

Equality and Human Rights Commission

Legal aid reforms and women's access to justice

Shadow Report to the UN Committee on the

Elimination of Discrimination against Women

Follow-up procedure

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Introduction

The context of this submission

1. This submission provides the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) with information for its follow-up procedure on the 2013 concluding observation to the United Kingdom (UK) on legal aid and access to justice (paragraph 24).¹
2. This submission will focus on:
 - the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO Act) and other reforms in England and Wales, and
 - the impact of employment tribunal fees in Great Britain.
3. This report was updated in March 2016 after submission to the CEDAW Committee due to a significant Court of Appeal decision affecting legal aid for survivors of domestic violence (see paragraph 13).

The role of the Equality and Human Rights Commission and the scope of this submission

4. The Equality and Human Rights Commission (EHRC) was established by the UK Parliament in the Equality Act 2006 as an independent body with a mandate covering both equality and human rights. Among other responsibilities, the EHRC

¹ Committee on Elimination of Discrimination Against Women (2013), *Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland (30 July 2013)*, UN Doc. CEDAW/C/GBR/CO/7. Available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fGBR%2fCO%2f7&Lang=en [Accessed 17 November 2015]. The CEDAW Committee noted: the restrictions of the LASPO Act; the evidence requirements in cases of domestic violence; the proposed residency test; and employment tribunal fees. The Committee urged the UK to: ensure effective access to justice by women, in particular victims of violence, to courts and tribunals; and continuously assess the impact of the reforms, and protect women from informal community arbitration systems, especially those that violate their rights under the Convention on the Elimination of All Forms of Discrimination against Women.

was tasked by the UK Parliament with assessing and reporting on the UK's progress in achieving the human rights in the treaties the UK has chosen to ratify.² The EHRC works with the UK's other 'A' status national human rights institutions and with government departments and agencies to fulfil this role.³

5. The EHRC's jurisdiction covers England and Wales, and Scottish matters reserved to the UK Parliament. Justice matters in Wales remain reserved, so the LASPO Act is applicable to both England and Wales. Employment tribunals are reserved to the UK Parliament, so the Employment Appeal Tribunal Fees Order 2013 applies across Great Britain.

The context of this submission

6. This submission is intended to inform the CEDAW Committee of the EHRC's assessment of the UK Government's progress towards addressing the Committee's 2013 concluding observation. In addition to highlighting issues which disproportionately impact on women, it also underlines the impact of some reforms to the legal aid system which have a more general application. This is part of the EHRC's ongoing efforts to assist the UK Government to fulfil its international obligations in relation to access to justice. To this end, this report is consistent with our recent submissions to the Economic, Cultural and Social Rights Committee⁴ and the Human Rights Committee.⁵ It also draws on the EHRC's recent review of available literature exploring how recent changes have affected access to justice in England and Wales.⁶

² Equality Act 2006, section 9(2).

³ The UK's other 'A' status national human rights institutions are the Scottish Human Rights Commission and the Northern Ireland Human Rights Commission.

⁴ Equality and Human Rights Commission (2015), *Socio-Economic Rights in the UK: Equality and Human Rights Commission Submission to the United Nations Committee on Economic, Social and Cultural Rights on the United Kingdom's Implementation of the International Covenant on Economic, Social and Cultural Rights*. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fIFL%2fGBR%2f21491&Lang=en [Accessed 17 November 2015].

⁵ Equality and Human Rights Commission (2015), *Civil and Political Rights in the UK: Equality and Human Rights Commission Submission to the United Nations Human Rights Committee on the United Kingdom's Implementation of the International Covenant on Civil and Political Rights*. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fCSS%2fGBR%2f20681&Lang=en [Accessed 17 November 2015].

⁶ Anthony, H. and Crilly, C. (2015), *Equality, human rights and access to civil law justice: a literature review*, Equality and Human Rights Commission Research Report 99. Available at:

7. The reforms are relatively recent, so data on actual impact is not widely available. The EHRC's literature review and submissions therefore focus on potential impact, as well as actual impact evidenced to date. The EHRC's literature review showed several evidence gaps, including in relation to the use of informal arbitration systems, specifically the extent to which mediation is used as an alternative to litigation, in particular by women of different religions or beliefs.⁷ We are therefore unable to comment on this matter in this submission.

<http://www.equalityhumanrights.com/publication/equality-human-rights-and-access-civil-law-justice-literature-review> [Accessed 17 November 2015].

⁷ Anthony, H. and Crilly, C. (2015), *Equality, human rights and access to civil law justice: a literature review*, Equality and Human Rights Commission Research Report 99. See p. 9, footnote 6. This literature review considered whether there were any relevant findings in relation to a number of main questions, including 'To what extent are individuals (particularly women with different religions or beliefs) using alternative dispute resolution mechanisms?' (p. 12).

