer than for all but the most complex of unfair dismissal cases. What is not established by any evidence of which we are aware is that claims which lead to (or are likely if successful to lead to) awards in excess of £30,000 necessarily take longer to hear, or are more demanding to case manage, than other cases.

20.3 The tendency for discrimination and Public Interest Disclosure Act cases to be lengthier is already factored in to the tiers of fees proposed under both Option 1 and Option 2. In the light of this, there is no alternative to a monetary limit that would be more justifiable as the threshold for increasing the fee; however we do not consider that the case for an additional fee for claims over £30,000 is sufficiently compelling to outweigh the problems and possible obstacles to settlement that its introduction will create.

Question 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?

21.1 Option 2 would provide businesses, in cases where Claimants take the option not to pay the highest fee so that they can claim compensation over £30,000, with some indication of what their maximum exposure was. However, if Claimants are permitted

to pay an increased fee at a later stage in the proceedings so that they can seek compensation over £30,000, then there will be a degree of uncertainty for business. In addition the fee proposal will not provide certainty as to how much the business will need to allow for the cost of defending the claim; nor will it give any certainty as to how much, below the relatively high threshold of £30,000, will be awarded if the claim succeeds (and should be provided for accordingly).

21.2 As stated previously in our response, whether Option 2 helps to manage the realistic expectations of claimants will likely largely depend on the quality of advice they receive in order to assist them in valuing their claim. In some cases even the clearest advice will not dissuade claimants from their own sense of the worth of their claim.

Question 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.

22.1 As a generalisation this is only partially true. The compensatory award for unfair dismissal is made having regard to the claimant's loss of earnings in consequence of their dismissal, which will be higher for a given period for higher earners. The basic award is more a factor of the claimant's age and length of service; the cap on a week's pay is some way below the average full time wage.[23] Awards for discrimination claims are also based on the loss the claimant has suffered, but there is usually an additional injury to feelings award. This figure can reach £30,000 by itself in the most serious cases. As a general rule, the longer the claimant has been out of work, the higher the award they receive, but a major factor in awards, which has no obvious correlation with level of earnings, is whether there should be a *Polkey* reduction and/or a reduction for contributory fault. Rising levels of long term unemployment are likely to have an impact on the level of awards made by ETs to claimants whatever their previous level of income.

22.2 There are no statistics of which we are aware which shed light on the level of earnings of those receiving awards in excess of £30,000, and the experience of ELA members does not support the suggestion that most awards are made to high earners (whatever the definition of this category might be).[24]

22.3 Due to the lack of evidence available specifically linking the level of the Claimant's income to the award they received, ELA feels unable to come to a definitive conclusion on this point.

Question 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 chose to make a higher value claim (and can afford to pay the fee).

23.1 No, for the reasons given below. The Government has made it clear that the consultation is not to answer the fundamental question of whether or not fees should be charged *per se*. The reasons for the Government's policy decision are taken to be those stated in the Consultation Paper, namely:

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[23] The cap, now £430 a week, equates to £22,360 a year; the average full time wage in 2011 was £26,200.

[24] The published ET statistics do not provide information relating to the level of awards for claims made under other jurisdictions, such as unlawful deductions claims or in respect of the value of claims which settle prior to a Hearing. Claims for breach of contract can never result in awards in excess of £25,000, but may contribute to a total award above £30,000 where other claims are made in the same case.

- To promote economic growth and job creation by removing structural barriers that impede competitiveness and employer confidence by reducing the number of claims issued, by encouraging/supporting ACAS/ADR, and encouraging/ supporting those Claimants who do present a claim to settle at the earliest opportunity thereafter.

- To ensure public services are cost effective by users meeting the cost, subject to protections for those who cannot afford to pay.

23.2 Whether these principles justify charging higher fees to those who choose to make a claim with a higher value attributed depends at least in part on what kind of claimant makes such claims. “High value” claimants broadly fall into the following categories:

- Those on lower incomes, but whose total loss will be high as a consequence of complexity of the case and/or the length of time they have been or will be out of work;

- Those on higher incomes, that in turn lead to higher losses;

- Those in either of the above categories whose low or modest loss of earnings claim is augmented by an injury to feelings award, a high basic award reflecting long service, an uplift for the respondent’s procedural failures and/or a protective award; and

- Those with a misconceived expectations (with all manner of financial resources) whether as a result of little or no legal advice or otherwise.

- Those benefitting from fee remission with a claim that may only speculatively go over the threshold but as they do not have to pay, make the higher value claim anyway.

23.3 The ELA makes no comment on any moral argument for charging people more when they make a claim which they value at over £30,000 at the outset. There is no stated policy aim supporting the proposition that those generally better able to afford a higher fee should pay a higher fee. However, insofar as that might be argued to be an implied aim, there are no data to connect higher value claims with wealthier claimants, whatever the definition of wealthier might be.[25]

23.4 As outlined above a higher value claim can be justifiably made by those on low, average and higher incomes. However one should bear in mind that in cases of unfair dismissal at least, most claimants will have lost, and may not yet have replaced, that income while still trying to meet their household’s expenditure.

23.5 The main justification for Option 2 appears to be that a higher value claim is more likely to use more of the ET’s resources. However, there is no evidence offered in the Consultation Paper, and we know of none, establishing how much, if any, more of the ET’s resources are used as the value of the claim increases.

[25] We do not, in particular, regard anyone whose income is sufficient not to qualify for remission of fees as automatically qualifying as “wealthy”.

23.6 In cases of unfair dismissal the difference between an over the threshold award and one which comes under, may just be a matter of the number of weeks the employee has been out of work. All other facts might be exactly the same and take no longer to determine. The issues of legal complexity which instinctively do use more of the ET's resources and that of claim value are independent. Each will have its own impact on ET resources.

23.7 The fact that the question raises the issue of Claimant's ability to chose, assumes that the Claimant has the financial freedom to do so, and is encouraged by the increased fee to make a realistic assessment of the claim. As already indicated even higher earners who are dismissed and are no longer in receipt of their salary may not have that freedom to choose.

Do you have any views on impacts you think [increasing the issue fee in step with the increase in level of compensation claimed] would have on Claimants or Respondents? Please provide any supporting evidence for your statement.

Claimants

23.8 In the ELA's view only those Claimants who qualify for fee remission or are independently wealthy will be unaffected by being charged higher fees at the outset under Option 2. While it is assumed that the number of independently wealthy Claimants will be relatively small in number, the numbers of claimants that could be in receipt of at least partial fees remission benefit is potentially very large indeed. Paragraph 143 of the Consultation Paper puts this at 90% for a fee of £1,750. However full remission would only be available to a minority of claimants.

23.9 All other categories of claimants are likely to be adversely affected by Option 2 more than Option 1, and there is a clear risk that the substantially greater fee associated with making an unlimited claim, at a time when a salary is no longer being paid, may lead to an economically forced sub-threshold claim being made.

23.10 Option 2 also impacts on claimant at the outset when they may have little time properly to assess merits and quantum (particularly given the short limitation period), and may be forced into a protective position to claim the maximum rather than lose out; or conversely, for financial reasons take a conservative approach and give away what they might otherwise be entitled to. A reliable assessment of the merits and likely quantum of the claim may not be able to be accurately undertaken:

- until at least after disclosure, given that very often the majority of the documents are in the possession of the respondent. This point is acknowledged in the conclusion to the consultation document with regard to pay history in equal pay claims (page 50);
- at the outset when a claimant will not know how long s/he will be out of work
- when there is a wide range of possible awards e.g. the Vento bands for injury to feelings, and between one and 13 weeks' pay for a protective award.

23.11 In the ELA's view, to meet these difficulties, at least in part, standard Directions issued by the ET could and should include a direction that the Claimant has a number

of days after disclosure to pay an additional fee and increase the value of the claim. Given the wide discretion ETs have in making awards of compensation, Respondents do not really get certainty on quantum until the determination of the claim. In ELA's view it is difficult to see that significant detriment would be caused to the respondent by not knowing until shortly after disclosure what category of quantum the claimant is making.

Respondents

23.12 From the respondent's perspective Option 1 or Option 2 may be more or less attractive depending on what level of claim it faces most and its ability to pay an award or costs order. As with claimants, respondents come in all shapes and sizes and will be impacted differently.

