

## **Response of the Equality and Human Rights Commission to the Consultation:**

### **Consultation details**

Title:	Questionnaire for a study on article 13 of the Convention on Rights of Persons with Disabilities
Source of consultation:	Office of the High Commissioner of Human Rights
Date:	28 <sup>th</sup> April 2017

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## **Questionnaire for the OHCHR study on Article 13 of the CRPD - response from the Equality and Human Rights Commission of Great Britain.**

**1. Does your country have laws, policies or guidelines on access to justice, at any level of government, which ensure persons with disabilities, particularly women and children with disabilities:**

**a. to participate in judicial and administrative proceedings on an equal basis with others in their role as witness, juror, complainant, defendant or other, including through the provision of procedural and age-appropriate accommodations (please identify and share the text of those provisions);**

**b. to have individual legal standing in all administrative and judicial procedures, including the right to be heard as part of their right to fair trial;**

**c. to have access to effective remedies that are appropriately proportional to the right(s) infringed and which are tailored to their specific situation;**

**d. to have effective access to justice in the context of disasters, migration and asylum-seeking, conflict and post-conflict situations and transitional justice, and formal or informal systems of customary, indigenous and community justice, among others.**

We have decided to answer the above four questions by referring to relevant guidance and legislation.

### Guidance

The *Equal Treatment Bench Book* (ETBB) published by the Courts and Tribunals Judiciary in 2013,<sup>1</sup> offers advice and guidance to judges, magistrates and all other judicial office holders. It considers the reasonable adjustments and accommodations that individuals with physical impairments may require to ensure they are able to access judicial and administrative proceedings.<sup>2</sup>

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<sup>1</sup> The Equal Treatment Bench Book is available [here](#).

<sup>2</sup> As stated in this publication, on the chapter considering physical impairments:

The UN Convention of the Rights of People with Disabilities 2006, which is binding on UK courts and tribunals, defines persons with disabilities as including those who have long term physical, mental, intellectual or sensory impairments which, in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Making reasonable adjustments or accommodating the needs of disabled people is not a form of favouritism or bias towards disabled people but may be necessary to help provide a level playing field by giving disabled people the opportunity to participate in court and tribunal hearings in whatever capacity. Disabled people need to be given the opportunity to express themselves properly and, if a witness, to give their evidence to the court or tribunal. To achieve this aim each person with a disability must be assessed and treated by the judge or tribunal panel as an individual so that their specific needs can be considered and appropriate action taken. Failure to do this may result in a decision being overturned on appeal.

Regarding jurors, the ETBB states:

## Legislation

### *Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)*

The Equality and Human Rights Commission (the Commission) recently undertook an equality and human rights literature review on access to justice.<sup>3</sup> Where sources expressed a view on the equality and human rights impacts of recent changes to civil law justice, as a consequence of LASPO, the majority of these views made criticisms and identified a range of actual or potential adverse impacts. A number of sources highlighted particular impacts on disabled people.

LASPO introduced a mandatory telephone gateway service for legal advice on discrimination, debt and Special Educational Needs (the Civil Legal Advice service) in England and Wales. The consequences of the telephone gateway not operating properly, or not being accessible for some people, may be that access to justice in discrimination cases is inhibited. Mind (a mental health charity) suggested that people with mental health conditions may face additional barriers in using the Civil Legal Advice service, including the need to provide financial information before obtaining advice and perceptions about a lack of empathy by advisers. It said ‘we know that [a telephone advice service] fails to reach a proportion of people with mental health problems because of the communication difficulties associated with their condition, or because those people may not have the capacity to use the means of communication offered’.<sup>4</sup> The Public Law Project also found that the Civil Legal Advice service was not always identifying people who should be provided with face-to-face advice because of communication difficulties, mental health or mental capacity issues.<sup>5</sup>

### *Civil Procedure Rules under the Civil Procedure Act 1997*

The Civil Procedure Rules Part 21 and Rule 6.25 also provide safeguards for children and protected parties who lack capacity when involved in legal proceedings. The Civil Procedure Rules require a litigation friend to be in attendance for children and protected parties during the court proceedings, and conduct proceedings on their behalf.<sup>6</sup>

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The presumption is that [disabled persons] should so act unless the judge is of the opinion that the person will not, on account of disability, be capable of acting effectively as a juror, in which case that person should be discharged.