Legal aid, access to justice and human rights

8. Ensuring access to civil law justice, including through the provision of legal aid where appropriate, is a significant part of how the UK should ensure it meets the obligations it agreed to when it ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1986. The CEDAW Committee has outlined that the 'right of access to justice for women is essential to the realisation of all the rights protected under the Convention on the Elimination of All Forms of Discrimination against Women'.⁸ Article 2(c) of CEDAW requires States to 'establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination'. Elaborating on this, the CEDAW Committee has determined that States must 'ensure that women have recourse to affordable, accessible and timely remedies, with legal aid and assistance as necessary'⁹ and that 'a crucial element in guaranteeing that justice systems are economically accessible to women is the provision of free or low-cost legal aid, advice and representation in judicial and quasi-judicial processes in all fields of law'.¹⁰
9. Other UN treaty bodies have raised specific concerns about the human rights implications of the UK Government's civil legal aid changes. For example, the UN Human Rights Committee highlighted the shortcomings in the exceptional cases

⁸ Committee on the Elimination of Discrimination against Women (2015), *General recommendation No. 33 on women's access to justice* (3 August 2015), UN Doc CEDAW/C/GC/33, para 1. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/33&Lang=en [Accessed 17 November 2015].

⁹ Committee on the Elimination of Discrimination against Women (2010), *General recommendation No. 28 on the core obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women* (16 December 2010), UN Doc CEDAW/C/GC/28, para 34. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/28&Lang=en [Accessed 17 November 2015].

¹⁰ Committee on the Elimination of Discrimination against Women (2015), *General recommendation No. 33*. See para 36, footnote 8).

funding (ECF) scheme introduced by the LASPO Act and the plans to introduce a residence test for civil legal aid,¹¹ and recommended the UK Government '[e]nsure that changes to the legal aid system do not undermine the right of access to courts and effective remedy' by addressing these issues.¹²

¹¹ Human Rights Committee (2015), *Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland* (17 August 2015), UN Doc CCPR/C/GBR/CO/7, para 22. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGBR%2fCO%2f7&Lang=en [Accessed 17 November 2015].

¹² Human Rights Committee (2015). See para 22, footnote 11).

Legal aid and access to justice in Great Britain

10. As part of measures to reduce the economic deficit and to address broader policy objectives,¹³ the UK Government has introduced or proposed a number of changes, which have affected how individuals access civil law justice in England and Wales, including:

- introducing the LASPO Act which has:
 - restricted the scope of legal aid
 - enabled the introduction of a mandatory telephone gateway, and
 - provided for ECF
- proposing a residence test for legal aid
- reforming Judicial Review (including restrictions to legal aid), and
- introducing employment tribunal fees across Great Britain.

Restricting the scope of legal aid in England and Wales

11. The LASPO Act was commenced in April 2013 and narrowed the scope of civil legal aid in England and Wales. For example, it has excluded the majority of private family, housing, debt, welfare benefits, employment and clinical negligence matters.¹⁴ The EHRC has previously raised concerns about the potential or actual impact of this reduced scope on people who share particular protected characteristics, particularly women, people with disabilities and ethnic

¹³ Ministry of Justice (2010), *Proposals for the Reform of Legal Aid in England and Wales*, paras 1.3–1.4, 2.12–2.24. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228970/7967.pdf [Accessed 17 November 2015].

¹⁴ Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1.

minorities.¹⁵ This section will focus on those reductions that either have affected, or have the potential to affect, effective access to justice for women.¹⁶

12. Civil legal aid in England and Wales is generally available in two forms: initial advice and assistance (Legal Help) and representation in court (Civil Representation). The number of cases for both forms of civil legal aid has declined significantly in the years following the introduction of the LASPO Act. The number of new matters started for Legal Help fell from 573,672¹⁷ in 2012–13 to 170,617 in 2014–15 (70 per cent reduction).¹⁸ The number of certificates granted for Civil Representation cases fell from 150,521 to 92,707 (38 per cent reduction).¹⁹

13. The LASPO Act limits legal aid in **private family law** to cases where the client can provide evidence of previous domestic violence, except where the case qualifies for ECF (see below).²⁰ The Civil Legal Aid (Procedure) Regulations 2012²¹ stipulated that domestic violence must have taken place within the past two years and outlined permitted sources of evidence. The EHRC welcomes the 2014 amendments to these Regulations which extended the types of evidence of domestic violence that will be accepted²² – as it does the UK Government's

¹⁵ See, for example: Equality and Human Rights Commission (2015), *Socio-Economic Rights in the UK* (see pp. 75–85, footnote 4); Equality and Human Rights Commission (2015), *Civil and Political Rights in the UK* (see pp. 12–17, footnote 5); Anthony, H. and Crilly, C. (2015) (see footnote 6).

¹⁶ The EHRC outlines its analysis of the reduction in scope of non-asylum immigration, social security and education cases in the following report: Equality and Human Rights Commission (2015), *Socio-Economic Rights in the UK* (see footnote 4).

¹⁷ This figure does not include the Housing Possession Court Duty Scheme, Telephone Operator Service and Community Legal Advice Centres.

