Implementation of the International Covenant on Economic, Social and Cultural Rights in the United Kingdom of Great Britain and Northern Ireland

Parallel Report

Submission to the Committee on Economic, Social and Cultural Rights

October 2015

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FOREWORD

Just Fair is a charity set up in 2011 with the intention of advancing the case for human rights, particularly economic, social and cultural rights, in the UK. As the austerity era dawned, and conscious that the Committee on Economic, Social and Cultural Rights was due to carry out its 6th periodic review of the UK, Just Fair soon set up the 'Just Fair Consortium' with the intention of monitoring compliance with the Covenant and assisting the Committee with its State Party review.

As Chair of Just Fair I am delighted that we have been able to make this submission to the Committee. However, it falls upon me to express our deep gratitude to all those who assisted with the preparation of this submission and indeed the reports that we published in the preceding years and which form its backbone. The list of names and organisations is long and extensive, covering many different areas of society in the UK, and is testament both to the level of support we have received and the deep commitment to social justice that those on it hold dear and exemplify in their daily lives. We are enormously grateful to them all.

The authors, listed under 'acknowledgements', are all experts in their fields who worked tirelessly and with great dedication. They have produced excellent legal analysis which captures the real concerns of the people most affected by the issues under consideration whilst remaining scrupulously objective and impartial.

I also wish to thank the Just Fair's patrons and trustees for all their invaluable work in helping produce this submission. Special thanks must also go to our funders without whom it simply would not have been possible to produce a submission of such considerable breadth and detail, or which possesses such a high level of expert analysis.

Just Fair believes that the reports the Consortium has published have done much to highlight the struggles many people face in the UK and to advance its charitable purpose, namely the promotion in the UK of the rights set out in ICESCR. This has only been possible with the support of the Consortium Members, all of whom have come together to help form a movement behind economic, social and cultural rights for the benefit of all those who live in the UK. Added to this list must be our friends and colleagues in other parts of the country who run their own human rights consortiums and from whom we have learnt so much and who have made their own excellent submissions to the Committee.

Finally on behalf of Just Fair we wish to thank all of the individuals who have had the courage and the conviction to raise their concerns with us and our Consortium Members, and whose problems we hope this submission and the work of the Committee will help to alleviate.

Jamie Burton
Just Fair (Chair)

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In 2014 I was proud to write the foreword to Just Fair's landmark Report "Dignity and Opportunity for All: Securing the rights of disabled people in the austerity era". The Report achieved what successive UK Governments had failed to do; namely to examine the cumulative impact of changes to housing, welfare benefits, employment and social care on disabled people's rights. In times of wide ranging cuts to public expenditure an objective and comprehensive analysis of the State's performance under the UNCRPD and ICESCR was necessary and Just Fair provided it.

It therefore gives me great pleasure to write the Forward to this submission to the UN Committee on Economic, Social and Cultural Rights and to contribute to the Committee's review of the UK. The submission extends Just Fair's analysis to matters of food poverty, housing and healthcare and provides a similar level of in-depth and impartial analysis as was evident in the 'Dignity and Opportunity for All' Report. That Report has also been updated for inclusion into the submission and covers further changes to welfare benefits and public services announced by the new Conservative Government, elected in May 2015.

Sadly, as the submission clearly shows, the economic and social rights of disabled people have deteriorated even further than at the time of our 2014 summation. What particularly strikes me is how often it has been those with existing vulnerabilities, or who are already suffering from disadvantage, who have been worst affected by the cuts or reforms. To take just one example, those in acute need of mental health services not receiving them and on occasion being forced to live on the streets.

And yet, as I understand it, the Committee has previously said that:

'the duty of States parties to protect the vulnerable members of their societies assumes greater rather than less importance in times of severe resource constraints.'[1]

Therefore, for all these reasons, the work of the Committee is vital at this time of biting austerity. The UK's relationship with human rights is at a critical juncture. Whilst much of the political rhetoric is antithetical to domestic human rights (which are understood to include only civil and political rights), there is growing awareness and appreciation of economic and social rights. People in the UK increasingly understand and appreciate the relevance of these rights to their everyday lives. The Committee's review of the UK's performance under ICESCR will doubtless prove another important step in the advancement of economic and social rights in the UK.

Baroness Campbell of Surbiton DBE
House of Lords
Just Fair (Patron)

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[1] *General Comment No 3*

Throughout my professional life, both before and after I became a member of the House of Lords, I have written and campaigned extensively on matters of poverty and social justice. In that work I have come to appreciate the critical role that human rights can play and therefore I was very pleased to be invited to be a Patron of Just Fair and to write this foreword.

This report is submitted on behalf of the 'Just Fair Consortium', an association of 70 or so civil society groups that campaign for social justice in the UK. It has been prepared by experts in international human rights law who have worked with the Consortium's members to identify and examine their most pressing concerns and offers an independent and in-depth analysis of the UK's compliance with ICESCR.

Arguably, human rights have never been so important in the UK, at least in recent times. Major changes are underway and it remains unclear what type of society we will become. And yet despite the magnitude of these changes, little is being done properly to record and examine their implications for citizens and residents, particularly the least well off. For example, the Government will not carry out a cumulative impact assessment of its latest round of cuts to social security and has recently announced that it will stop measuring child poverty by income and will instead focus on non-income based metrics. These measures threaten to undermine the capacity of the government and others properly to evaluate and review the reforms.

Therefore it is critical that organisations like the Just Fair Consortium strive to understand and explain the human rights consequences of these changes to social security, housing, social care and other aspects of the welfare state in particular, so that those responsible for any breaches of human rights are held to account and any offending policies halted. I hope therefore that the Committee will find this submission a valuable resource when carrying out its vital work.

Baroness Lister of Burtersett
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THE JUST FAIR CONSORTIUM

Just Fair is also enormously grateful for the assistance of the Consortium Members in the preparation of this submission.

The organisations that form part of the Consortium on the 13 September 2015 are listed below.

Consortium Members

1. Article 12
2. ATD Fourth World
3. Black Environment Network
4. Amnesty International UK
5. Anti-Bedroom Tax and Benefit Justice Federation
6. Brap
7. Cambridge Ethnic Community Forum
8. Campaign for a Fairer Society
9. Centre for Economic and Social Inclusion
10. Centre for Secular Space
11. Centre for Welfare Reform
12. Child Poverty Action Group
13. Church Action on Poverty
14. Children's Rights Alliance England
15. Compass
16. Community Food Enterprise
17. Consortia of Ethnic Minority Organisations (COEMO)
18. Crisis
19. Dalit Solidarity Network
20. Design Charity
21. DIAL Peterborough
22. Disability Law Service
23. Disability Rights UK
24. Discrimination Law Association
25. Doctors of the World
26. Disabled People Against Cuts
27. Eaves

28. Employability Forum
29. English Regions Equality and Human Rights Network (EREN)
30. Equal Rights Trust
31. Equality and Diversity Forum
32. Esther Community Enterprise
33. Fareshare
34. Fatherhood Institute
35. Fawcett Society
36. Food Cycle
37. Freedom from Torture
38. Friends, Families and Travellers
39. Galop
40. High Pay Centre
41. Housing Justice
42. Howard League for Penal Reform
43. Inclusion London
44. JUST West Yorkshire
45. Kirkby Unemployment Centre
46. Law Centres Network
47. Lesbian and Gay Foundation
48. LGBT Consortium
49. Luton Foodbank
50. Mencap
51. Merseyside & Cheshire Unemployed Workers Centre Co-ordinating Committee
52. Migrants Rights Network
53. National Council for Voluntary Youth Services (NCVYS)
55. Pavement, The
56. Public and Commercial Services Union
57. Reconnect
58. Refugee Council
59. Refugee Youth
60. Refugees in Effective and Active Partnership (REAP)
61. Right to Education Project (Action Aid)
62. Race on the Agenda (ROTA)
63. Runnymede Trust

64. Save the Children
65. Southall Black Sisters
66. SWAN (Social Work Action Network)
67. Adolescent and Children's Trust, The (TACT)
68. Taxpayers Against Poverty
69. Trade Union Congress
70. Trussell Trust
71. Vegan Society
72. Unison
73. Unicef UK
74. West London Churches Homeless Concern
75. Women in Prison
76. Women's Budget Group
77. Women's Resource Centre
78. Zacchaeus 2000 Trust (Z2K)

Consortium Observers

1. Equality and Human Rights Commission
2. London School of Economics (Human Rights Futures Project)
3. British Institute of International and Comparative Law

LIST OF ABBREVIATIONS

CEDAW – Convention on the Elimination of all forms of Discrimination Against Women (1979)
CESCR – Committee on Economic, Social and Cultural Rights
CPA - Child Poverty Act (2010)
CPI - Consumer Price Index
CRC- Convention on the Rights of the Child (1989)
CRPD - Convention on the Rights of Persons with Disabilities (2007)
DCLG – Department for Communities and Local Government
DEFRA – Department for Environment, Food and Rural Affairs
DLA - Disability Living Allowance
DWP – Department for Work and Pensions
ECHR - European Convention on Human Rights (1950)
ESA – Employment Support Allowance
ESC - European Social Charter
FAO - Food and Agriculture Organisation
HMRC - HM Revenue and Customs
HRA - Human Rights Act (1998)
ICESCR - International Covenant on Economic, Social and Cultural Rights (1966)
JSA - Job Seekers Allowance
IFS - Institute for Fiscal Studies
IMF - International Monetary Fund
JCHR –Joint Committee on Human Rights
NMW - National Minimum Wage
OHCHR - Office of the High Commissioner for Human Rights
ONS – Office for National Statistics
PIP – Personal Independence Payment
RPI - Retail Price Index
PAC - Public Accounts Select Committee
SPERI - Sheffield Political Economy Research Institute
UNCRPD – UN Convention on the Rights of Persons with Disabilities

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INTRODUCTION

The Submission

This submission focuses on a selected number of areas of implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR) by the UK Government and is designed to assist the Pre-Sessional Working Group formulate its list of issues and the Committee to review the UK performance under ICESCR.

The submission brings together analysis set out by Just Fair in four thematic reports it produced in the last two years and offers a detailed account of recent policy changes and their known or potential impact on economic and social rights in the UK. The reports are:

- 'Going Hungry? The Human Right to Food in the UK';
- 'Dignity and Opportunity for All: Securing the rights of disabled people in the austerity era';
- 'Protecting the Right to Housing in England: A Context of Crisis';
- 'The Right to Health in the UK'.

All of the reports have been updated since publication and incorporated into this submission, with a section of the submission devoted to each report. Key recommendations are made at the end of each sub-section.

The Report deals with the decisions of the UK Government based in Westminster. It does not examine the exercise of functions by the devolved administrations in Scotland, Wales and Northern Ireland. This is because other consortiums and civil society organisations are making submissions to the Committee in relation to Scotland, Wales and Northern Ireland. However, much of the law and policy that bears on the enjoyment of economic and social rights throughout the UK emanates from Westminster and therefore in many instances Just Fair's analysis applies to the United Kingdom as a whole.

Methodology

The submission is made on behalf of the 'Just Fair Consortium' – a consortium of more than 70 civil society organisations that work in the UK. The Consortium focuses on the key issues affecting people such as, child, food and fuel poverty, unemployment, homelessness,

the social care crisis and changes to the social security system. It includes large and small organisations and many who work very closely with some of the least well off and vulnerable in society. A list of the Consortium Members is included with the submission.

Just Fair worked with its Consortium Members to identify and research common or particularly serious concerns that are affecting people in the UK. A particular emphasis was placed on relatively recent government policies and reforms and areas where it appeared retrogression may have occurred since the Committee's last review of the United Kingdom (5^{th}/2009).

Just Fair then examined those concerns by reference to the relevant law as set out in particular by the Committee in its General Comments and other statements made in the course of its work. It remained wholly objective and wherever possible used the Government's own data in its analysis. Using this approach Just Fair identified instances where economic and social rights are not being respected, protected or fulfilled to the extent required by international law and made appropriate recommendations accordingly.

The expert analysis included in the reports was conducted with the assistance of experts in international law and in particular in economic and social rights. All those involved in the composition of the Report are listed in the acknowledgements section.

Publication

Just Fair published its reports one at a time and worked with Consortium Members to use the reports and human rights based approaches in their advocacy.[1] These campaigns bought together activists, academics, politicians, lawyers and journalists and achieved considerable media attention and some tangible improvements. Importantly, each campaign benefitted from having the single voice of the Consortium behind it.

Structure of the submission

As stated above the submission includes sections that include the updated versions of each report. Some modifications have been made to harmonise the reports and to eliminate unnecessary repetition. Key Recommendations are listed at the end of each section or sub-section.

The 'List of Issues" section is largely derived from the four reports and sets out the important issues Just Fair believes need to be included in the PSWG's List of Issues. The List of

[1] Please note that the Right to Health report was drafted in August 2015 and was not therefore the subject of a campaign prior to the preparation of this submission.

Issues section is a stand-alone document but Just Fair strongly recommends the Committee reads all four of the reports in order to benefit from the in-depth analysis contained therein. In any event the List of Issues is cross-referenced to the substantive reports.

The "Just Fair's Findings in Context" section sets out some all-important context to the submission and identifies common features to its findings. It is designed to assist with the comprehension of the Report and the List of Issues sections. Whilst it is not professed to be a comprehensive account of the relevant socio-political background, it should equip the Committee with sufficient knowledge to better understand the Consortium's concerns and to formulate its own views as regards the State Party's performance under ICESCR.

The 'Acknowledgements' section lists the very great number of persons to whom Just Fair is grateful for their invaluable assistance in the production of this submission. The funders who have assisted Just Fair are acknowledged and thanked.

Finally, the Consortium Members section lists the organisations that form part of the Consortium on 13 September 2015.

Conclusion

Although the Just Fair Consortium has not been able to provide a comprehensive account of the Government's performance under ICESCR, this submission reflects the particular concerns of its Consortium Members. It is also the product of detailed, comprehensive and objective consideration of all the evidence. It is hoped that both PSWG and the Committee will find it useful in its sixth periodic review of the UK.

The Just Fair Consortium will of course endeavour to respond to any queries the Committee may have arising from this Report and fully intends to provide further evidence or submissions in response to the List of Issues.

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JUST FAIR'S FINDINGS IN CONTEXT

The Status of the ICESCR and other Human Rights Instruments in the UK

The UK ratified ICESCR in 1976.[1] However, the rights contained within it have not been incorporated into domestic law. Individuals cannot therefore invoke ICESCR in court proceedings.

Similarly, although the UK has signed and ratified an array of international treaties, including the Conventions on the Elimination of all forms of Discrimination Against Women (CEDAW) and Racial Discrimination (CERD), as well as the Conventions on the Rights of Persons with Disabilities (UNCPRD) and the Rights of the Child (CRC), and is a party to a number of regional human rights treaties including the European Convention on Human Rights (ECHR), the European Social Charter (ESC)[2] and the European Union's Charter of Fundamental Rights, only the ECHR has been incorporated into domestic law (by virtue of the Human Rights Act 1998).

The UK appears reluctant to be held to account for any failures to give effect to economic, social and cultural rights. It has not signed or ratified the Optional Protocol to the ICESCR, or the Revised ESC (1996)[3] or the Additional Protocol to the ESC (1995), which provides for a collective complaints mechanism. [4]

The Conservative Party promised to abolish the HRA in its 2015 election manifesto. Having won the May 2015 election it will now consult on a possible UK Bill of Rights. There is no indication that the current administration would welcome the inclusion of economic, social or cultural rights in a UK Bill of Rights.

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[1] The UK signed the Covenant in 1968 and ratified it in 1976.
[2] European Social Charter (1961), available at: http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=035&CM=8&DF=07/09/2015&CL=ENG
[3] European Social Charter (Revised) (1996), available at: http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=163&CM=8&DF=07/09/2015&CL=ENG
[4] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, (1995), available at: http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=158&CM=8&DF=07/09/2015&CL=ENG

Policy background

After the financial crash of 2007-8 successive UK governments have pursued economic policies designed to reduce the national deficit by making significant and wide ranging reductions to public spending. In particular governments have made significant cuts to social security and welfare budgets and grants to local authorities who provide many essential services.

In June 2010, the newly elected coalition government published an "emergency budget", which set out a five-year plan to reduce the deficit. The plan was to reduce Government spending by £32 billion per year by 2014/15, while supporting people into work and out of poverty.[5] £11billion of the £32 billion was to come from welfare spending. In fact by 2015 the government had made net cuts of about £17 billion p.a in social security spending.[6]

Furthermore, in addition to limiting benefit levels, and in recognition of the problems of administrative complexity that had become one of the most defining features of the UK social security system, from 2010-2015 the coalition introduced the following changes in the Welfare Reform Act 2012,[7] with the purported aims of "structural simplification" and "incentivising work":

- The introduction of "Universal Credit" which is to be paid to the unemployed and those on low incomes. Universal Credit replaces income support, income-based jobseeker's allowance, income-related employment support allowance (ESA), housing benefit, child tax credit and working tax credit.[8] Universal Credit is being introduced in stages and will not be completed until at least 2017. According to current government statements from 2016, all new benefits claimants will have to apply for Universal Credit.[9]

- The introduction of personal independent payment (PIP), which will replace disability living allowance;

[5] HM Treasury, Budget 2010, available at: http://webarchive.nationalarchives.gov.uk/20130129110402/http:/www.hm-treasury.gov.uk/d/junebudget_complete.pdf See also; PM's speech on Welfare Reform Bill, 17 February 2011: www.gov.uk/government/speeches/pms-speech-on-welfare-reform-bill; DWP. 2014. *DWP's welfare reform agenda explained – a brief introduction*: www.gov.uk/government/uploads/system/uploads/attachment_data/file/287327/dwp-reform-agenda-explained-feb-2014-1.pdf

[6] Institute for Fiscal Studies 26 May 2015

[7] Available at: http://www.legislation.gov.uk/ukpga/2012/5/contents/enacted/data.htm

[8] s.1 & 33 Welfare Reform Act 2012. Joint Committee on Human Rights, Welfare Reform Bill

[9] Child Poverty Action Group, Universal Credit Factsheet

- A reduction in housing benefit for claimants deemed to have more rooms than they need.[10] The Government describes this as ending the 'under occupancy subsidy', while opponents refer to it as the 'bedroom tax;'

- The introduction of a benefit cap that limits the maximum amount of benefits that a claimant or a couple can receive.[11] This was set at £18,600 for a single person and £26,000 for a couple;[12]

- An increase in the range of sanctions and conditions attached to the receipt of benefits; [13] and

- The abolition of Council Tax Credit.

From the beginning, weaknesses had been identified in the design and operation of the flagship prototype system of universal credit (not yet fully implemented) that could cause short-term fluctuations in household incomes; with potential to push vulnerable claimants and their families into destitution.[14]

Moreover, as the benefit changes have gradually been rolled out, concerns have continued to grow about the degree of conditionality inherent in the system: the prevailing characterisation of vulnerable claimants as inappropriately benefit dependent; and the lack of realistic opportunities for young people, lone parents and other vulnerable individuals in demographically disadvantaged areas to engage in labour markets; especially in a recessionary climate. [15]

Significantly, it has been demonstrated that in many cases, specific cost-cutting measures such as the so called 'bedroom tax', the 'benefits cap,' restriction of entitlement to housing

[10] s.69 Welfare Reform Act and paras 341-345 of the Explanatory Notes.
[11] s. 96 Welfare Reform Act; paras 470-479 of the Explanatory Notes
[12] Regulation 2, Benefit Cap (Housing Benefit) Regulations 2012/2994
[13] DWP (Department for Work and Pensions), *Universal Credit, Welfare that Works* CM 7937, The Stationery Office 2010
[14] A Tarr, D Finn, *Implementing Universal Credit: will the reforms improve the service for users?* (2012) Joseph Rowntree Foundation Report http://www.cesi.org.uk/publications/implementing-universal-credit-will-reforms-improve-service-users access 29-01-15
[15] C. Beatty and D Fothergill, *Hitting the Poorest Places Hardest :* Centre for Regional and Economic Research CRER, Sheffield Hallam University, April 2013,full Report *available at* http://www.shu.ac.uk/research/cresr/sites/shu.ac.uk/files/hitting-poorest-places-hardest_0.pdf
See also Ruth Lister, 'The Age of Responsibility: Social Policy and Citizenship in the Early 21st Century' in C Holden, M Kilkey, and G Ramia (eds.) Social Policy Review 23 (Bristol Policy Press 2012) 79; D Owen, L Gambin, C. Hasluck, C Lyonette B. Casey, *The Equality Impacts of the Current Recession, (*2009) Equality and Human Rights Research Report: http://www.equalityhumanrights.com/sites/default/files/documents/research/47_the_equality_impacts_of_the_current_recession.pdf, last accessed 29-01-15

benefit for European Economic Area ("EEA") nationals,[16] an unfettered sanctions regime; tougher functional tests for sickness-related benefits, and changes from the Independent Living Allowance (ILA) to Disability Living Allowance (DLA) have *combined* to reduce income for vulnerable individuals households reliant on multiple benefits to supplement poverty wages. [17]

Despite these growing concerns, in his first budget of this Parliament, the Chancellor of the Exchequer for the Conservative Government elected in May 2015, announced that a further £12 billion of cuts to the annual social security budget would be made by 2017/18.[18]

The Government's proposals for these savings are set out in the Welfare Reform and Work Bill 2015/16, which is currently before Parliament. They include:

- A lowering of the cap on welfare benefits to £20,000 for couples and £13,400 for single parents (£23,000 and £15,410 respectively for claimants in Greater London);
- A four year freeze on the rates of the following benefits
    - jobseeker's allowance;
    - employment support allowance;
    - housing benefit;
    - universal credit; and
    - certain categories of tax credits.
- Child tax credits will only be paid for the first two children in a family.