Q24 Do you agree with the Option 2 fee proposals? If not, please explain why.

24.1 The ELA does not take a view as between Option 1 and Option 2. We have also identified possible other approaches as worthy of consideration. In our replies to the questions above about Option 2 we have identified concerns about how the Option would work and whether it would have undesired consequences. Further points are made about the application of Option 2 to multiples in our response to Question 25.

24.2 It would be merely repetitious to set out these points again here. We therefore only make the point that the apparent policy behind the proposal for a significant additional fee for high value claims does not in fact support the proposal, in the absence of evidence that claims with a value set at more than £30,000 are the preserve of wealthy claimants, or consume disproportionate shares of ET resources, or both. We also reiterate the concern that a single fee once paid or remitted removes the incentive to settle that a second pending fee would have, unless there is provision for at least a partial refund of the fee if the case does not proceed to a hearing.

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

25.1 At paragraphs 138 to 141 inclusive the Consultation Paper proposes:

- that fee levels for multiple claims broadly reflect the fee levels proposed under Option 1 based on type of claim;
- that Level 1-3 fees be further assessed by reference to the number of Claimants in the multiple
- that any Claimant in the multiple seeking an award above £30,000 would automatically trigger the Level 4 fee, subject to an individual submission of a single claim.

25.2 In response to the first point, we refer to our comments about the fee structure for multiples under Option 1 above. These apply equally to the use of the same approach under Option 2. The third point above requires further specific comment.

25.3 We note that individuals have the option to submit a single claim if they are part of a multiple and they, but not the other claimants in the multiple, seek an award above £30,000. In ELA's view this is likely to lead to a duplication of proceedings, where single claims run alongside multiple claims, and an increase in the costs both of pursuing and defending the claims and of the ET administering the process.

25.3 If the claim is funded by a Union or Legal Expenses Insurer, the claim may also be considered "disproportionate" (one element of the irreducible minima required by insurance companies when considering whether to provide cover) on the grounds that it would be more expensive to pursue the claim individually. This may lead to claimants agreeing to stay with the multiple and paying the higher Level 4 fee. This is an example of the kind of situation where, even in a relatively small multiple, a huge increase in the applicable fee would be incurred if one claimant seeks higher compensation (in a five claimant multiple, the *difference* between level 3 and level 4 is £3,450).

25.4 The proposal is silent on the cost-critical issue of the point at which Claimants will be required to commit to making a single claim join the multiple. Claimants may voluntarily wish to amend their claim to seek more than £30,000 in the event that disclosure or other information suggests a higher claim is appropriate, or they may wish to reduce the value of the claim if changing from multiple to single claim. In multiple claims the likelihood of additional Claimants being joined (whether by application to the ET or under the ET's own case management powers) increases with the size of the multiple. The Consultation Paper offers no indication of how the complex problems arising from claimants being added to multiples, or seeking to amend to claim higher compensation within a multiple, are to be dealt with.

25.5 In our view the sort of problems highlighted above can only be avoided if the fee structure for multiples does not include an enhanced level 4 fee. If that view is not accepted, at the least one individual claiming more than £30,000 should not cause the total fee for the multiple to increase by more than the difference between the level 1, 2 or 3 fee (as the case may be) and the level 4 fee, *in a single case.*

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

26.1 ELA notes that the proposals are the same as in relation to Option 1, and accordingly our responses to Questions 10 and 11 (and for multiples 12 and 13) apply equally here, apart, obviously, from the points made in response to those questions which relate specifically to the hearing fee.

26.2 As an additional point, since the fee payable on presentation of the claim is much higher under Option 2, we consider that a much greater proportion of claimants will fall within the category of entitlement to partial remission of the fee than if Option 1 applies; this will therefore increase the amount of work involved for the administration in assessing entitlement, and in all probability the number of disputed cases. This makes all the more important our proposals to avoid the prejudice to claimants, the cost to the tribunal system of additional jurisdictional disputes, and the risk of respondents incurring costs opposing extensions of time, which would flow from a provision that claims presented without the correct fee or documentation are not accepted.

Question 27: Do you agree with approach to refunding fees under Option 2? If not please explain why

27.1 Option 2 proposes that there be no refunding of fees. The ELA regards this as simply unacceptable, for reasons developed under a number of the other questions as well as reasons specific to Option 2 set out below. In summary, a blanket refusal to refund fees will be counterproductive and unfair, and likely to result in breaches of Treasury guidelines on fee charging.

27.2 Option 2 requires the claimant on issue to assess on issue the value of their claim within series of bands, depending on the type of claim first and then whether the value of the claim is up to £29,999.99 or unlimited. The Tribunal system deals with large numbers of litigants in person, usually acting without the benefit of prior legal advice. Litigants in person will rarely be able to assess quantum accurately. If Claimants assess the band wrongly, but receive subsequent legal advice to amend the claim to bring it within a lower band, or into a different level, the proposal allows no mechanism to refund the higher element of fee paid. This is likely to result in injustice and may result in satellite litigation.

27.3 In discrimination cases involving personal injury, it will usually not be possible to assess the level of quantum accurately on the issue of the claim, given the very short limitation periods for lodging ET claims and given that medical evidence will need to be obtained in order for quantum for personal injury to be assessed. Again no provision is made to refund the higher fee element of the claim, in the event that the claim is amended to come within a lower band. This may also be subject to challenge through satellite litigation.

27.4 In the same way as under Option 1, a policy of never refunding fees is likely to operate unjustly in other situations. If a hearing does not take place, either because of a settlement or withdrawal of the claim, virtually none of the costs to be covered by the hearing fee are in fact incurred. Since the Option 2 fee is intended to cover the claimant's contribution to the cost of providing a hearing, ELA considers it unreasonable that no part of the fee is to be refundable in such circumstances. We are concerned that the absence of any provision for even partial refunds is not compatible with Treasury Guidelines that fees should not exceed the cost of providing the service. Moreover, the policy would be counterproductive. Withdrawals save the Tribunals costs. Where there is no mechanism for refunds, some claimants may continue with all claims, or to proceed all the way to hearing, taking the view that as they have paid the required fee, they may as well proceed.

27.5 In addition, we consider that where an error on the part of the ET has resulted in a fee/too high a fee being paid, it would be unjust not to provide for refunds.

Question 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?

28.1 The problem of claimants' inability to assess accurately the value of their claims is not one that can be solved by the provision of better information; it is inherent in the litigation process. Leaving aside the simpler cases in which the only claim is for unpaid wages or holiday pay, claimants and their advisers will in most, cases not be in

a position to calculate the value of their claim in advance of presenting it and paying the relevant fee, for two reasons.

28.2 Firstly, at the point of issue the claim is often at a formative stage. Claims must be issued within three months of the event triggering the claim, typically dismissal. Multiple heads of claim may be pleaded initially to protect the claimant's position. Heads of claim will often then fall away as the claim progresses and the likely success and associated value of those claims becomes clearer through receipt of the Response, disclosure, further discussion and consideration.

28.3 Secondly, as ETs make awards of compensation so far as possible on the basis of actual loss, many claimants will be denied compensation because they anticipated greater success in their efforts to mitigate their loss than was borne out in reality. Although the Consultation Paper suggests that claimants will be more focused in their expectations, and therefore more satisfied with the outcome, there will be many who will be most dissatisfied that they limited their claim to £30,000 and thus potentially denied themselves many thousands of pounds in compensation. This is a more likely scenario in discrimination claims, which can be both factually and technically difficult. This in turn could lead to satellite litigation on the issue of claimants being deprived of an effective remedy (see our response to Question 19).

28.4 Even if more professional advice is made available to claimants (which we regard as improbable at a time when services provided by such bodies as Law Centres and the CAB are under exceptional pressure and suffering declining funding), it is difficult to envisage how these fundamental difficulties can be overcome. This is made worse by the Government's proposal to withdraw all Legal Assistance in employment cases and severely limiting access in discrimination cases. Claimants and their lawyers will naturally gravitate to an assessment of a claim's value which is at or nearer its highest, precisely because it will be too early to make any really accurate assessment.