¹⁸ Legal Aid Agency (2015), *Legal aid statistics main tables: January to March 2015*, Table 1.2: Civil legal aid workload summary since 2001–02. Available at: <https://www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2015> [Accessed 17 November 2015].

¹⁹ Legal Aid Agency (2015), *Legal aid statistics main tables: January to March 2015*, Table 1.2: Civil legal aid workload summary since 2001–02. Available at: <https://www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2015> [Accessed 17 November 2015].

²⁰ Legal aid is available for proceedings which provide protection from domestic violence, such as protective injunctions, without the need to provide evidence of domestic violence. See: House of Commons Justice Committee (2015), *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, Eighth Report of Session 2014–15, para 64. Available at: <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf> [Accessed 17 November 2015].

²¹ Regulation 33 was amended by The Civil Legal Aid (Procedure) (Amendment) Regulations 2014.

²² For example, that: the alleged perpetrator is on relevant police bail for a domestic violence offence; the client was refused admission to a refuge established for the purpose of providing accommodation for victims, or those at risk of, domestic violence due to insufficient accommodation; a letter or report from a health professional confirming that a referral has been made by a health professional to a person who provides specialist support or assistance for victims of, or those at risk of, domestic violence. See: The Civil Legal Aid (Procedure) (Amendment) Regulations 2014, regulation 2.

commitment to keeping the evidence requirements under review.²³ However, the EHRC remains concerned by evidence from civil society organisations that suggests domestic violence victims may still be unable to provide proof of their experiences in the prescribed form. Rights of Women and Women's Aid report that, six months after the range of acceptable evidence had been expanded, 38 per cent of women reported that they did not have the prescribed forms of evidence to access family law legal aid.²⁴ Women's Aid reported to the House of Commons Justice Committee that in a recent survey of 1,000 survivors of domestic violence, 80 per cent experienced emotional and psychological abuse and over 50 per cent experienced financial abuse, which is difficult to evidence.²⁵ Rights of Women challenged the lawfulness of the regulations limiting the type of evidence, but in January 2015 the High Court found the regulations to be lawful.²⁶ In February 2016, Rights of Women successfully challenged this decision in the Court of Appeal, which ruled that the regulation is invalid and does not cater for victims of domestic violence who have suffered from financial abuse.²⁷ A Ministry of Justice spokesperson has said the Government will 'carefully consider' the decision.²⁸

14. The House of Commons Justice Committee also received evidence that women sometimes have to pay for particular forms of proof, and that this was a barrier for those on low incomes.²⁹ The Committee also heard about the problems arising from the requirement that evidence must not be more than two years old.³⁰ This may force domestic violence victims to represent themselves at a family court hearing, confronting in person the other party who had previously perpetrated violence against them, or to not take action at all.³¹

²³ See: House of Commons Justice Committee (2015) (para 67, footnote 20). Also see: United Kingdom response to the United Nations Committee on the Elimination of All Forms of Discrimination against Women Committee (2015), para 8.

²⁴ See: Welsh Women's Aid, Rights of Women and Women's Aid (2014), *Evidencing domestic violence: reviewing the amended regulations*. Available at: <http://rightsofwomen.org.uk/wp-content/uploads/2014/12/Evidencing-domestic-violence-IV.pdf> [Accessed 17 November 2015]. This report was based on an online survey completed by 182 respondents.

²⁵ House of Commons Justice Committee (2015) (para 66, footnote 20).

²⁶ *R (oao Rights of Women) v Lord Chancellor* [2015] EWHC 35 (Admin).

²⁷ *R (Rights of Women) v Secretary of State for Justice* [2016] EWCA Civ 91.

²⁸ Times, 2016. Domestic violence legal aid changes were 'invalid', *Times Online*, [online] 18 February. Available at: <http://www.bbc.co.uk/news/uk-35605498> [Accessed 7 March 2016].

²⁹ House of Commons Justice Committee (para 71, footnote 20).

³⁰ House of Commons Justice Committee (paras 69–70, footnote 20).

³¹ See: Welsh Women's Aid, Rights of Women and Women's Aid (footnote 24). This report was based on an online survey completed by 182 respondents.

- 15.** In a further welcome development, the UK Government again amended the regulations in July 2015. As a result, it is no longer necessary for fresh evidence of domestic violence to be produced when the client's solicitor is applying to amend a legal aid certificate, if the original evidence is by that time over two years old.³²
- 16.** As noted above, the LASPO Act limits legal aid in **private family law** to cases where the client can provide evidence of previous domestic violence; this includes legal aid for **divorce** proceedings.³³ As a consequence, many petitioners do not qualify for legal assistance when completing the divorce form. As women are over-represented among divorce petitioners, this restriction has a disproportionate impact on women.³⁴
- 17.** Most **housing** cases have also been excluded from civil legal aid. There are some limited exceptions, including cases involving housing disrepair where there is a risk of serious harm, and cases where there is the risk of homelessness. In the Government's own assessment of the likely equality impact of LASPO, limiting legal aid for housing was predicted to have a disproportionate impact on women given their overrepresentation among housing clients compared with the adult population as a whole.³⁵
- 18.** Legal aid is only available for **debt** cases where the client is at immediate risk of losing their home. These restrictions are also likely to have a greater impact on women than on men. Research has shown that 64 per cent of people who are over-indebted are women.³⁶
- 19.** Although **discrimination** cases are still eligible for public funding, the exclusion of funding for employment cases could act as a barrier for victims of workplace

³² Regulation 2(5) of The Civil and Criminal Legal Aid (Amendment) Regulations 2015 included a new regulation 31(7A) to The Civil Legal Aid (Procedure) Regulations 2012.