The Government has also promised to report on progress "towards their commitments to achieving full employment, meeting the target of three million new apprenticeships" and "on the Troubled Families Initiative". [19]

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[16] Housing Benefit (Habitual Residence) Amendment Regulations 2014, Adjudication and Operations HB Circular, A6/2014 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299052/a6-2014.pdf accessed 25-01-15

[17] *Welfare Reform, Work First Policies and Benefit Conditionality*: *Reinforcing Poverty and Social Exclusion?* : The Centre for Enterprise and Economic Development Research (CEDDR) University of Middlesex, ESRC Report, by A Daguerre and D. Etherington (Jan 2015) available at http://www.mdx.ac.uk/__data/assets/pdf_file/0015/211209/Welfare-and-benefit-conditionality-report-January-2015.pdf

[18] Wallace T (2015) 'Budget 2015 summary and highlights: Everything you need to know' *the* Telegraph, 12.07.2015, available at: http://www.telegraph.co.uk/finance/budget/11724370/key-points-summer.html

The respected and independent Institute for Fiscal Studies (IFS) has predicted that the four-year freeze will leave three million families worse off by an average of £1,000 p.a.[20] This is a prospect which comes only 18 months after the European Committee on Social Rights concluded that:

> *"the situation in United Kingdom is not in conformity with Article 12§1 of the Charter on the ground that: the minimum levels [sic] of short-term and long-term incapacity benefit is manifestly inadequate; the minimum level of state pension is manifestly inadequate; the minimum level of job seeker's allowance is manifestly inadequate."*[21]

Unfortunately, the IFS contends that the reduction in child poverty achieved at the beginning of this century is at risk of being reversed. Their most recent projection is that that by 2020/21 3 million children will be in relative poverty before housing costs, and 4.3 million after housing costs. It projects that absolute child poverty will stand at 3.5 million and 4.7 million before and after housing costs respectively, an increase of 0.7 million in relative child poverty and an increase of over a million in absolute child poverty when compared with the 2010/11 baseline.[22]

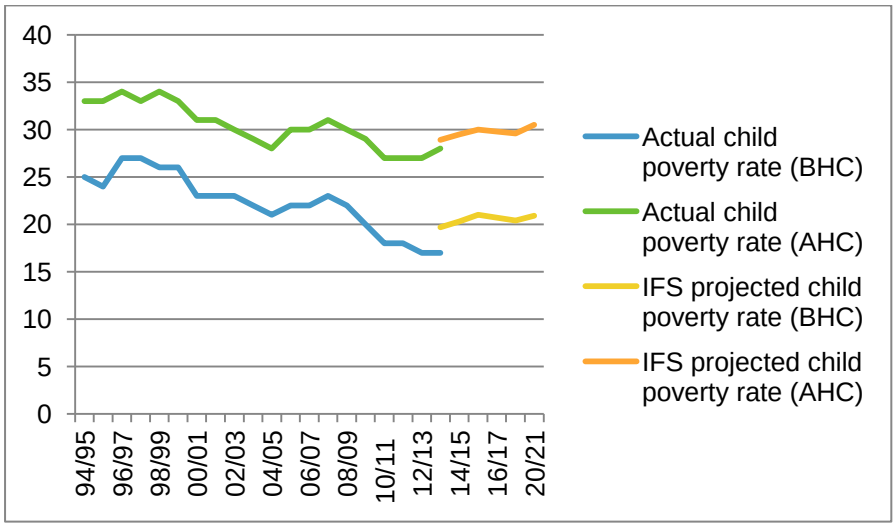

Figure 1 Projection of child poverty in the UK by 2020 (IFS, 2014)

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[19] Prime Minister's Office, the Queen's Speech 2015: Background briefing notes, pp. 13-17, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/430149/QS_lobby_pack_FINAL_NEW_2.pdf

[20] Crawford, M (2015) *The Summer budget: Taxes up, borrowing up, departmental spending up,* Institute for Fiscal Studies, available at: http://www.ifs.org.uk/publications/7852 Dathan, M (2015) 'Budget 2015: George Osborne's benefit cuts set to make 13 million families 'significantly worse off'", the Independent, 09.07.2015, available at: http://www.independent.co.uk/news/uk/politics/budget-2015-live-george-osbornes-benefit-cuts-set-to-make-13m-families-significantly-worse-off-10378031.html

[21] European Committee of Social Rights (2014), Conclusions XX-2 (2013) (Great Britain) Articles 3, 11, 12, 13 and 14 of the 1961 Charter, p 19.

[22] Browne, et al, IFS, Child and working-age poverty in Northern Ireland over the next decade: an update, available at http://www.ifs.org.uk/bns/bn144.pdf

In addition local authorities, the principal duty bearers towards disabled people and other vulnerable groups, have had their grants from central government greatly depleted which has in turn lead to reduced expenditure on front line service provision in many areas of the country. Social care had already endured many years of under-investment, yet the Association of Directors of Adult Social Services estimate that total spending cuts, including inflation and demographic pressures, amount to £4.6bn since 2011, equivalent to almost a third (31%) of the £14.6bn spent on adult social care by councils in 2010-11.[23] Furthermore, according to the Local Government Association the latest government spending review has made the medium-term outlook for health and social care extremely challenging, with a further 29% funding gap forecast over the next 5 years.[24] The Council of Europe's monitoring committee recently confirmed that:

> "*the capacity to deliver essential public services, quality health and social care and effective and adequate community services and facilities, especially to the growing number of older people will be severely restricted by the austerity measures placed upon local government*".[25]

Common themes in Just Fair's findings

It was to be expected that the 'austerity' based policies set out above would have a direct bearing on the UK's performance under the Covenant.[26]

However, neither of the governments elected since the Committee's last review of the UK conducted cumulative impact assessments of their budget cuts, even in relation to particularly vulnerable groups, such as people with disabilities, despite expert opinion that this was possible.[27] Neither did they evaluate the impact of their policies on particular rights covered by the Convention or, in several important instances at least, collect sufficient data to allow others to do so. For example, despite dramatic increases in the use of food-banks and clear evidence linking those increases with reforms of the social security and benefits system, neither the 2010-15 or May 2015 governments set out to assess levels of hunger in the UK or the reasons for it.

[23] ADASS (2015)Sixth Annual ADASS Budget Survey Report
[24] Local Government Association "Adult social care funding: 2014 state of the nation report" October 2014.
[25] Congress 'Local and regional democracy in the United Kingdom' CG(26)
[26] For a full list of reports examining the impact of the cuts see http://www2.warwick.ac.uk/fac/soc/law/research/centres/chrp/projects/spendingcuts/resources/database/reportsgroups/
[27] Ministers humiliated over cumulative impact assessment', Disability News Service, 11 July 2014.

In Just Fair's opinion, and as set out in this submission, the State Party has repeatedly failed to properly evaluate and examine the human rights implications of its acts or omissions for the people living in the UK.

Significantly, this pattern looks set to continue. The Government has declined to carry out a cumulative impact assessment of the measures set out in the Welfare Reform and Work Bill 2015/16 and recently announced that it will no longer measure child poverty using income based metrics,[28] a move that has been criticized by civil society and academics alike[29] and will undoubtedly restrict the capacity to consistently assess the UK's performance under the Covenant.

Despite these failings in data collection, the available evidence demonstrates that gaps in government regulation or operational problems are leading to rights violations (for example delays in the administration of the social security system). This evidence includes the testimony of individuals directly affected (such as pregnant former asylum seekers who have not received appropriate maternity care or people with disabilities who have been unable to access accommodation), as well as government data and that of third parties like the IFS and other credible organisations.

In addition, the State Party has failed to address in a systematic way known barriers to the fulfilment of rights, such as the low skills profile of disabled people which inhibits their right to work, whilst it has erected new barriers, like the large fees increase for individuals wishing to bring discrimination claims before the Employment Tribunal.

It is clear that credible arguments can also be raised that the UK is not discharging its general obligations under Article 2 (1) "to take steps, individually and through international assistance and co-operation … to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant", even when economic circumstances are taken into account.

For example, according to Ministry of Justice data, 647,527 welfare benefit appeals were heard between 2009 and June 2013, of which 40% were decided in favour of the claimant, [30]

[28] Department of Work and Pensions, Government to strengthen child poverty measure, 1 July 2015, Available at https://www.gov.uk/government/news/government-to-strengthen-child-poverty-measure
[29] Hills, John et al, "New child poverty measures could allow government to shirk its responsibilities", LSE British Politics and Policy Blog, 6 July 2015, Last accessed on 20 August 2015. Available at http://blogs.lse.ac.uk/politicsandpolicy/new-child-poverty-measures-could-allow-government-to-shirk-its-responsibilities/; Granham, Alison, "It Seems Children From Low-Income Families Are at the Bottom of the Government's List of Priorities", Last accessed on 29 Aug 2015, Available at http://www.huffingtonpost.co.uk/alison-garnham/child-poverty_b_7971940.html?utm_hp_ref=uk&ncid=tweetlnkushpmg00000067
[30] Ministry of Justice, *Quarterly tribunal statistics April-June 2013* (including data from 2009/10)

whilst the Independent Living Fund, which helped disabled persons with the highest levels of need to live at home, was closed in June 2015. This suggests a failure of the government to make maximum use of available resources, wasting scarce public resources on a system that is not fit for purpose and abolishing one that was universally acclaimed.

Simultaneously, in terms of revenue, the Commons Committee of Public Accounts concluded that the State "does not use the full range of sanctions at its disposal to pursue vigorously all unpaid tax, and its measure of the tax gap does not capture all the avoided tax that it should be collecting".[31]

There is also clear evidence that particularly vulnerable groups are suffering disproportionately from the cumulative effects of a number of different policies and cuts in public spending. For example it is clear that cuts in benefits levels have contributed directly to significant reductions in standards of living, including in terms of accessing adequate food, for many people in the UK, but particularly those living in low income households or with disabilities. Front-line services in homelessness prevention and support have also been cut, a contributory factor in the rising numbers of rough sleepers in England.[32] Therefore, even taking account of the the prevailing economic conditions, the UK appears to have engaged in impermissible retrogression in relation to certain rights.

These matters are set out in greater detail in the following sections of the submission along with the other findings made by Just Fair.

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[31] House of Commons Committee of Public Accounts*, HMRC Tax Collection: Annual Report & Accounts 2012–13,* 2013, p. 3, available at: http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/666/666.pdf.
[32] *Homelessness Monitor 2015* (Crisis, February 2015) at above note 41.

LIST OF ISSUES

Submission by Just Fair to the United Nations Committee on Economic, Social and Cultural Rights regarding the list of issues pertaining to the United Kingdom's examination by the Committee on Economic, Social and Cultural Rights

Article 11 - The Right to Housing in England

This submission focuses on two areas of particular concern about the right to adequate housing in England, which show that the UK government is manifestly failing to discharge its obligations under the ICESCR. These are first, homelessness (See section 1.4.1, page 53), and second, multiple concerns with the quality, affordability, and regulation of the Private Rental Sector (PRS) (See 1.4.2, page 63).

A growing number of individuals and families in England are not able to secure the adequate, safe and affordable housing that the ICESCR requires. Homelessness is rising. Housing is increasingly unaffordable, and legislative changes have weakened key safety nets for English households.

The government is obliged not to take regressive steps or strip away enjoyment of the right to housing unless it is absolutely necessary. Any backward movement must be justified according to strict criteria.

The submission records a number of worrying statistics, including that the number of individuals forced to "sleep rough' in England has increased year on year, by a total of 55% since 2010 and 14% in the last year alone (see Rough Sleeping, page 54).

Hidden homelessness, overcrowding, and the use of inadequate temporary accommodation mask the true levels of homelessness. Use of temporary 'bed and breakfast' accommodation is higher now than at any time in the past five years, and its use for families continues in breach of the government's own rules.

Further, a startling 29% of dwellings in the PRS are non-decent, meaning they do not meet basic standards of health, safety and habitability. Tenants are afraid to complain about the poor quality of properties for fear of retaliatory evictions or arbitrary rent rises (See relevant section on page 64). There is a clear link between weakened security of tenure for tenants and sub-standard accommodation in the PRS.

The issues of homelessness and multiple concerns with the quality, affordability, and regulation of the PRS illustrate serious concerns with retrogression in the enjoyment of the right to adequate housing in England. Multiple problems reveal that many people in England

currently lack the right to adequate housing, and the government is failing in its obligations to them.

Just Fair calls on the Committee to recommend that the State Party:

1. Provides information on measures taken to combat the rising number of street homeless and rough sleeping individuals and to provide support to those individuals and families who are homeless or rough sleeping.

2. Indicates the measures taken to ensure access to adequate and affordable housing in light of the acute shortage of social and affordable housing and the low quality of housing, particularly in the private rental sector.

3. Provides information on measures to strengthen security of tenure across both the social housing sector and private rental sector.[33]

4. Indicates to what extent austerity measures (or budget cuts) in the summer 2015 Westminster budget affect the enjoyment of economic, social and cultural rights, in particular by disadvantaged and marginalised groups, addressing in particular the removal of access to housing benefit for all individuals under 21.

5. Indicates the measures taken to ensure 'priority need' categories for social housing accurately reflect all real vulnerabilities and do not exclude those in real need.

6. Provides information on measures to discontinue the use of inadequate, temporary accommodation such as bed and breakfast accommodation for homeless and threatened homeless individuals and, particularly, families.

Article 11 - The Right to Food in the UK

This part of the submission focuses on issues of food accessibility, adequacy and availability relevant to the discharge of the UK obligations under ICESCR.

In recent years, one of the world's richest countries has witnessed a dramatic increase in the number of people seeking emergency food aid from food-banks and being admitted to hospital for illnesses related to malnutrition. Welfare reforms, benefit delays and the cost of living crisis have pushed an unprecedented number of people into a state of hunger, malnutrition and food insecurity.

[33] See also the key recommendations in Private Rental Sector.

The leading causes for referrals to the Trussell Trust, the biggest food banks provider, are benefit delays (30.93%); low income (20.29%); benefit changes (16.97%); debt (7.85%); and refusal of a crisis loan (4.29%).[34] There is a real concern that food banks are, in practice, becoming a substitute for an adequate social security system.[35] At the same time "[t]he rise of low wage jobs, coupled with stagnation of pay levels has meant, for the first time, the majority of people in poverty in the UK are in a working household"[36].

The UK suffers from a lack of essential, thematic monitoring and evidence gathering on food insecurity and food aid uptake.[37] In this way the UK is falling behind other OECD states, such as the United States and Canada, which both routinely collect data on food insecurity.[38]

Additionally, no rights-based food strategy currently exists in the UK. Rather than seeking to secure the right to food through a human rights-based approach, the UK Government has said that it aims to guarantee the right to food through the legislation and regulations of the welfare state.[39]

While public authorities are required to act consistently with the rights contained within the ECHR, incorporated into domestic law by way of the HRA,[40] there is no equivalent duty on public authorities to act consistently with (or respect, protect and fulfil) the right to food. To this extent, the UK is failing to provide a legal framework which is capable of ensuring that all duty-bearers comply with their obligations under the Covenant concerning the right to food. During the 2009 CESCR review of the UK, for example, the Government declared that ICESCR rights, including the right to food, constitute mere declaratory principles and programmatic objectives rather than legal obligations.[41]

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[34] See Trussell Trust, *Latest food bank figures top 900,000, 2014,* available at: http://tinyurl.com/ojzvz4a.

[35] See 2.5, 2.5 on the Section II of this submission.

[36] *Fabian Commission on Food and Poverty, Working Paper 1: Money and affordability,* p. 5, citing Donald Hirsch (JRF), *A Minimum Income Standard for the UK in 2014,* 2014

[37] DEFRA, *Household Food Security in the UK: A Review of Food Aid Final Report,* 2014, p. 59, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/283071/household-food-security-uk-140219.pdf.

[38] Fabian Commission, *Fabian Commission on Food and Poverty, Working Paper 1: Money and affordability*, November 2014, pp. 5-6, available at http://foodandpoverty.org.uk/wp-content/uploads/2014/11/Hearing-One-WorkingPaper.pdf

[39] CESCR, *Fifth periodic reports submitted by States parties under articles 16 and 17 of the Covenant, United Kingdom of Great Britain and Northern Ireland,* 2007, pp. 39-40, available at: http://tinyurl.com/qgecy25.

[40] HRA, 1998, s. 6, available at: http://www.legislation.gov.uk/ukpga/1998/42/data.pdf.

[41] CESCR, Concluding Observations of the CESCR: *United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories,* 2009, p. 3, available at: http://tinyurl.com/nkag223.

There is a real concern that recent welfare decisions to cap and re-index benefits are retrogressive.[42] This submission shows that in one of the world's richest countries, the availability of food is restricted in parts of the UK as a result of food scarcity and the expansion of ´food deserts´ (i.e. areas where there is limited local availability of healthy food).[43]

Just Fair recommends the Committee requests that the State Party:

1. Provides a proposal for the effective monitoring and evaluation of compliance with the right to food in light of the absence of a government structure for the monitoring and evaluation of individual attainment of adequate and affordable food.

2. Formulates a national right to food strategy and action plan designed to ensure the right to food for everyone in the UK.

3. Indicates the measures taken to ensure access to adequate and affordable food in light of the significant reliance on food banks and increase in malnutrition.

4. Indicates what steps have been taken to ensure that food banks are not used as a substitute for a comprehensive social security system administered by the state.

5. Takes into account the rising cost of living, including food, fuel and housing prices, explains how it measures whether incomes are sufficient to guarantee the right to food for all.

6. Provides information about what steps are taken to review benefit levels to determine whether those benefits provide recipients with the minimum essential level of income to prevent hunger, including in respect of:

    a. the benefit cap, and the decision to index benefits to the CPI, in order to reverse the growing gap between benefit levels and food costs;

    b. the benefit sanctions scheme, and benefit delay;

    c. the abolition of crisis loans and community care grants, and measures to ensure individuals in crisis are able to obtain vital expenses for essential foodstuffs.

[42] See relevant sections of submission Section II The Right to Food 2.5; The Right to Health 3.4.2.
[43] See Wrigley, N, "Food Deserts in British Cities", Economic and Social Research Council, 2004, available at: http://eprints.soton.ac.uk/15645; See also Just Fair, *Freedom from Hunger: Realising the Right to Food in the UK,* 2013, p. 8, available at: http://tinyurl.com/nbkvftb.

7. Provides information on measures taken to ensure all necessary steps are taken to prevent and eliminate discrimination in enjoyment of the right to food, particularly with regard to women, children and disabled people and in light of the increased use of food banks, costs of living and cuts in benefits.

8. Explains how it intends to combat the growth of UK food deserts, particularly among disadvantaged communities.

9. Explains what steps are being taken to review and, as appropriate, alter fiscal policy (including that relating to expenditure and revenue) to ensure that the Government makes use of the maximum of available resources in order to progressively realise the right to food.

Article 12 - The Right to Health in the UK

This submission highlights the situation of certain groups whose enjoyment of the right to the highest attainable standard of health (hereinafter right to health), appears to be threatened. The submission focuses on asylum seekers, undocumented migrants and people with mental health conditions.

