**Equality and Human Rights Commission (UK) response to UN Special Rapporteur on Disabilities’ inquiry into the right of disabled people to social security**

**Introduction**

1. The UN Convention on the Rights of Persons with Disabilities (UNCRPD) reaffirms disabled people’s human rights. It recognises that equality and human rights are for everyone and sets out how governments should ensure those rights are protected.
2. The United Kingdom (UK) ratified UNCRPD in 2009, and the UK submitted its initial report to the UN Disability Committee in 2011.[[1]](#footnote-1) Since then, we have come some way towards building a more inclusive society, but there is still much to do – and this must be done with disabled people. The Equality and Human Rights Commission (EHRC) along with the Equality Commission for Northern Ireland, the Northern Ireland Human Rights Commission and the Scottish Human Rights Commission are designated, by Article 33(2), as the UK Independent Mechanism to promote, protect and monitor the implementation of the UNCRPD in the UK. Together, in late 2014, we submitted an interim report, which brings together the available evidence, including of disabled people’s views and experiences, to set out the key issues disabled people face in the UK.[[2]](#footnote-2)
3. The UN Disability Committee’s examination of the UK’s progress has been delayed and is not now expected until 2017. In the interim, the EHRC continues to work with the many disabled people and their organisations that are producing their own analysis of how well UNCRPD rights are being put into practice. The EHRC also continues to develop its own evidence-based assessment of how the UK’s obligations under UNCRPD are being implemented in our jurisdiction, namely England and Wales, and Scottish matters that are reserved to the UK Government.
4. Our submission responds to some of the questions identified by the new UN Special Rapporteur on Disabilities’ inquiry into the right of disabled people to social security.[[3]](#footnote-3) With the time and resources available, it has not been possible for the EHRC to cover all of the issues identified by the Special Rapporteur, some of which call for detailed factual information that should be readily available from the relevant government departments and the UK Government’s Office of Disability Issues should be able to assist with.
5. The last period has seen considerable pressure on the provision of public funded programmes and payments, including those aimed at disabled people. In response to the global economic downturn, a number of changes have been made to the forms of support available, as well as to the levels of public spending in the UK. This context has naturally impacted on the UK’s progress in implementing UNCRPD. Our submission focuses on areas we consider highly relevant to the UN Special Rapporteur on the rights of persons with disabilities’ inquiry into the right of persons with disabilities to social protection:
6. The impact of reforms to the UK’s social security system on disabled people’s right to independent living under Article 19, and to an adequate standard of living and social protection under Article 28;
7. Whether the design and delivery of health and social care services in England is consistent with rights to the highest attainable standard of physical and mental health under Article 25, independent living under Article 19, and to freedom from cruel, inhuman or degrading treatment or punishment under Article 15 UNCRPD; and
8. The impact of reforms affecting access to civil law justice in England and Wales on disabled people’s right to effective access to justice under Article 13 and on the realisation of other rights under UNCRPD
9. **The impact of reforms to the UK’s social security system on disabled people’s right to independent living under Article 19, and to an adequate standard of living and social protection under Article 28**

**Financial Decision-Making and the Public Sector Equality Duty**

1. The public sector equality duty (PSED) was established by the Equality Act 2010[[4]](#footnote-4) and applies to all characteristics protected by that Act. It requires all public authorities in England, Scotland and Wales to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations. In advancing equality of opportunity, authorities must consider minimising disadvantages shared by persons with particular protected characteristics and consider taking steps to meet their particular needs. In the EHRC’s analysis, by making financial decisions that are compliant with the PSED the UK Government is more likely to act consistently with its obligations under the UNCRPD, including Article 28.
2. The EHRC is the regulator of the PSED. Using our statutory powers[[5]](#footnote-5) we conducted a formal assessment of the extent to which a Spending Review conducting by the UK Government in 2010[[6]](#footnote-6) complied with the requirements of the former equality duties for race, gender and disability.[[7]](#footnote-7) While we found that a number of the Spending Review decisions were fully in accord with the requirements of these equality duties, in other cases our analysis identified weaknesses in the decision making process and in compliance with the duties. One example was the 20% reduction in the Bus Service Operators Grant, where the potential impact on people with disabilities was not included in the advice provided to HM Treasury ministers. Similarly, there was no evidence of any equality screening of the impact of the proposed household cap on welfare benefits. [[8]](#footnote-8)
3. To improve compliance with the PSED, the EHRC recommended ongoing monitoring to understand the cumulative impact of future Spending Reviews and budgets on individuals with protected characteristics, including disabled people. When potential adverse impact is identified, consideration should be given at the early stages to mitigation and to the effectiveness of proposed mitigating actions. In relation to disabled people, the EHRC considers there is a strong case for cumulative impact assessments as disabled people are more likely to be in receipt of a combination of benefits. For example, our research shows that tax and social security reforms have disproportionate impacts on families containing at least one disabled person, particularly a disabled child.[[9]](#footnote-9)
4. The UK Government has suggested that modelling difficulties prevent it from undertaking an assessment of cumulative impact that would be sufficiently robust.[[10]](#footnote-10) However, the UK Parliament’s Social Security Advisory Committee emphasises the importance of the UK Government assessing the cumulative impact of tax and spending decisions on disabled people, and proposes options for building on analyses which have already been undertaken.[[11]](#footnote-11) An EHRC funded study by Landman Economics and NIESR has found that assessments which look at cumulative impacts on individuals who share a protected characteristic are both feasible and practicable.[[12]](#footnote-12)
5. The EHRC’s follow-up report on the impact of the decisions in the 2010 Spending Review found HM Treasury’s Equalities Analysis report for the 2013 Spending Round[[13]](#footnote-13) to be light on detail, and suggested further improvements in relation to data collection.[[14]](#footnote-14) These included recommending that HM Treasury identify key areas of spending or tax where an impact on people with protected characteristics is considered likely, but where equality data is inadequate. This would allow gaps in data to be filled.[[15]](#footnote-15) Following the General Election in May 2015, the EHRC wrote to the new Chief Secretary to HM Treasury highlighting our recommendations and seeking their full adoption.