³³ Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1, paragraph 12.

³⁴ ONS statistics indicate that women are the petitioners in 65 per cent of divorce proceedings. See: Office of National Statistics (2014), *Divorces in England and Wales 2012*. Available at: <http://www.ons.gov.uk/ons/taxonomy/index.html?nscl=Divorces> [Accessed 20 November 2015].

³⁵ The UK Government's Equality Impact Assessment that preceded the LASPO Act reforms notes that housing clients are more likely to be women than the adult population as a whole (61 per cent compared with 51 per cent of the population). See: Ministry of Justice (2011), *Reform of Legal Aid in England and Wales: Equality Impact Assessment*, paras 2.81–2.82. Available at: <http://webarchive.nationalarchives.gov.uk/20111121205348/http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-eia.pdf> [Accessed 26 January 2016]

³⁶ The Money Advice Service (2013), *Indebted lives: the complexities of life in debt*, p 3. Available at: <https://www.moneyadviceservice.org.uk/en/static/indebted-lives-the-complexities-of-life-in-debt-press-office> [Accessed 20 November 2015].

discrimination, who often need expert advice to understand that their employment problems engage anti-discrimination law.³⁷ The EHRC's recent research on pregnancy and maternity found that around 11 per cent of mothers in the research sample reported they were either dismissed, made compulsorily redundant, or treated so poorly they felt they had to leave their job. Scaled up to the general population this could mean as many as 54,000 mothers a year.³⁸

20. The EHRC's analysis suggests that the reduced scope of legal aid in these areas of law may have a particular adverse impact on women. This in turn indicates potential limitations on effective access to justice and redress for rights protected by CEDAW, as required by the Convention and elaborated on by the CEDAW Committee. Although the evidence rules on domestic violence for private law family cases have been relaxed, the recent experience of civil society organisations suggests that many women victims of violence are unable to satisfy these requirements in practice.

21. Using powers under the LASPO Act, the UK Government has introduced a **mandatory telephone advice gateway** in England and Wales as the only route to legal aid for cases involving discrimination, debt and special educational needs. While the UK Government has given assurances that reasonable adjustments will be made for people with disabilities and those with urgent cases,³⁹ research findings from the Ministry of Justice⁴⁰ and the Public Law Project⁴¹ suggest an adverse impact on access to advice for people with particular impairments and on those with limited English language skills.

³⁷ Equality Act 2010, part 5.

³⁸ HM Government and Equality and Human Rights Commission (2015), *Pregnancy and Maternity-Related Discrimination and Disadvantage – First Findings: Surveys of Employers and Mothers*, p 9. Available at: <http://www.equalityhumanrights.com/sites/default/files/uploads/Pregnancy-and-maternity-related-discrimination-and-disadvantage.pdf> [Accessed 20 November 2015].

³⁹ Ministry of Justice (2011), *Reform of Legal Aid in England and Wales: Equality Impact Assessment*, paras 6.30, 6.57 and 6.86. Available at: <http://webarchive.nationalarchives.gov.uk/20111121205348/http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-eia.pdf> [Accessed 26 January 2016]

⁴⁰ Ministry of Justice (2014), *Civil Legal Advice mandatory gateway: research findings*. Available at: <https://www.gov.uk/government/publications/civil-legal-advice-mandatory-gateway-research-findings> [Accessed 26 November 2015].

⁴¹ Public Law Project (2015), *Keys to the gateway: an independent review of the mandatory Civil Legal Advice Gateway*. Available at: <http://www.publiclawproject.org.uk/resources/199/an-independent-review-of-the-mandatory-civil-legal-advice-gateway> [Accessed 20 November 2015].

Exceptional cases funding scheme in England and Wales

22. ECF was introduced under section 10 of the LASPO Act. It was designed to allow funding for areas of law normally excluded from legal aid, where a failure to provide funding would result in a breach of the individual's human rights under the European Convention on Human Rights (ECHR) or rights under European law. However, evidence suggests the scheme is not functioning as intended, because of its demanding application process and the strict interpretation of its eligibility criteria.⁴² The UK Government had estimated that 3,700 cases would be funded each year.⁴³ However in 2014/15, 1,172 applications were made for exceptional funding; only 214 of these were granted, of which 97 were for inquest cases.⁴⁴

23. In July 2015, the High Court held that the ECF scheme was not providing the human rights safety net promised by Ministers and therefore fell short of fulfilling the requirements of the LASPO Act.⁴⁵ In response to the judgment, the UK Government has shortened the ECF application form and introduced a procedure for urgent applications. However, there is no right of appeal against refusal of ECF and legal aid providers still have to make applications 'at risk' – that is, facing the possibility that they will not be paid for their time preparing an ECF application that is unsuccessful. In the EHRC's analysis, the application procedure remains too complicated for litigants in person to deal with. The Lord Chancellor's revised guidance on the scheme is still awaited.