<sup>3</sup> EHRC (2015) *Equality, human rights and access to civil law justice: a literature review*, available [here](#)

<sup>4</sup> Mind (2014) *Written evidence to the Justice Committee inquiry in to the impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, section 6.2. Available [here](#).

<sup>5</sup> Hickman, B. and Oldfield, D. (2015), *Keys to the gateway: An independent review of the mandatory Civil Legal Advice gateway*. Public Law Project.

<sup>6</sup> Full explanation of the duties of courts can be found in the online Civil Procedure Rules, with relevant sections [here](#) and [here](#).

### Equality Act 2010

The Equality Act 2010 makes it unlawful to discriminate, harass or victimise disabled people in the context of work, employment, provision of goods and services, membership of associations and public transport. It also places a duty on public bodies to promote equality and seek to reduce inequalities (explained more fully in response to question 3).

### The Commission's position on LASPO reforms

The Commission has highlighted that the reforms to legal aid potentially raises issues for the protection and promotion of disabled people's rights under the CRPD and possibly undermines redress in relation to these rights.<sup>7</sup> The Commission<sup>8</sup> also raises concerns about the impact of the telephone gateway service on disabled people's access to justice.<sup>9</sup> The Ministry of Justice's evaluation of the Civil Legal Advice service during its first year of operation found some evidence of refusals to request reasonable adjustments to people using this service, such as support for hearing impairments.<sup>10</sup> The Commission is also concerned about the lack of Home Office guidance or procedures to ensure that immigration detainees who lack capacity are provided with the assistance they require to effectively assert their legal right to challenge their detention. This situation was described in a recent High Court judgment as a 'potential lacuna in the system'.<sup>11</sup>

## **2. Do you have examples from your country on:**

### **a. how procedural and age-appropriate accommodations are provided and applied, including protocols or other guidelines;**

The *Equal Treatment Bench Book* (2013) provides advice and guidance regarding children and vulnerable adults, individuals with physical disabilities, and individuals with mental disabilities, specific learning difficulties and issues of capacity.<sup>12</sup>

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<sup>7</sup> Equality and Human Rights Commission (2015), *Equality and Human Rights Commission (UK) response to UN Special Rapporteur on Disabilities' inquiry into the right of disabled people to social security*.

<sup>8</sup> Ibid.

<sup>9</sup> The Commission's view was expressed in relation to the proposal that there be a single telephone gateway as a remote access point for four areas of civil law: discrimination; debt; special educational needs (SEN); and community care. However, the gateway was introduced for the first three of these areas, but not for community care law due to the high number of these cases that would require Civil Representation.

<sup>10</sup> Ministry of Justice (2014), *Civil Legal Advice mandatory gateway: Overarching research summary*.

<sup>11</sup> *R (VC) v SSHD* [2016] EWHC 273 (Admin), para. 159

<sup>12</sup> . As stated in the ETBB guidance,

Accommodating a vulnerable person's needs (as required by case law, the Equality Act 2010, the European Convention on Human Rights, the UN Convention on the Rights of the Child, the UN Convention on the Rights of Persons with Disabilities and the European Directive establishing minimum standards on the rights, support and protection of victims of crime) requires the court or tribunal to adopt a more flexible approach.