### Enforcement of the PSED by the Courts of England and Wales

1. The courts have an important role in interpreting the meaning of the ‘due regard’ duty under the PSED. As the legal framework of the PSED is very similar to the requirements of the former equality duties for race, disability and gender, earlier court decisions still provide helpful clarification for public authorities on the principles for complying with the PSED.[[16]](#footnote-16) These principles emphasise that there must be genuine and timely consideration, based on sufficient information of potential impacts on individuals sharing protected characteristics, and that decisions must be kept under review.
2. A recent court case has confirmed these principles in relation to the new duty. In December 2012, the UK Government decided to close the Independent Living Fund (ILF), which provides financial support to disabled people so they can live actively in their communities. The Court of Appeal of England and Wales overturned this decision, on the grounds that that the UK Government had not complied with the PSED. It had failed to ensure that the duty was fulfilled by the decision maker personally – in this case, the Secretary of State for Work and Pensions – taking into account all the relevant evidence. The court also confirmed that the UK’s obligations under UNCRPD, in particular Article 19, ought to inform the scope of the PSED with respect to disabled people.[[17]](#footnote-17)
3. In March 2014, the UK Government again decided to close the ILF. This decision was found to be lawful by the High Court, as “[t]he Minister had sufficient information to enable him to discharge the PSED and he went about the exercise with the requisite thoroughness, conscientiousness and care.”[[18]](#footnote-18) Although the decision did not ultimately support the Article 19 rights of disabled people, the court found that the Secretary of State had given “focussed regard to the potentially very grave impact upon individuals in this specific group of disabled persons, within the context of a consideration of the statutory requirements for disabled people as a whole.”[[19]](#footnote-19)
4. In another 2014 case, however, the High Court rejected the contention that the decision to adopt a 20 metre criterion to receive the higher rate of mobility allowance under the new Personal Independence Payments scheme (see below) was unlawful.[[20]](#footnote-20) The Secretary of State had complied with the PSED, since he had in mind the impact of the proposals and their effect on disabled people when he took the decision.

## Impacts of Social Security Reform on Disabled People

### Context

1. 24% of disabled people were living in poverty in 2012/13 compared with 18% of those who were not disabled.[[21]](#footnote-21) The Welfare Reform Act 2012 introduced reforms to the social security system in England, Scotland and Wales, which were implemented at the same time as reductions in local government budgets for adult social care. Local authorities’ total spending on adult social care fell 8% in real terms between 2010-11 and 2012-13 and is projected to continue falling.[[22]](#footnote-22)

### Transition from Disability Living Allowance to Personal Independence Payments

1. The Welfare Reform Act 2012 introduced Personal Independence Payments (PIP), which are replacing Disability Living Allowance (DLA). The policy aim of PIP is “to provide support for disabled people with the greatest needs and who face the greatest challenges to remaining independent and participating in society.”[[23]](#footnote-23) It was intended that PIP would “result in a 20% reduction in caseload and expenditure once fully implemented by 2015-16.”[[24]](#footnote-24) The object was to ensure that “financial support was targeted on those with the greatest need and to make the benefit affordable in the longer term.”[[25]](#footnote-25)
2. The proposed transition from the DLA to PIP is likely to result in a loss of income for many disabled people. Figures from the Department for Work and Pensions (DWP) estimate that around 3 million people will receive PIP by May 2018 – around 600,000 fewer than those who would have received DLA.[[26]](#footnote-26)
3. An initial assessment commissioned by the DWP also found that people with mental health problems had difficulties engaging with the PIP application process and that the quality of reports from health assessors was variable.[[27]](#footnote-27)

1. The National Audit Office has highlighted backlogs in PIP assessment and claims processes, with the potential to cause claimants distress and financial difficulties.[[28]](#footnote-28) The House of Commons Work and Pensions Committee recommends that, to address the long delays on decisions for PIP applications, DWP "closely examine[s] its own systems and that it work[s] with the contracted providers to resolve the current dire situation", and that “the DWP set out a plan for informing claimants about the delays they are likely to face."[[29]](#footnote-29) A recent High Court judgment held that the delay in determining PIP claims was both “unacceptable and unlawful” due to unreasonable, systemic failings.[[30]](#footnote-30) The court noted that although the claimants in the case now have PIP, there are “still thousands of claimants waiting for determination of their claims” and back payments do not make up for the stress and difficulty of such a wait. DWP has noted that waiting times more than halved in the last six months of 2014, from 30 to 14 weeks. DWP also notes that over the course of 2014 a number of measures were introduced to improve PIP waiting times, including doubling the number of people working on PIP and quadrupling the number of health professionals involved in assessments.[[31]](#footnote-31)
2. The proportionality of this policy is difficult to measure because “available statistics on PIP awards are still very limited.”[[32]](#footnote-32) An independent review has called for a "rigorous, quantitative and qualitative evaluation strategy with a scheduled plan for publication of findings”,[[33]](#footnote-33) holding that this is necessary in order to “build confidence that award outcomes are fair and consistent".[[34]](#footnote-34) The EHRC shares this analysis and considers further impact assessment will be needed to demonstrate the policy is proportionate and in line with the UK’s UNCRPD obligations progressively to realise rights to independent living and social protection under Articles 19 and 28 respectively.