⁴² See: Joint Committee on Human Rights (2013), *The implications for access to justice of the Government's proposals to reform legal aid*, Seventh Report of Session 2013–2014, para 140. Available at: <http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/100/10002.htm> [Accessed 26 November 2015] and House of Commons Justice Committee (2015) (see paras 30–47, footnote 20). The Public Law Project, which assists with exceptional funding applications, has concluded that the process is onerous and complex, and ill-suited to applications made in person. See: Public Law Project, (2013) *Public Law Project response to 'Transforming Legal Aid': Delivering a more credible and efficient system consultation*, paras 81–82. Available at: <http://www.publiclawproject.org.uk/resources/20/response-to-moj-consultation-paper-transforming-legal-aid> [Accessed 26 November 2015].

⁴³ Lord Faulks (2014), *House of Lords Hansard 11 February 2014: Column 530*. Available at: <http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/140211-0001.htm#14021176000398> [Accessed 8 December 2015].

⁴⁴ Ministry of Justice (2014), *Legal aid statistics in England and Wales 2013–2014*, Legal Aid Agency. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/325921/legal-aid-statistics-2013-14.pdf [Accessed 26 November 2015].

⁴⁵ *IS – v- (1) Director of Legal Aid Casework (2) Lord Chancellor* [2015] EWHC 1965 (Admin).

24. Recommendation 1: The EHRC recommends that the UK Government continues to review the operation of the ECF scheme to ensure that all shortcomings identified by the High Court are addressed.

Judicial review in England and Wales

25. Judicial review enables judges to review the lawfulness of the decisions or actions of public bodies in England and Wales, providing an important check on their exercise of power. Judicial review may be used to challenge administrative decisions relating to women's civil and political and economic, social and cultural rights as outlined in CEDAW. For example, it could be used to challenge a policy operated by a public authority that has the effect of restricting women's access to health care or welfare benefits.

26. In addition to changes through the LASPO Act,⁴⁶ the UK Government introduced amending regulations⁴⁷ to limit legal aid for judicial review to cases where the court has granted permission for the application to go ahead. Following a successful judicial review challenge of these regulations,⁴⁸ the UK Government expanded the circumstances where retrospective funding may be granted.⁴⁹ However, legal aid practitioners still have to make judicial review applications 'at risk', which may well deter them from taking on important cases that might have succeeded. In the EHRC's analysis, this could have a negative impact on the ability of individuals – including women – to hold the state to account.⁵⁰

27. The UK Government has also introduced significant reforms to judicial review procedures in England and Wales through the Criminal Justice and Courts Act 2015. These reforms include restrictions on costs capping orders⁵¹ for public

⁴⁶ For example, there have been changes to when legal aid is available for judicial review. See: Anthony, H. and Crilly, C. (2015) (p. 69, footnote 6).

⁴⁷ Civil Legal Aid (Remuneration) (Amendment) (No.3) Regulations 2014.

⁴⁸ *R (Ben Hoare Bell and others) v Lord Chancellor* [2015] EWHC 523 (Admin).

⁴⁹ Civil Legal Aid (Remuneration) (Amendment) Regulations 2015, SI 2015/898.

⁵⁰ Equality and Human Rights Commission (2013), *Submission of Equality and Human Rights Commission to JCHR inquiry into the implications for access to justice of the Government's proposed legal aid reforms*. Available at: <http://www.equalityhumanrights.com/legal-and-policy/our-legal-work/consultation-responses/response-to-joint-committee-on-human-rights-inquiry-into-access-to-legal-aid-reform> [Accessed 26 November 2015].

⁵¹ The system of cost capping orders has been evolved by the courts as a device for capping the claimant's exposure to the risk of paying the defendant's costs, should the claim fail. The court takes into account the public interest in the case, whether the claimant has a personal interest in the outcome, and the claimant's financial means.

interest proceedings, which the court may now make only if it grants permission for the judicial review to go ahead.⁵² The reforms also create a much greater risk of interveners⁵³ having to pay costs. These reforms may deter civil society organisations from applying for judicial review in the public interest, as they would face the risk of paying the defendant's full costs of resisting permission, should permission be refused. They may also deter civil society and the EHRC (in pursuit of its statutory powers⁵⁴) from applying to intervene in a case because of the risk of having a costs order made against them.⁵⁵

28. In its General Comment on women's access to justice, the CEDAW Committee recommends that State Parties '[c]ooperate with civil society and community-based organizations to develop sustainable mechanisms to support women's access to justice and encourage non-governmental organizations and civil society entities to take part in litigation on women's rights'.⁵⁶ The reforms identified above may discourage civil society from taking part in litigation to enforce the rights of women.