Asylum seekers and migrants

The UK National Health Service (NHS) was established by the National Health Service Act 1946 and came into operation in 1948. It provides health services to those who are 'ordinarily resident' in the UK, free of charge (with the exception of some charges for prescriptions, optical and dental services)[44] at the point of use, and is financed by taxes.[45]

The health system in the UK should be commended for providing accessible and largely free healthcare not only to UK citizens, but also to non-UK citizens who are ordinarily resident[46] in the UK and to specific vulnerable groups, such as refugees and asylum seekers. Nevertheless concerns arise regarding the fact that the category of non-ordinarily resident people, who are excluded from free access to NHS services, is a wide and composite group

[44] http://www.nhs.uk/NHSEngland/thenhs/about/Pages/overview.aspx, see below for an explanation of the definition of a resident.
[45] Doctors of the World, *Legal Report on Access to Healthcare in 12 Countries*, 2015, p. 124, available at https://mdmeuroblog.files.wordpress.com/2014/05/mdm-legal-report-on-access-to-healthcare-in-12-countries-3rd-june-20151.pdf
[46] The recently adopted Immigration Act 2014, section 39(1), defines 'persons not ordinarily resident' in UK as:
(a) persons who require leave to enter or remain in the United Kingdom but do not have it, and
(b) persons who have leave to enter or remain in the United Kingdom for a limited period.

including undocumented migrants and also temporary migrants who have permission to remain in the country for a limited time.

Undocumented pregnant women in the UK are charged for maternity care.[47] Normally hospitals charge patients approximately 4,000 Euros for a full course of maternity care, as long as no complications arise.[48] The Department of Health has stressed that maternity care is considered to be immediately necessary treatment that cannot be withheld irrespective of ability to pay.[49] Yet, evidence from Maternity Action, Doctors of World and Refugee Council,[50] demonstrates that vulnerable and destitute women, including failed asylum seekers, are either being deterred from seeking help or have had maternity care denied or delayed when payment cannot be made upfront.

These charges constitute a barrier for undocumented pregnant women, hindering access to maternity care. Significantly, the CESCR has recognised maternal care as an obligation of comparable priority to minimum core obligations.[51]

Undocumented migrants as a whole are commonly recognised by UN human rights treaty-bodies and charter-bodies as a vulnerable group requiring particular attention.[52] It has been reported that in the UK undocumented migrants who are working are likely to be paid below the minimum wage and at times face problems in receiving their salary, suggesting that they are financially disadvantaged.[53] The approximately 500,000 undocumented migrants in the United Kingdom make up the largest group of chargeable overseas visitors. Many of these

[47] Doctors of the World, *Legal Report on Access to Healthcare in 12 Countries*, 2015, p. 131, available at https://mdmeuroblog.files.wordpress.com/2014/05/mdm-legal-report-on-access-to-healthcare-in-12-countries-3rd-june-20151.pdf

[48] Doctors of the World, *Legal Report on Access to Healthcare in 12 Countries*, 2015, p. 131, available at https://mdmeuroblog.files.wordpress.com/2014/05/mdm-legal-report-on-access-to-healthcare-in-12-countries-3rd-june-20151.pdf

[49] Doctors of the World, *Legal Report on Access to Healthcare in 12 Countries*, 2015, p. 131, available at https://mdmeuroblog.files.wordpress.com/2014/05/mdm-legal-report-on-access-to-healthcare-in-12-countries-3rd-june-20151.pdf; Department of Health, 2013, *Guidance on implementing the Overseas Visitors Charging Regulations*, p. 54, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/418634/Implementing_overseas_charging_regulations_2015.pdf

[50] This information is limited to the small number of women who contacted the Refugee Council for help. The Refugee Council does not provide data on the number of women in similar situation in the UK. See Kelley, N., and Stevenson, J., 2006, *First do no harm: denying healthcare to people whose asylum claims have failed*, Refugee Council & Oxfam UK, p. 11-12, available at: http://www.refugeecouncil.org.uk/assets/0001/7074/Health_access_report_jun06.pdf [Accessed February 2015].

[51] CESCR, General Comment 14, para 44(a).

[52] United Nations, The Economic, Social and Cultural Rights of Migrants in an Irregular Situation (New York and Geneva 2014) p. 40; Human Rights Council, "Expert consultation on access to medicines as a fundamental component of the right to health" (A/HRC/17/43), para. 34

[53] Undocumented Worker Transitions, EU Sixth Framework Programme, United Kingdom Country Report, July 2007, page 24. Available at: http://www.undocumentedmigrants.eu/library/v99354_3.pdf; Black, R., Collyer, M., Skeldon, R. and Waddington, C. (2005) A survey of the illegally resident population in detention in the UK, Home Office Online Report 20/05.

individuals have few resources to pay charges that may be incurred in order to access healthcare.[54] Research indicates that, due to their limited resources, many migrants will either not seek the care they need (at least not until they are critically ill), or will simply be unable to pay for any treatment provided.[55] The fact that undocumented migrants are chargeable for NHS services, because they fall within the category of those who are not ordinarily resident, constitutes an economic barrier to access to healthcare in the UK.

This submission highlights studies which confirm refugees, asylum seekers and migrants in the UK experience significant communication and language barriers when attempting to access healthcare and other services.

Mental health services

For a number of reasons, people with mental health conditions are shown to be more likely to descend into poverty than people who do not suffer from such conditions. [56] They may be unable to work because of illness or be less competitive due to possible lack of opportunities to develop skills. Poverty also exposes people to risk factors for developing or worsening mental disorders. For example, limited educational and employment opportunities are positively associated with poor mental health.[57] The correlation between growing up in a low-income household and poor mental health is well established[58] and childhood poverty has been associated with low psychological and intellectual development.[59]

People suffering from mental health conditions who are in the custody of the State, either in prison, police custody or psychiatric hospitals are a particularly vulnerable group, in need of specific attention. The State should ensure the protection of their human rights, including

[54] Department of Health, *'Sustaining services, ensuring fairness: Evidence to support review 2012 policy recommendations and a strategy for the development of an Impact Assessment', p.9.*

[55] Liberty, 'Liberty's response to the government's consultation on access to healthcare and data sharing in the NHS', p.9, available at: https://www.liberty-human-rights.org.uk/sites/default/files/Liberty's-response-to-the-Home-Office-and-Department-of-Health-Consultations-on-access-to-NHS-services-August-2013.pdf

[56] Funk, M., Drew, N., & Knapp, M. (2012). Mental health, poverty and development. *Journal of Public Mental Health, 11*(4), 166-185. Retrieved July 21, 2015, from http://eprints.lse.ac.uk/47609/1/Mental health poverty and development (lsero).pdf) (WORLD HEALTH ORGANIZATION 2004. *Global status report: alcohol policy*, available at: https://www.google.ru/?gws_rd=ssl#newwindow=1&q=WORLD+HEALTH+ORGANIZATION+2004.+Global+status+report+:+alcohol+policy

[57] Funk, M., Drew, N., & Knapp, M. (2012). Mental health, poverty and development. *Journal of Public Mental Health, 11*(4), 166-185. Retrieved July 21, 2015, from http://eprints.lse.ac.uk/47609/1/Mental health poverty and development (lsero).pdf) (WORLD HEALTH ORGANIZATION 2004. *Global status report: alcohol policy*, available at: https://www.google.ru/?gws_rd=ssl#newwindow=1&q=WORLD+HEALTH+ORGANIZATION+2004.+Global+status+report+:+alcohol+policy

[58] Bradshaw, 2001; Costello *et al.*, 2001; DCSF,2007; Fabian Society, 2006; HM Treasury, 2008;Huston, 1991; Mayer, 2002.

[59] Aber *et al.*, 1997 in Griggs, J. and Walker, R. 2008. The costs for child poverty for individuals and society. A literature review. Joseph Rowntree Foundation.

their right to life and right to health.[60] There is an inconsistency and lack of monitoring in the way that records are maintained for the use of force in police custody, which is particularly concerning when force is used to restrain people with mental health conditions, who are at risk of harming themselves.[61]

This submission concludes there is evidence to suggest that detention has a deleterious impact on both physical and mental health. The stress of the detention centre environment can manifest itself in physical symptoms, including gastrointestinal, respiratory, and sleep disorders.[62] All detainees are entitled to receive the same range of services and quality of care as those in the community. However, the standard of care provided in Immigration Removal Centres has frequently been criticised as sub-standard.[63]

Just Fair recommends the Committee calls upon the State Party to explain the steps it is taking to:

1. Remove National Health Service charges for undocumented pregnant women.

2. Desist from pursuing or issuing National Health Service charges against undocumented migrants that are genuinely without funds.

3. Put measures in place to ensure effective interpretation services improve access to healthcare services.

4. Review its legislation, such as National Health Services (Charges to Overseas Visitors) Regulations 2015 with a view to avoid retrogression in the realization of the right to health.

5. Act upon the recommendation the CESCR and educate its health professionals and public sector workers on the provisions of the Covenant.

[60] Equality and Human Rights Commission, 'Preventing Deaths in Detention of Adults with Mental Health Conditions: An Inquiry by the Equality and Human Rights Commission' February 2015, p. 4-9, available at: http://www.equalityhumanrights.com/sites/default/files/publication_pdf/Adult%20Deaths%20in%20Detention%20Inquiry%20Report.pdf

[61] Her Majesty's Inspectorate of Constabulary (HMIC)Report, The Welfare of Vulnerable People in Police Custody, March 2015, p. 22, available at: http://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/the-welfare-of-vulnerable-people-in-police-custody.pdf

[62] British Medical Association (2002) *Asylum seekers: meeting their healthcare needs.* London: BMA; HM Inspectorate of Prisons and Independent Chief Inspector of Borders and Immigration (2012) *The effectiveness and impact of immigration detention casework.* London: HMIP/CIBI

[63] Submission From The British Medical Association To The Parliamentary Inquiry Into The Use Of Immigration Detention, para. 3.1, available at: https://detentioninquiry.files.wordpress.com/2015/02/british-medical-association.pdf

6. Continue efforts to bridge the existing inequalities between the levels of enjoyment of right to health by people suffering from mental conditions and other segments of the population.

7. Fund and promote campaigns which target the stigmatisation of mental illness.

8. Rebalance the existing funding inequality to ensure spending reflects the growing need and demand as well as to commit to real term increases in funding for mental health services for both adults and children. It is also recommended that the United Kingdom implements early detection and intervention programmes, like the ones in England managed by the Early Intervention Foundation.[64] Such programmes should include women's access to mental health support during and after pregnancy as well as raising children's awareness of mental health by putting it on the national curriculum and training teachers and school nurses.

9. Ensure staff training is implemented at detention facilities, for medical professionals as well as police officials, on the relevant provisions of the Mental Health Act regarding detention under Sections 135 and 136 as well as the Guidance Policy published by the National Policing Improvement Agency.

10. Ensure there is proper recording of any force used to restrain persons with mental health conditions and complete transparency in such records, so that these may be scrutinized and the relevant authorities be held to account if the need arises.

11. Ensure staff members in detention facilities are trained to identify vulnerable detainees and refer them in a timely manner to healthcare professionals for assessment.

The Economic and Social Rights of People with Disabilities

Article 2 - Duty of Progressive Realization

There can be little doubt that, individually and cumulatively, measures implemented by the UK government have and continue to lead directly to deterioration in respect of the rights of many persons with disabilities. For example, following reassessment, 23% of persons with disabilities who had been in receipt of Disability Living Allowance, which has played a central role in reducing disability related poverty by contributing towards the extra costs of living with

[64] Details on the programmes managed by the Early Intervention Foundation are available at: http://www.eif.org.uk/our-work/

a disability, have lost entitlement for its replacement the Personal Independence Payment.[65] Losing this entitlement (or elements of it) leads directly to the loss of other benefits and services, such as financial support with purchasing a vehicle. People no longer receiving DLA/PIP are also no longer sheltered from other reforms, such as the overall 'benefit cap'. People losing the financial support provided by Disability Living Allowance may also find that they lose other benefits and services as a consequence of reforms to long term sickness benefits by the introduction of Employment and Support Allowance or local government spending cuts affecting eligibility for social care.

The UK government has justified a wide range of deliberately retrogressive measures as being essential to achieving 'deficit reduction' and to ensure that in future the UK 'lives within its means'. Prime Minister David Cameron has indicated that such levels of public spending should not be regarded as a temporary measure, but a permanent feature of UK fiscal policy.

A number of bodies, including the Equality and Human Rights Commission, the parliamentary Joint Committee on Human Rights and the UN Special Rapporteur on housing, have expressed concern that the government is failing in its obligation to take account of the impact – individually and cumulatively - of policies and spending decisions on the rights of persons with disabilities. The failure of the government to have done so with respect to its decision to close the Independent Living Fund was found unlawful by the Court of Appeal, which determined that the Department for Work and Pensions had failed in its duty to have due regard to the need to advance equality for persons with disabilities in arriving at the decision to close the fund (although the fund has now closed). Yet despite this case, more recent equality analysis regarding the proposed benefit cap including in the Welfare Reform and Work Bill 2015 simply asserts that 'Households where someone is in receipt of Disability Living Allowance (or its replacement, Personal Independence Payment), Attendance Allowance, Industrial Injuries Benefit or the support component of Employment Support Allowance are exempt from the benefit cap' and provides no further analysis, despite there being many households that include disabled people who do not qualify for these benefits and who will be adversely affected by proposed measure.

Despite the Government's view that it would be impossible to undertake a cumulative impact assessment of a number of reforms and policy changes on disabled people, the respected Institute for Fiscal Studies (IFS) has said that such an assessment is possible. However, the

[65] Department for Work and Pensions (17 June 2015) Tables: Personal Independence Payment: Official Statistics, GB (April 2013 – April 2015).

IFS also said it would be extremely difficult to include public services, such as social care, as well as benefit and tax changes.[66]

The Equality and Human Rights Commission (EHRC) has also published research by Landman Economics and the National Institute of Economic and Social Research into the cumulative impact of tax, benefit and public spending decisions on households including individuals with one or more protected characteristics.[67] This report shows that households including one or more disabled people have been more adversely affected by reductions to benefits and public expenditure than households with no disabled people, and that households including one or more disabled children have been more adversely affected than those including one or more disabled adults. The report also makes recommendations with regard to data collection and statistical modelling by Government, to enable more accurate identification of any disproportionate impact of combined changes in tax, benefits and public spending on protected groups, including disabled people.

Against this background, Just Fair recommends that the Committee request that the State Party:

1. Details its approach to analyzing the likely impact of individual policy proposals and spending decisions on the rights of persons with disabilities and provides evidence of having done so comprehensively.

2. Conducts and publishes a cumulative impact assessment regarding the impact of policies and spending decisions introduced since 2010 on the rights to social security and to an adequate standard of living.

3. Sets out how it will mitigate any negative impact on the rights of persons with disabilities of policies and spending decisions introduced since 2010 and its plans to progressively realize the economic, social and cultural rights of persons with disabilities.

Article 2 - Non-discrimination

Anecdotal evidence suggests that persons with disabilities are encountering extensive discrimination, and in particular denial of reasonable accommodation, in relation to accessing economic and social rights. This includes inaccessible benefits assessment

[66] 'Ministers humiliated over cumulative impact assessment', Disability News Service, 11 July 2014.
[67] Reed, H and Portes, J (2014) Cumulative Impact Assessment: A Research Report by Landman Economics and the National Institute of Economic and Social Research (NIESR) for the Equality and Human Rights Commission (Equality and Human Rights Commission Research Report 94).

processes and the failure of work programme providers to provide reasonable accommodations. With respect to the latter, persons with disabilities who encounter such discrimination also risk facing benefit sanctions where as a consequence of such barriers they are unable to meet conditions of benefit entitlement, such as attending meetings, attending training or applying for jobs.[68]

Article 6 & 7 – The Right to Work and to Just and Favourable Conditions of Employment

In 2009, the most recent report of the UN Committee on Economic, Social and Cultural Rights on the UK highlighted that progress was still needed in the area of work and employment:[69]

Although the past few years have seen growth in the numbers of persons with disabilities in employment, around 30% fewer disabled people than non-disabled people are in paid work.[70] Whilst for some disabled people and people with long term health conditions the impact of their impairment and symptoms may be too significant to allow them to engage in paid work, this still represents a considerable gap in the rate of employment among disabled people in comparison to non-disabled people. These figures compare badly with employment rates for disabled people in other European Union countries[71] and mask particularly low levels of employment among some groups, such as young disabled people and those with few qualifications, as well as people with learning disabilities or mental health problems.[72]

The government's recent commitment to halve the 30 per cent gap between the employment rate of persons with disabilities and those without is therefore welcome. Nevertheless, there are serious questions regarding the efficacy of existing policies and programmes in respect of achieving the government's ambition:

[68] 'No DWP apology for Work Programme "discrimination and punishment"', Disability News Service, 3 October 2014.
[69] Committee on Economic, Social and Cultural Rights, Concluding observations on the combined fourth to fifth periodic report of the UK, June 2009 (E/C 12/GBR/CO/5) para 20. "[The Committee] calls upon the State Party to reinforce its measures aimed at ensuring that persons with disabilities, including those with learning disabilities, have equal opportunities for productive and gainful employment, equal pay for work of equal value, and provide them with improved, expanded and equal opportunities to gain the necessary qualifications, in line with its general comment no. 5 (1994) on persons with disabilities."
[70] Sayce and Crowther, Taking control of employment support.
[71] European Union (2010) Social Inclusion, Income and Living Conditions Survey.
[72] Sayce and Crowther, Taking control of employment support.

Employment support (See Section 4.7.7 to 4.7.9, page 191 - 195)

The government's flagship 'Work Programme' has been largely ineffective in helping benefit claimants with disabilities to get into work.[73] Official statistics show that over 91% of new Employment and Support Allowance claimants who joined the Work Programme in March 2014 did not have a 'job outcome' by March 2015.[74] The experience of claimants suggests that this is because the programme is not personalised to the needs of individuals and adjustments are not made to the programme to take account of the needs of disabled claimants. Although ESA claimants are now subject to strict conditionality regimes and sanctions, there is concern that such claimants are given conditions with which they cannot comply due to their impairment and that it is this lack of compliance that is leading to many having part of their benefit sanctioned.[75]

The government's Access to Work scheme, which provides support to persons with disabilities and employers with workplace adjustments, equipment and support, has been shown to yield £1.48 in tax revenues to the Treasury for every £1 invested.[76] However, it was reported in February 2015 that most recipients of Access to Work were losing support when their cases were reviewed.[77] In addition, while the government has announced its intention to introduce a range of welcome measures to enhance the effectiveness of the scheme it has also announced its intention to restrict the value of any award for ongoing support to the equivalent of one and a half times the average salary, or £40,800 per year in October 2015.[78] This restriction is likely to have the most significant impact on Deaf users of British Sign Language, who need support from freelance BSL interpreters to enable them to do their jobs.

Skills and qualifications (See Section 4.7.14 for more detailed information, page 198)

Evidence shows a correlation between disability and educational attainment: disabled people (of all ages) are twice as likely to have no qualifications as non-disabled people, and are also less likely to have higher level qualifications. The correlation works both ways: disability may

[73] Submission from Department for Work and Pensions to House of Commons Public Accounts Committee (2013) *Work Programme outcome statistics*, 33rd report, 2012-2013; Department for Work and Pensions (2013) *Work programme statistical summary*.
[74] Department for Work and Pensions (2013) Statistical Summary of Work Programme Official Statistics, referenced in Sayce and Crowther, Taking control of employment support.
[75] Eg Manchester CAB, Punishing Poverty? A review of benefits sanctions and their impacts on clients and claimants.
[76] Sayce, L (2011) Getting in, staying in and getting on Disability employment support fit for the future (TSO)
[77] 'Most Access to Work recipients "have their support cut after reviews"', Disability News Service, 2 February 2015.
[78] Mark Harper MP (2015) Written Ministerial Statement on Access to Work, 12 March 2015.

lead to lower educational attainment, but people who have experienced educational disadvantage are also more likely to become disabled later in life.[79]

The low skill profile of disabled people is a major barrier to employment,[80] making training, or retraining when an individual's impairment prevents them from continuing in their previous job, an important part of the mix of initiatives to help disabled people realise their right to work. Yet action to improve formal skills and qualifications among persons with disabilities continues to be largely absent from policy and programmes to improve the employment opportunities of persons with disabilities.