### Under-Occupation Deduction to Housing Benefit

1. Changes to housing benefit under the Welfare Reform Act 2012 include reducing the amount paid to claimants living in social housing who are deemed to have “surplus” bedrooms. The UK Government’s intentions were to tackle the budget deficit and change the behaviour of social housing tenants, principally by providing an economic incentive for them “to move to smaller properties where their accommodation is considered larger than necessary”.[[35]](#footnote-35) Two-thirds of housing benefit claimants affected by this measure are disabled, many of whom require an additional bedroom for a personal assistant or carer to stay overnight or to store equipment. [[36]](#footnote-36)
2. DWP has stated that “Discretionary Housing Payments (DHPs) may be awarded when a [local authority] considers that a claimant requires further financial assistance towards housing costs and is in receipt of a social security benefit which qualifies them for a DHP payment.[[37]](#footnote-37) The under-occupation deduction is one of the circumstances for which a DHP may be awarded. However, local authorities apply different eligibility rules and some have capped the total amount available for DHP. Currently, the funding for DHP is sufficient to cover around one in seven cases.[[38]](#footnote-38) The Scottish Government has been able to mitigate the impact of the under-occupation deduction by providing local authorities with additional discretionary housing payment (DHP) funding.[[39]](#footnote-39)
3. DHPs are not intended to be a permanent solution; as noted by the House of Commons Work and Pensions Committee, “[t]hey are intended to address periods of temporary need while tenants make longer term arrangements to deal with the impact of the reforms.” [[40]](#footnote-40)  In practice, the majority of tenants dispute that they have more accommodation than they need, and only 6% of affected tenants moved in the first six months following the introduction of the policy.[[41]](#footnote-41) Around half of the affected households have rent arrears as a result of this reform, with evidence demonstrating “considerable hardship as their rent payments reduce the available income needed to meet essential living costs.”[[42]](#footnote-42)

### Work Capability Assessment

1. Employment and Support Allowance (ESA) is the main benefit for people who are unable to work because of illness or disability.[[43]](#footnote-43) The Work Capability Assessment is the test used by the DWP to determine whether claimants should be placed in the ‘support group’ for ESA, or the group required to perform ‘work related activity’. There is some evidence that disabled people are being assessed incorrectly as being fit for work and this may be a particular problem for those with mental health problems.[[44]](#footnote-44) According to figures provided by DWP, around 40% of work capability assessments are challenged, and of these challenges, between 33 – 47% result in decisions being overturned.[[45]](#footnote-45)

### Independent Living Fund

1. The ILF supports around 17,000 disabled people in the UK by providing financial support, above that available from local authorities. It enables disabled people to live independently in their homes and to participate in education, training and employment. The decision to close the ILF takes effect from June 2015.[[46]](#footnote-46) In the EHRC’s analysis, this decision could force some disabled people into residential care, as local authorities may no longer be able to cover costs of supporting them to live independently. In addition, some people who previously received ILF support to participate in education, training and employment may no longer receive similar support from local authorities.
2. **Whether the design and delivery of health and social care services in England are consistent with rights to the highest attainable standard of physical and mental health under Article 25 and supports rights under Article 19**

Impact of Reductions in Resources for Adult Social Care

1. The provision of adequate social care in the home and in the community can support the right to independent living under Article 19 CRPD. Over the last period, local authorities have targeted their resources towards providing services for disabled people with support needs that are ‘substantial’ or ‘critical’. Some individuals and groups, including older disabled people, people with mild to moderate learning difficulties and people with mental health impairments, are less likely to meet these high thresholds.[[47]](#footnote-47) Research shows there are hundreds of thousands fewer people receiving lower or no local authority brokered care as a result of budget reductions, with older people particularly affected; and suggests the size of the reductions were without 'almost certainly without precedent in the history of adult social care'. [[48]](#footnote-48) Recent research[[49]](#footnote-49) indicates that resources for social care for older people in England remain severely constrained. There has been a 23% reduction in expenditure on community services for older people such as home and day care. There has also been a reduction in other services, such as spending on meals, which reduced by 46% between 2009/10 and 2012/13. The numbers of older people receiving support has also fallen, at a time when there is growing demand for social care from those aged 65 and over.
2. The European Court of Human Rights (ECtHR) has recognised that states have a wide margin of appreciation in cases involving social, economic and health care policy, especially when deciding how to allocate scarce resources. For example, in *McDonald v UK*, [[50]](#footnote-50) it was held by the European Court of Human Rights (ECtHR) that a local authority had breached Article 8 of the European Convention on Human Rights (ECHR) when it withdrew night-time toileting assistance for an older disabled woman, whose assessed needs included this assistance, forcing her instead to use incontinence pads. However, once the local authority had reviewed the claimant’s care needs and concluded that the use of the pads met her toileting needs, the interference with her Article 8 rights became justified.