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

29.1 Several views have been expressed by members of the working parties preparing this response. One view is that the fees charged to litigants should not reflect the cost of running the ET system, but should be proportionate to the financial value of any potential award which an individual might recover if their claim succeeds. Those members supporting this view strongly disagree with a system which charges all individuals a flat fee regardless of the likely value of their compensation, because this will price lower earners out of the ET system. 29.2 The members supporting this view consider that the fee levels set out in annex A are not fair, and that it would not be responsible of the Government to charge them. For example, an individual complaining about a detriment on grounds of disability would be charged £1,500 under Option 1 for a claim proceeding to a hearing but might only recover (and might only be seeking) an injury to feelings award of £2-3,000. Similarly, someone complaining about a failure to provide a written statement of reasons for dismissal would have to pay £1,200 to bring their claim to a hearing under Option 1, but the ET could only award them a maximum of two weeks' pay[26]**.** The most extreme example of disparity is that the higher fee proposed under Option 2 for claims for more than

[26] See s 93 ERA 1996

£30,000 (£1,750) exceeds that incurred for obtaining permission to appeal to the Supreme Court and that Court's Hearing fee combined (£1,600).

29.3 It is not suggested that claimants would have to value their claim at the outset and pay the fee accordingly. Most claimants, including those who have received good legal advice, do not know at the time of bringing a claim how much money they can expect to recover. This is particularly the case in discrimination complaints, when disclosure or information provided in a questionnaire response may significantly alter the value of the claim, because for example it discloses that a valuable bonus was withheld from an individual because of their race, gender or age. However there are statistics of the mean and median awards for the major heads of ET claims. It is therefore the view of some of our members that the Ministry of Justice should devise a system of fees which are strictly proportionate to the average award made for each type of claim. This might be done using a number of different bands, for example a band for claims which are likely to result in nil or very low level compensation.

29.4 This would allow for fees in the lowest value cases to be significantly lower than the government proposes, for example in respect of Working Time Regulations 1998 claims the issue fee should be £50 at most, rather than £150.

29.5 An alternative view is that a fee system based on the likely resources used would be fairest.

29.6 Another view expressed by some of our members is that fees should be linked to the salaries of employees, rather than the value of the claim or complexity of the case. Those employees who previously enjoyed higher salaries are likely to have greater financial resources, and are more likely to be able to afford the higher fees. This proposal would avoid pricing employees on low salaries, but with complex/high value claims out of using the ET system.

29.7 A further suggestion, discussed at paragraph 3.6 above, is that fees are first levied after there has been a CMD, with the possibility of the fee being split between claimants and respondents.

Question 30: Do you agree with the simplified fee structure and our fee proposals for the employment appeal tribunal

30.1 In respect of the accuracy of the information given at paragraphs 151 to 160 of the Consultation Paper, ELA would like to make the following observations:

30.2 Paragraph 152 states that just over 2,000 appeals were received by the EAT in 2010/11. ELA notes however that of the 2,000 appeals that were received, only 600 or so cases a year proceed to either a preliminary hearing or a full hearing. The vast

majority are rejected, struck out or withdrawn prior to registration. This information is evident from the statistics published by HMCTS[27].

30.3 Paragraph 155 states that appeals nearly always take one day to conclude at hearing. ELA disagrees. First ELA notes that there is not one type of hearing in the EAT, but four.

- Rule 3(10) hearings (effectively appeals against the rejection of a Notice of Appeal on the sift).
- Preliminary Hearings.
- Directions Hearings (these are rare, but the Practice Direction (para 6.5) does provide for them;
- Full Hearings.

30.4 The experience of ELA members is that rule 3(10), preliminary and directions hearings are unlikely to last more than two hours. Indeed many rule 3(10) hearings last only a few minutes, as a judge may announce at the start of a hearing that s/he has been persuaded by a skeleton argument that the appeal has reasonable prospects of succeeding and that is the end of the matter. It is routine practice for both Rule 3(10) and preliminary hearings to be listed in batches of three or sometimes more before the same bench on the same day. Even full hearings are not uncommonly only listed for half a day.

30.5 Paragraph 155 states that there are very few applications for written reasons in the EAT. ELA notes that whilst this might be factually correct, it is misleading. The only reason why there are very few applications is because many judgments are reserved, and many extempore judgments are transcribed at the direction of the judge so that they can be posted on the EAT website; a written judgment is always ordered if the outcome of the appeal is remission to the ET, since the ET to which the case is to be remitted needs to know the EAT's reasons for allowing the appeal. In Scotland all judgments in the EAT are reserved. There is therefore rarely any reason to request written reasons in the EAT.

30.6 ELA does not agree with the simplified fee structure which is proposed.

Issue Fees

30.7 In ELA's view an issue fee should only be charged if an appeal is accepted as correctly constituted and treated by the EAT as a valid appeal. Pursuant to the EAT Practice Direction, unless a Notice of Appeal is in accordance with Form 1 and has the correct documentation attached to it, it is not validly lodged (paragraph 2.1 of the Practice Direction), and in the experience of ELA members, this requirement is strictly applied and results in a significant minority of Notices of Appeal being rejected without any judicial consideration of their merits at all.

[27] The way this information is presented has recently changed, so that from 2010/11 the Ministry of Justice has included the cases which are rejected, struck out or withdrawn prior to registration as cases that have been "disposed of" by the Employment Appeal Tribunal.

30.8 We do not think it would be responsible, or fair, or in accordance with the government's stated objectives, to charge litigants £400 to lodge a Notice of Appeal which is then refused as incorrectly constituted. We note that decisions on the validity of appeals at this stage are made by the Registrar and her staff, and not Judges, and any cost to the taxpayer is modest. Further, we note that technically an issue fee can only be charged in respect of claims which are "issued", and a Notice of Appeal which is not properly constituted is not regarded as having been "issued". Accordingly, in our view the issue fee should only be incurred once a Notice of Appeal has been accepted as validly lodged.

30.9 We also consider that the issue fee should be per appeal, rather than per appellant[28]. As the matter involves issues of law, the number of appellants will rarely impact on the cost to HMCTS of the appeal.

30.10 There are differing views on some points relating to the structure and timing of fees. The majority view of those in the working party considering this issue is that the issue fee should cover the cost of the sift and any preliminary hearing and interim applications. In the majority's view, appellants should have six weeks from the date the Notice of Appeal is lodged in which to pay the issue fee. Those appellants who are employees will in many cases have been out of employment for a significant period and would otherwise only have a very limited period to raise the required funds following receipt of the ET's decision.

30.11 The minority view is that it is appropriate to charge a nominal fee for issuing the claim, which would also cover the sift. If the appeal is rejected at the sift, the Claimant can then elect (or not) to pay the balance of the issue fee to proceed to a 3(10) hearing.

Written Reasons

30.12 For the reasons given at paragraph 30.5, the need for a request for written reasons will arise so infrequently that to charge a separate fee for this is an unnecessary complication of the fee structure. Moreover the judgments of the EAT are important public documents, not least because decisions are binding on ETs; we consider that it would be contrary to the fundamental principles of open justice to make the publication of reasons for EAT decisions dependent on the willingness of litigants to pay for the transcribing of the oral judgment in their case.

30.13 We also note that the government proposes to charge parties for requesting written reasons in the ET. Anyone who wishes to appeal needs to obtain written reasons. That is a further reason for not charging a fee for requesting written reasons in the ET: that would effectively be a further hidden cost for a party who wishes to appeal, effectively raising the cost of appealing to £1850 if the appeal proceeds to a hearing.

Hearing Fees

30.14 In our view, the fees charged should reflect the following:

[28] It is not made clear in the Consultation Paper whether this is what the government has in mind; the point is made in case it is intended that if there are several appellants the fee would be charged to each. We consider that Form 1 may require to be modified to make it clear that it is possible for more than one party to appeal a particular decision of the ET using the same form.

- **The length of any hearing.** In our view the fees should be based on the length of time the matter is listed for, with a half-day hearing costing less than a full-day hearing. We consider that there is little risk that parties will provide unrealistic listing estimates, because such estimates would be held against them by the judge case managing the matter and the parties will be concerned that the time estimate is sufficient to do their case justice.