29. Recommendation 2: The EHRC recommends that the UK Government monitors the effect of changes to legal aid for judicial review to ensure that challenges to unlawful administrative decisions relating to women's rights are not being hindered.

Impact of the proposed residence test in England Wales

30. The UK Government has taken a decision to introduce a residence test for civil legal aid.⁵⁷ With certain exceptions, the test was designed to limit funding to people who are lawfully resident in the UK and who, at some point, have been lawfully resident for at least 12 months continuously. In the analysis of the UK

⁵² Criminal Justice and Courts Act 2015, s 88(3).

⁵³ The role of an intervener is to assist the court with evidence, submissions of law, expertise or a perspective which has not already been provided by the parties (and so would not otherwise be available to the court). An intervener does not become a party to the proceedings and can only intervene with the permission of the court.

⁵⁴ Equality Act 2006, s 30.

⁵⁵ For further analysis of the impact on potential interveners, see: Anthony, H. and Crilly, C. (2015) (pp. 73–5, footnote 6).

⁵⁶ Committee on the Elimination of Discrimination against Women (2015), *General recommendation No. 33* (see para 15(h), footnote 8).

⁵⁷ The proposal is contained in: Ministry of Justice (2013), *Transforming legal aid: delivering a more credible and efficient system*. Available at: https://consult.justice.gov.uk/digital-communications/transforming-legal-aid/supporting_documents/transforminglegalaid.pdf [Accessed 26 November 2015].

Parliament's Joint Committee on Human Rights, certain vulnerable groups would be unable to prove that they satisfy the test, including those without documents to prove their immigration history and victims of trafficking whose status is disputed.⁵⁸

31. In July 2014, the High Court ruled that the residence test was 'ultra vires' of the LASPO Act, and in breach of Article 14 of the ECHR (prohibition of discrimination in the enjoyment of rights) read with Article 6 (the right to a fair trial) - and therefore discriminatory.⁵⁹ The UK Government's appeal against this decision was upheld by the Court of Appeal in November 2015, but it is likely that the matter will now be considered by the Supreme Court. Meanwhile, implementation of the residence test has been delayed.

32. Recommendation 3: The EHRC recommends the UK Government withdraws proposals for a residence test for civil legal aid.

Employment tribunal fees in Great Britain

33. In July 2013, the UK Government introduced fees of up to £950 for employment tribunal hearings, payable by the claimants in England, Wales and Scotland.⁶⁰ This is in addition to a fee of up to £250 for issuing the claim.⁶¹ All discrimination claims are subject to the higher level of fees. Depending on their financial circumstances, claimants may qualify for full or part remission of the fees.⁶² The CEDAW Committee made a General Recommendation in 2015 that States Parties '[r]emove economic barriers to justice by providing legal aid and by ensuring that fees for issuing and filing documents as well as court costs are reduced for women with low income and waived for women living in poverty'.⁶³

34. Claimants may apply for a remission of employment tribunal fees. The scheme is relatively complex in nature; an applicant must satisfy both the test for disposable capital and a separate test relating to gross monthly income. Fees may be

⁵⁸ Joint Committee on Human Rights (2013) (footnote 40).

⁵⁹ *R (Public Law Project) v Secretary of State for Justice* [2014] EWHC 2365 (Admin).

⁶⁰ Since 1971, the UK provided a statutory tribunal (currently known as 'the employment tribunal') for resolving employment-related disputes, at no cost to the employer or worker, save in very limited cases. The tribunal is administered by HM Courts and Tribunals Service, an executive agency of the Ministry of Justice.

⁶¹ The Employment Tribunal and Employment Appeal Tribunal Fees Order 2013.

⁶² Courts and Tribunals Fee Remission Order 2013 (SI 2013 2302).

⁶³ Committee on the Elimination of Discrimination against Women (2015), *General recommendation No. 33* (see para 17(a), footnote 8).

remitted either in full, or in part. Employment tribunal statistics show that a full or partial fee remission is granted in only 21 per cent of cases.⁶⁴ In contrast, the 2012 Equality Impact Assessment that accompanied the UK Government's response to the consultation on the proposal for tribunal fees predicted that 24 per cent of claimants would benefit from full fee remission and a further 53 per cent of claimants would benefit from a variable discount on fee rates up to £950.⁶⁵