Fostering a receptive labour market (see section 4.7.11 & 4.7.15, pages 196 & 198)

Policy and programmes regarding the employment of persons with disabilities have focused overwhelmingly on compelling individuals to participate in programmes of activity to prepare them for work and in support of their seeking work. Little attention has been devoted to addressing structural barriers in the labour market that place persons with disabilities at a disadvantage.[81] This includes discrimination as well as workplace harassment.[82] In 2013 the Government launched 'Disability Confident' to promote the value of employing persons with disabilities to employers. It is unclear what the precise aims of the programme are or what the programme itself has achieved.

Promoting and enforcing anti-discrimination law (see section 4.7.5, page 188)

Despite the UK enjoying some of the most comprehensive equality law globally, resources devoted to its promotion and enforcement have declined sharply. The budget of the Equality and Human Rights Commission – which is responsible for several equality grounds as well as human rights - is smaller in 2015/16 than that enjoyed by the Disability Rights Commission, one of the three bodies it replaced, in 2006/7.

[79] Meager and Higgins, Disability and skills in a changing economy.
[80] Trotter et al, Work in progress: Rethinking employment support for disabled people.
[81] In 2006, the government's Social Security Advisory Committee noted:
We have observed that the process of getting employers – in particular those operating [small and medium sized enterprises] – actively engaged and committed to working within the Government's agenda, is lagging far behind what is needed to open the labour market to people with health conditions and/or disabilities (in particular those relating to mental health), and provide an environment in which such people can be supported in sustained employment (Social Security Advisory Committee (2006) *19th Report, August 2005-July 2006,* p 30.)
[82] Disabled employees more likely to experience ill-treatment at work', Cardiff University School of Social Sciences, 5 March 2013, reporting on Fevre, Robinson, Jones and Lewis (2013) 'The Ill-treatment of Disabled Employees in British Workplaces' *Work, Employment and Society*; Coleman, Sykes and Groom *Barriers to employment and unfair treatment at work: a quantitative analysis of disabled people's experiences*.

Right to remedy

The last government introduced fees for individuals wishing to bring claims before Employment Tribunals, including in relation to disability discrimination. This prevents many from securing redress for employment discrimination. Overall there has been a decline of 81% in the number of claims accepted between Q4 2012-13, before the introduction of fees, and Q4 2013-14, after the fees were introduced. In relation to disability discrimination claims specifically, the reduction in claims was over 45%[83]

Just Fair recommends that the Committee ask the State Party:

1. To outline its plans to address the shortcomings of the Work Programme with respect to supporting persons with disabilities to secure sustainable employment.

2. To ask the government to clarify the intended success measures of Disability Confident in reaching and influencing the behavior of employers and to provide details of the impact of the programme to date on enhancing the employment prospects of persons with disabilities.

3. To outline how promotion and enforcement of the disability provisions of the Equality Act fits into its vision for halving the disability employment gap.

4. To scrap or significantly reduce Employment Tribunal Fees which evidence shows have created significant barriers to persons with disabilities and others experiencing discrimination from accessing an effective remedy.

5. To explain the steps it will take to mitigate the impact on the jobs and employment prospects of persons with disabilities for whom the cost of support exceeds the upper-limit on Access to Work awards.

Article 9 – The Right to Social Security

The UK's social security system as it relates to persons with disabilities has undergone almost continuous reform since the 1980s with further reform proposals announced in July and August 2015. These reforms - advanced under the rubric of 'welfare to work' - have led to a system that has become increasingly inadequate, inaccessible, ineffective and punitive with respect to the right to social security of persons with disabilities. The reforms have embodied three key features:

[83] Source: ministry of justice quarterly tribunal statistics for january to march 2014

- Redrawing the boundaries of who is or is not deemed capable of work (and hence entitled to disability benefits) through the design, implementation and redesign of eligibility criteria and associated assessment processes.

- The requirement of those deemed capable of work, or with the potential of being capable of work in future, to participate in 'work-focused activities' arranged by the government.

- The increased use of sanctions (depriving people of benefits) for non-compliance with the requirements to participate in work-focused activities.

The design and implementation of Employment and Support Allowance (See section 4.8.6, page 204)

Employment and Support Allowance (ESA) was introduced in 2008 to replace incapacity benefit and has been developed and implemented by successive governments since. Central to implementation of the new benefit has been large-scale assessment and reassessment of claimants, a function outsourced originally to the private sector company Atos Origin and now carried out by Maximus, albeit with final decisions on eligibility made by Department for Work and Pensions officials, based on the information collated via the assessment process. The outcome of this assessment places individuals in one of three categories. Claimants who are found fit for work are not entitled to continue claiming ESA. Claimants who are assessed as being able to work in the foreseeable future are placed in the ESA work related activity group (WRAG), for which receipt of ESA is conditional on engagement in some form of work related activity to prepare for a return to work. Those who are assessed as unlikely to be able to work in the foreseeable future are placed in the support group (SG) and receipt of ESA is unconditional.[84]

The assessment process has been plagued with difficulties and controversy. It has been widely reported that, as a result of deficiencies in the way the WCA operates, many claimants who are seriously ill or severely disabled, and in need of an income-replacement benefit because they are unable to work, are found fit for work or placed in the WRAG when in reality they need unconditional support.[85] If claimants are found fit for work the only alternative income-replacement benefit normally available is JSA. However, JSA is only paid to claimants who are available for work, so those who are in fact too ill to work may be told by the Jobcentre that they are too ill to claim JSA or that they are unable to fulfil the conditions of JSA, imposed to demonstrate they are actively searching for and preparing for

[84] DWP, Employment and Support Allowance: Help if you are ill or disabled.
[85] Eg, CAB, Right First Time.

work, including keeping regular appointments at the Jobcentre.[86, 87] Figures published by the Department for Work and Pensions in August 2015 suggest a disproportionately high number of deaths among those declared fit to work in the weeks immediately following assessment. Although the available evidence does not allow any causality to be established categorically, [88] a recent coroner's verdict did link the suicide of disabled man with a decision that he as fit for work.[89]

According to Ministry of Justice data, 647,527 appeals were heard between 2009 and June 2013, of which 40% were decided in favour of the claimant. [90] This suggests a failure of the government to make maximum use of available resources, wasting scarce public resources on a system that is not fit for purpose.

Denial of income during appeal

Until October 2013 any claimant who appealed the outcome of their WCA continued to receive ESA at the assessment rate pending appeal, providing them with an income. However, new regulations[91] make reconsideration of the decision by DWP mandatory before an appeal can be lodged with the tribunal service, resulting in a gap in payment, since there is no right to payment of benefit pending reconsideration (payment of ESA at the assessment rate is recommenced once an appeal is lodged with the tribunal service).[92] The Minister of State for Employment has explained[93] that claimants in this situation can apply for JSA but have their job-seeking obligations tailored to the limitations of their impairment or health condition. Unhelpfully for claimants, there appears to be a lack of clarity in relation to the way in which a claim for an alternative benefit, such as JSA, during the reconsideration stage will work in practice. There is a very real risk that claimants who are found fit for work when assessed for ESA, but are in reality too ill or disabled to work, will have no income while their claim is being reconsidered.

[86] H Barnes, J Oakley, H Stevens and P Sissons (2011) *Unsuccessful Employment and Support Allowance claims* DWP Research report 762 (Inst for Employment Studies).
[87] National Association of Welfare Rights Advisers (2013) *Submission to the Independent review of the Work Capability Assessment – Year 4*.
[88] Department for Work and Pensions (2015) mortality statistics
[89] http://www.disabilitynewsservice.com/coroners-ground-breaking-verdict-suicide-was-triggered-by-fit-for-work-test/
[90] Ministry of Justice, *Quarterly tribunal statistics April-June 2013* (including data from 2009/10)
[91] Social Security, Child Support, Vaccine Damage and Other Payments (Decisions and Appeals) (Amendment) Regulations 2013.
[92] Hansard, Lord Freud, HL deb, col 745, 13 February 2013, debate on The Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013.
[93] Hansard, Fourth Delegated Legislation Committee, col 9, 3 September 2013.

Plans to abolish the Work Related Activity Group

Under the Welfare Reform and Work Bill currently going through Parliament, the work-related component of ESA (for those in the WRAG) will effectively be abolished from April 2017, from which time new claimants will receive the same amount as claimants on JSA. At present rates, this will mean that new claimants will receive nearly £30 less per week than current claimants in the WRAG. (Similar changes will be made to Universal Credit, which is replacing income-related ESA). When this measure was announced in the Summer 2015 Budget, the rationale was explained as improving "work incentives".[94] However, within the structure of ESA, those placed in the WRAG have not been found "fit for work"; rather, they have been found to have "limited capability for work". Claimants in the WRAG have greater barriers to work than those on JSA and it generally takes them longer to find work than JSA claimants. Justifying the change as designed to improve work incentives implies that the main barrier to employment for claimants in the WRAG is one of motivation, although much research suggests that for most claimants in the WRAG the main barrier to employment is their impairment or health condition[95] (and employers' unwillingness to employ disabled people and people with serious long term health conditions).

Inappropriate use of sanctions (See Section on 4.10.2 page 216)

In its recent report on the use of sanctions,[96] the UK Parliament's Work and Pensions Select Committee highlighted a number of issues with regard to applying sanctions to ESA claimants in the WRAG and to disabled people claiming JSA. In relation to JSA claimants, the Committee expressed concern that the newly-introduced Claimant Commitment, an agreement between JobCentre Plus and the claimant that sets out what is expected of the claimant, was not being sufficiently differentiated to take account of the impact of claimants' impairments or health conditions. This was leading to claimants being sanctioned for failing to meet requirements set out in their Claimant Commitment that they were unable to meet.

The Committee noted that the vast majority of sanctions imposed on ESA claimants in the WRAG related to failure to participate in work-related activity. [97] However, evidence indicates a general failure by JobCentre Plus and Work Programme providers to tailor work-related activity to take account of claimants' impairments or health conditions.[98] Despite internal DWP guidance setting out safeguards to protect ESA claimants from inappropriate

[94] Summer Budget 2015, HC 264 2015-16, para 41.
[95] 'Budget benefit cut "insulting and misguided"', Mind, 8 July 2015 **and** Hale, *Fulfilling Potential?*
[96] Work and Pensions Select Committee (2015) *Benefit sanctions policy beyond the Oakley Review,* Fifth Report of Session 2014-15.
[97] D Webster (2015) Briefing: The DWP's JSA/ESA sanctions statistics release, 13 May 2015, Child Poverty Action Group, 28 May 2015.
[98] Hale, Fulfilling Potential?

conditionality, this can lead to ESA claimants in the WRAG being referred for sanction due to failing to participate in work related activity that they are unable to undertake.

Benefits rate freeze

Under the Welfare Reform and Work Bill 2015, which sets out the relevant provisions of the Summer Budget 2015, the rate at which most working age benefits are paid is to be frozen for four years. Although most disability benefits are to be exempt from the freeze, disabled people also rely on universal benefits, such as housing benefit and the basic element of working tax credit, which will be frozen. This measure will further reduce the adequacy of benefits claimed by disabled people and push them further into poverty.

The Welfare Reform and Work Bill 2015 will also make changes to tax credits. Although the disability element of working tax credit will be unaffected, all claimants of working tax credits – and the equivalent element of Universal Credit – will see their payments reduced as a result of specific cuts to in-work support.

Just Fair recommends that the Committee ask the State Party:

1. To explain the steps it is taking to ensure that assessments accurately determine the prospects of persons with disabilities or health conditions finding and maintaining sustainable employment, taking account of the full range of barriers that might be encountered and the availability and efficacy of measures to overcome them.

2. To set out how it is ensuring that its own services and that of the private and voluntary sector organisations it engages to carry out assessments or to provide employment support are non-discriminatory, including in relation to the provision of reasonable accommodations, accessible and personalized.

3. To explain how it will guarantee that persons who have lodged an appeal regarding their assessment for ESA will not be denied social security income while awaiting the outcome of the mandatory reconsideration stage of the process.

4. To set out its plans for fulfilling the right to social security of those persons with disabilities or health conditions who are deemed ineligible for ESA by the Department for Work and Pensions (DWP) but whose impairment or health conditions prevents them from meeting the conditionality requirements of JSA.

5. To explain how abolishing the Work Related Activity Group will improve the employment prospects of persons with disabilities while protecting their right to social security.

Article 11 – The Right to an Adequate Standard of Living

Just Fair notes the advice provided in General Comment 5 of the Committee on Economic, Social and Cultural Rights regarding the scope of the right to an adequate standard of living in the context of the lives of persons with disabilities:

> '*In addition to the need to ensure that persons with disabilities have access to adequate food, accessible housing and other basic material needs, it is also necessary to ensure that "support services, including assistive devices" are available "for persons with disabilities, to assist them to increase their level of independence in their daily living and to exercise their rights'*.

In its 23rd report, "Implementation of the Right to Independent Living", published in March 2012, the Joint Committee on Human Rights (JCHR) raised the following concern:[99]

> *'The range of reforms proposed to housing benefit, Disability Living Allowance, the Independent Living Fund, and changes to eligibility criteria (for social care) risk interacting in a particularly harmful way for disabled people. Some disabled people risk losing DLA and local authority support, while not getting support from the Independent Living Fund, all of which may force them to return to residential care. As a result, there seems to be a significant risk of retrogression of independent living and a breach of the UK's Article 19 obligations.*'

Disability Living Allowance (See Section on 4.5.2, page 161)

Disability Living Allowance was introduced in 1992 in recognition of the fact that persons with disabilities face additional, disability-related, costs of living in seeking to live independently, which if unaddressed place persons with disabilities at a higher risk of poverty. The Extra Costs Commission found that disabled people pay on average £550 per month more than people who are not disabled on everyday living costs.[100] The average award of PIP is £360 per month. The Joseph Rowntree Foundation calculates that one million more people in families receiving Disability Living Allowance or Attendance Allowance (for people aged over 65 when they first claim) would be in poverty if those benefits were not included in their income.[101]

The Welfare Reform Act 2012 included plans to replace Disability Living Allowance with the 'Personal Independence Payment' (PIP). The Government stated its intention at the outset

[99] JCHR, Implementation of disabled people's right to independent living, para 161.
[100] Brawn, E: *Priced Out*, Scope, April 2014
[101] McInnes, T et al (2014) Monitoring Poverty and Social Exclusion, Joseph Rowntree Institute

that the introduction of PIP will save 20% of the cost of this benefit for working age claimants[102] by the time the new benefit has been fully rolled out. Many organisations have expressed concern that a primary aim of saving 20% of the cost may not be compatible with protecting disabled people's right to independent living.[103] The most recent PIP statistical release from Government shows that 23% of DLA claimants who have been reassessed for PIP have lost entitlement to the benefit,[104] although this proportion may change when DLA claimants with indefinite awards are reassessed, a process which started in July 2015 and is expected to be completed by late 2017.[105]

Motability

Charities, disabled people's organisations and disabled people have identified a number of issues with the criteria for PIP.[106] Of particular concern has been the proposals regarding the 'moving around' activity. Under the associated regulations, for claimants who have physical difficulties moving around (but no cognitive or mental health difficulties affecting their mobility), the enhanced mobility component of PIP is only available to those unable to move, without a wheelchair, less than 20 metres. This is a much shorter distance than 50 metres, the distance used in other policy areas[107] Therefore a very large number of current DLA claimants who receive the higher rate mobility component will lose that vital support, including the benefits of the Motability scheme, which enables people to exchange their mobility allowance to lease a car, scooter or motorised wheelchair.[108] Motability has said:[109]

> *'To date, we have seen 15,669 customers whose reassessments from DLA to PIP have been completed. Of these, 9,394 (60%) have retained the higher level of mobility allowance and therefore have no issues in relation to the Scheme. However, 6,275 (40%) have not retained the higher level of mobility allowance and, as a consequence, have left the Scheme (or are in the process of doing so) and received our transitional support package including a payment of (in most cases)*

[102] DWP (2012) Disability Living Allowance reform Impact Assessment; DWP (2012) Disability Living Allowance reform Equality Impact Assessment.
[103] JCHR, Implementation of disabled people's right to independent living, para 140.
[104] Department for Work and Pensions (17 June 2015) *Tables: Personal Independence Payment: Official Statistics, GB* (April 2013 – April 2015).
[105] Department for Work and Pensions (August 2015) *Timetable for PIP replacing DLA*.
[106] All 173 organisations' responses to the PIP assessment and thresholds consultation are available on the Government's website.
[107] Eg, Department for Transport *Inclusive Mobility* (referenced in Building Regulations Approved Document M), Section 3.4 (Seating) and Section 5.1 (Car parking provision).
[108] The Motability Scheme enables disabled people to lease a new car, scooter or powered wheelchair, using the Higher Rate Mobility Component of Disability Living Allowance, the Enhanced Rate of the Mobility Component of Personal Independence Payment (PIP) , the War Pensioners' Mobility Supplement or the Armed Forces Independence Payment.
[109] Information provided by Motability, 5 August 2015.

£2,000. Some of these individuals will be pursuing reconsiderations and appeals but we have no contact with them once they leave the Scheme.'

Overall it has been estimated the total number of physically disabled people who will lose their higher/enhanced mobility component is around 600,000.[110] Thus more than half a million people with physical mobility difficulties will receive less help to get out and participate in the community under the new benefit.

Social care (See Section 4.5.5, page 173)

The Care Act 2014 has introduced a range of positive reforms to the social care system in England and Wales. Under Part 1 of the Care Act 2014, there are now national eligibility criteria in place for adult social care services, which should lead to greater consistency between local authorities in relation to who they support. However, since the Act only came into force in April 2015, its impact on disabled people's enjoyment of the right to independent living is not yet apparent.

Despite this positive legislative development, research undertaken by the Local Government Association in early 2015[111] showed that the majority of local authorities were concerned that they would not have sufficient funds to implement the Act; only 3% of local authorities were confident of having sufficient resources to do so. Social care had already endured many years of under-investment, yet the Association of Directors of Adult Social Services estimate that total spending cuts, including inflation and demographic pressures, amount to £4.6bn since 2011, equivalent to almost a third (31%) of the £14.6bn spent on adult social care by councils in 2010-11.[112] The 2015 Spending Review has opened the door to even deeper cuts in the years to come. This reduction in funding has led to a widespread increase in eligibility thresholds with almost nine out of 10 councils now only supporting people with 'substantial' or 'critical' needs. It has been calculated that this has led to 69,000 working age disabled adults with moderate needs and 8,000 with substantial needs losing their eligibility for social care. Amongst older people, the drop is even greater: almost a quarter of a million fewer older people received social care support in 2012/13 compared to 2009/10, a reduction of 26%.

The Care Act 2014 also introduces radical reform of charges to individuals for social care services, including a more generous means test and a lifetime cap on social care charges. These reforms were intended to be brought into force in April 2016, but in July 2015 the

[110] Hansard, Baroness Hollis, HL deb, col 940, 25 February 2013.
[111] Local Government Association (2015) *Care Act Implementation: Results of Local Authority Stocktake 3,* March 2015; **and** 'Councils ready for Care Act but raise concerns about costs on eve of implementation', Community Care, 25 March 2015.
[112] ADASS (2015)Sixth Annual ADASS budget survey report and see page 9 above ft 23.

Government decided to delay this particular aspect of the Care Act until 2020,[113] partly in response to concerns raised by local authorities about the impact of cuts to funding and increasing demand for social care services.