- **The complexity of the matter;** in this respect please see the views expressed under Question 29. The majority view is that there should be a similar banding system for the calculation of EAT fees, according to the likely award that would be made in the ET (on remission or after rehearing).

30.15 It is our understanding that the proposal for a hearing fee is that it would apply if, but only if, the appeal proceeds to a full hearing. That accords with our view. We do not consider that it would be fair to charge appellants a hearing fee in respect of a rule 3(10) hearing, when permission to appeal is sought. In our experience, the sift process (when cases are looked at on the papers by judges to determine whether permission to appeal should be granted) is not a reliable method of determining which cases have reasonable prospects of succeeding or not. Many cases which are given permission on the papers lack merit, and many meritorious cases which ultimately succeed are not given permission on the papers. Further, a consistent approach is not applied by EAT judges as a whole.

30.16 We also do not consider that it would be fair to charge a hearing fee in respect of a preliminary hearing or a directions hearing. Nor should a hearing fee be charged in respect of a review application. In relation to preliminary hearings, as with decisions to reject appeals on the sift, ELA members have experience of very different approaches by different judges sitting in the EAT to whether a preliminary hearing is ordered.

Discretionary Waiver of Fees

30.17 In ELA's experience, from time to time the parties are faced with a decision by an ET which falls far below the standards one could expect from an ET. In those circumstances it is the fault of neither party that the matter has to proceed to the EAT. Accordingly, we consider that it would be only right for the EAT to have a discretion to order that fees for the appeal are reimbursed to the party paying them by HMCTS.

30.18 Further, in our view, a judge should have a discretion to waive fees if an appeal raises matters of public importance. A judge should be able to exercise this discretion either at the time of the sift, or at the final hearing. ELA considers that it is paramount that the introduction of fees in the EAT does not discourage parties from pursuing challenges in relation to important points of law.

Discretion that Respondent pays the Fees

30.19 In our view, the EAT should have a discretion to order a respondent to pay the issue fee and hearing fee if the appeal succeeds. In our view this would be an effective incentive for respondents to concede appeals that have merit at an earlier stage and/or would avoid respondents defending plainly indefensible ET decisions.

Remission

30.20 The EAT is able to remit a matter to the ET, typically where the ET has failed to adjudicate upon an issue or erred in law. We do not believe that any further fees should be payable for further proceedings in the ET if the EAT has either ordered the matter to be remitted or ordered a rehearing of the entire claim. As set out above, we also consider that in such cases the EAT should have a discretion to refund any fees incurred.

Question 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.

31.1 The ELA recognises that the broader the range of payment options, the higher the likely cost to users and the taxpayer as a result of the associated administrative expense. Our members are mindful that any payment system must be efficient, effective and simple to use. However, the ELA considers that it is essential that there should be as few restrictions as possible to access to the ET for any individual with a legitimate case, regardless of their financial arrangements or their location. In recognition of the fact that some claimants may not have access to a credit/debit card, or even a bank account[29], and may reside a significant distance from their nearest tribunal office, it is important that a range of payment options and payment locations are available. Specific payment options are explored further below.

31.2 If Option 1 is selected, we suggest that all payment options recommended below should be available for both stages of fee payment. Our comments also apply equally to payments of the fee for instituting an appeal to the EAT.

A. Online payment

31.3 ELA recognises that a significant and growing proportion of ET claims are submitted online. This provides an opportunity to make the fee payment process straightforward and simple for the majority via an instantaneous online transaction, which could be completed simultaneously when a claim is presented. Where the Claimant is able to make payment online using their credit/debit card details and they do not intend to apply for a remission, we do not see a problem with payment being made online at that stage.

31.4 ELA proposes therefore that there should be a facility available for the claimant to make an instantaneous payment via an online transaction at the same time as submitting the online claim form, in the same way as in most online shopping transactions. It is difficult to predict how most users will choose to make their payments but we expect that online payment will become the preferred method for most claimants and, it is hoped, will create the least administrative and financial strain on the tribunal service.

31.5 ELA is mindful that any payment which is made simultaneously with submission of the ET1 will not be appropriate if the claimant wishes to be considered for a fee

[29] See the statistics given in the response below to Question 10 of the Equality Impact Assessment.

remission. It is unclear at this stage what proportion of candidates are likely to qualify for a remission. ELA considers it important that the system for online submission of claims should equally be available for claimants claiming remission of fees and therefore not including payment details.

31.6 ELA notes that the HMCTS offers a Money Claim Online and a Possession Online service in the High Court and County Court. There is a reduced fee for using these services, presumably to encourage users to opt for this method instead of more costly local paper-based methods. A similar reduced fee could be offered to users who lodge ET1s online. However, we would recommend caution as such a discount may give rise to issues of indirect discrimination towards disabled users - see paragraph 10.4 below in our answer to questions on the Equality Impact Assessment.

B. Cash

31.6 The experience of ELA members who represent claimants in civil proceedings indicates that a significant minority of ET claimants will have no access to a credit/debit card, or a bank account. These individuals are also likely to have limited access to the internet. For such claimants, the ELA consider it vital that they have the opportunity to submit their claim and make payment in person. In many cases, the only straightforward method of payment available will be cash.

31.7 Cash payments however, are not without risk. It is easy to see how accusations against HMCTS staff could arise if there were to be some disagreement about the amount of money sent to the tribunal office. Dealing with such disputes could give rise to an even greater administrative burden on the service and satellite litigation. Therefore, the ELA believes that payment by cash should not be permitted by post, but should be permitted in person.

31.8 Although the ELA recognise that providing cash handling facilities in the tribunal offices is likely to give rise to additional administrative expense, we suggest that payment in person in cash (or by credit or debit card) at the relevant tribunal office, accompanied by appropriate receipt of payment, is necessary to ensure appropriate access to justice. The ELA suggest that all permanently staffed tribunal offices, and the offices of the EAT, should have the facility to receive cash and a terminal to process credit and debit cards.

31.9 The ELA recognises that payment of fees in person is likely to be more problematic for claimants in the ET than in County Courts. Given the geographical location of tribunal offices, Claimants are less likely to have a tribunal office within a short distance from their home than a claimant in the County Court (a point applying with much greater force to the EAT). This creates obvious difficulties where cash is their only available method of payment or in circumstance where they do not have access to the internet.

31.10 The ELA suggest therefore that claimants should be able to make a payment at their local Post Office (but not lodge their claim there) and should be issued with a receipt/reference number which can be quoted on their claim form.

C. Cheque

31.11 Although the use of cheques is likely to continue to fall, they are also likely to remain the preferred option of payment for many individuals due to the perceived level of security, control and convenience they offer. In the light of the decision not to go ahead with the planned abolition of cheques, ELA members believe it will remain a convenient and trusted method of payment and so consider it important that it should be included as a payment option.

31.12 It is recognised that the delays inherent in payment by cheque and the danger that a cheque may be dishonoured may cause jurisdictional issues, increase the administrative burden and disrupt the ET's timetable in some instances. It is however our expectation that this will occur very infrequently. The view of ELA members is that where an application is supported by a fee paid by cheque, the claim should be recorded and processed on the date of receipt in the same way as if it had been accompanied by any other valid form of payment. The respondent should be notified of the claim, which should start the 28 day period for the response to be filed. In the event that the cheque is subsequently dishonoured, the claim should be made the subject of an immediate stay or sist and the Respondent should be notified of the same, immediately[30]. The stay or sist should last for a set period, which the ELA suggests is 14 days, for the claimant to remedy matters by making the required payment or providing supporting evidence for an application for remission of the fee, failing which a judicial decision should be taken on whether or not to strike out the claim (with the procedural safeguards appropriate for such a step). Equivalent arrangements should apply for appeals to the EAT

D. Postal order

31.13 ELA members propose that postal orders should not be permitted as a method of payment. ELA members submit that the use of postal orders carries with it many of the same dangers as the use of cash. The use of Post Office counters for the payment of fees, would render postal orders unnecessary in any event.