**b. training programmes on the right of access to justice for persons with disabilities for judges, lawyers, prosecutors, police, social workers, language and sign language interpreters, legal aid centres, other judicial and administrative bodies intervening in judicial or quasi-judicial instances;**

The Commission has highlighted the lack of requirements for compulsory training for members of the judiciary on the UNCRPD or forms of reasonable accommodation to ensure equal access to justice, and considers that this as a key issue for the UK's upcoming CRPD examination.<sup>13</sup>

The Ministry of Justice, in its equality impact assessment on legal aid reforms, states that there is evidence that the judiciary and court staff can find it challenging assisting people with certain specific needs (such as mental health and learning disabilities)<sup>14</sup>. Recent research commissioned by Ministry of Justice on the court experience of adults with mental health conditions, learning disabilities and limited mental capacity found that further training was needed for staff at all levels to address awareness and recognition, and improve capabilities in accommodating needs in the courtroom.<sup>15</sup>

Other research has also identified a need for better guidance on whether and how to disclose mental health problems, learning disabilities and limited mental capacity, and how to deal with disclosures made by court users, for the various agencies working with these individuals.<sup>16</sup>

**c. education programmes on the right of access to justice for persons with disabilities for law students as well as in schools of social work, sign language interpretation, forensic science, psychiatry and psychology, among other relevant faculties;**

We do not have a response to this question as we have no evidence on the current situation.

**d. legal aid programmes, public and/or private, which include the right of access to justice for persons with disabilities in their practices, including the availability of support and liaison services for courts or other judicial or quasi-judicial instances.**

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<sup>13</sup> EHRC, SHRC, NIHR, ECNI (2017). *Disability rights in the UK: UK Independent Mechanism Submission to inform the CRPD List of Issues on the UK*, page 34. Equality and Human Rights Commission, Scottish Human Rights Commission, Northern Ireland Human Rights Commission, Equality Commission for Northern Ireland, available [here](#).

<sup>14</sup> Ministry of Justice (2011) *Reform of Legal Aid in England and Wales: Equality Impact Assessment (EIA)*. 21 June 2011.

<sup>15</sup> McLeod, R., Philpin, C., Sweeting, A., Joyce, I and Evans, R. (2010) *Court experience of adults with mental health conditions learning disabilities and limited mental capacity*. Report 1: Overview and recommendations. Ministry of Justice Research Series 8/10.

<sup>16</sup> KM Research and Consultancy (2009) *Access to Justice: a review of the existing evidence of the experiences of adults with mental health problems*. Ministry of Justice Research Series 6/09 May 2009.

## Legal Aid

Across Great Britain, legal aid is available for certain individuals facing legal proceedings. Reforms to legal aid<sup>17</sup> were introduced by LASPO in England and Wales in 2013. The reforms excluded many areas of law from the scope of civil legal aid, including the majority of private family, housing, debt, welfare benefits, employment and clinical negligence matters.<sup>18</sup> Some of the areas of law excluded from legal aid by the new provisions are relevant to claims related to special educational needs, mental health and mental capacities, facilities for disabled people, and claims under the Equality Act 2010.<sup>19</sup>

The Ministry of Justice, in its consultation for reform of the legal aid system in England and Wales,<sup>20</sup> accepted that withdrawing legal aid for legal advice about certain benefits would have a disproportionate impact on disabled people in England and Wales. It recognised that the class of individuals bringing these cases is more likely to report being ill or disabled, in comparison with the civil legal aid client base as a whole, and states that, regarding the impact of these reforms, they have “identified the potential for a particular or substantial disadvantageous impact on clients who are female, BAME, and ill or disabled.”<sup>21</sup> The Government considers that the alternative sources of advice available such as charities and local authorities, and that the tribunal system will provide sufficient support for disabled individuals, and any changes are proportionate.<sup>22</sup>

Evidence indicates that removing welfare benefits (with some exceptions), private family law cases (such as contact or divorce) and most housing cases from the scope of legal aid has had a negative impact on disabled people’s access to justice.<sup>23 24</sup>

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<sup>17</sup> Legal aid is divided into Legal Help (advice and assistance) and Civil Representation (representation by solicitors and barristers).