- 35.** The introduction of employment tribunal fees has coincided with a significant drop in the number of applications. Figures from the Ministry of Justice indicate a 72 per cent decline in claims accepted, comparing the first quarter of 2013/14 (when no fees were payable) to the first quarter of 2015/16.⁶⁶ There is some evidence that fees have a deterrent effect on potential applicants. For example, Citizens Advice found that in over half of claims assessed as having a very good, good or 50/50 chance of success, fees or costs were cited as a reason for the claimants being unlikely to proceed.⁶⁷
- 36.** The same statistics show a drop of 87 per cent in sex discrimination claims⁶⁸ and 70 per cent in equal pay claims across Great Britain.⁶⁹ In the last two categories, women represent over four-fifths of claimants, indicating a disproportionate impact.⁷⁰ Claims for unfair dismissal/detriment relating to pregnancy decreased 34 per cent.⁷¹ The EHRC's literature review provides further evidence of the disproportionate adverse impact on women in England and Wales.⁷² In Scotland,

⁶⁴ In 1,145 out of 5,412 cases where the employment tribunal requested fees in Q1 of 15/16. See: Ministry of Justice (2015), *Tribunals and Gender Recognition Statistics Quarterly: Annex D Employment Tribunal Fees Tables – Table D.1 Employment Tribunal Fees – Issue fees requested, fees paid in full and remissions awarded*. Available at: <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-april-to-june-2015> [Accessed 26 November 2015].

⁶⁵ Ministry of Justice (2012), *Charging fees in employment tribunals and the Employment Appeal Tribunal: Government response – Equality Impact Assessment*, p 26. Available at: <https://consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011> [Accessed 30 November 2015].

⁶⁶ From 44,334 to 12,563. See: Ministry of Justice (2015), *Tribunals and Gender Recognition Statistics Quarterly: Main table (April to June 2015) – Table 1.2 Employment Tribunal – Total number of receipts by jurisdiction, 2007/08 to Q1 2015/16*. Available at: <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-april-to-june-2015> [Accessed 26 November 2015].

⁶⁷ Citizens Advice (2014), *One year on from the introduction of fees to access the Employment Tribunal: summary of results from a survey of employment cases brought to Citizens Advice bureaux*.

⁶⁸ From 6,310 to 814 cases.

⁶⁹ From 8,091 to 2,395 cases.

⁷⁰ Trott, L. (2012) 'Are tribunal and EAT fees a price worth paying?', *IDS Employment Law Brief*, vol. 947 (April).

⁷¹ From 376 to 247 cases.

⁷² Anthony, H. and Crilly, C. (2015) (see section 6, footnote 6).

sex discrimination claims have fallen 75 per cent and pregnancy discrimination claims fallen by 29 per cent.⁷³

37. The EHRC's analysis suggests the introduction of substantial fees for employment tribunals may be compromising claimants' rights under Article 6 of the ECHR, which protects access to justice in the determination of civil rights and obligations. The particular impact on women may engage Article 6 (the right to a fair trial) read with Article 14 (prohibition of discrimination in the enjoyment of rights). The European Court of Human Rights (ECtHR) has interpreted 'civil rights and obligations' as including rights under employment law and has held that domestic procedural rules must not affect the very essence of the right of access to the court. Where fees are payable, the amount should be assessed in the particular circumstances of the case - including the applicant's ability to pay.⁷⁴ A greater justification is required if fees are imposed at an initial stage of the proceedings.⁷⁵

38. The EHRC intervened in two legal challenges brought by Unison (a trade union) to the introduction of employment tribunal fees; our intervention was continued in the Court of Appeal. We submitted that the EU principle of effectiveness meant that national procedural rules must not render practically impossible or excessively difficult the exercise of EU rights (including rights to non-discrimination). Although the Court of Appeal dismissed the appeals⁷⁶ on the basis of insufficient evidence, it described the question of whether fees had, in at least some cases, made it in practice impossible to pursue a claim as 'troubling' and said that the drop in claims was sufficiently 'startling' to merit a full and careful analysis of its causes.⁷⁷

39. Clause 33 of the Scotland Bill would enable transfer of powers over specified tribunal functions to Scottish tribunals, allowing the Scottish Parliament to

⁷³ Sex discrimination claims have fallen from 110 to 28 cases and pregnancy claims have fallen from 35 to 25. See: Ministry of Justice (2015), *Tribunals and gender recognition certificate statistics quarterly: April to June 2015 – Annex C: Employment Tribunal Receipts Tables*: Table C.4 – Total Number of Employment Tribunal Jurisdictional Complaints Received by Region, January 2012 to June 2015. Available at: <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-april-to-june-2015> [Accessed 26 November 2015].

⁷⁴ *Podbielski v Poland* [2005].

⁷⁵ *Weissman v Romania* [2006].

⁷⁶ *R (on the application of Unison) v Lord Chancellor* [2015] EWCA Civ 935 CA.

⁷⁷ *R (on the application of Unison) v Lord Chancellor* [2015] EWCA Civ 935 CA, para 68.

determine tribunal fees.⁷⁸ The Scottish Government has announced that it would abolish fees for employment tribunals.⁷⁹

Fees for divorce petitions

40. The EHRC notes the UK Government's proposal to increase court fees for divorce petitions from £410 to £550 (that is, by 34 per cent). ONS statistics⁸⁰ indicate that women are the petitioners in 65 per cent of divorce proceedings so this proposal is likely to have a disproportionate adverse impact on women.