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

32.1 The ELA understands that introducing fees into ETs and the EAT will require users and service staff to adapt to new processes and that the minimisation of additional costs will be a consideration. Accordingly, the ELA sees the benefit of an initial centralised "vetting" system on receipt of claim and fee payment (and realises that this may be necessary in relation to online submission and payment). However, this question has been viewed with some concern by members of the ELA who view it as the first step towards increased centralisation of ET services. There is a concern that the centralisation of HMCTS's ET functions could have a detrimental impact on the quality, transparency, agility and accountability of the service.

32.2 The overriding objective of the ET is "to deal with cases justly". This does not simply relate to the fair outcome of individual cases but also, we submit, requires a fair claim handling system which is transparent, accountable, accessible and responsive to the needs of its users. The ELA recognises the argument that a centralised system of

[30] We understand that this is the practice with cheques in the County Court, and that problems arise very infrequently.

claim processing could produce some cost savings, but the concern is that this would be at the expense of quality and user-friendliness. Moreover we have seen no evidence that savings would in reality be achieved which would outweigh transitional costs.

32.3 The ELA suggests that, in order to protect the level of service experienced by users, all interlocutory stages of the tribunal process should remain in the hands of the designated tribunal office which has conduct of the claim. The ELA believe that the principle that a user is able to speak to an individual caseworker who has the conduct of a file within a particular office is an important one that should be maintained. While predictability and consistency are important, there are more important issues regarding treating individuals in accordance with the overriding objective and ensuring that the system does not act as a deterrent to the pursuit of legitimate claims, particularly for unrepresented parties. The approach we advocate is also consistent with the emphasis in Government policy on a localism agenda.

32.4 When designing the new system, it should be borne in mind that a typical claim brought in, for example, Central London will be different to, and require a different approach than, claims brought in other parts of the country. Therefore, rigid centralisation of the tribunal system may produce anomalous results if there is an overemphasis on consistency and a "one size fits all" approach. Therefore, ELA members hold the view that a degree of flexibility and informality must be built into any new system to ensure fairness.

RESPONSE TO QUESTIONS ABOUT THE EQUALITY IMPACT ASSESSMENT

Q1 – 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?

General

1.1 The comments made in this section of our response are based on the proposals as set out in the Consultation Paper. In our responses above, ELA identifies a number of elements in the proposals with which we do not agree, and we make a number of alternative proposals. Adoption of these would significantly reduce the adverse impacts of the proposals which we identify in our comments below.

1.2 Workers with a gross annual income of as little as £13,000 a year (the minimum wage for a full-time job) or couples with a joint income above £18,000 a year could have to pay the highest fees under both Options 1 and 2 to pursue discrimination cases.

1.3 At paragraph 4.2 of its Initial Equality Impact Assessment the MoJ has accepted that

> *"as some of the equalities groups are disproportionately represented in lower income brackets, they would therefore be disproportionately affected if it were it not for the remissions scheme which mitigates the effects on those with the lowest incomes and ensures that no one is denied access to justice through the introduction of fees."*

1.4 It is also accepted at paragraph 3.9 of the Initial Equality Impact Assessment that it is

> *"possible that these proposals impact on the duty to advance equality of opportunity if potential claimants with protected characteristics are put off from taking forward discrimination cases due to the introduction of fees."*

1.5 We do not accept the assertion that the remission system will necessarily provide justification for adverse impacts of the proposals on the various "equality groups" identified in the Initial Equality Impact Assessment. Many claimants, especially those with on-going discrimination claims and who are still employed will not be entitled to any form of remission. Likewise those who have been dismissed or whose employment is at an end may also find it difficult to satisfy the conditions for having fees remitted. Time limits for presenting claims are very short; in most cases three months from the time of the incident or discrimination in question. Many claimants will not have the means to pay the initial fees whilst they are, for example, waiting to see if they are entitled to state benefits. Many claimants will not be entitled to benefits for some months and therefore will not satisfy the rules on remission of fees before the three month time limits expire. This will prevent many worthwhile cases being brought in the ET and undermine any potential justification of the acknowledged adverse impacts that the MoJ may seek to establish.

1.6 At paragraph 7.3 of the Initial Equality Impact Assessment, it is stated that an average of only 31% of all types of employment tribunal claims are currently settled through ACAS. This appears to be a low rate of success. It suggests that a likely consequence of the introduction of Option 1 is that both lodging and hearing fees are likely to be incurred in the majority of cases not settled through ACAS[31]. The proposals in Option 1 and Option 2 do not appear to do anything to encourage early settlement of claims, other than discourage potential claimants from bringing claims. Further ACAS only becomes involved with conciliating employment claims once they have been lodged. If, as is currently proposed, there will be no refunds of fees once claims are lodged, there will be no guarantee that those fees will be recovered by claimants, even with the assistance of ACAS. The involvement of ACAS therefore provides little capacity to resolve claims without recourse to the tribunal or incentives for claimants to avoid litigation.[32]

1.7 At paragraph 12.2 of the Initial Equality Impact Assessment, it is suggested that claimants who are represented by trade unions or no win no fee lawyers, or have legal expenses insurance, will not suffer any equality impacts. This assertion is not supported by any substantive evidence. It is not clear whether trade unions will be prepared to cover their members' tribunal fees in every case. They may decide to rewrite their terms to exclude fees from Legal Scheme cover. Generally the right to advice and/or representation under union legal schemes is expressed to be discretionary. In any event ET statistics show that claimants represented by trade unions consistently make up only around 5% of the total numbers of claimants.

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[31] In fact we think the figure gives an incomplete picture, since many cases are also settled without the involvement of ACAS, and appear in the statistics simply as "withdrawn". We do not however have the means of quantifying the effect of this point.

[32] We recognise that the position will be somewhat different once the government's proposal for all ET claims to be submitted initially to ACAS comes into operation. However the introduction of a substantial fee to bring a claim will in our view lead many employers to decline ACAS assistance until the claimant "puts his money where his mouth is" and pays the fee, thus undermining the purpose of this useful reform.

1.8 Lawyers act in around 65% of all claims[33]. The ET statistics do not identify lawyers or other representatives who act under a no win no fee agreement governed by the Claims Management Regulation scheme. Anecdotally, it is the experience of ELA members that they currently only act for claimants in a small range of ET jurisdictions (most notably multiple equal pay claims) and do not generally offer representation on a no win no fee basis for claims such as breach of contract, wages and other such claims[34]. Further, it is common for no win no fee agreements to exclude disbursements such as counsel's brief fee for a hearing. It can be anticipated that agreements will be modified to exclude ET fees.

1.9 It is not clear how insurers will respond to the introduction of fees but one potential outcome may be an increase in premia or an erosion or removal of cover for employment claims. It is possible that policies will exclude payment of fees so the insurer can insist that claimants who otherwise qualify for a remission of fees have to apply for a remission. Unions and no win no fee lawyers and representatives governed by the Claims Management Regulation scheme may do likewise.

Sex

1.10 The gender pay gap has recently been widening. Given the significant additional barriers to bringing equal pay claims that either Option 1 or Option 2 would create (given that such claims will fall into categories of case which attract the highest level of fees), one of the consequences could be an acceleration of differences in pay between the sexes. If potential female claimants are deterred or prevented from bringing worthwhile claims through lack of funds or if they fail to qualify for remission, this could mean that employers no longer have an incentive to ensure that their pay systems are free of sex discrimination. Some members of the committee have suggested this could lead to a legal challenge being made by way of judicial review. This would be on the basis that fees act as a disincentive or barrier to an effective remedy in discrimination cases. This would be a breach of the requirements in the relevant EU Directives that UK legislation provide an effective remedy for breaches.

1.11 Most if not all claimants in equal pay claims remain in employment or are in employment when the claims are commenced. Most of these potential claimants are unlikely to satisfy requirements for remission of fees. Most of the equal pay claims currently lodged with tribunals are large multiple claims many with more than 200 claimants; each with many different classes of workers in them. At paragraph 25.5 of its Initial Equality Impact Assessment it is suggested that in a multiple claim where some of the claimants are entitled to remission and others are not, those who are not will be required to pay the full fee between them. Most if not all of these claims will attract the highest rate of fees. The remission policy therefore will have no effect on a great number of the current equal pay multiple claims other than to shift the burden of fees disproportionately on to the shoulders of those who are above the income limit

[33] This figure overstates the incidence of legal representation in single claims, since it includes large multiples with legal representation.