Home Care for Older People

1. A strong focus of the EHRC’s recent work has been on older people’s human rights in the context of social care, particularly home care. In 2011, the EHRC published the report of our formal inquiry into home care for older people in England.[[51]](#footnote-51) We found that inadequacies in home care had a severe impact on some older people and could lead to breaches of their human rights. There were examples of older people receiving inadequate support with food and drink; several instances of intentional physical abuse; care workers being allocated insufficient time for visits, leading to neglect; a lack of respect for personal privacy when intimate tasks were carried out; and service users having insufficient control over the timing of care visits.
2. Two years on, the EHRC completed a review of the implementation of the recommendations made in this inquiry. We found that the majority of local authorities had taken some action to address our recommendations. We also found that their approach to commissioning home care may be increasing risks to the human rights of older people. [[52]](#footnote-52) For example, the contract rates paid by some local authorities to care providers did not always appear to cover the actual costs of delivering care. Low pay and poor working conditions may lead to a high turnover of care workers and increase the risks to the human rights of older people.
3. A central recommendation of our inquiry was to extend the scope of the Human Rights Act 1998 to the provision of publicly funded or publicly arranged home care that is delivered by independent organisations. This recommendation has now been implemented through the Care Act 2014.[[53]](#footnote-53)
4. The findings of the EHRC’s inquiry into older people and human right in home care informed our Human Rights Review 2012,[[54]](#footnote-54) which found that ‘Health and social care commissioners and service providers do not always understand their human rights obligations and the regulator’s approach is not always effective in identifying and preventing human rights abuses.’ We also highlighted how some service uses, particularly older or disabled people, may experience poor treatment in breach of their rights under Article 8 and Article 3 of the European Convention on Human Rights (rights which are reflected in UNCRPD, for example in Articles 15, 16 and 17). The Review also showed that many authorities had a poor understanding of their positive human rights obligations and that frontline staff may lack awareness of the link between the care they provide and human rights.

## Cruel, Inhuman or Degrading Treatment in Healthcare Settings

1. The UK Government’s “Transforming Care” initiative responded to failings, at all levels, into the treatment of patients with learning disabilities in residential settings and their vulnerability to violations of their right to freedom from cruel, inhuman or degrading treatment or punishment under Article 15 UNCRPD.[[55]](#footnote-55) Also at risk was their right to the highest attainable standard of health under Article 25. Implementation of the initiative is monitored by the Department of Health and includes a commitment to rapidly reduce hospital placements for people with learning disabilities and/or autism by 1 June 2014, if those people would be better off with community based support. [[56]](#footnote-56) As the House of Commons Public Accounts Committee (PAC) notes, “the Government failed to meet its pledge and the number of patients in hospital has been broadly stable over the last year (3,250 in September 2013 and 3,230 in September 2014).”[[57]](#footnote-57)
2. NHS England has since made a commitment “to a closure programme for large NHS mental health hospitals, along with a transition plan for the people with learning disabilities within these hospitals, from 2016–17.”[[58]](#footnote-58) The PAC emphasised that this closure programme must be “matched by the necessary growth in high-quality community services.” It also emphasised the “fundamental failing” represented by the lack of “an overall dataset on the population with learning disabilities and challenging behaviour”.[[59]](#footnote-59)

### Unequal Access to Healthcare

1. Disabled people, particularly those with a learning disability or mental health condition, are more likely to have significant health risks, to experience health inequalities and major health problems and are likely to die younger than other people.[[60]](#footnote-60) They are also less likely to receive health checks, screening tests and treatment. Across the UK, there is evidence of low levels of disability awareness among healthcare staff; failure to investigate or treat physical ill health because it is viewed as part of a mental health condition or learning disability[[61]](#footnote-61) and a lack of user friendly written information in accessible formats.[[62]](#footnote-62)
2. In response to findings by the Parliamentary and Health Service Ombudsman and the Local Government Ombudsman for England and Wales of systemic problems in the care for people with learning disabilities,[[63]](#footnote-63) the UK Government has noted that “there is still more that needs to be done to achieve the changes to the culture of care and compassion that we all want to see for people with learning disabilities.”[[64]](#footnote-64) The UK Government took further action through the Care Act 2014, which places a new duty on local authorities to appoint an independent advocate for someone who has substantial difficulty in being involved in decisions about their care and support, if there is no appropriate individual to support them.

### Mental Health Safeguards

1. In England and Wales many of the vital safeguards in the Mental Health Act 2007 have been found not to be working effectively.[[65]](#footnote-65) Issues of concern include difficulties in accessing treatment without being subject to compulsory detention, which is compounded by the unavailability of hospital beds.
2. The CQC has emphasised a number of issues in relation to Independent Mental Health Advocates (IMHAs).[[66]](#footnote-66) Under amendments made to the Mental Health Act in 2009, everyone detained under that Act is entitled to receive support from IMHAs to help them understand their rights, their treatment, and the reasons for that treatment. The CQC’s monitoring indicates that only a small proportion of local authorities had undertaken a needs assessment to inform their commissioning of IMHAs, even though this is a basic requirement of good commissioning practice.[[67]](#footnote-67) The CQC also raised issues in relation to the funding of IMHA services, and lack of access to information about IMHA services on wards, both of which can have serious implications for access to these services.[[68]](#footnote-68)

## Health Care for Adults with Mental Health Problems

1. The Health and Social Care Act 2012 included the principle that mental health must be given equal priority to physical health: so-called 'parity of esteem'..[[69]](#footnote-69) In 2015, an inquiry into parity of esteem by the All Party Parliamentary Group (APPG) on Mental Health found that, although progress has been made in some areas, there is still a long way to go before parity is achieved.[[70]](#footnote-70) The APPG called for:

* UK Government to introduce an objective setting out a quantified national reduction in premature mortality among people with mental health problems;
* access to safe and speedy access to quality crisis care 24 hours a day, 7 days a week;
* mental health to be a public health priority; and
* a review to be undertaken into i) how the Government holds NHS England to account in meeting its commitment to parity of esteem as set out in the NHS Mandate; and ii) how NHS England holds Clinical Commissioning Groups (CCGs) to account in meeting their commitment to parity of esteem as set out in the NHS Mandate.

1. In 2014, the Department of Health and NHS England acknowledged that there was a 'large treatment gap, with most people with mental health problems receiving no treatment and with severe funding restrictions compared with physical health services'.[[71]](#footnote-71) Their policy paper announced an additional £33 million allocation for 2014/15 to improve services for people in mental health crisis, and to boost early intervention services, and a further £80 million for 2015/16 to set access and waiting time standards.