<sup>18</sup> EHRC, SHRC, NIHR, ECNI (2017). *Disability rights in the UK: UK Independent Mechanism Submission to inform the CRPD List of Issues on the UK*. Page 32.

<sup>19</sup> For a full list of those eligible for legal aid please see Schedule 1, parts 1-3, of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, available [here](#).

<sup>20</sup> Ministry of Justice (2010) *Proposals for the reform of legal aid in England and Wales. Consultation Paper*. London: the Stationery Office Limited. Pages 63/64,

<sup>21</sup> Ministry of Justice (2011) *Reform of legal aid in England and Wales: Equality Impact Assessment*. London: the Stationery Office Limited. Page 29, para 1.48

<sup>22</sup> Ministry of Justice (2010) *Proposals for the reform of legal aid in England and Wales. Consultation Paper*. London: the Stationery Office Limited. Pages 63/64, para.4.178; page 72, para. 4.217.

<sup>23</sup> The House of Commons Justice Select Committee (12 March 2015) *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, available [here](#). This report states that the UK Government has recognised in its equality impact assessment that individuals bringing welfare benefit cases are more likely to report being disabled than the civil legal aid client base as a whole. The report goes on to say that following the changes, the number of debt, employment and welfare benefits advice cases fell by over 99%. The over-representation of disabled people in social housing compared with the adult population as a whole means they face a disproportionate impact from the exclusion of most housing cases. The Government’s equality impact assessment included statistics that showed potential adverse impacts on disabled people.

<sup>24</sup> The House of Commons Justice Select Committee (2011) *The Government’s proposed reform of legal aid*. Available [here](#). This report cites the high incidence of mental health conditions among



Sometimes legal aid can be granted for cases outside of the scope of LASPO. This is known as exceptional case funding (ECF). It can be made available where necessary to avoid a breach of an individual's Convention rights under the Human Rights Act (1998) or under enforceable EU rights. However, very few ECF applications are approved (5% were granted in the first year i.e. April 2013-March 2014).<sup>25</sup> The Government equality impact assessment of reforms to legal aid highlighted some of the points raised by respondents to the 2010 consultation about impacts on disabled people.

- For many disabled people, welfare benefits (including DLA, Attendance Allowance, Incapacity Benefit and those benefits replacing them under welfare benefits reforms) would be their only source of income and therefore it would be unjust to deny them access to funding to challenge decisions which could damage their health and wellbeing.
- Barriers to challenging benefits decisions could lead to social exclusion.
- People with learning difficulties might be especially disadvantaged in relation to understanding the benefits thresholds or process for challenging a determination in the tribunal.<sup>26</sup>

Following the legal aid reforms, all welfare benefits cases in England and Wales are outside the scope of legal aid except for cases under the Equality Act 2010 and appeals to the Upper Tribunal on a point of law.

### Provision of Advice

In addition, because of cuts to advice provision, there is less advice available for discrimination. In England and Wales, the availability of frontline discrimination legal advice and representation continues to diminish,<sup>27</sup> resulting in people in some parts of the UK being unable to access legal advice and representation on discrimination issues. This has left so-called 'advice deserts' in some areas.<sup>28</sup>

### The Commission's positions

The Commission has called for the UK Government to:

- review the impact of budget reductions and recent legal aid reforms on the availability of legal advice from non-government organisations
- explain how it will address the problem of 'advice deserts'.<sup>29</sup>
- consider how disproportionate impacts on disabled people following legal aid reforms will be addressed or mitigated.

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people involved in private family law proceedings, and related concerns about their capacity to effectively present their cases as litigants in person.

London: the Stationery Office Limited.

<sup>25</sup> Ministry of Justice, Legal aid statistics: April to June 2016, available [here](#).