[34] ELA members' experience is that no win no fee lawyers cherry pick the most potentially lucrative unfair dismissal claims, but rarely take on claims where the award is likely to be average or low. The cap on fees recoverable of 35% of damages under the Damage-based Agreements Regulations makes cases with an expected award of less than £10,000 uneconomic for most such lawyers.

for remission, but who may be earning well below the average wage.[35] This calls into question the basis of the Ministry's justification of the acknowledged adverse disparate impacts on female ET Claimants; particularly those with equal pay and sex discrimination claims.

1.12 Additionally in multiple equal pay or sex discrimination claims where some of the claimants are entitled to partial or full remission of fees, the system will create a substantial administrative burden for both claimants' representatives and ET staff to establish who is and who is not entitled to remission of fees and if so, by how much. This is particularly so in cases where some claimants may be entitled to remission in part or wholly and other in the same multiple are not. It may be that the additional burden outweighs the potential savings in fees and parties and representatives are better off just paying the full fees, again undermining the suggested justification for the acknowledged adverse impacts on equality groups.

Disability

1.13 It is clear from the Section 14 of the Initial Equality Impact Assessment that both Options 1 and 2 will have a profound adverse impact on disabled people, perhaps more so than any other equality group. The authors acknowledge that a significant proportion (22%) of those bringing ET claims of all types including 40% of those bringing discrimination claims are disabled: proportions well in excess of the incidence of disability in the adult working population. Disabled people are therefore over twice as likely to be bringing such employment claims as the population as a whole, and over three times as likely to be bringing discrimination claims (which attract the highest level of fees). The effect therefore is that disabled ET claimants are three times more likely to be charged the highest level of fees under the current proposals.

1.14 Other than the general statistics set out at paragraph 25.4, the Initial Equality Impact Assessment contains no evidence or analysis of how the remission system might mitigate the acknowledged adverse affects both Options 1 and 2 will have on disabled people. On the MoJ's own measure, only 26.4% of ET claimants will be entitled to full remission. The authors acknowledge at paragraph 4.13 that information on claimants' incomes is not routinely collected and instead they rely on an adjusted analysis of the Family Resources Survey from 2008/2009 – i.e on data collected before the impact of the recession, public sector wage freezes and inflation can have been fully reflected in the survey results. Further, changes to eligibility for state benefits have been introduced since the survey period and these too may well have had an effect on incomes. In the absence of reliable primary data, it is therefore difficult to see how much weight can be attributed to the analysis advanced or the speculative assessments of the effects of Options 1 or 2 on rates of available remission.

1.15 Further, the analysis does not assess the personal circumstances of disabled people presenting employment claims and whether they are more likely or not to be in employment or otherwise entitled to remission of any kind. In the absence of reliable information it cannot be said with any certainty that the remission system will have

[35] For a single person, the maximum gross income for category 1 remission is £13,000 a year; the average full time wage is £26,200.

the purported effect of mitigating the acknowledged and significant adverse impact of Option 1 and 2 on disabled people. It follows again that the MoJ's proffered justification for the acknowledged adverse impacts on disabled people is no more than an assertion, not founded on reliable evidence.

Maternity

1.16 It is clear from the ET statistics that the incidence of employment claims based on pregnancy and maternity is rising. In the absence of any data whatsoever on household income and pregnancy it is difficult to say how Options 1 or 2 will affect pregnant claimants. However we draw attention to the point that women who take or have just returned from maternity leave will experience a drop in income, at a time when outgoings are increased by the arrival of the child, and are therefore particularly unlikely to be in a position to pay significant fees. A full Equality Impact Assessment will need to address how this particular disadvantage is to be mitigated. We would refer you back to our suggestion at paragraph 2.6 following that there should be an exempt category of claimant.

Mitigation and justification

1.17 For the reasons set out above, it is not accepted that the fees remission regime can be relied on to provide justification for the acknowledged adverse effects of these proposals on equality groups.

1.18 In relation to the other mitigation and justifications advanced:

(i) whilst it is accepted that charging fees at a level that does not fully recover costs can be seen as a form of mitigation, it cannot be said to provide justification. As outlined above, the ultimate effect of the introduction of Options 1 or 2 will be to prevent worthy claimants from bringing claims in ETs. This will have a direct effect on equality groups, especially women and disabled people.

(ii) ACAS conciliation facilitates settlement in a relatively low proportion of cases, and usually only after the claim has been brought. This cannot therefore provide justification for the adverse effects on equality groups prevented from bringing claims by the introduction of the fees regimes in either Option 1 or Option 2. Thus the barriers to justice will remain for the majority of employment claimants and the existence of ACAS cannot be said to provide justification.

(iii) Giving the ET powers to order the respondent to refund claimants' fees at the end of an successful case cannot provide mitigation or justification to those claimants from equality groups who are prevented from bringing or continuing with claims in the first case through lack of funds. Moreover there will be no guarantee that the fee will actually be recovered, given that in a significant minority of cases the compensation awarded is not recovered by the claimant.

(iv) There is also the issue of claimants who bring claims where the intention is to recover from the Redundancy Payments Office because the respondent is insolvent. There is no right to recover the fee as part of the debt payable in insolvency and the fee would not be a preferential debt in any insolvency situation.

Q2 – Could you provide any evidence or sources of information that will help us to understand and assess those impacts?

2.1 ELA would suggest that MoJ look at how other departments or public services have done equality impact assessments either for introducing fees for first time for previously free services or for major increases: for example, the Department for Business Innovation and Skills' Equality Impact Assessments on tuition fees in higher education and new fees in further education; also, the Department of Health Equality Impact Assessment in relation to charging fees in health care or social care.

Q3 – What do you consider to be the potentially positive or adverse equality impacts on employers under Options 1 and 2?

Q4 – Do you have any evidence or sources of information that will help us to understand and assess those impacts?

3.1 These questions are most conveniently answered together. ELA are not aware of any adverse equality impacts on employers under Options 1 and 2.

3.2 It is possible that the introduction of fees will have a positive impact on the recruitment of employees from protected groups in the light of what employers have said in previous surveys that fear of unmeritorious ET claims is currently a disincentive to recruitment from all or any particular protected group. However, it is difficult to measure this; in the experience of ELA members the reasons for recruiting or not recruiting are very complex. ELA is not aware of any evidence or sources of information to assess those impacts.

Q5 – 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

5.1 Please see in addition to the points below our response to Questions 1 and 2. The evidence considered for the purpose of this question is taken from the ET and EAT Statistics 2008-9 and the HMCTS ET and EAT Statistics 2010-11.

5.2 With regard to the protected groups, the statistics for 2010/2011, Table 1, show that there were 18,300 claims for sex discrimination, 7,200 for disability discrimination, 5,000 for race discrimination, 880 for discrimination on the grounds of religion or belief, 640 for discrimination on grounds of sexual orientation and 6,800 for age discrimination.

5.3 ACAS settled a number of claims within the protected groups as follows:

Sex discrimination – 28%

Race discrimination – 36%

Disability discrimination – 46%

Religious belief discrimination – 34%

Sexual discrimination – 41%

Age discrimination – 35%

5.4 The overall number of percentage of settlement through ACAS was only a third of cases at 29%.

5.5 When compared with the figures for the number of cases successful at the Employment Tribunal for the protected groups, these show as follows:

Sex Discrimination – 290 = 2%

Race Discrimination – 150 = 3%

Disability Discrimination – 190 = 3%

Religious Belief Discrimination – 27 = 3%

Sexual Orientation Discrimination – 22 = 3%

Age Discrimination – 90 = 2%[36]

5.6 With regard to representation of claimants at ETs, table 4 shows that for 2010 to 2011, 10,000 claimants were represented by Trade Unions and 142,700 were represented by lawyers (including many of those claiming in large multiples).

5.7 There were very few successful cases for the protected groups for 2010 and 2011 from the figures. For example for Race Discrimination claims only 72 were successful, of those, only two were awarded between £30,000 to £39,999 and 3 claims received between £40,000 to £49,999 and 3 claims received for compensation over £50,000. The median award for Race Discrimination is £6,277.