### Access to Care in a Mental Health Crisis

1. A range of evidence highlights problems in access to care during a mental health crisis.[[72]](#footnote-72) Bed availability in England decreased by 10% in the four years between December 2010 and December 2014: from 23,740 to 21,446.[[73]](#footnote-73) Yet the number of formal detentions alone increased by 14% between 2009/10 and 2013/14: from 46,600 to 53,176.[[74]](#footnote-74) Increasing numbers of patients are being detained far from home.[[75]](#footnote-75) The House of Commons Health Committee noted that pressure on beds was leading to patients being formally detained in order to secure a bed.[[76]](#footnote-76)
2. Increasing suicide rates also suggest problems with access to mental health care in crises.[[77]](#footnote-77) 6,233 suicides of people aged 15 and over were registered in the UK in 2013. This represented a 4% increase in suicides in comparison with 2012. The UK suicide rate was 11.9 deaths per 100,000 population in 2013, with the male suicide rate the highest since 2001.[[78]](#footnote-78)
3. The House of Commons Home Affairs Committee (HAC) recently highlighted the “extent to which frontline [police] officers are increasingly spending their time helping people with mental health problems.”[[79]](#footnote-79) Numbers of people detained in police cells under s136 of the Mental Health Act 1983 are falling; 9,000 people were detained in police cells in 2011-12, and 6,028 were detained in 2013-14.[[80]](#footnote-80) Nevertheless, considerable concern has been expressed about their use for people who have committed no crime but require a mental health assessment or treatment.[[81]](#footnote-81)
4. The HAC emphasised that further improvements could be made in how public authorities deal with people with mental health problems, in particular by improving collaboration between police and health services and providing training for police officers in identifying mental illness, de-escalation techniques and avoiding disproportionate use of restraint.[[82]](#footnote-82) In this regard, the EHRC welcomes the Department of Health’s review and recommendations on how to avoid the use of police cells as places of safety,[[83]](#footnote-83) as well as the joint commitment made in the Mental Health Crisis Care Concordat to ensure that sufficient health-based places of safety are available: it sets a target of a decrease of at least 50% in the use of police cells as places of safety between 2011/12 and 2014/15.[[84]](#footnote-84) To achieve this target, it is essential that the UK Government continues its financial commitment to alternative facilities. Through a new Police and Criminal Justice Bill, the UK Government is reforming legislation in relation to the detention of people under sections 135 and 136 of the Mental Health Act 1983 to ensure better outcomes for those experiencing a mental health crisis.[[85]](#footnote-85)

### Also relevant to this issue is the EHRC’s inquiry into non-natural deaths in detention of adults with mental health conditions, which is discussed below.

### Variation in the Availability and Quality of Services

1. The mental health care available varies by locality. For instance, the proportion of patients in England who are referred to Improving Access to Psychological Therapies (IAPT) programmes and who start treatment within 28 days varied 3-96% in 2013-14, depending on the Clinical Commissioning Group (CCG) concerned.[[86]](#footnote-86) 11% of patients waited for over 90 days. According to FOI data, some waited over a year.[[87]](#footnote-87)
2. The variability of care also applies to in-patient wards. In England, some in-patient services have been described as “frightening, un-therapeutic and fail[ing] to demonstrate the compassion which should be expected when caring for very vulnerable people” [[88]](#footnote-88) Inspection reports have included findings about the inappropriate use of blanket rules, inadequate regard for patient privacy, and controlling practices. [[89]](#footnote-89)
3. The NGO MIND has identified huge variations in the use of physical restraint in hospitals: over one year, one trust reported 38 incidents while another reported over 3,000.[[90]](#footnote-90) There were nearly 1,000 incidents of physical injury following restraint, in addition to potential psychological harm. CQC's Mental Health Act Monitoring Report for 2012-13 repeated earlier criticisms of restraint and called for cultures that support therapeutic practices.[[91]](#footnote-91) Since then, UK Government policy papers have set out the need for a reduction in the use of restraint and an end to face-down restraint.[[92]](#footnote-92) The recording of data on restraint incidents is, however, incomplete, with only 46 out of 67 mental health organisations submitting returns in 2013/14[[93]](#footnote-93): without this, it is impossible to monitor practice, either locally or nationally.[[94]](#footnote-94)

**Non-Natural Deaths in Detention of Adults with Mental Health Conditions**

1. Between 2010 and 2013, there were between 161 and 173 non-natural deaths across the three detention estates each year, the vast majority of these related to people detained in prisons and hospitals.[[95]](#footnote-95)
2. In 2014, the EHRC conducted an inquiry into the reduction of ‘non-natural’ deaths of adults with mental health conditions detained in prisons, police cells and hospitals’ which found a number of shortcomings in the implementation of the UK’s obligations to protect individuals in state detention whose lives are at risk, whether from the acts of others or from suicide.[[96]](#footnote-96) These failures included inadequate risk assessments, [[97]](#footnote-97) lack of beds in psychiatric hospitals leading to a failure to provide timely and appropriate mental health treatment,[[98]](#footnote-98) inconsistent provision of mental health care in prisons, [[99]](#footnote-99) inadequate involvement of families in treatment of prisoners, and the use of segregation for prisoners with mental health conditions.[[100]](#footnote-100)
3. The EHRC found that it was often not possible to access reports of investigations into non-natural deaths of patients detained in hospital, and raised concerns about the quality of initial investigations by hospitals in the absence of an independent body tasked with carrying out these investigations. [[101]](#footnote-101) In this regard, the duty of candour set out in regulations,[[102]](#footnote-102) which requires care providers to act transparently, has the potential for driving significant improvement.
4. The shortcomings in the care of detained individuals with mental health conditions suggest that the UK Government is not fulfilling its obligation to promote the highest attainable standard of health under Article 25 UNCRPD. As the non-fulfilment of this right may result in suicide in some cases, it may also be breaching its obligations to protect the right to life of these individuals under Article 10 UNCRPD. The EHRC is expecting a response to its recommendations from UK Government shortly.
5. **The impact of reforms affecting access to civil law justice in England and Wales on disabled people’s right to effective access to justice under Article 13 and the realisation of other rights under UNCRPD**
6. The UK Government has introduced a number of changes that affect access to civil law justice in England and Wales. The rationale for most of these reforms is the need to significantly reduce public spending.[[103]](#footnote-103) Evidence suggests that many of the changes have had an adverse impact on disabled people, in particular:

Reforms to legal aid under the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012, including:

* Restrictions to the scope of civil legal aid;
* The introduction of a mandatory telephone gateway for certain cases; and
* An exceptional case funding scheme, which evidence suggests is not operating as intended;
* Reforms to Judicial Review; and
* Fees for Employment Tribunals.

1. The EHRC considers these changes raise issues for the protection and promotion of disabled people’s substantive rights under UNCRPD; and undermine access to redress in relation to these rights.
2. The context in which these changes have been introduced is also relevant for disabled people. Budget reductions continue to have an impact on the provision of legal advice by solicitors’ firms and non-governmental organisations. Many non-governmental advice centres are heavily used by disabled people; for example, 37% of citizens advice bureaux clients are disabled or have long term health problems.[[104]](#footnote-104) Of 338 citizens advice bureaux, only 21 now offer specialist civil legal aid advice, compared to 200 five years ago.[[105]](#footnote-105). Nine law centres closed in the first year of implementation of the LASPO Act in April 2013.[[106]](#footnote-106) Similarly, Shelter, a national housing advice centre, had to close nine of its advice centres a result of £3 million cut in its legal aid funding.[[107]](#footnote-107)

**The Impact of the LASPO Reforms on Disabled people**

Restricting the Scope of Legal Aid

1. The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 narrowed the scope of civil legal aid in England and Wales. These restrictions took effect in April 2013. Excluded areas include housing and debt cases except where the home is at risk; and welfare benefits cases apart from appeals to the Upper Tribunal on points of law. Employment cases have also been removed from scope, except those involving discrimination. Similarly, education cases are now excluded other than those involving discrimination or special educational needs. The majority of clinical negligence cases are also excluded.
2. Civil legal aid is generally available in two forms: initial advice and assistance (Legal Help) and representation in court (Civil Representation). The number of cases for both types of legal aid dropped significantly in the year following the introduction of the LASPO Act (Legal Help cases fell from 782,000 in 2012-13 to 381,000 in 2013-14 and Civil Representation cases fell from 144,000 to 116,000).[[108]](#footnote-108)
3. Most **housing** cases have now been excluded from civil legal aid. There are some limited exceptions, including cases involving housing disrepair where there is a risk of serious harm, or the risk of homelessness. There is evidence that these changes have had a disproportionate impact on disabled people. For example the UK Government’s Equality Impact Assessment for the LASPO reforms noted those who are ill or disabled make up 29% of those with affected housing cases compared to 19% of the total population.[[109]](#footnote-109) Removing most housing disrepair cases from the scope of legal aid is likely to have an impact on disabled tenants’ rights to an adequate standard of housing under Article 28 UNCRPD.
4. Most cases concerning **welfare benefits** payments now fall outside the scope of legal aid. Although an exception may be made for appeals to the Upper Tribunal on a point of law, only 145 cases were funded by legal aid in 20113/14, compared to over 88,000 welfare benefits cases in the year before the LASPO reforms took effect.[[110]](#footnote-110) Evidence suggests that disabled people are over-represented among those seeking advice on welfare benefits entitlements.[[111]](#footnote-111) The UK Government’s Equality Impact Assessment on the LASPO reforms accepted the potential adverse impact on disabled people of removing legal aid for most welfare benefits cases. It noted that barriers to challenging welfare benefits decisions could lead to social exclusion.[[112]](#footnote-112)
5. Recent tribunal statistics show a marked reduction in social security appeals since the introduction of the LASPO reforms.[[113]](#footnote-113) Between January and March 2013, the Social Security and Child Support Tribunal received around 155,600 appeals - of which cases relating to Employment Support Allowance accounted for 70% and Disability Living Allowance accounted for 12%.[[114]](#footnote-114) Over the same period in 2014, the number of appeals dropped to around 32,500. This may be partly explained by the introduction, from October 2013, of a ‘mandatory reconsideration’ stage before an appeal can be lodged. A recent survey has found that, in the assessment of specialist advisers, mandatory reconsideration is failing to deliver the right outcomes as an alternative to the appeals process, especially in ESA cases. [[115]](#footnote-115)
6. Restricting disabled persons’ access to advice on their entitlement to welfare benefits may therefore have an adverse impact on their ability to realise rights to an adequate standard of social protection under Article 28 UNCRPD, together with rights to effective access to justice under Article 13.
7. Cases involving **debt** are within the scope of legal aid only if a person is at immediate risk of losing their home. The UK Government’s Equality Impact Assessment on the LASPO reforms indicated that 27% of debt clients are ill or disabled compared with 19% of the population as a whole. The assessment also drew attention to potential adverse impacts on people with mental health conditions of restricting legal aid for debt problems.
8. Initial legal advice on debt must now be obtained via the mandatory telephone advice gateway, discussed below. In its first year of operation, debt cases handled by the telephone gateway were about 90% fewer than anticipated by the UK Government (2,301 cases compared to an estimate of 20,811).[[116]](#footnote-116)
9. Restricting disabled persons’ access to advice on debt problems may therefore have an adverse impact on the realisation of their rights to effective access to justice under Article 13. The restriction may also engage rights under Article 12(5) relating to control of one’s own financial affairs.
10. Although **discrimination** cases (including disability discrimination) are still eligible for public funding, the exclusion of legal aid for employment cases could act as a barrier for victims of workplace discrimination, who often need expert advice to understand that their employment problems engage anti-discrimination law.[[117]](#footnote-117) Another potential barrier is the introduction of fees for Employment Tribunal claims, discussed below. It should be noted that discrimination is also an area for which initial legal advice must now be obtained via the telephone advice gateway.
11. The majority of **community care** clients (68%) are disabled.[[118]](#footnote-118) Although community careremains within the scope of legal aid, the low take-up may indicate an adverse effect on the enjoyment of rights under Articles 25, 26 and 28 UNCRPD, read with Article 13 (access to justice). One NGO estimates a 40% shortfall in take-up, compared with predictions; in its analysis, this is caused by a shortage of specialist legal aid providers and low public awareness of legal aid still being available for community care.[[119]](#footnote-119)
12. The great majority of **clinical negligence** cases are now excluded from legal aid.[[120]](#footnote-120) In its Equality Impact Assessment for the LASPO reforms, the UK Government acknowledged concerns that clinical negligence claimants were more likely to be disabled or otherwise vulnerable and that the absence of redress could compound their marginalised position, potentially undermining their quality of life.
13. The only **education** cases that remain within the scope of legal aid are those involving special educational needs. As with discrimination and debt cases, initial legal advice on special educational needs must be obtained through the telephone advice gateway, discussed below. In its first year of operation, 45% fewer cases in this category were started, compared to official predictions.[[121]](#footnote-121) The shortage of specialist providers may contribute, in turn, to a lack of public awareness of legal aid being available for special educational needs.[[122]](#footnote-122)