The Independent Living Fund (See Section 4.5.3 for more detailed information)

The Independent Living Fund (ILF), which existed to 'top up' the funding available from local authorities in recognition that those with the highest levels of support needs required assistance that local authorities could not provide, was closed on 30th June 2015. Former ILF users in Scotland and Northern Ireland receive the same level of funding as they received before the ILF closure, from the Independent Living Funds for Scotland and Northern Ireland.[114] The scheme in Wales consists of a special grant from the Welsh Government to Welsh local authorities, until March 2017, to enable them to provide ILF recipients with the same level of funding as they received under the ILF; the policy after March 2017 will be dependent on the level of funding provided to the Welsh Government.[115]

However, provision for former ILF users in England has been much less clear. Funding devolved from the ILF to individual local authorities, limited to the first year following closure, was not ring-fenced,[116] so the impact of the fund's closure on individual users has been dependent on decisions taken at local level. Just days before the closure of the fund it was clear that there was considerable confusion and delay in relation to the transition process, as funding was transferred from central to local Government and ILF users were left anxious about the extent of their future support.[117]

The Government's Equality Analysis concerning closure of the ILF (only conducted after the Court of Appeal case mentioned above) acknowledged that:

> *'It is almost certain that closure of the ILF will mean that the majority of users will face changes to the way their support is delivered, including the real possibility of a reduction to the funding they currently receive. This is because the ILF funds some aspects of care that some local authorities do not and may also provide different levels of flexibility in the use of such funding.'*

[113] Rt Hon Alistair Burt MP, Minister of State for Community and Social Care (2015), *Letter to Cllr Izzie Seccombe, Chair, Local Government Association*, 17 July 2015.
[114] The Scottish Government *Independent Living Fund Scotland* (The Scottish Government website).
[115] The Welsh Government (13 March 2015) Written Statement: Future care and support arrangements for Independent Living Fund recipients in Wales.
[116] DWP (18 December, no year indicated on document) Closure of Independent Living Fund (ILF) and integration into mainstream care and support system
[117] 'Councils apologise over ILF delays and confusion, but blame government' Disability News Service, 19 June 2015

The Local Government Association and the Association of Directors of Adult Social Care have stated that:

> *"As ILF recipients transfer into the Local Authority system in 2015, and are subsequently reviewed against the [local authority assessment] criteria, the value of the personal budget calculated through the Resource Allocation System will generally be at a lower level than the initial ILF/LA budget."*

Housing (See Section 4.3. page 146)

Under the Welfare Reform and Work Bill 2015, the Conservative Government is implementing a four-year freeze on the level of benefits; this freeze includes housing benefit and the local housing allowance (for those living in private rented accommodation). The Government's impact assessment[118] suggests that disabled people will not be affected by this measure because disability benefits including PIP, DLA and ESA (support group component only) are not included in the freeze. However, there are many disabled people who don't qualify for these benefits, and even those who do will still have their housing benefit/local housing allowance frozen, so they will have to divert money intended to cover everyday living and disability-related expenses to supplement their housing benefit and ensure their rent is paid.

For social housing tenants whose housing benefit does not cover their whole rent, there may be some small benefit arising from the Government's intention to reduce social housing rents by 1% per year over the next 10 years, although this advantage is likely to be cancelled out by the freezing of housing benefit for the next four years. Over the longer term, however, the reduction in social housing rents will have a negative impact on the ability of social landlords to build more housing.[119] This will have a particularly significant impact on disabled people, for whom the development of new social housing, built to higher access standards than private housing, is especially important as more than 90% of housing in the UK is not accessible for disabled people.[120]

Just Fair recommends that the Committee ask the State Party to:

1. Outline its approach to ensuring that persons with disabilities are able to access resources and support sufficient to ensure that they can live independently and

[118] Department for Work and Pensions (July 2015) Welfare Reform and Work Bill: Impact Assessment of the Benefit rate freeze.
[119] Office for Budget Responsibility (2015), *Economic and Fiscal Outlook*, Cm 9088, July 2015.
[120] Habinteg Housing Association (2015) Briefing: Disabled Facilities Grants 2015.

participate fully in society, including assistance with meeting the extra costs of disability.

2. Explain how it plans to ensure that sufficient resources are allocated to local councils to meet their minimum obligations under the Care Act.

3. Explain how it intends to ensure that the closure of the Independent Living Fund will not lead to disabled people losing their independence, their ability to participate in the community and to undertake paid work.

4. Set out how it will increase the supply of affordable and accessible housing for persons with disabilities.

Protecting the Right to Housing in England: A Context of Crisis

justfair

SECTION I

1. THE RIGHT TO HOUSING IN ENGLAND (ARTICLE 11)

England is experiencing a housing crisis. Exceptionally high numbers of people are homeless, or vulnerable to homelessness. The current housing environment is characterised by profound issues of lack of supply, high and further increasing housing costs, lack of security of tenure, and homes of such poor quality that they are unfit for habitation. These issues plague all of England's main housing tenure types: the owner occupied, the private rental, and the social housing sector. Housing insecurity affects not only people on low incomes, but broad swathes of the English population, who currently live in situations of insecurity and uncertainty.

In this context of crisis, the government is failing to meet its obligations to ensure the right to housing of its population, so that everyone can enjoy a standard of living in homes that are adequate, safe, and secure.

The UK accepted international obligations to respect, protect and fulfil the right to housing under the International Covenant on Economic, Social and Cultural Rights (ICESCR) when it ratified the ICESCR in 1976. It undertook to take progressive steps towards the realisation of the right to housing, using all the means at its disposal, both financial and otherwise.

In a climate of austerity, it is vital to point out that the government is obliged not to take regressive (that is, backward), steps or strip away enjoyment of the right to housing unless this is absolutely necessary. Any backward movement must be justified under the strictest possible criteria.

Yet a growing number of individuals and families in England are not able to secure the adequate, safe and affordable housing that the ICESCR requires. Homelessness is rising. Housing is increasingly unaffordable, and legislative changes have weakened key safety nets for English households.

This section focuses on two areas of particular concern in England, which show that the UK government is manifestly failing to discharge its obligations for the right to adequate housing under the ICESCR

These are first, homelessness, and second, multiple concerns with the quality, affordability, and regulation of the Private Rental Sector (PRS).

Both areas illustrate serious concerns with retrogression (that is, backward steps) in the enjoyment of the right to adequate housing; and how current law and policy over housing fails to protect some of England's most vulnerable and marginalised individuals and families.

Homelessness:

Exceptionally high levels of homelessness in England represent a serious concern with respect to the enjoyment of the right to housing under the ICESCR. Homelessness is the paradigm violation of the right to housing, and its most obvious manifestation. The deprivation of any dwelling that a person may call his or her own, with adequate privacy and security of tenure, is denied to the person experiencing homelessness.

This section details:

- The number of individuals forced to sleep rough in England has increased year on year, by a total of 55% since 2010 and 14% in the last year alone.

- Frontline services for homeless prevention and support are under severe financial pressure, with cuts negatively affecting the number of shelter and hostel beds and the number of frontline workers available, despite the growing numbers of homeless people needing these services.

- Hidden homelessness, overcrowding, and the use of inadequate temporary accommodation mask, but do not relieve, the true levels of homelessness. Increasing numbers of hidden homeless individuals and families live in a situation of unacceptable insecurity and instability.

- Use of temporary 'bed and breakfast' accommodation is higher now than at any time in the past five years, and its use for families continues in breach of the government's own rules.

- The vulnerable continue to live in insecure conditions: 280,000 households in England are currently at risk of homelessness, a 9% increase in one year.

- Local Housing Authority (LHA) duties to homeless and threatened homeless individuals have been weakened, allowing LHAs to discharge their duties without the consent of the homeless person. This puts more of the most vulnerable and marginalised households at risk of street homelessness.

The fact that levels of homelessness are rising, more households are at risk of becoming homeless, and key services for homeless people are being cut, points to a retrogressive step in the enjoyment of the right to housing, and thus a serious failing in the Government's obligations under the ICESCR.

The Private Rental Sector:

The private rental sector in the UK has, in recent history, accounted for only a small part of the tenure picture. However, the sector has grown rapidly, and set against a shrinking social housing sphere, the private rental sector now forms the second largest form of tenure in England.

Serious issues of quality, security of tenure, and affordability make the PRS a profoundly insecure form of housing for many.

This section shows that:

- A startling 29% of dwellings in the PRS are non-decent, meaning they do not meet basic standards of health, safety and habitability. For almost one third of those living in private rental accommodation, life is lived in unsafe and unhealthy conditions below the basic minimum considered adequate in England.

- Security of tenure in the PRS is inadequate. Tenants are afraid to complain about the poor quality of properties for fear of retaliatory evictions or arbitrary rent rises. There are no real safeguards against this practice, and as many as 200,000 tenants were subject to a retaliatory eviction in 2013.

- The PRS is increasingly unaffordable. The cost of housing is almost double that of social housing and private tenants are increasingly unable to meet the costs. A quarter of those renting in the PRS need housing benefit to meet the cost of housing.

The government has increasingly presented the PRS as an important lifestyle choice, and as a tenure suited to greater labour market mobility and flexibility. While this may be the case for some economically empowered households, the overall context of private rentals shows that the sector provides housing for a large number of people, particularly families, for whom a private rental home is a source of anxiety over tenure security, cost, habitability, and quality, rather than a sought-after choice.

1.1 Introduction: Housing, a Context of Crisis:

**Due to devolution of some functions away from the Westminster government in 1999, the legislative and policy terrain of housing is different in England from other parts of the United Kingdom. This report considers the English situation only.*

The UK government accepted international obligations to respect, protect and fulfil the right to housing under the International Covenant on Economic, Social and Cultural Rights (ICESCR) when it ratified the ICESCR in 1976. Yet a large number of individuals and families are not able to secure the adequate housing that provides the safe and affordable living conditions that the ICESCR requires.

The current housing climate is characterised by rapid changes in modes of living and tenure in the UK, interwoven in complex relationships with issues of supply, affordability, security of tenure, and habitability. These problems in realising the right to housing are linked to a political climate of austerity, and attendant cuts to state social security and other benefits. *The resulting situation is accurately identified as one of crisis.*[1]

This section focuses on two areas of particular concern in England, where the UK government is manifestly failing to discharge its obligations for the right to adequate housing under the ICESCR:

1. Homelessness; and
2. Multiple concerns with the quality, affordability, and regulation of the Private Rental Sector (PRS).

[1] See for example: United Nations General Assembly, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context – Addendum – Mission to the United Kingdom of Great Britain and Northern Ireland* A/HRC/25/54/Add.2 (30 December 2013) at para 26; National Housing Federation *Broken Market Broken Dreams: Home Truths 2014/2015* (National Housing Federation 2015); Fitzpatrick, et al *The Homeless Monitor: England 2015* (Crisis, February 2015) at vi; Griffith & Jefferys Solutions for the Housing Shortage (Shelter, 2013) at 13; Bone, 'Neoliberal Nomads: Housing Insecurity and the Revival of Private Renting in the UK' (2014) 19(4) *Sociological Research Online* 1.

With respect both to homelessness and the multiple areas of concern in the PRS, issues of affordability, security of tenure, habitability (quality), supply, and security of tenure emerge as major stumbling blocks to the actual enjoyment of adequate housing. Importantly, these issues map directly onto the seven elements which must be present for the right to adequate housing under the ICESCR to be enjoyed (set out below in Section 3.2.1). Accordingly, these multiple problems reveal that many people in England currently lack the right to adequate housing, and the government is failing in its obligations to them.

Moreover, the problems in all these areas are increasing, rather than decreasing, and give rise to real concerns that the UK is failing to fulfil its obligation of progressive realisation. More problematically, in fact, this is evidence of *retrogression* – backward steps – in the enjoyment of rights, which can only be justified in the most exceptional of circumstances and on the most stringent of grounds, many of which are not met in the English context.

1.2 Housing in England: A Snapshot of the Context

1.2.1 Rapid Change: Housing Upheavals

Housing in England is composed of three major tenure types: owner-occupied housing, social housing, and a private rental sector (PRS).

As recently as the 1970's state provided or subsidised social housing in the UK comprised almost a third of the housing stock, and housed more than a third of the population.[2] By 2013, the most recent year for which statistics are available, the vast majority of households in England lived in the private sector: 18.7 million of England's 22.6 million dwellings were either owner-occupied (14.3 million) or privately rented (4.4 million). Only 3.9 million households are now living in social housing.[3]

The last four decades can thus be characterised as, at the least, ones of rapid change or upheaval in the housing experience.

Four main challenges in the housing context can be identified, within which the enjoyment of the right to housing in England should be understood:

1.2.2 Four Main Challenges to the Enjoyment of the Right to Adequate Housing

Affordability

In the 15 years to 2012, median house prices in England rose by 200%. At the same time, median full-time earnings rose by just over 50%.[4] Many households, across tenure categories, experience pressures of affordability, given the overall context of high house prices, low pay, low savings rates, a high level of household or personal debt, and

[2] Alison Ravetz, *Council Housing and Culture: The History of a Social Experiment* (Routledge, 2001) at 2.
[3] Department for Communities and Local Government *English Housing Survey: Households 2013-14* (DCLG, July 2015) at 13.
[4] Department for Communities and Local Government, *Table 586: Median House Prices based on Land Registry Data, by District, from 1996* (DCLG, April 2014).

increasingly stringent restrictions on the housing costs which are eligible for coverage by State benefits.[5]

For most households, the cost of housing is the single largest household expense.[6] For more vulnerable households, the cost can only be expressed as prohibitive: In 2011/12, private renters in the bottom fifth of the UK income distribution spent an average of 56% of their income on housing.[7] In 2013/14, private renters *as a whole* spent an average of 52% of income on their housing.[8] For as many as 20% of all households, state support is necessary to be able to meet the cost of housing at all.[9] Not only low, but also middle income, groups are struggling to meet the cost of housing.[10]

It is, in fact, difficult to understand the overall housing situation in England absent an examination of recent, and deepening, cuts to social or welfare benefits. As a leading housing charity notes: 'policy factors – particularly ongoing welfare benefit cuts – have a more direct bearing on levels of homelessness than the economic context in and of itself.'[11] Several of these state benefit cuts have a specific and targeted impact on the affordability of housing. These include the housing benefit reductions for households considered to be 'under occupying' social housing, in the form of the controversial 'spare room subsidy' or 'bedroom tax.' A policy justified on the grounds of economic rationality and fairness,[12] this cut in benefit has put additional pressure on already vulnerable households and individuals, particularly those with disabilities.[13] The Department for Work and Pensions Interim Report evaluating the impact of the policy reveals that 20% of affected households have been unable to pay the increased cost of their housing, and indicated that where payments were being made, in more than 50% of cases, households were forced to make cuts to other household essentials or incur debts in order to pay the rent.[14] These essentials included energy for heating and lighting and adequate food.[15] Some households report having skipped meals to pay rent since the policy came into effect.[16] In another worrying measure, the new Westminster administration has announced budget cuts which will remove housing

[5] Houston et al *Gaps in the Housing Safety Net* (University of St Andrews, 2014) (Commissioned by Shelter) at 10. See also Bone 'Neoliberal Nomads' above note 2 at 3.
[6] Houston, ibid.
[7] Ibid.
[8] DCLG English Housing Survey 2013/14, above note 4 at 72 – 73. This figure excludes housing benefit. With housing benefit taken into account, the average % of income spent on housing by those in the private rental sector is 43%. Ibid at 72.
[9] MacInnes et al, *Monitoring Poverty and Social Exclusion 2013* (Joseph Rowntree Foundation & New Policy Institute, 2013) at 116.
[10] *Home Truths 2014/15* above note 2 at 19, UN Special Rapporteur's Report on the UK, above note 2 at para 22.
[11] *Homelessness Monitor 2015*, above note 2 at viii.
[12] Department for Work and Pensions *Housing Benefit Claimant Factsheet: Removal of Spare Room Subsidy* (DWP, 2013). See further Carr & Cowan 'The Social Tenant, the Law, and the UK's Politics of Austerity' (2015) 5(1) *Oñati Socio-Legal Series* 73.
[13] See *Lall v Westminster City Council* SC242/13/09744, (20 Sept 2013) and Tribunal Decision *F v Glasgow City Council* SC100/13/11351 (9 Sept 2013). See further Department for Work and Pensions *Evaluation of Removal of the Spare Room Subsidy: Interim Report* (DWP Research Report No 882, July 2014); UN Special Rapporteur's Report on the UK, above note 2 at para 46 – 53.
[14] Department for Work and Pensions *Evaluation of Removal of the Spare Room Subsidy* ibid at 17 and 69 – 72.
[15] Ibid at 70 – 71.
[16] Ibid.

benefit eligibility from those under 21 years of age.[17] Given that the latest English Housing Survey found that private renters who were aged 16 - 24 were among those who paid more than half their income in rent, even when housing benefit was taken into account,[18] this measure is likely to affect vulnerable households disproportionately and is likely to push more young people into street or hidden homelessness.

The housing picture is further complicated by stark differences across geographic regions. London, home to almost 8.5 million people,[19] has experienced a rapid inflation in the cost of living. In the year to January 2015, house prices in London rose 13%[20] and the average house price was £510,000.[21] In May 2015, housing prices in London were at record heights.[22] Housing costs in much of the South of England are also high.[23] While housing costs in other areas of England, particularly the more economically depressed North East, are lower, this does not necessarily equate to greater affordability. When lower salaries are taken into account, *all but a handful of regions in England are classed as unaffordable*, based on average house prices exceeding seven times the average salary.[24]

Security of Tenure

Especially in the private rental sector,[25] but also with respect to social housing,[26] tenure is increasingly insecure. With the expansion of homeownership since the early 1980s, and in the overall context of low wages and scant savings, increasing numbers of low and moderate income households are now owner-occupiers.[27] Thus, across *all* tenures, security of tenure is not robust. In the rental sectors, this is mainly due to lack of protection offered to tenants though the tenancy agreement itself, and lack of accompanying regulation. In the home-owner market, tenure insecurity is more contextualised, and is experienced when home owners cannot pay their mortgage costs due to the disparity between the value of the mortgage and the income of the mortgagee; other high personal debt burdens, or loss of employment, for instance. While the UK has not suffered the shocks and repossessions experienced in the housing crisis elsewhere in Europe, many households remain vulnerable, particularly those already economically or socially disadvantaged.[28]

[17] Her Majesty's Treasury, *Summer Budget 2015* (HC 264, 8 July 2015) at 88.
[18] *English Housing Survey 2013/14* above note 4 at 73.
[19] Office for National Statistics, *ONS Population Estimates, Borough and Ward: Mid Year Estimates Since 1961* (ONS, October 2014).
[20] Office for National Statistics, *House Price Index, January 2015* (ONS, 24 March 2015).
[21] Ibid at 9.
[22] Office for National Statistics, *House Price Index, May 2015* (ONS, 14 July 2015) at 8.
[23] ONS *House Price Index January 2015* above n 21 at 7. See also *Home Truths 2014/15*, above note 2 at 23.
[24] Ibid and at Figure 21.
[25] See below Section 4.2.
[26] Carr & Cowan, above note 12, provide a concise summary of tenure security changes in the Social Housing sector at 77 – 80.
[27] Houston, above note 6 at 10.
[28] Bank of England, *Quarterly Bulletin 2014 Q4* (2014) 54(4) at 432. See also Whittaker, *Resolution Foundation Briefing Note Mortgaged Future: Modelling Household Debt Affordability and Access to Re-Financing as Interest Rates Rise* (May 20 2014).

Supply

There is wide agreement that England faces a stark undersupply of dwellings, and that current policies are not adequate to remedy this issue. This picture reflects decades of underproduction, rather than a recessionary phenomenon.[29] As such *the current undersupply cannot be justified in terms of austerity policies or on account of any recent economic downturns*.[30]

Sound estimates are that 250,000 new dwellings are needed each year, *double the number currently being built*.[31] The Government currently proposes to build 200,000 'starter homes', available for first time buyers under the age of 40, over the next five year parliament, and proposes a range of enabling policies for the private sector such as those to 'unlock homes on brownfield land' as well as demand side subsidies such as the Help to Buy Equity loan scheme.[32] There is no new investment in social housing, and further social housing units will be privatised through a 'reinvigorated' Right to Buy,[33] which gives sitting tenants in social housing the right to buy their homes at a subsidized rate. These measures are likely only to address the housing needs of already relatively economically advantaged individuals or households. In addition, the plans do not go nearly far enough in ensuring supply: overall, it is projected that at current building rates, by 2031 England will be 2.5 million homes short of need.[34]

Quality or Habitability of Dwellings

A startling 22% of dwellings in England failed to meet the 'decent homes standard' in 2012.[35] Although this percentage is an improvement overall since 2006, in the private rental sector,

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[29] See *UN Special Rapporteur's Report on the UK*, above note 2 at para 24; *Homelessness Monitor* at 4; European Commission, *Recommendation for a Council Recommendation on the United Kingdom's 2014 National Reform Programme and Delivering a Council Opinion on the United Kingdom's 2014 Convergence Programme* (European Commission, Brussels, 2.6.2014 COM(2014) 429 final) at 3.

[30] *Homelessness Monitor* ibid.

[31] See *Home Truths 2014/15* above note 2; National Housing Federation et al, *Response to the Draft National Planning Policy Framework Consultation: Housing and Homelessness Joint Response (National Housing Federation, Chartered Institute of Housing, Shelter, Crisis, Homeless Link and the Northern Housing Consortium)* (October 2011) at 1; Shelter, *In the Mix: the Need for a Diverse Supply of New Homes* (Shelter, November 2014). Shelter, *What Happens when there aren't Enough Homes?* (Shelter, January 2015) at 10; Holmans *New Estimates of Housing Demand and Need in England, 2011 to 2031 Town and Country Planning Tomorrow Series Paper 16* (TCPA 2013) at 5.