5.8 The figures for sex discrimination were similar in that only 9 claims out of a total of 173 achieved over £30,000 to £30,999, three achieved £40,000 to £40,999 and £50,000 to £50,999. The median award for Sex Discrimination for 2010/2011 was £6,078.

5.9 For Disability Discrimination 72 were awarded compensation, of those there were none within the range of £30,999 to £30,999, three ranged between £40,000 to £40,999 and four for compensation over £50,000. The median for Disability Discrimination was £6,142. (Table 8).

5.10 For Religious Discrimination there were no awards of compensation over £30,000 and the median was £6,892. (Table 9).

5.11 For Sexual Orientation there was only one claim over £30,000. The median was £5,500. (Table 10).

[36] The numbers here are higher than the numbers cited in the paragraphs which follow; we presume this is because compensation was only assessed in some of the cases where claims succeeded, remedy being left to the parties in the other cases.

5.12 For Age Discrimination there are only two claims in the range of £30,000 to £39,999, two awards within £40,000 and £49,999 four awards over £50,000. The median was £12,697. (Table 11).

5.13 The consultation paper already recognises that there are some

> *"implications of the proposals on Equality Act 2010 Protected Characteristic Groups in seeking access to justice; these will impact on different equality groups, differently insofar as they have varying income profiles".*

The figures quoted above clearly indicate that there are very few claims that proceed to a full hearing and are successful and indeed the number who succeed in achieving compensation over £30,000 is minimal.

5.14 Those members of protected groups who are relatively disadvantaged, particularly but not only those with disabilities, already face greater difficulties in commencing ET proceedings. The proposed fees will present an added barrier. Legal costs are often incurred at the outset of the case. It is likely that both options 1 and 2 will require potential claimants to seek early legal advice on their claims in terms of their likelihood of success and value of the claim. The proposals will in particular require claimants who are from vulnerable and hard to reach communities to seek early legal advice and guidance before making an application.

5.17 It is recognised the purpose of the fee structure is to transfer costs burdened from the taxpayer to the users and that the wider purpose is to discourage ET claims and to encourage the resolution of disputes at local levels between employee and employer. However, the factors mentioned above will mean that the employer will be at a considerable advantage in any informal procedures, because there will be less reason to anticipate that the employee will take the matter to a tribunal if not offered an acceptable solution to the dispute..

5.18 The consultation paper refers to the need to limit unmeritorious claims in the ET but there is no evidence supporting the suggestion that there are significant numbers of unmeritorious claims. For instance, only 10% of claims made are struck out (Table 2); many of these will be cases where the claim is struck out because of a failure by the claimant to comply with case management orders; that does not necessarily indicate an unmeritorious claim.

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?

6.1 The consultation paper makes it clear that the policy behind Option 2 is to provide businesses with greater certainty over their maximum liability of award by asking claimants to specify if their claim is above or below £30,000. This in practice is almost impossible for a claimant to determine as it is not the claimant who can make a full assessment of the value of the claim but rather the ET after hearing all the evidence in taking evidence from both parties.

6.2 This is particularly so with discrimination claims. If claimants are to try and work out the potential value of their claim they will have to take professional advice at an

additional cost in order to assess the likely value of the claim. Even if professional advice is obtained (itself increasingly difficult for those without the means to pay for a lawyer) the best legal advisers can do is to use the guidance given by *Vento* and *Da'Bell* to assess into which band the Tribunal will place their case for the purpose of compensation for injury to feelings. No one can predict with any certainty what the Tribunal will determine until all the evidence has been heard.

6.3 Moreover, the relatively small proportion of discrimination awards in excess of £30,000, illustrated by the statistics we have quoted in the reply to Question 5, must make many legal advisers very cautious about committing their clients to paying a very substantial additional fee for what at the start of proceedings, typically before replies to a statutory questionnaire have been received, and before disclosure. "Access to justice" in the Question must include access to full recovery of the compensation assessed by the ET as due for the respondent's unlawful acts, but it cannot be known whether that will necessitate payment of the additional fee to put the claim into the unlimited compensation bracket at so early a stage as when the claim is presented.

6.3 It is for these reasons that ELA proposes that if the higher fee for claims over £30,000 is introduced, claimants should have the opportunity to apply to amend their claim to place it in the higher bracket, on payment (subject to remission) of the additional fee.

6.4 The consultation paper acknowledges that discrimination claims derive from European legislation and therefore it is not possible to set a fixed cap on discrimination awards. Given the points made above about the barriers that would be created by the proposal to charge an additional fee to access the possibility of compensation over £30,000, we consider that that proposal comes very close to imposing a cap, which would place the UK in breach of EU law.

6.5 The consultation paper proposes other options. These include the flat rate cap applicable to all compensation for discrimination and employment cases but with the obligation on ET to make awards where necessary to put the claimant in the position they would have been in if the discrimination had not occurred. There is also a proposal that the cap would only apply to compensation awarded to job applicants who would not have got a job notwithstanding discrimination. These options involve a change in the substantive law on remedies for unlawful discrimination, and in our view it is inappropriate for such changes to be canvassed by a Government Department which is not responsible for the relevant legislation, within a consultation exercise on the issue of introducing fees .ELA considers that any proposals of this nature would have to be the subject of a proper consultation exercise sponsored by the relevant Department.

6.6 The Consultation Paper refers to setting up of tools and guidance which will be available to claimants to assist them to make an assessment of the value of the claim. We note that no concrete proposals are made, and have grave doubts as to the utility of this proposal: the plain reality is that in many cases, particularly where discrimination is concerned, it is simply not possible to put a reliable value on the claim at the outset, or even at all until the evidence has been heard.

6.7 The Consultation Paper refers to the remission scheme and suggests that the likely level of remissions for the Level 4 fee of £1,750 proposed under Option 2 will result in approximately 90% of claimants being eligible for full or part remission. This calls

into question the purpose of introducing such a high fee. The figure of 90% is in any event only part of the picture. Annex 5 of the Regulatory Impact Assessment shows that only 43.6% of the adult population would have to pay less than £1,000 under remission category 3; most if not all of those entitled to full remission under category 1 or 2 would presumably be within that 43.6%, so that some 50% of the population would face a fee of at least £1,000. That is a significant barrier to accessing an award of full compensation for losses valued by the ET as exceeding £30,000.

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?

7.1 ELA as a non-political organisation do not consider it appropriate to suggest any specific alternative options for remission. However ELA members have indicated support for the suggestions below, which we record as meriting consideration, given our significant concerns about the sufficiency of the remission scheme currently proposed.

(1) There is an imbalance in the proposed fee structure in the context of discrimination claims, where claimants are required to bear the highest level of upfront cost (under option 1 - £1,500 and under option 2 - £1,750), when there is to be a *power* only for ETs to order that the unsuccessful party reimburse the fees paid by the successful party. The imbalance is demonstrated starkly by looking at the ET statistics; these show that only between 2% and 3% of all claimants making claims of discrimination succeeded in obtaining compensation from the ET[37]. A remission system backed by the *automatic* reimbursement of fees by the unsuccessful party could go some way to addressing imbalance.

(2) Whilst there are claimants bringing unmeritorious or vexatious claims – who should rightly be deterred from doing so - equally there are unscrupulous employers who breach their obligations and leave employees with no option but to bring claims to enforce their rights under the Equality Act 2010 and more generally (i.e. a claim may be the only rather than the "last" resort). A remission system which took account of the discriminatory actions of an employer across a period of time before a specific claim was raised (by looking at earlier successful discrimination claims against the respondent or findings of failures to comply with orders/recommendations of the ET etc) and provided for an apportionment of upfront fee costs between the claimant and respondent or that the respondent pay such costs (working on the premise that it would have greater resources and had caused the system to be used in the past) could address this inequality. Any such arrangement should include a mechanism for reimbursement of the unsuccessful party's fees. (The risk if this approach is adopted might be that serial litigants who qualify for remission would not be deterred from raising numerous claims. The remission system could therefore include a bar on full or partial waivers where a claimant had raised repeated claims against the same respondent. ELA appreciates this may be difficult to police unless there is a central record of

[37] The figures for each strand of discrimination are cited at paragraph 5.5 above.

previous claims to which staff dealing with fees remissions could have access.)