Reviewing the changes

41. The CEDAW Committee has recommended the UK Government continually monitor the impact on women of the reforms to access to justice. The EHRC's guidance 'Meeting the equality duty in policy and decision-making'⁸¹ makes clear that '[a]ssessing the impact on equality is an ongoing process that does not end once a policy has been agreed or implemented'.⁸² The experience gained through implementation can be used to consider any possible adjustments to the approach to legal aid reforms.

⁷⁸ Scotland Bill 2015–16, clause 33; Pyper, D. and McGuinness, F. (2015), House of Commons Library Briefing Paper: Employment tribunals fees, Number 7081, 15 September 2015, p 21. Available at: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07081> [Accessed 26 November 2015].

⁷⁹ Scottish Government (2015), *A Stronger Scotland: The Government's Programme for Scotland 2015–16*, p 3. Available at: <http://www.gov.scot/Resource/0048/00484439.pdf> [Accessed 26 November 2015].

⁸⁰ Office for National Statistics (2014), *Divorces in England and Wales* (see footnote 32).

⁸¹ The Public Sector Equality Duty requires a public authority, in the exercise of its functions, to have due regard to the need to: eliminate discrimination, harassment and victimisation; advance equality of opportunity of, and foster good relations between, persons who share a protected characteristic and persons who do not share it. See: Equality Act 2010, s 149(1).

⁸² Equality and Human Rights Commission (2014), 'Meeting the equality duty in policy and decision-making – England (and non-devolved public authorities in Scotland and Wales)', p 19. Available at: http://www.equalityhumanrights.com/sites/default/files/publication_pdf/Meeting%20the%20duty%20in%20policy%20and%20decision-making.pdf [Accessed 26 November 2015].

42. The UK Government has committed to 'conduct a post implementation review of the legal aid reforms within three to five years of implementation (2016-2018)'.⁸³ The precise timing or terms of reference have not yet, however, been announced.

43. Recommendation 4: The EHRC recommends that the Government:

- **outlines a clear timetable for the review of the legal aid reforms**
- **ensures the review includes the commissioning of independent research on the actual equality and human rights impacts of the legal aid reforms, including on women, across England, Scotland and Wales**
- **ensures the participation of women's rights organisations and other relevant stakeholders, and**
- **considers the equality and human rights impacts identified, including the impact on women, and takes steps to mitigate any indirectly discriminatory effects arising from the reforms.**

44. On 11 June 2015 the UK Government announced the start of a review on the impact of the employment tribunal fees, which is due to be completed at the end of 2015. The review 'will consider how effective the introduction of fees has been at meeting the original objectives, while maintaining access to justice'.⁸⁴ On 10 September 2015 the Under Secretary of State for Justice confirmed the 'review will seek to assess the effect fees have had including, so far as possible, any differential impact on people with protected characteristics and the types of case they bring'.⁸⁵

45. Recommendation 5: The EHRC recommends that the UK Government takes steps to address any disproportionate adverse impacts on women arising from the employment tribunal fees as identified in its review. Further, the EHRC suggests that implementation of the current proposals for enhanced

⁸³ Ministry of Justice (2015), *Government response to Justice Committee's Eighth Report of Session 2014–15: Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, p 4. Available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/444939/response-to-justice-committee.pdf [Accessed 26 November 2015].

⁸⁴ Ministry of Justice (2015), *Employment Tribunal Fees Post Implementation Review*. Available at: <https://www.gov.uk/government/publications/employment-tribunal-fees-post-implementation-review> [Accessed 26 November 2015].

⁸⁵ Vara, S. (Parliamentary Under Secretary, Ministry of Justice) (2015), *Employment Tribunals Service: Fees and Charges: Written question – 9118*, Parliamentary Questions (10 September 2015). Available at: <http://www.parliament.uk/written-questions-answers-statements/written-question/commons/2015-09-07/9118> [Accessed 26 November 2015].

court fees for divorce petitions are delayed until the results of the current evaluation of the fee remission scheme is known.⁸⁶

46. Finally, the EHRC welcomes the UK Government's commitment that, at the end of 2015 and early 2016, it will publish findings from research into advice provision in the not-for-profit sector; a survey of how individuals seek to resolve civil, administrative or family justice problems; and a survey on the prevalence of civil justice problems in England and Wales.⁸⁷

⁸⁶ This review is part of the UK Government's current review of employment tribunal Fees. See: Ministry of Justice (2015), *Employment Tribunal Fees Post Implementation Review* (see footnote 85).

⁸⁷ Heaton, R. (Permanent Secretary, Ministry of Justice) (2015), *Letter to Nick Walker, Clerk of Justice Committee, 2 November 2015, with supplementary responses following evidence session on 13 October 2015*, p. 3. Available at: <http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/one-off-sessions/parliament-2015/ministry-of-justice-report-and-accounts-2014-15-and-related-matters/> [Accessed 20 November 2015].

Contacts

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