[32] Conservative Party Manifesto 2015 at 51 available at https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf

[33] Ibid.

[34] Holmans, at 5.

[35] The *English Housing Survey Headline Report*, above note 4 at 71 states that a 'decent home' is one that meets all of four criteria:
a) it meets the current statutory minimum standard for housing as set out in the Housing Health and Safety Rating System (HHSRS); b) it is in a reasonable state of repair (related to the age and condition of a range of building components including walls, roofs, windows, doors, chimneys, electrics and heating systems); c) it has reasonably modern facilities and services (related to the age, size and layout/location of the kitchen, bathroom and WC and any common areas for blocks of flats, and to noise insulation); it provides a reasonable degree of thermal comfort (related to insulation and heating efficiency).
Detailed definitions of each of the criteria are included in Department for Communities and Local Government: *A Decent Home: Definition and Guidance for Implementation*, (DCLG, June 2006). The Housing Health and Safety Rating System (HHSRS) is an assessment tool against which decency of dwellings can be measured. See also Department for Communities and Local Government: *Housing*

non-decent homes continue to comprise almost one third – 29% - of the housing stock.[36] Overall, therefore, nearly a quarter of dwellings in the UK cannot be said to meet adequate standards of habitability, and thus an unwarranted number of households in the UK are exposed to very poor home environmental quality, with high levels of risks, particularly to health.

1.3 The Legal Framework: the Government's Obligations for the Right to Housing

1.3.1 National Position on ICESCR Rights

The United Kingdom has signed and ratified the ICESCR.[37] However, the state has not directly incorporated the rights under the ICESCR into its national laws. This means that individuals cannot ask a domestic court to adjudicate a rights claim on the basis of a breach of the ICESCR. In addition, the UK has yet to ratify the Optional Protocol to the Convention, which provides a mechanism for individuals to bring complaints before the Committee on Economic and Social Rights (CESCR), the independent body of experts which monitors implementation of ICESCR. Despite this lack of incorporation, it is important to note that the *international obligations for the rights contained in the ICESCR are nonetheless binding on the UK*.

The UK is also a party to the European Convention on Human Rights. In addition to its obligations under ICESCR, the UK has a number of obligations in European instruments to protect the right to housing. While the ECHR does not contain a right to housing per se, various Articles of the Convention and its Protocols may provide some protection for aspects of the right to housing.[38] In addition, the UK has obligations for ensuring the right to housing under the European Social Charter (ESC).[39]

No justiciable right to housing exists under domestic law, though the Human Rights Act (HRA) 1998 and the Equality Act 2010, among other legislation, may provide avenues to protect and ensure aspects of the right to housing. Importantly, the HRA incorporates the rights under the ECHR into domestic UK law, and all public authorities are under an obligation to act in conformity with those rights.

Health and Safety Rating System: Guidance for Landlords and Property Related Professionals (May 2006).

[36] *English Housing Survey 2013/14 p 80*.

[37] The UK signed the Convention in 1968, and ratified it in 1976.

[38] See Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Hart, 2013) at 67 – 74.

[39] Ibid at 50 – 67. The UK has not chosen to ratify the Revised European Social Charter, but has obligations under the original European Social Charter. The UK has accepted obligations with respect to Articles 15, 16, and 19, all of which protect the right to housing in some aspect. See UK Country Fact Sheet (January 2015).

1.3.2 The Right to Housing under the ICESCR

Substantive Obligations under Article 11(1)

The legal standard against which the UK's performance on ensuring the right to housing will be measured is set out in Article 11(1) of the ICESCR:

> The States Parties to the Present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and *housing*, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

Article 11(1) sets the right to housing within the broader enjoyment of an adequate standard of living, reflecting housing as one of a number of elements needed to enjoy a decent life. However, each aspect of Article 11(1) has its own legal content and, therefore, entails its own legal obligations for the state.

The Committee on Economic, Social and Cultural Rights has, in its authoritative interpretation of the right to housing in General Comment No 4 and General Comment No 7, set out seven aspects of housing which must be present in order for a state to be meeting its obligations with respect to the right to housing.

These elements include:

i) Legal security of tenure

Legal security of tenure can be considered the cornerstone of the right to housing. Any individual or family whose home is subject to seizure at any time, or who is subject to the threat of arbitrary eviction, cannot be said to enjoy the right to housing, but to reside only at another's pleasure.

Accordingly, General Comment 4 states that 'all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.'[40] Forced or arbitrary evictions are a prima facie violation of the ICESCR.[41]

The obligation to prevent forced evictions is immediate and not subject to the progressive realisation standard in Article 2(1) of ICESCR,[42] discussed below. States have positive obligations to protect against forced evictions, which include an obligation to prevent such

[40] UN Committee on Economic, Social and Cultural Rights, *The Right to Adequate Housing (Article 11(1)): Committee on Economic, Social and Cultural Rights General Comment 4* (1991) E/1992/23 at para 8(a).
[41] UN Committee on Economic, Social and Cultural Rights, *The Right to Adequate Housing: Forced Evictions (Article 11(1)) Committee on Economic, Social and Cultural Rights General Comment 7* (1997) E/1998/22 Annex IV at para 1.
[42] General Comment 4, above note 35 at para 8.

evictions being undertaken by private parties.[43] The state should have in place legislative measures to prevent them.[44]

Evictions will be in violation of State obligations under the covenant if they are undertaken in a discriminatory manner,[45] or as a punitive measure.[46] Evictions should be a last resort, carried out with a minimum of force,[47] and subject to strict procedural safeguards.[48]

Recognising that homelessness often leads to a breach of other human rights, the CESCR states that an eviction should not be undertaken if the immediate result will be the violation of other human rights of the individual.[49]

ii) Availability of Services, Materials, Facilities and Infrastructure

All dwellings must contain certain facilities which are recognised as essential for the health, security, comfort and nutrition of the household.[50] Specifically, each individual should have sustainable access to the following: natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.[51] These facilities and materials represent the bare minimum requirements for adequate housing.[52]

iii) Affordability

Affordability of housing has clear implications for the ability of individuals to enjoy their right to housing. Accordingly, the financial costs associated with housing should not compromise the household's or individual's ability to satisfy other basic needs.[53] This means that, where housing is unaffordable, states have international legal obligations under the covenant to take measures which will ensure affordability. These steps include providing housing subsidies for both home owners and tenants, and ensuring that housing finance reflects housing needs.[54] Tenants must be protected from unreasonable rent increases, whether their landlords are private parties or state agents.[55]

iv) Habitability

In order to meet the standard of adequacy required by the ICESCR, states must ensure housing is habitable in terms of the physical safety of the dwelling and its occupants. The

[43] Ibid at para 9. See also General Comment 7, above note 36 at para 17; and UN Committee on Economic, Social and Cultural Rights, *International Technical Assistance Measures (Article 22): Committee on Economic, Social and Cultural Rights General Comment 2* (1990) E/1990/23 at paras 6 and 8(d).
[44] General Comment 4, above note 35 at para 9.
[45] General Comment 7, above note 36 at para 10.
[46] Ibid at para 12.
[47] Ibid at para 13.
[48] Ibid at para 14 – 15.
[49] Ibid at para 16.
[50] General Comment 4, above note 35 at para 8b.
[51] Ibid.
[52] See further Hohmann, above note 33 at 23 – 24.
[53] General Comment 4, above note 35 at para 8c.
[54] Ibid.
[55] Ibid.

dwelling must be of an adequate size, and protect the dwellers from excessive cold, heat, damp, or other environmental threats. It must not pose a threat to its occupiers' health.[56] Health should be understood to encompass mental health.[57]

v) Accessibility

Accessibility has two aspects. First, housing must be accessible for disadvantaged groups, including the elderly, children, those with physical disabilities, the terminally or chronically ill, HIV-positive individuals, and victims of natural disasters or those in disaster-prone areas.[58] The Committee notes that the state should provide some priority consideration to these groups,[59] in order to meet its obligations (both positive and negative in nature) to ensure equal enjoyment of the ICESCR rights to all.[60] Secondly, access to land is related to access to housing and states must take steps to ensure adequate and appropriate land is made available to meet housing supply needs.[61]

vi) Location

Housing experts recognise that 'the location of the dwelling constitutes one of the key elements – if not the key element – in the social integration of individuals into society'.[62] Accordingly, housing must not be isolated from livelihood and educational opportunities, or health services, and houses should not be built on polluted sites.[63] Moreover, particularly in cases where households need to be relocated, individuals should not be isolated from existing community ties and social or kinship networks.[64]

vii) Cultural Adequacy

Housing must not suppress the expression of cultural identity, or the diversity of housing needs. Thus, those with particular housing traditions – for example, Traveller Communities, the Roma, or Gypsies should have the cultural aspects of their rights ensured. However, cultural adequacy should not be invoked to justify housing that is otherwise inadequate, in terms of quality or location. Importantly, in meeting its obligations for housing that is culturally adequate states must protect individuals from conditions that would not meet the norms of the community, or which could be considered degrading or shaming within the mores of the population at large.

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[56] Ibid at 8d.
[57] Farha, rIs there a Woman in the House? Re/Conceiving the Right to Housing; *Canadian Journal of Women and the Law* 118 at 129.
[58] General Comment 4, above note 35 at para 8 e.
[59] Ibid.
[60] See further, with specific reference to access to housing, UN Committee on Economic Social and Cultural Rights, *The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (Article 3) Committee on Economic, Social and Cultural Rights General Comment 16* (2005) E/C.12/2005/4 and UN Committee on Economic, Social and Cultural Rights, *Non Discrimination in Economic, Social and Cultural Rights (Article 2(2)): Committee on Economic, Social and Cultural Rights General Comment 20* (2009) E/C.12/GC/20.
[61] General Comment 4, above note 35 at para 8e.
[62] Kemeny, *Housing and Social Theory* (Routledge, 1992) at 159.
[63] General Comment 4, above note 35 at 8f.
[64] Ibid.

The Nature of State Obligations under the Covenant

The nature of States Parties' obligations under the ICESCR is set out in Article 2(1), which reads:

> Each States Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Article 2(1) sets out the obligation to progressively realise the rights in the Covenant, acknowledging that full enjoyment of all Covenant rights might not be immediately possible in all states.

However, the obligation of progressive realisation does not empty the Covenant of immediate or hard legal obligations. Rather, Article 2(1) requires the following action and imposes the following concrete obligations:

i) Immediate Obligations and Minimum Core Rights

Despite the overall progressive nature of the obligations under the Covenant, the ICESCR *does* impose immediate obligations on States Parties. The obligation to guarantee rights without discrimination is immediate in nature.[65] In addition, those aspects of the rights which can be met through respecting people's existing rights should be met right away. Any other aspect of the rights not imposing significant resource implications should also be immediately ensured.[66]

In addition, the Covenant imposes an immediate obligation to ensure the minimum core of each right, and, in respect of the right to housing under Article 11(1), the minimum core of each of the seven elements of the right.[67]

The obligation to ensure a minimum core does not mean that a certain proportion of a State Party's population should enjoy the right, but rather that at least the core elements of the right should be enjoyed by each and every individual to whom the state owes an obligation under the Covenant. In particular, states must protect those groups who are most marginalised or disadvantaged.[68] Any state failing to protect the minimum core of a right under the ICESCR is *prima facie* in violation of its international obligations under the Covenant.[69]

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[65] ICESCR Art 2(2).
[66] UN Committee on Economic, Social and Cultural Rights *An Evaluation of the Obligation to Take Steps to the 'Maximum of Available Resources' Under an Optional Protocol to the Covenant* (2007) E/C.12/2007/1 at para 7.
[67] UN Committee on Economic, Social and Cultural Rights, *The Nature of States' Parties Obligations (Article 2(1)): Committee on Economic, Social and Cultural Rights General Comment 3* (1990) E/1991/23 at para 10.
[68] UN CESCR *Statement on Maximum Available Resources*, above note 61 at para 4.
[69] General Comment 3, above note 62 at para 10.

Any limitation on the rights under the ICESCR must also, under Article 4 of the Covenant, be determined by law, and be consistent with the purpose of promoting the general welfare in a democratic society. Further, any limitation under Article 4 cannot exceed the scope of compatibility with the nature of the ICESCR rights.[70]

ii) Maximum Available Resources

Article 2(1) obligates states to mobilise the maximum available resources towards the realisation of ICESCR rights.

The CESCR has provided concrete guidelines on the obligation of states to make use of maximum available resources. While noting that states retain a margin of appreciation,[71] the Committee will examine whether the measures the state has taken are 'adequate' or 'reasonable' the Committee will take into account the following (non-exhaustive list) of factors:

> (a) The extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights;
> (b) Whether the State party exercised its discretion in a non-discriminatory and non-arbitrary manner;
> (c) Whether the State party's decision (not) to allocate available resources was in accordance with international human rights standards;
> (d) Where several policy options are available, whether the State party adopted the option that least restricts Covenant rights;
> (e) The time frame in which the steps were taken;
> (f) Whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk.[72]

Although normally thought of in terms of a portion of the State Party's budgetary allocation, resources should be conceived of more broadly. They can include other dimensions of public finance (such as monetary policy and government borrowing) and can encompass human, technological, organisational, natural and informational resources.[73]

iii) Progressive Realisation

States must continually take steps towards the realisation of the rights contained in the Covenant, such that those aspects of the right which *cannot* immediately be ensured are met

[70] ICESCR Art 4. See further on this point Nolan, 'Putting ESR-Based Budget Analysis into Practice: Addressing the Conceptual Challenges' in Nolan, O'Connell & Harvey, (eds) *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart, 2013) at 49 and Leckie, 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20 *HRQ* 81 at 98.
[71] Statement on Maximum Available Resources, above note 61 at para 11.
[72] Ibid at para 8.
[73] Elson, Balakrishnan & Heintz, 'Public Finance, Maximum Available Resources and Human Rights' in Nolan, O'Connell & Harvey, above note 65 at 14.

progressively over time. In the words of the CESCR, States must 'move as expeditiously and effectively as possible' towards the realisation of the right.[74] Steps must be deliberate, concrete, and targeted towards the increased enjoyment of the right.[75]

Importantly, the obligation to *take steps* is not in itself limited or qualified by resource constraints or development issues.[76] Thus, the improvement of rights enjoyment in a state is a continuous forward or upward obligation.

iv) Retrogressive Steps as a Violation of the ICESCR

The obligation of progressive realisation means that, except in a narrow range of exceptional circumstances, individuals should enjoy their rights more fully as time goes on. Retrogression or 'backsliding' in the enjoyment of rights, or in their legal protection, should not occur.[77]

Thus the state should not adopt measures which will diminish enjoyment or access to rights,[78] including through repeal of legislation which protects the rights under the ICESCR, or imposition of legislation which negatively affects the rights.[79] Budgetary decisions which negatively impact rights enjoyment under the Covenant must be strictly justified.[80]

'Force majeure' or lack of available resources may present a defence to the retrogressive measures.[81] Where resource constraints are given by the state as a justification for retrogressive measures, the acceptability of those measures will be measured against objective criteria pertaining to the situation in the state. These criteria include:

> (a) The country's level of development;
> (b) The severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant;
> (c) The country's current economic situation, in particular whether the country was undergoing a period of economic recession;
> (d) The existence of other serious claims on the State party's limited resources; for example, resulting from a recent natural disaster or from recent internal or international armed conflict.

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[74] General Comment 3, above note 62 at para 9.
[75] Ibid at para 2.
[76] Ibid.
[77] See further Nolan, Lusiani and Courtis, 'Two Steps Forward, No Steps Back? Evolving Criteria on The Prohibition of Retrogression in Economic and Social Rights' in Nolan, (ed) *Economic and Social Rights After the Global Financial Crisis* (CUP, 2014) at 123.
[78] The *Limburg Principles* note that a state violates the right if 'it deliberately retards or halts the progressive realization of a right, unless it is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or *force majeure'. Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (1978) E/CN.4/1987/17 at para 72.
[79] See UN Committee on Economic, Social and Cultural Rights, *The Right to Adequate Food (Article 11(1)): Committee on Economic, Social and Cultural Rights General Comment 12* (1999) E/C.12/1999/5 at para 19.
[80] See Nolan & Deutschke 'Art 2(1) ICESCR and States Parties Obligations: Whither the Budget?' (2010) 3 *EHRLR* 280 at 282.
[81] *Limburg Principles*, above note 73 at para 72. See further *Maastrict Guidelines on Violations of Economic, Social and Cultural Rights* (1996) E/C.12/2000/13 at para 14(f).

(e) Whether the State party had sought to identify low-cost options; and
(f) Whether the State party had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason.[82]

In all cases, however, deliberate regressive steps will be carefully scrutinised by the Committee: they constitute a prima facie violation of the Convention, which states have the burden of proof to discharge.[83] The Committee has repeatedly stated that a state which appears to be moving backward on the enjoyment of Covenant rights would have to provide a full justification that any retrogressive measure was strictly necessary,[84] after considering all alternatives, and that the measure was 'fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.'[85] In other words, governments introducing retrogressive measures must show they have used the maximum of available resources to avoid taking such a step.[86]

Crucially, moreover, retrogressive measures must not compromise the minimum core of the right.[87]

The Committee has noted that policies in times of economic and financial crises may lead to retrogression, and that in such times any retrogressive policy must meet four requirements:[88]

- First, the policy must be temporary in nature, enduring only for the period of crisis itself.
- Second, the policy must be necessary and proportionate, 'in the sense that the adoption of any other policy or a failure to act would be more detrimental to economic, social and cultural rights.'[89]
- Third, the policy cannot be discriminatory in nature or effects, and must encompass 'all possible measures, including tax measures,' to ensure inequalities do not increase, and that particularly disadvantaged and marginalised individuals or groups are not disproportionately affected by the measure.[90]

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[82] UN CESCR *Maximum Available Resources Statement* above note 61 at para 10.
[83] General Comment 13 at para 45, Gen Comment 14, para 32, General Comment 15, para 19, General Comment 17 para 27. See further Nolan, Lusiani and Courtis at 124-5.
[84] UN Committee on Economic, Social and Cultural Rights, *The Right to Education (Article 13): Committee on Economic, Social and Cultural Rights General Comment 13* (1999) E/C.12/1999/10 at para 45.
[85] General Comment 3, above note 62 at para 9. See further, for example, General Comment 13, above note 79 at para 45; UN Committee on Economic, Social and Cultural Rights, *The Right to the Highest Attainable Standard of Health (Article 12): Committee on Economic, Social and Cultural Rights General Comment 14* (2000) E/C.12/2000/4, at para 32; UN Committee on Economic, Social and Cultural Rights, *The Right to Water (Articles 11 and 12): Committee on Economic, Social and Cultural Rights General Comment 15* (2002) E/C.12/2002/11 at para 19. See also Nolan, Lusiani and Courtis, above note 72 at 124-5; and UN CESCR Statement on Maximum of Available Resources above note 61 at para 9.
[86] Sepulveda, *The Nature of the Obligations under the ICESCR* (Intersentia 2003).
[87] See for eg General Comment 15, above note 80 at para 42, General Comment 14, above note 80 at para 48,
[88] UN CESCR, *Letter to States Parties dated 16 May 2012*, Reference CESCR/48th/SP/MAB/SW.
[89] Ibid.
[90] Ibid.

- Fourth, the policy must identify the core of the right to be affected, and ensure that the core content is protected at all times.[91]

The conditions on austerity measures are thus strict and must be justified with reference to all rights, and all resources available. The minimum core must not be compromised, and the retrogressive measure must be the 'least bad' option available.

1.4 Areas of Concern: The Right to Housing in England

1.4.1 Homelessness

Homelessness is the paradigm violation of the right to housing, and its most obvious manifestation. The deprivation of any dwelling that a person may call his or her own, with adequate privacy and security of tenure, is denied to the person experiencing homelessness. For the homeless, there is no place from which he or she 'may not at any time be excluded as a result to someone else's say-so'.[92] The homeless have no security of tenure. They do not enjoy the dignity and peace represented by the right as a whole.[93]

While those who make their homes or beds on the street are the visible face of homelessness, ranks of 'hidden homeless' are dependent on the charity of friends and family (who may be ill-equipped or resourced to accommodate them), or stay in often profoundly unsuitable temporary accommodation.