(3) In discrimination cases Claimants can seek declarations and more significantly recommendations which could have a wider equality impact on others (i.e. not just the Claimant). This is different to the other types of claims in which remedy is isolated to the Claimant and ordinarily of monetary value. ELA suggests that remission should therefore take account of this different form of remedy with a reduction/exemption in fees

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.

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

8.1 These questions are best answered together. The brief answer to Question 8 is no. The remission system will mitigate some adverse equality impacts but will not address them completely, for example those in the middle/higher income brackets will be disadvantaged by the remission system proposed and therefore face the burden of paying the highest level of fees with no waiver. The income levels in remission 2 are significantly lower than the average annual earnings in the UK[38].

8.2 The remission system will have to be understood both by Claimants and ET staff, and operate efficiently, to provide the mitigation suggested. In that regard consideration must be given to the impact on those with protected characteristics and in particular claimants with a learning or sensory disability, or whose first language is not English, who as a consequence are more likely to have difficulty accessing remission from paying fees. A report prepared analysing the impact of the introduction of the 2007 court fees (on which the proposals are based)[39] provides some useful information on possible equality impact (and more generally of the fees and remission system). In a section analysing views on the fee remission system it states

> *"some focus group participants suggested that the information and guidance provided could have been clearer, particularly for those whose first language is not English or with other special needs"*[40].

8.3 A more general point made by the report is that it seems the largest dissatisfaction with the new court fee remission system centred around the uncertainty of court staff processing remissions and dealing with queries from possible applicants. The report recommended training and guidance. ELA therefore question what administrative costs will be incurred by HMCTS in training and supporting staff with this entirely

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[38] Office for National Statistics 2011 annual survey of hours and earnings shows the median gross annual earnings for full-time employees to be £26,200

[39] Ministry of Justice "Is the 2007 court fee remission system working?" – Price Waterhouse Coopers LLP 2007

[40] Quotes from footnote 3 "*Sometimes I get a dictionary and call my daughter – it's not that easy with the language barrier*" (female family focus group participant) and "*We are quite old and feel that, for people of our age, the system should be made* a *lot clearer and simple to understand with all information provided"* (interview participant who did not apply for a remission).

new system. We are also concerned how it will operate thereafter. A recent survey conducted by ELA of our members identified as a major issue members' concerns over the operation of an overstretched service.

8.5 We do not accept the assertion that the remission system will necessarily provide justification for adverse impacts of the proposals on the various "equality groups" identified in the Initial Equality Impact Assessment. Justification entails not just mitigation of adverse consequences but proportionality between the discriminatory effect and the legitimate aim pursued (in this case making users of the ET service responsible for meeting part of the cost of providing the service, an aim we fully accept as legitimate).

8.6 Many claimants, especially those with on-going discrimination claims and who are still employed will not be entitled to any form of remission. Likewise those who have been dismissed or whose employment is at an end may also find it difficult to satisfy the conditions for having fees remitted. Time limits for presenting claims are very short; in most cases three months from the time of the incident or discrimination in question. Many claimants will not have the means to pay the initial fees whilst they are, for example, waiting to see if they are entitled to state benefits, or during a period of disqualification. Many claimants will not be entitled to benefits for some months and therefore will not satisfy the rules on remission of fees before the three month time limits expire. This will prevent many worthwhile cases being brought in the ET and undermine any potential justification of the acknowledged adverse impacts that the MoJ may seek to establish.

8.7 Also, there are deterrents for potential claimants who weigh up the fees they will have to pay against the sums they will be likely to obtain, particularly where there is no automatic right to recovery of fees from an unsuccessful respondent. This could be partly addressed by making reimbursement automatic rather than discretionary. However, there is still the issue of respondent failing to pay when ordered to do so by the ET. Non-payment of ET awards is common enough that this must be a real concern for many potential claimants.

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?

Q11 – Further to Q10 do you have any suggestions on how those potential equality impacts could be mitigated?

10.1 These two questions can best be answered together. Annex B provides little insight into what payment processes are proposed. It is suggested technology will be utilised and the examples of on-line and automated telephone payment solutions are given. It is also suggested centralised fee accounting will be developed and payments taken away from local offices, whilst ensuring those who do not have access to or the means to pay fees electronically will still have access to justice. The suggested example is allowing payment through a High Street bank.

10.2 ELA believes the widest possible range of payment options should be made available for the timely payment of fees, especially if time limits are still to run until the fee is paid. Please refer to our response to Question 31 on the main Consultation Paper. We

note in particular that the civil courts system provides the widest possible options for payment of fees including payment by cash as well as debit or credit cards, cash, postal orders or cheques[41].

10.3 We draw attention to the fact that the latest Office for National Statistics ("ONS") Bulletin found that 23% of households did not have a household internet connection[42]. That is 5.7 million households. Of those who used the internet, only 27% currently use it to submit official forms electronically. It is anticipated that an even smaller number make payments with official forms submitted electronically. Accordingly, relying mainly on the internet for payment of fees is likely to present barriers to access to justice for a significant proportion of tribunal users.

10.4 The ONS Internet Access Quarterly Update 2011[43] indicates that 4.25 million disabled adults had never used the internet, which is just over half of the 8.43 million adults who have never used the internet. ELA considers this is a significant number and a failure to provide accessible alternatives to electronic payment over the internet can be anticipated to have a disproportionate effect on disabled users, amongst others.

10.5 HM Treasury Statistical Release[44] records that there are still some 0.85 million households without access to bank accounts (referred to as "unbanked"), covering 1.5 million adults. 58% of these households had an adult of working age. 89% of unbanked households were in receipt of a state benefit compared with only 69% of "banked" households. 20% of unbanked households contained a person not in work due to ill-health. Unbanked individuals would not be able to use electronic methods of payment, since of necessity they will not have debit cards, and almost certainly not credit cards either. Failure to provide alternative ways of paying fees not requiring access to a bank account can be anticipated to have a disproportionate effect on disabled users and a potential equality impact.

10.6 The statistics for unbanked Black and Minority Ethnic Groups do not appear to differ significantly from those for white households but this may mask the number of the unbanked who are migrant workers from Europe, who in the experience of ELA members often do not have access to a bank account and so would have to pay fees in cash. This may have a potential equality impact with regard to national origin. There are a substantial number of holiday pay claims under the Working Time Regulations by building and casual agricultural workers, many of whom are paid in cash and do not have access to bank accounts.

10.7 ELA has already noted that the civil courts system provides the widest possible options for payment of fees. ELA urges that the tribunal fees payment system should mirror that in the civil courts.

10.8 ELA appreciates that there may be estate and administrative costs in providing facilities for payment by cash at all ET offices. However, the inability to pay by cash may have a disproportionate affect on disabled users and migrant workers and so an equality impact. It also affects access to justice for other "unbanked" households. In addition, there are only 33 ET offices throughout the country, and very many potential

[41] See HM Courts & Tribunals Form EX50
[42] Internet Access-Households and Individuals, 2011 (31st August 2011)
[43] Q3 issued on the 16th November 2011
[44] Households without access to bank accounts 2008-2009 (December 2010)

claimants would find personal attendance at the nearest ET office both very inconvenient and expensive. In our response to Question 31 above we propose that it should be possible to pay tribunal fees in cash in Post Offices to mitigate this effect.

Q12 – Where, in addition to any of the questions 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.

12.1 ELA has nothing to add to the responses above.

Members of the ELA Working Party

Working Party Chairs:
Paul Statham, Pattinson & Brewer Solicitors
Peter Wallington QC, 11 KBW

Group 1
Option 1 - covering questions 2-5, 15 and time limits
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Andrew Berk, Aston Bond LLP
Susan Dennehy, Newspaper Society
Rupert Farr, Blake-Turner & Co
Rebecca Johns, Fasken Martineau LLP
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David Rintoul, Addleshaw Goddard LLP
Nicola Walker, Taylor Wessing LLP
Barbara Zeitler, Three Dr Johnson's Buildings

Group 3
Option 1 - fees for stages other than claiming and setting down for trial (questions 6, 8, 9, 14 and 27. This could also look at recovery of fees paid from the other party, and refunds)
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Paul Callaghan, Taylor Wessing LLP
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