<sup>26</sup> Ministry of Justice (2011) *Reform of legal aid in England and Wales: Equality Impact Assessment*. London: the Stationery Office Limited. Page 62, para 2.209.

<sup>27</sup> In addition to legal aid reform, in England and Wales there have also been freezes to legal aid rates and increased administrative controls, which have led many law firms to stop doing legal aid work.

<sup>28</sup> The Law Society (27 July 2016) *Lack of housing legal aid services is leading to nationwide advice deserts* (press release), available [here](#) [accessed: 16 August 2016].

<sup>29</sup> Cited in EHRC, SHRC, NIHRC, ECNI (2017). *Disability rights in the UK: UK Independent Mechanism Submission to inform the CRPD List of Issues on the UK*, p.33

The Commission recently intervened in a case which was considering the availability of legal aid to pay for legal representation, for prisoners who wish to have pre-tariff reviews by the Parole Board, Category A<sup>30</sup> reviews and decisions for placement in close supervision centres.<sup>31</sup>

Our intervention considered the following matters:

- The importance of fairness in decision making within a prison context;
- The extent to which prisoners are in a position to make their own representations and understand their legal rights;
- The test to be applied by the court;
- The objections to a rigid rule preventing the provision of Legal Aid to prisoners in a wide range of circumstances.

In our intervention we considered issues in relation to discrimination against disabled prisoners, as specified by the Equality Act 2010, and the public sector equality duty on prisons under that Act, as well as articles 2, 5, 6, 8 and 14 of the ECHR and Article 3(1) of the UNCRRC.

The Court of Appeal determined that the legal aid system in place, in particular when considering the needs of prisoners with mental health issues or learning difficulties, was inherently and systematically unfair in the process of determining eligibility for legal aid for these prisoners, so has granted judicial review of the relevant regulations.<sup>32</sup>

### **3. Does your country have laws, policies and strategies to ensure the participation of persons with disabilities on an equal basis with others in the judiciary or other judicial or quasi-judicial instances, including in their role as judges, witnesses, jurors, lawyers or any other active party to judicial or quasi-judicial procedures?**

The Equality Act 2010 places a duty on public authorities to have due regard to the need to advance equality of opportunity between persons who share a protected characteristic (including disability) and those who do not. This includes encouraging persons who share a protected characteristic to participate in public life or in any other activity in which participations by such persons is disproportionately low.<sup>33 34</sup>

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<sup>30</sup> Category A prisoners are those in a closed prison whose escape would be highly dangerous to the public or national security.

<sup>31</sup> *R (Howard League for Penal Reform and the Prisoners' Advice Service) v The Lord Chancellor* [2017] EWCA Civ 244, [2017] WL 01291406.

<sup>32</sup> Criminal Legal Aid (General) (Amendment) Regulations 2013/2790.

<sup>33</sup> Equality Act 2010 s.149 (1)(b) and (3)(c).

<sup>34</sup> The Commission has produced technical guidance on this duty, and states the following in regard to participation of individuals with protected characteristics:

A body subject to the [public sector equality] duty will need to have sufficient understanding of the causes of disproportionately low participation to enable it to comply in substance with the duty to have due regard to the need to encourage participation. This may require the body to collect additional evidence.



The Equality Act 2010 makes discrimination in most areas of activity unlawful subject to certain exceptions. These areas of activity include, for example, employment and other areas of work, education, housing, the provision of services, the exercise of public functions and membership of associations. The Act also provides protection against harassment and victimisation, and a requirement to make reasonable adjustments for disabled people.<sup>35</sup>

The Commission has produced Statutory Codes of Practice to the Equality Act 2010, covering discrimination in the provision of services and public functions,<sup>36</sup> and covering discrimination in employment and other work-related situations.