Homelessness often results in the violation of a host of other human rights, from privacy to health, and in the inability to exercise civic human rights such as the right to vote.[94] Vulnerable groups (including ex-services personnel, the young, those with mental health issues, and women at risk of domestic violence) are at particular risk of experiencing homelessness, and, where they do become homeless, will be affected by the experience more severely.[95]

Homelessness, in its various manifestations, must be understood as a *prima facie* violation of the right to housing, including the minimum core of the right.

As such, the 'exceptionally high'[96] levels of homelessness in England represent a serious concern with respect to the enjoyment of the right to housing under the ICESCR. The fact that levels of homelessness are rising, and more households are at risk of becoming homeless, points to a retrogressive step in the enjoyment of the right to housing, and thus a serious failing in the Government's obligations under the ICESCR.

[91] Ibid.
[92] Waldron, Homelessness and the Issue of Freedomssue of Free*UCLA Law Review* 295 at 299.
[93] General comment 4, above note 35.
[94] See Hohmann, above note 33 at 148 - 9. See further Thomas *Homelessness Kills: An Analysis of the Mortality of Homeless people in Early twenty-first century England* (Crisis, 2012).
[95] Bevan, 2012). : An Analysis of the Mortality of Homeless people in Early twe*MLR* 964 at 971 11: The Hollow Housing Law Revolutionities and Local Government, *Homelessness: Code of Guidance for Local Authorities* (DCLG 2006).
[96] Bevan, above note 90 at 972.

Rising Levels of Street Homelessness

a) Rough Sleeping

An important estimate of street homelessness is provided by 'rough sleeping' statistics. The definition of rough sleepers captures those homeless people identified as:

> People sleeping, about to bed down (sitting on/in or standing next to their bedding) or actually bedded down in the open air (such as on the streets, in tents, doorways, parks, bus shelters or encampments). People in buildings or other places not designed for habitation (such as stairwells, barns, sheds, car parks, cars, derelict boats, stations, or "bashes" which are makeshift shelters, often comprised of cardboard boxes).
>
> The definition does not include people in hostels or shelters, people in campsites or other sites used for recreational purposes or organised protest, squatters or travellers.
>
> Bedded down is taken to mean either lying down or sleeping. About to bed down includes those who are sitting in/on or near a sleeping bag or other bedding.[97]

It is important to note that rough sleeping statistics present a snapshot of rough sleepers on any given night. They do not represent a total of people sleeping rough in any month or year.

Rough sleeping statistics therefore capture only the tip of the homeless iceberg, although they may represent many of its most vulnerable and deprived individuals, many of whom suffer from deep, multiple forms of social vulnerability and exclusion such as issues with substance abuse and mental health.[98]

National figures on rough sleeping indicate that there has been a 55% increase since 2010,[99] with approximately a 5% increase in 2012 and in 2013.[100] The most recent figures, for autumn 2014, indicate a total rough sleeping population of 2,744. This is an increase of 14% from the 2013 figure of 2,414.[101]

More accurate figures are available for London, where rough sleeping doubled over the six years to 2013.[102] The autumn 2014 counts for London indicate a startling 37% increase over 2013.[103] Outside London, the rise in rough sleeping was estimated at 7%.[104]

The year-on-year rises in rough sleeping indicate a serious violation of all elements of the right to housing, including its minimum core. Moreover, the worsening situation illustrates serious retrogressive steps in enjoyment of the right.

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[97] Department for Communities and Local Government, *Rough Sleeping Statistics England Autumn 2014 Official Statistics* (DCLG, 26 February 2015) at 9.
[98] Fitzpatrick, Bramley and Johnsen, *Multiple Exclusion Homelessness in the UK: An Overview of Key Findings: Briefing Paper No 1* (Herriott-Watt University 2012).
[99] *Rough Sleeping Statistics England – Autumn 2014* above note 92 at 3.
[100] Ibid.
[101] Ibid.
[102] Ibid.
[103] Ibid.
[104] Ibid.

b) Rates of Shelter or Hostel Use

Many homeless individuals will not be found bedding down as rough sleepers, as they are accommodated in night shelters or hostels which provide temporary, stop-gap accommodation to those who would otherwise find themselves on the street.

In England, 'night shelters' normally refer to basic spaces used for overnight accommodation in the very short term. Most are operated by charities, are often free, and may offer some food. In some areas, night shelters open only during winter months.[105] Almost half of providers offering beds to homeless individuals were operating at or above full capacity in 2013-14[106] 72% of providers refused access to their services because all beds were full in 2013, a rise from 47% in 2012.[107]

Hostels offer slightly more stable accommodation arrangements, often available only to homeless people referred to them from other frontline agencies.[108] In particular, hostel accommodation is used to provide temporary accommodation to homeless individuals to whom local authorities owe a statutory duty (discussed further below section 4.1.5). There are about 40,000 people in England using hostels for housing.[109]

Hostels are not free, though can be paid for out of housing benefit.[110] They generally provide a shared bedroom, kitchen and bathroom facilities.[111] Hostel accommodation is not available to those who are not eligible for government welfare benefits, which affects its availability, particularly for recent migrants. It is generally not available to families or couples.[112]

In the face of rising levels of homelessness and vulnerability to homelessness, there is a troubling drop in the number of hostel places available, with 6% fewer beds available in hostels in 2013 than in 2012,[113] and a further 5% fewer accommodation projects for single people available in 2014.[114] Overall, there is a drop of 3% in available beds for single homeless persons. This fall, though statistically small, means more people are pushed onto the street, further increasing unacceptable levels of rough sleeping.

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[105] See for example Hammersmith and Fulham Council *Finding a place to Live and Renting from a Private Landlord* (2009) available at http://www.lbhf.gov.uk/Directory/Housing/Housing_advice/Homelessness/97574_Finding_a_place_to_live.asp

[106] 2013 figures are in Homeless Link, *Survey of Needs and Protection 2014* (Homeless Link, 24 April 2014) at 23; 2014 figures are in Homeless Link, *Support for Single Homeless People in England: Annual Review 2015* (Homeless Link, 2015) at 21.

[107] *Survey of Needs and Protection 2014*, above note 101 at 18.

[108] Shelter, *How to get into a Hostel or Night Shelter* at http://england.shelter.org.uk/get_advice/homelessness/homeless_and_on_the_streets/how_to_get_into_a_hostel_or_nightshelter

[109] *Survey of Needs and Protection 2014* above note 1091 at 18 – 24.

[110] Shelter, *Nightshelters and Emergency Hostels* available at http://www.lbhf.gov.uk/Directory/Housing/Housing_advice/Homelessness/97574_Finding_a_place_to_live.asp.

[111] Ibid.

[112] Ibid.

[113] *Survey of Needs and Protection 2014* above note 101 at 19.

[114] *Support for Single Homeless People 2015*, above note 101 at 17.

Further, although hostel or shelter beds can be of profound importance, *they do not fulfil even the minimum core elements of the right to adequate housing. There is no security of tenure, no long term peace or security can be guaranteed. A right to bare shelter is of fundamental importance to the street homeless population, but shelter beds do not fulfil the State party's obligation for the realisation of the right to adequate housing.*

Cuts in Funding for Frontline Homelessness Prevention and Support

With growing levels of homelessness, including both street homelessness, discussed above, and 'hidden' homelessness, discussed in section 4.1.3 below, one might expect the government to respond with additional funding and other measures to provide increased frontline support for homelessness prevention, and for those who find themselves without a home.

However, front-line services in homelessness prevention and support have been under severe financial pressure in recent years.[115] Many of these services have been cut, and these cuts are a contributory factor in the rising numbers of rough sleepers in England.[116]

Local Authority budgets to support single homeless people had been cut by over a quarter in the three years leading up to 2013/14.[117] *Budget pressures, coupled with legislative reforms that weaken local authority duties to the homeless (or make it easier for those authorities to discharge their duty to the homeless),[118] have resulted in inadequate frontline help for homeless individuals, even those who present with clear signs of need and vulnerability.[119]*

The inadequacy of frontline services for the homeless is also evident in the cuts in numbers of hostel and shelter beds, discussed in section 4.1.1.b) above. As many as 38% of these emergency and temporary accommodation services saw their funding fall from 2012 levels in 2013.[120] Almost half of those services affected have responded to the budget shortfalls by reducing the number of frontline staff.[121]

Frontline and emergency services are of prime importance to the most vulnerable, and can make a profound difference to those at risk of the most severe deprivations of the right to housing. *Cuts to such services represent a real indication of retrogression for obligations within the minimum core elements of the right to housing.*

[115] See *Survey of Needs and Protection 2014* above note 101; *Homelessness Monitor 2015*, above note 2 at 18-21.
[116] *Homelessness Monitor 2015*, above note 2 at 41.
[117] Spurr, 'Revealed: The Extent of Single Homeless Cuts' *Inside Housing* (4 July 2014).
[118] See further section 4.1.5 below.
[119] See *Homelessness Monitor 2015*, above note 2 at 19. See further Dobie, Sanders, & Teixeira, *Turned Away: The Treatment of Single Homeless People by Local Authority Homeless Services in England* (Crisis 2014).
[120] *Survey of Needs and Protection 2014*, above note 101 at 4.
[121] Ibid.

Rates of 'Hidden' Homelessness are Unacceptably High

a) Hidden Homelessness: Defining the Phenomenon

Hidden homelessness can be defined as the number of people not entitled to accommodation by the local authority, because they are not in priority need, but who have no accommodation that they are entitled to occupy or can reasonably continue to occupy. Thus it describes those who, having lost their own home, share with family or friends, often in accommodation characterised by insecure and poor living conditions. The definition can include would-be couples forced to live apart, as well as single homeless and hostel residents.[122] While such individuals may be housed, they experience a profound level of tenure insecurity, and as such cannot be said to enjoy the right to adequate housing.[123]

Hidden homelessness remains unacceptably high. On 2010 statistics, as many as 4% of households in the UK are 'concealed'[124] within another household, with concealed homeless households particularly high in London.[125] Some 2.23 million households in England house a concealed single person; 265,000 concealed single parents and couples.[126] The burden and insecurity can attend both the 'host' and concealed family or person. In fact, government figures illustrate that over a quarter of people accepted as homeless by a LHA became so as a parent, friend or relative was no longer able or willing to accommodate the person.[127]

b) Overcrowding

Hidden homelessness is also tellingly illustrated by overcrowding statistics. Over 3%, or 685,000 households, in England were overcrowded in 2012.[128] Overcrowding is not merely a matter of inconvenience for the families affected. The government imposes occupancy standards for the very reason that those living in overcrowded properties are subjected to inadequate living conditions on multiple levels. In addition to cramped conditions, there are knock-on effects in the enjoyment of other economic and social rights, such as the right to health, and the right to a private life, for example.[129]

Overcrowding statistics can be calculated by measuring the number of bedrooms in a dwelling against the number of household members, taking into account 'undesirable' sharing.[130] Overcrowded households were most commonly found in the private and social

[122] Bramley et al *Estimating Housing Need* (DCLG, Nov 2010) at 29 box 2.1; House of Commons Select Committee on Office of the Deputy Prime Minister: *Housing, Planning, Local Government and the Regions, Written Evidence – Memorandum by the Countryside Agency* (HOM 58) (2005) at http://www.publications.parliament.uk/pa/cm200405/cmselect/cmodpm/61/61we02.htm
[123] Hohmann, above note 33 at 149.
[124] Bramley above note 117 at 5.
[125] Ibid.
[126] *Homelessness Monitor 2015*, above note 2 at xii.
[127] Department for Communities and Local Government, *Statutory Homelessness: January to March Quarter 2015 England* (DCLG, 24 June 2015) at 5.
[128] *Homelessness Monitor 2015*, above note 2 at 8.
[129] See for example *R (on the application of Bernard) v Enfield LBC* [2003] UKHRR 148 (Admin) (QB) and *O'Donnell (a minor) and others v South Dublin County Council* [2007] IEHC 204.
[130] *English Housing Survey*, above note 4 at pg 28 box 2. For statistical purposes, the 'bedroom standard' is calculated as follows:
A standard number of bedrooms is calculated for each household in accordance with its age/sex/marital status composition and the relationship of the members to one another. A

rental sector, at 6% of households in those tenure categories.[131] The rates of overcrowding in London are the highest in the country, at 8%.[132]

c) Temporary Accommodation for Homeless Households including 'Bed and Breakfast' Accommodation

In December 2014, statistics record the highest number of households placed in temporary accommodation by local authorities in the last five years, and a 9% increase on the previous year. There were 61,970 temporary accommodation households at the end of December 2014.[133] Yet, by 31st of March 2015, this number had risen again, representing an 11% rise on March of 2014, and bring the total to 64,710 households.[134]

Temporary accommodation is vitally important to keep homeless individuals and families off the street. However, it is often profoundly unsuitable in the long term. Problematically, the operation of homelessness legislation means that families in temporary accommodation can be disadvantaged in gaining access to permanent and stable accommodation, as they can cease to be in 'priority need'.[135]

Placement in temporary accommodation occurs when there is no suitable long-term (for example social or private rental) accommodation available for the household. Temporary accommodation varies widely, and is classed as either 'self-contained' or as having shared facilities. Shared facility temporary accommodation comprises hostels (see above section 4.1.1.b), women's refuges, and what is called 'Bed and Breakfast' (B&B) accommodation.[136]

While for many 'Bed and Breakfast' accommodation conjures images of country weekends away, the Bed and Breakfast accommodation experienced by homeless or threatened homeless families in England cannot be understood in this cosy way. Rather, B&B

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separate bedroom is allowed for each married or cohabiting couple, any other person aged 21 or over, each pair of adolescents aged 10-20 of the same sex, and each pair of children under 10. Any unpaired person aged 10-20 is notionally paired, if possible, with a child under 10 of the same sex, or, if that is not possible, he or she is counted as requiring a separate bedroom, as is any unpaired child under 10.
This notional standard number of bedrooms is then compared with the actual number of bedrooms (including bed-sitters) available for the sole use of the household, and differences are tabulated. Bedrooms converted to other uses are not counted as available unless they have been denoted as bedrooms by the respondents; bedrooms not actually in use are counted unless uninhabitable.
Households are said to be overcrowded if they have fewer bedrooms available than the notional number needed. Households are said to be under-occupying if they have two or more bedrooms more than the notional needed.
Ibid at 70. The bedroom standard, though used to calculate overcrowding rates for statistical purposes, is one of two calculations of overcrowding provided for in the Housing Act 1985 in ss 324 – 326.

[131] *English Housing Survey*, above note 4 at 28 and table 9.

[132] Mayor of London *Homes for London: The London Housing Strategy* (Greater London Authority March 2014) at 11.

[133] DCLG *Statutory Homelessness Statistics Oct-Dec 2014*, above note 122 at 1.

[134] DCLG, Statutory Homelessness Statistics January to March Quarter 2015 England (DCLG, 24 June 2015) at 9.

[135] See Housing Act 1996 Part VII.

[136] DCLG *Statutory Homelessness Statistics Oct-Dec 2014* above note 122 at 8.

accommodation offers extremely basic accommodation, normally with shared bathrooms and kitchens, often of poor quality.[137]

Accordingly, the Homelessness (Suitability of Accommodation) Order 2003, states that B&B accommodation is not 'suitable accommodation' for families unless there is no other accommodation available and, even then, only for a maximum period of six weeks.[138]

Nevertheless, in England, the number of families with dependent children placed in B&B style accommodation increased from 630 at the end of March 2010 to 2,040 at the end of December 2014 – an increase of 31% from a year earlier.[139] By March 31 2015 the increase was 111% over the end of the same quarter of 2014.[140] Of these, 36% had been in bed and breakfast style accommodation for more than six weeks.[141]

Numbers at Risk of Homelessness Higher

In 2013/14, 280,000 households in England were at risk of homelessness, a figure which represents a 9% increase on the previous year.[142] High housing costs, lack of adequate and affordable housing units, low wages, and cuts in state support mean that increasing numbers of families and individuals live in a situation of day-to-day insecurity.

Given that the combination of these factors places heightened pressures on already stressed and vulnerable households, the government should be taking measures to strengthen protection for these households.

Instead, recent legislative reforms, particularly those introduced under the Localism Act 2011 (which is discussed in more detail in section 4.1.5, below) represent a move towards a 'stop-gap' understanding of homelessness.[143] The ability of Local Housing Authorities (LHAs) to bring to an end to their duties to the homeless without securing the consent of the person,[144] for example, represents a move away from a more holistic protection of individuals and households at risk of homelessness which takes account of the underlying drivers for homelessness, and the tools for its prevention. The definition of homelessness represents a statement about what society accepts as the minimum standard of adequacy below which no person's housing should fall.[145] Accordingly, narrowing the definition of homelessness or taking steps to exclude state duties for those who were previously considered homeless diminishes social inclusion and equality.

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[137] See the personal testimonials and descriptions of B&B Accommodation in the Local Government Ombudsman, *Report on an Investigation into Complaint Numbers 12 009 140 & 12 013 552 against Westminster City Council* (13 September 2013).
[138] SI 2003/3326
[139] DCLG *Statutory Homelessness Statistics Oct-Dec 2014* above note 122 at 9.
[140] DCLG Statutorily Homelessness: January to March Quarter 2015 England at 11.
[141] Ibid.
[142] Combining the figures on prevention and relief with those on homelessness acceptances reveals the increased number of households at risk of losing their home. See *Homelessness Monitor 2015*, above note 2 at 60.
[143] See for eg Bevan, above note 90 at 974.
[144] See the discussion in 4.1.5 below.
[145] Rossi & Wright, 'The Ghetto Underclass: Social Science Perspectives' (1989) 501 *Annals of the American Academy of Political and Social Science* 132 at 134.

Therefore, such legislative weakening fits uneasily with the state's obligation under the ICESCR to provide a right to adequate housing, rather than a right to mere shelter for those in particular crisis, as important as such assistance may *also* be.

Weakening of Local Authority Homelessness Duties

Local Authorities in England have a statutory duty to house homeless individuals and households. The legislative picture is complex,[146] but specifically, the Housing Act 1996 imposes a main duty on Local Housing Authorities (LHAs) to house those who are unintentionally homeless, and who are in priority need.[147] It covers not only 'roofless' individuals but those in overcrowded or other unsuitable accommodation and thus 'threatened' with homelessness.[148] The legislation thus provides an important recognition of manifestations of homelessness other than rooflessness based on rough sleeping figures.

The threshold for making an application to be considered homeless is low, and, once made, imposes a duty on the LHA, which may include providing temporary accommodation.[149] 'Gatekeeping' by LHAs, though incompatible with the legislation,[150] can significantly skew the figures of 'homelessness acceptances'. *Importantly, this does not mean that homelessness, or the numbers of those at risk of homelessness, is actually declining*.

The categories of intentionality and priority need serve to narrow the duty on LHAs. The categories of those in priority need are narrow, covering only: households with dependent children or a pregnant woman; those made homeless or threatened by homelessness due to a disaster such as flood or fire; those who are vulnerable because of old age, mental illness, handicap or physical disability or other special circumstance, those aged 16 or 17; those aged 18 to 20 and previously in care; those previously in custody; those previously in Her Majesty's Forces; or those who were forced to flee their home because of violence or the threat of violence.[151] Intentionality operates so that some vulnerable individuals and families, and those who fall foul of the legislation in good faith through misunderstanding, for example,[152] remain ineligible for assistance or rehousing.

As commentators note, the statutory safety net works very well in straightforward cases, but can significantly disadvantage complex or difficult cases, and places a significant burden on the vulnerable, who have to prove their vulnerability.[153] Those who do not fall within the

[146] See Cowan, Housing Law and Policy (CUP, 2011) at 151- 172.
[147] Housing Act 1996 Part VII particularly ss 190 – 196.
[148] Ibid.
[149] Cowan, above note 139 at 151 – 52.
[150] Ibid at 151 – 54.
[151] See Housing Act 1996 Part VII s 189 as amended by The Homelessness (Priority Need for Accommodation) (England) Order 2002.
[152] See for example *Ugiagbe v Southwark LBC* [2009] HLR 35.
[153] Thames Reach notes that:
'The statutory safety net works very successfully where the proof of statutory rights is easy to establish; e.g. where you are required to prove that you have dependent children. It is less helpful where you have to prove not only circumstances, but vulnerability. For example a person with a physical disability has to prove that their disability makes them vulnerable "so that they may suffer in a situation where another homeless person would be able to cope without suffering". A process of assessment is required to ascertain vulnerability and this is carried out by the local authority to which the person has applied.'
Thames Reach *Homelessness Facts and Figures* (Thames Reach, 26 February 2015).

narrow categories of 'priority need' will be unable to benefit. Thus, this is a safety net in which significant holes exist.