Mandatory Telephone Advice Gateway

1. Using powers under LASPO, the UK Government has introduced a mandatory telephone advice gateway in England and Wales for cases involving discrimination, debt and special education needs.[[123]](#footnote-123) The gateway is now effectively the only route by which legal aid can be accessed for these areas of law. The UK Government has given assurances that reasonable adjustments will be made for people with disabilities and those with urgent cases for whom telephone advice is unsuitable.[[124]](#footnote-124)
2. In December 2014 the Ministry of Justice (MoJ) released research commissioned to evaluate the accessibility and effectiveness of the mandatory telephone advice gateway during its first year of operation.[[125]](#footnote-125) The research identified:

* significantly lower usage of the gateway service than anticipated, including for advice on discrimination matters;[[126]](#footnote-126)
* a commonly held perception that the service was not well publicised;
* evidence of the service not accurately identifying people who should be diverted to face-to-face advice because of communication difficulties, mental health or mental capacity issues, or the complexity of their case; and
* some evidence of the service refusing requests for adjustments to facilitate contact (such as support for hearing impairments).

1. An independent review of the telephone advice gateway[[127]](#footnote-127) concluded that users found the service confusing and bureaucratic. The review also conducted a gap analysis of questions not addressed by the MoJ research. These included:

* the experiences of individuals who did not access the gateway but would have been entitled to do so; and
* an assessment of the accuracy and quality of the advice given by the telephone operator screening service.

1. The findings of the MoJ evaluation combined with those of the independent research suggest that the introduction of the mandatory telephone advice gateway may have an adverse impact on disabled people’s access to justice rights under Article 13 UNCRPD.

Exceptional Case Funding (ECF) Scheme

1. The Exceptional Case Funding (ECF) scheme was designed to allow funding for areas of law normally excluded from legal aid, where a failure to provide funding would be, or would result in, a breach of the individual’s human rights under the European Convention on Human Rights (ECHR) or rights under European law. The EHRC has suggested that the scheme is still not functioning as intended, both because of its demanding application process and the strict interpretation of its eligibility criteria.[[128]](#footnote-128)
2. UK Government predictions of between 5,000 and 7,000 ECF applications per year have not been borne out. In 2013/14, 1,520 ECF applications were made; 69 of these were granted, of which only 16 were for non-inquest cases.[[129]](#footnote-129) As well as low numbers of applications for some areas of law, success rates are low, for example, between July and September 2014 there were only 10 ECF applications for housing cases, of which one was successful.[[130]](#footnote-130)
3. The Joint Committee on Human Rights (JCHR) has noted that:

* the ECF application process is onerous and detailed and that solicitors are not paid for making an application (unless it is successful);
* there is no procedure for urgent cases and no exemption for people who lack capacity; and that
* it is questionable whether the vulnerable people whom the scheme is meant to assist are able to present their case to the Legal Aid Agency without assistance.[[131]](#footnote-131)

This suggests that the operation of the ECF scheme may not be consistent with the realisation of rights under Article 13 UNCRPD.