**4. Does your country monitor and collect disaggregated data with respect to access to judicial or quasi-judicial procedures concerning:**

**a. the participation of persons with disabilities in judicial or quasi-judicial procedures, including the number of complaints submitted, nature of complaints and outcomes;**

**.b. persons with disabilities obtaining remedies and the nature of those remedies, whether they are adequate, effective, prompt and appropriate, responding to their specific situation;**

**c. persons with disabilities being convicted, the nature of their sentence, and whether they benefitted from safeguards of the right to fair trial on an equal basis with others;**

We regret we have been unable to provide an answer to these questions within the deadline for this questionnaire.

**d. the opening and conduct of impartial and independent investigations of human rights violations of persons with disabilities, particularly those relating to the right to life, liberty and security of the person, freedom from violence, abuse and exploitation, and freedom from torture or cruel, inhuman or degrading treatment or punishment..**

The Commission undertook an inquiry into deaths in custody in 2015.<sup>37</sup> We found that there were significant numbers of deaths in custody of those individuals with mental health conditions from non-natural causes. Our report highlights that the Prison and Probation Ombudsman (PPO) examined information<sup>38</sup> about prisoners who died in prison custody between 2012 and 2014, finding that of those who died from self-inflicted means (199), 70% had been identified with mental health needs. Of those who died of natural causes (358), 22% had mental health needs. A

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<sup>35</sup> EHRC (2011). *Equality Act 2010 Code of Practice - Services, public functions and associations Statutory Code of Practice*. Page 17. Available [here](#).

<sup>36</sup> See note 32; also EHRC (2011). *Equality Act 2010 Code of Practice – Employment Statutory Code of Practice*. Available [here](#).

<sup>37</sup> EHRC (2015) *Inquiry into non-natural deaths in detention of adults with mental health conditions, 2010–13*. Available [here](#).

<sup>38</sup> The sample for the data in this report was 557 prisoners who died in prison custody between 2012 and 2014 and whose deaths were investigated by the Prison and Probation Ombudsman.

research review that we commissioned at the same time identified a number of concerns, including: inappropriate mental health assessments; inadequate staff training; a lack of coordinated care; and a lack of joined-up work between prison and healthcare staff, and between primary healthcare, mental health and substance misuse services. It pointed out that some mental health conditions cause sufferers to present very challenging behaviour that staff may deal with as a behavioural rather than a mental health problem, which may lead to a punitive rather than a therapeutic response.<sup>39</sup>

Our inquiry found that in England and Wales, there is no statutory regulation of police powers of control and restraint. Although there is specific guidance and training for all officers on restraint, the extent to which this is adopted is a matter for individual police forces, resulting in little consistency in the use of control and restraint across different police forces.

Courts have found that in health and social care settings, the ability for those detained on mental health grounds to review their detention has been found to be insufficient and further affects their vulnerability. Hence, the Court of Protection<sup>40</sup> held that a failure to provide an independent advocate to an incapacitated man meant that he was deprived of an effective means of challenging his detention under Article 5 of the European Convention.<sup>41</sup> Subsequently, in 2014 the Supreme Court clarified that in England there must be some form of independent review of the conditions of detention under the Mental Capacity Act 2005 for those who lack capacity to consent.<sup>42</sup>

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<sup>39</sup> EHRC (2015) *Non-natural deaths following prison and police custody* Research report 106. Jake Phillips, Loraine Gelsthorpe, Nicola Padfield, Sarah Buckingham, Sheffield Hallam University and University of Cambridge.

<sup>40</sup> In the context of the Mental Capacity Act 2005. *Hillingdon LBC v Neary*. [2011] EWHC 3522 (COP)

<sup>41</sup> This judgment contrasts with judgments in Scotland where the review and appeal mechanisms were found to be sufficient for the purposes of complying with Article 5(4) (*Black v Mental Health Tribunal for Scotland [2011]*).

<sup>42</sup> See *Surrey County Council v P and others (Equality and Human Rights Commission and others intervening)*; *Cheshire West and Chester Council v P and another (Same intervening)*. [2014] UKSC 19; [2014] A.C. 896.