**Impact of Judicial Review Reforms**

1. Judicial review enables judges to review the lawfulness of the decisions or actions of public bodies, providing an important check on their exercise of power. This procedure may be used to challenge administrative decisions relating to rights protected by UNCRPD, including rights to education, housing, health care and social protection. It is also the mechanism most commonly used to challenge compliance with the Public Sector Equality Duty (PSED)[[132]](#footnote-132) and has been used to subject the operation of the LASPO reforms to the scrutiny of the courts.
2. The UK Government has introduced significant reforms to judicial review through the Criminal Justice and Courts Act 2015 (CJCA)[[133]](#footnote-133) (applicable to England and Wales). These reforms include changes relating to the ‘permission’ stage of judicial review. When considering an application for permission, the court or tribunal may now consider (and must do so on request by the defendant) whether the outcome for the applicant would have been substantially the same had the decision been lawfully taken. In this situation, permission to bring the claim must normally be refused.[[134]](#footnote-134) Similarly, the court or tribunal must normally refuse to grant the applicant a remedy if it appears highly likely that the outcome would have been substantially the same. While the court or tribunal retains discretion to hear the claim/grant a remedy for reasons of ‘exceptional public interest’, in the EHRC’s analysis the new rules create a risk of unlawful administrative action being unchallenged or leaving the applicant without a remedy for such action.
3. Under the CJCA, the court may only make a costs capping order[[135]](#footnote-135) for public interest proceedings once leave to apply for judicial review has already been granted. In considering an application for costs capping, the court must take into account factors listed in the CJCA. This provision is most likely to have a deterrent effect on judicial review applications brought by NGOs - including DPOs - in the public interest, as the organisation would face the risk of paying the defendant’s costs of resisting permission, should permission be refused.[[136]](#footnote-136)
4. In the EHRC’s analysis, the court should retain full discretion on all these aspects of judicial review procedure. We have emphasised that judicial review is not a system of appeal, but a process by which the High Court scrutinises the lawfulness of decisions made by public bodies. It is in the public interest to ensure that administrative decisions are taken lawfully.[[137]](#footnote-137) The reforms may have an impact on the realisation of rights under Article 13.
5. New restrictions to legal aid for judicial review are restricting the ability of individuals to make judicial review applications. Since 2014, legal aid has only been available if the court grants permission for the application to go ahead (subject to discretion to grant funding where the case settles before reaching the permission stage). The regulations[[138]](#footnote-138) introducing this change were amended following a successful legal challenge[[139]](#footnote-139) and now allow funding to be granted in a wider range of situations, including where the defendant has withdrawn the original decision.[[140]](#footnote-140) However, in the EHRC’s analysis, expecting legal aid practitioners to undertake judicial review applications ‘at risk’ may well deter them from taking on important cases that would have succeeded. This could have a negative impact on access to justice and the rule of law.[[141]](#footnote-141) It could also undermine the realisation of rights to access to justice under Article 13.

**Impact of New Tribunal Fees**

1. In July 2013, the UK Government introduced fees of up to £950 for Employment Tribunal[[142]](#footnote-142) (ET) hearings, payable by the claimant. This is in addition to a fee for issuing the claim, of up to £250.[[143]](#footnote-143) All discrimination claims – including disability discrimination - are subject to the higher level of fees. The introduction of fees affects ET claims in England, Wales and Scotland. Depending on their financial circumstances, claimants may qualify for full or part remission of the fees.[[144]](#footnote-144)
2. Evidence suggests a substantial drop in ET applications for discrimination since fees were introduced. Comparing claims in quarter one of 2013/14 (before the introduction of the fees) and quarter three of 2014/15, there has been a 54% reduction in cases for disability discrimination (1801 to 818).[[145]](#footnote-145)
3. The EHRC’s analysis of the effect on access to justice of introducing ET fees, suggests a disproportionate impact on disabled people[[146]](#footnote-146) and their rights under Article 27 (prohibition of discrimination in employment) alongside Article 13 of CRPD.

June 2015

**Annex 1**

## The right of persons with disabilities to social protection - Call for submissions

The Special Rapporteur on the rights of persons with disabilities, Catalina Devandas-Aguilar, is currently preparing a study to be presented at the 70th session of the General Assembly, in October 2015, on the right of persons with disabilities to social protection.

**Specific information request:**

1. Please provide information in relation to the existence of legislation and policies concerning mainstream and/or specific social protection programmes with regard to persons with disabilities, including:

* Institutional framework in charge of its implementation;
* Legislative, administrative, judiciary and/or other measures aiming to ensure access of persons with disabilities to mainstream social protection programmes (e.g., poverty reduction, social insurance, health care, public work, housing);
* Creation of disability-specific programmes (such as disability pensions, mobility grants or others);
* Fiscal adjustments or other similar measures.

2. Please provide information on how persons with disabilities are consulted and actively involved in the design, implementation and monitoring of social protection programmes.

3. Please provide information in relation to difficulties and good practices on the design, implementation and monitoring of mainstream and/or specific social protection programmes with regard to persons with disabilities, including:

* Conditions of accessibility and the provision of reasonable accommodation;
* Consideration of the specific needs of persons with disabilities within the services and/or benefits of existing programmes;
* Difficulties experienced by persons with disabilities and their families in fulfilling requirements and/or conditions for accessing social protection programmes;
* Consideration to age, gender and race or ethnic-based differences and possible barriers;
* Conflicts between the requirements and/or benefits of existing programmes, and the exercise by persons with disabilities of rights such as the enjoyment of legal capacity, living independently and being included in the community, or work;
* Allocation of grants to personal budgets;
* Disability-sensitive training and awareness-raising for civil servants and/or external partners;
* Existence of complaint or appeal mechanisms.

4. Please provide any information or data available, disaggregated by impairment, sex, age or ethnic origin if possible, in relation to:

* Coverage of social protection programmes by persons with disabilities;
* Rates of poverty among persons with disabilities;
* Additional costs or expenses related to disability.

5. Please provide information in relation to the eligibility criteria used for accessing mainstream and/or specific social protection programmes with regard to persons with disabilities, including:Definition of disability and disability assessments used for eligibility determination;

* Consistency of the eligibility criteria among different social protection programmes;
* Use of income and/or poverty thresholds;
* Consideration of disability-related extra costs in means-tested thresholds.

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135. The system of cost capping orders has been evolved by the courts as 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. [↑](#footnote-ref-135)
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