This already problematic legislation is further weakened by recent legislative changes under the Localism Act 2011, which have served to make it easier for LHAs to discharge their homelessness duties, without necessarily remedying homelessness itself.

Overall, these changes have a negative impact on the enjoyment of the right to housing in England. They impact particularly on security of tenure, affordability, and the potential adequacy of housing.

The Localism Act 2011 allows LHAs to discharge their duty to a homeless individual or household by making an offer of accommodation in the private rental sector, *even if the homeless individual does not accept that offer*. This significantly weakens the position of the homeless individual, who was previously able to remain 'statutorily homeless' and gain, for example, temporary accommodation, while waiting to access permanent social housing.[154] While the requirement that the private rental accommodation is 'suitable' takes account of factors which protect the elements of location, accessibility, and habitability, (such as location, links with carers and family)[155] and may act as a safeguard, the factors are not binding on the local authority, but merely indicative of the local authorities' judgement on whether accommodation is or is not suitable.

Notably, it appears that LHAs are increasingly placing homeless households outside their own districts: at the end of March 2015, just over one quarter of households in temporary accommodation were outside their local authority. The rate of increase of placements outside the local authority over the previous year was 30%.[156] This is in potential violation of the location element of the right to housing under the ICESCR, if links with family, support or care networks, livelihood and educational opportunities are denied and disrupted.

It is worrying that some LHAs have reacted to the new law explicitly as a way to bring to an end all their homelessness duties.[157] However, the desirability of bringing the LHA's housing duties to an end is, itself, an aim of the new legislative scheme.[158] Severe financial cuts facing Local Authorities operate as a significant push factor to use the legislation in this way.

The likely result of the new legislation, combined with the budgetary pressure facing Local Authorities, is that people will remain equally vulnerable and ill-housed, but now fall outside the scheme of legislative protection. Such a situation illustrates that the Localism Act amendments to the Housing Act 1996 may represent a regressive step in the realisation of the right to housing.

Given the very real concerns with the quality, security of tenure, and affordability of the private rental sector in England (discussed in greater depth below), reliance on this sector to

[154] Bevan, above note 90 at 970 – 972.
[155] Homelessness (Suitability of Accommodation) (England) Order 2012 No. 2601 Articles 2 and 3.
[156] DCLG *Statutory Homelessness Statistics Jan-March 2015*, above note xx at 12 .
[157] Bevan, above note 90 at 971. See for example Oxford City Council, *Homeless Discharge into the Private Rented Sector Policy* (2013).
[158] Department for Communities and Local Government, *Local Decisions: A Fairer Future for Social Housing Consultations Document* (DCLG, November 2010) at para 6.7 6.7 ov

ensure the right to housing of homeless individuals is unlikely to ensure adequate housing in practice. It is more likely to lead to a repeating cycle of homelessness and vulnerability.

In addition, the increased ability for LHAs to discharge their homeless duties more easily is likely to lead to households which were previously housed, even if in profoundly unsuitable conditions, becoming roofless and thus further swelling the ranks of the street homeless population. This is a profound diminution in the ability to enjoy the right to housing, and can only be considered a regressive situation of the enjoyment of ICESCR rights. This violation of the right to housing under the Covenant is made more likely by the fact that those at risk of homelessness tend to be vulnerable and marginalised, and thus less likely to be able to cope with the challenges of the private rental sector, which include weaker protection of tenure, higher costs, and poorer habitability or quality.[159] These issues are considered further below, in Section 4.2.

Key Recommendations: Homelessness

1. The government should take immediate measures to end homelessness, ensuring an adequate supply of affordable, permanent, decent, and habitable housing, by building and/or facilitating the building of at least 250,000 new homes per year.

2. In the absence of an adequate supply of affordable, decent and habitable housing, the government should take immediate measures to ensure affordability in the short-term through:
    a. the adequate provision of state benefits to those unable to afford housing costs;
    b. sustained investment in existing affordable housing stock.

3. The government must take immediate measures to reduce the exceptionally high levels of street homelessness, including through:
    a. ensuring adequate numbers of hostel or shelter places
    b. ensuring adequately resourced frontline support is available to all homeless or threatened homeless individuals and families
    c. taking immediate legislative measures to strengthen security of tenure across the
        i. social housing sector; and
        ii. private rental sector[160]
    d. taking policy measures to ensure housing is affordable in line with recommendations 1 and 2 above.

4. The government should strengthen legislation and take budgetary measures to
    a. ensure 'priority need' categories accurately reflect all real vulnerabilities and do not exclude those in real need;
    b. reinstate the crucially protective link between the discharge of LHA homelessness duties and the provision of social housing to ensure all vulnerable individuals and families remain adequately and securely housed.

[159] See further Bevan, above note 90 at 972
[160] See also the Key Recommendations in Part B, Private Rental Sector, below.

c. ensure Local Housing Authorities:
    i. cannot discharge their duties to the homeless through provision of private rental accommodation without the consent of the homeless person;
    ii. discontinue the use of inadequate, temporary accommodation such as bed and breakfast accommodation for homeless and threatened homeless individuals and, particularly, families.

1.4.2 Private Rental Sector

The private rental sector (PRS) in the UK has, in recent history, accounted for only a small part of the tenure picture.[161] However, the sector has grown rapidly, and set against a shrinking social housing sphere, the private rental sector now forms the second largest form of tenure in England, at 17% of the total households.[162] It remains a poorly regulated sector, with weak legislative controls.[163] For example, no checks are imposed on prospective landlords, and there is no requirement for a written tenancy agreement.[164]

The UK government has increasingly presented the PRS's expansion as based on lifestyle choice, and as a form of tenure suited to greater labour market mobility and flexibility.[165] While this may be the case for some economically empowered renters,[166] the overall context of private rentals suggests that the sector provides housing for a number of households, particularly families, for whom a private rental home is a source of anxiety over tenure security, cost, habitability, and quality, rather than a sought-after choice.[167]

More than one quarter of those households living in the PRS are in receipt of Housing Benefit, which subsidises their housing cost. This is a substantial increase since 2008-9 (when the figure stood at 19%)[168] indicating that issues of affordability in this sector continue, including for those who are employed.[169]

The majority of tenancies in the PRS are regulated by the Assured Shorthold Tenancy. Assured Shorthold Tenancies set a minimum tenancy period of six months, after which the tenancy can be renewed, or the landlord can terminate at will with two months' notice.[170] The landlord can increase the rent at the renewal period as he or she sees fit. A small number of tenancies, pre-existing 1990, continue to be regulated by the previous, rent-controlled legislation.

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[161] Cowan, above note 139 at 51. See further Hughes & Lowe, *The Private Rented Housing Market: Regulation or Deregulation?* (Ashgate, 2007).
[162] *English Housing Survey 2013/14*, above note 4 at 13.
[163] Cowan, above note 122 at 53-4.
[164] Crisis, *Response to the Communities and Local Government Select Committee Inquiry into the private Rental Sector* (January 2013) at para 4.4
[165] Department for Communities and Local Government, *Improving the Rented Housing Sector*, (2013) at https://www.gov.uk/government/policies/improving-the-rented-housing-sector--2/supporting-pages/private-rented-sector.
[166] See van Lohuizen & Emmett, 'The Flyers and the Triers' (Shelter, March 2015) at 11.
[167] Shelter, *Consultation Response: Shelter's Response to the Review of Property Conditions in the Private Rented Sector* (March 2014) at 2. See further *Home Truths*, above note 2 at 15.
[168] *English Housing Survey Headline Report*, above note 4 at 8.
[169] 10% of working households in the PRS are in receipt of housing benefit, up from 9% in 2009-10, See English Housing Report 2013/14, above note XX at 70 and at Annex Table 4.1
[170] Housing Act 1988, particularly s 5, as amended.

Three major issues with respect to the PRS are: the extreme poor quality of a large proportion of the dwellings in the sector; the worrying practice of revenge or retaliatory evictions; and the overall issue of affordability in the sector.

Quality

It is widely accepted that the quality of property in the PRS is poor.[171] The most recent government statistics reveal that 29% of the private rented sector is classed as 'non-decent.'[172] In unemployed households in the PRS, 43% lived in non-decent housing. Older renters, those who live alone, and those who have lived in their home for more than 10 years were also more likely to be in non-decent housing.[173]

It should be a matter of significant concern for the enjoyment of the right to housing that almost *one third of households in the private rental sector are living in housing that is substandard to the point that it is unsafe or unhealthy, and that the most vulnerable groups in the PRS face an increased incidence of non-decent living conditions*

Although the HHSRS risk assessment system provides a fairly sophisticated tool for the assessment of the quality of housing,[174] monitoring of quality in the private rented sector cannot in fact be considered rigorous:[175] there are no mandatory checks on properties, and investigations by local authorities into the adequacy of a property will normally only be taken at the instigation of the tenant, the implications of which are discussed below.

A rigorous quality control regime should lead to substantial increases in quality, and thus in enjoyment of the right to housing in England, yet there are no adequate, binding, measures currently planned by the government.

Retaliatory Evictions – a Failure of Security of Tenure

Forced evictions are, *prima facie*, a violation of the right to housing under the ICESCR. Whether undertaken by private parties, or by state agents, any eviction taken for retaliatory or punitive purposes is in violation of the right.

Evictions, when carried out, should not negatively impact on other rights of the individual or family, particularly by rendering the person homeless. Yet, government statistics show that the loss of a private sector tenancy is now the single biggest push into homelessness in England.[176]

A major issue in this area relates to the insecurity of tenure in the PRS, and is, significantly, tied to the extreme poor quality of the sector, with one third of homes within it being classed

[171] See Cowan, above note 122 at 56; Gousy *Safe and Decent Homes: Solutions for a Better Private Rented Sector* (Shelter, 2015); *Shelter's Response to the Review of Property Conditions in the Private Rented Sector* above note 160 at 3.
[172] *English Housing Survey 2013/14* above note 4 at 80.
[173] Ibid.
[174] *Housing Health and Safety Rating System: Guidance for Landlords* above note 30.
[175] Fitzpatrick et al, *The Homelessness monitor: England 2013* (Crisis, 2013) at 15.
[176] DCLG, *Statutory Homelessness: Jan-March 2015* (DCLG 24 June 2015) at 5.

as non-decent (see previous section on Quality). This is the issue of the retaliatory or 'revenge' eviction.

A retaliatory eviction occurs where a private landlord takes steps to evict a tenant, normally by serving a S 21 possession notice under the Housing Act 1988 on an Assured Shorthold Tenancy,[177] in response to a tenant's request that the landlord repair or improve the property, or when the tenant has involved the local authority's environmental health department in seeking improvements to the safety or quality of the property.[178]

There are currently no real legislative or practical safeguards against retaliatory eviction. The relevant legislation has allowed landlords to evict tenants without establishing any tenant fault. The Deregulation Act 2015[179] is a welcome legislative change, which will bring some safeguards into play if planned changes come into effect.[180] The new legislation provides that where a Local Authority has served a landlord with an improvement notice after a tenant has complained to it about poor conditions, the landlord is prevented from serving a Section 21 notice for a period of six months. The legislative change is welcome, but must be strengthened, as it depends upon the Local Authority having adequate resources to inspect premises and serve improvement notices in every case. In the overall context of the under-resourcing of Local Authorities, and the scale of the problem of retaliatory evictions, it is unlikely that these resources will be forthcoming.

Moreover, the short minimum term of six months on Assured Shorthold Tenancies means that tenants have very little security of tenure in the first place. Practically, in a climate of undersupply (and thus high tenant demand) and with landlords able to demand increasingly high rents, there is an incentive for landlords to evict sitting tenants in order to raise rents for new potential renters.

Although there are no official statistics on retaliatory eviction, in part due to the unregulated nature of the private rental sector, major housing charities estimate that in 2014, over 200,000 private renters were evicted or served with an eviction notice 'because they complained to their landlord, letting agent or council about a problem that wasn't their responsibility.'[181] In addition, the fear of retaliatory eviction further disadvantages tenants who would otherwise seek repairs or improvements to a property,[182] and many may face a stark choice between inadequate, unsafe and unhealthy housing, and the risk of losing their home.

[177] Housing Act 1988, particularly s 5, as amended.
[178] Wilson, *Retaliatory Eviction in the Private Rented Sector – Commons Library Standard Note SN07015* (13 February 2015) at 3.
[179] Deregulation Act 2015, ss 33 and 34.
[180] The changes are due to come into effect in October 2015.
[181] Gousey, *'Can't Complain': Why Poor Conditions Prevail in Private Rented Homes* (Shelter, March 2014). The RLA contests these figures, and cites alternative grounds upon which landlords have sought to evict. See Wilson, above note 171.
[182] Shelter, a major housing charity, reports that 12% of renters have not asked for a repair to be carried out or challenged a rent increase, for fear of eviction. *Shelter's Response to the Review of Property Conditions in the Private Rented Sector* above note 160 at 25- 26 See further Gousey, *'Can't Complain'* above note 172; Gousy *Safe and Decent Homes* above note 164.

Affordability

The average rent in the PRS is almost double the average rent for houses in the social rental sector.[183] In fact, private renters experience the highest weekly housing costs of any tenure type.[184]

A quarter of those renting in the private sector are dependent on housing benefit to pay their rent. This is a substantial increase, from 19%, in 2008-09.[185] A number of these households – 12% - were reliant on housing benefit despite being in work.[186] The government's most recent housing survey found that one third of private renters were finding it difficult to pay their rent,[187] with 31% of those households citing the decrease in housing benefit or local housing allowance as a factor, along with 20% citing unemployment, and 25% mentioning their other debts and responsibilities.[188]

Statistics show that the shorter one's tenancy is, the more likely one is to be paying a higher level of rent.[189] Accordingly, affordability is impacted by short-term tenancies. With over half of private renters having lived in their current address for less than two years,[190] it is evident that lower protection of tenancy is not only a security of tenure issue but an affordability issue, illustrating how all elements of the right to housing are interrelated and enjoyment of one will impact on enjoyment of others.

Key Recommendations: Private Rental Sector

1. The State must take immediate legislative measures to strengthen security of tenure in the private rental sector including through:
    a. Stronger and better resourced legislative measures to prohibit retaliatory evictions, including through preventing landlords from bringing eviction procedures as reprisal for well-founded maintenance and improvement requests where a property is in a serious state of disrepair or serious hazards are present;
    b. legislative measures to prohibit arbitrary or retaliatory rent increases
    c. Increasing the minimum tenancy term of private rental agreements to give tenants security and stability.

2. The State must take immediate steps to ensure housing in the private rental sector meets the 'decent homes' standard including through:
    a. immediate and rigorous monitoring of the safety and quality of housing in the sector

[183] Weekly average rent in the social housing sector was £94 compared with £176 in the private sector. See *English Housing Survey 2013/14*, above note 4 at 72 and 86 .
[184] *English Housing Survey 2013/14*, above note 4 at 14.
[185] English Housing Headline Survey 2012/13 at 1.36.
[186] Ibid at 1.42.
[187] English Housing Survey 2013/14 at 74.
[188] Ibid.
[189] English Housing Survey Headline Annex Table 3 at p 50.
[190] Housing Survey Report 2013/14 above note 4 at 70.

b. taking progressive steps, alone and in conjunction with the private sector, to improve the quality of housing in the sector through new building and improvements to existing housing stock.

3. The state must take steps to ensure affordability in the private rental sector including through
   a. stimulating and creating new housing across tenure types
   b. providing tenants with immediate legislative protection against arbitrary or retaliatory rent increases.

1.5 Conclusions

The overall context for the enjoyment of the right to housing in England is one of crisis. Exceptionally high numbers of people are homeless, or vulnerable to homelessness. The current housing environment is characterised by profound issues of lack of supply, high and further increasing housing costs, lack of security of tenure, and homes of such poor quality that they are unfit for habitation. These issues plague all of England's main housing tenure types: the owner occupied, the private rental, and the social housing sector. Housing insecurity affects not only people on low incomes, but broad swathes of the English population, who currently live in situations of insecurity and uncertainty.

In this context of crisis, the government is manifestly failing to meet its obligations to ensure the right to housing of its population, so that everyone can enjoy a standard of living in homes that are adequate, safe, and secure.

These failures can be seen strikingly in the areas of homelessness and in the private rental sector.

Homelessness is increasing, with numbers of rough sleepers, those using shelter and hostel accommodation, and the 'threatened' homeless rising. Rather than responding by strengthening the safety net for these most vulnerable of individuals, the government has cut back funding and weakened existing legislation. These actions represent regressive steps, a serious failure to respect, protect and fulfil the right to housing as required by the government's obligations under the ICESCR.

In the private rental sector, as many as one third of households are living in non-decent accommodation. The cost of a private rental is high, and for many, state support is needed to meet that cost even if the household is working. Supply can only be considered inadequate. The combination of these factors results in a private rental sector which is, despite government statements to the contrary, often the tenure of last resort.

In these two areas, the government must respond by taking steps, in line with the key recommendations outlined in this report, to end the housing crisis and fulfil its obligations under the ICESCR for the right to housing of its population.

Going Hungry?

The Human Right to Food in the UK

SECTION II

2. THE RIGHT TO FOOD IN THE UK (ARTICLE 11)

2.1 Introduction

The story of UK food insecurity[1], and concerns about enjoyment of the right to adequate food, predate the recent spike in food banks. It is intimately connected with the domestic response to the global economic crisis. In 2010, following a period of prolonged recession,[2] the Conservative and Liberal Democrat Coalition pledged to deliver economic recovery through a programme of austerity.[3] The 2010 'Emergency Budget' introduced spending reductions of £32 billion per year by 2014-15, including £11 billion of welfare reform savings.[4] Since then, the Chancellor has promised to eliminate the structural deficit by 2016/17.[5]

In recent years, the UK economy has shown some signs of recovery,[6] with early indications of economic growth becoming visible in the third quarter of 2013,[7] along with rising levels of employment.[8] When viewed through the lens of the right to food and the drivers of food insecurity, however, the apparent recovery appears more qualified. As will be seen below, the improvement in the level of employment is to a large extent attributable to a rise in low paid, temporary work.[9] Meanwhile, inflation has outpaced average income, leaving a very significant gap in the purchasing power of many.[10] To compound matters the price of

[1] Food security exists 'when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life'. See Food and Agriculture Organization, *Rome Declaration on Food Security and World Food Summit Plan of Action*, 1996, para 1, available at: http://www.fao.org/docrep/003/w3613e/w3613e00.htm; See also further examination of food security in Chapter II (2)(i).
[2] Office for National Statistics, *Quarterly National Accounts - National accounts aggregates,* 2013, available at: http://www.ons.gov.uk/ons/datasets-and-tables/data-selector.html?cdid=ABMI&dataset=qna&table-id=A2.
[3] HM Government, *The Coalition: our programme for government,* 2010, p. 15, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf.
[4] HM Treasury, *Budget 2010*, 2010, p. 2, available at: http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_188581.pdf.
[5] The Conservative Party, *Economy,* 2014, available at: http://www.conservatives.com/Policy/Where_we_stand/Economy.aspx.
[6] IFS, *The IFS Green Budget*, 2014, p. 3, available at: http://www.ifs.org.uk/budgets/gb2014/gb2014.pdf.
[7] ONS, *Economic Review, January 2014*, 2014, pp. 2-3, available at: http://www.ons.gov.uk/ons/dcp171766_348204.pdf.
[8] ONS, *Labour Market Statistics, January 2014*, 2014, p. 1, available at: http://www.ons.gov.uk/ons/dcp171778_347785.pdf.
[9] ONS, *Annual Survey of Hours and Earnings, 2013 Provisional Results,* 2014, pp. 11-12, available at: http://www.ons.gov.uk/ons/dcp171778_335027.pdf; See also Resolution Foundation, *Low Pay Britain 2013,* 2013, p. 14, available at: http://www.resolutionfoundation.org/media/media/downloads/Low_Pay_Britain_2013.pdf.
[10] ONS, *An Examination of Falling Real Wages, 2010 - 2013,* 2014, p. 17, available at: http://www.ons.gov.uk/ons/dcp171766_351467.pdf.

housing has increased dramatically, particularly in London and the South East.[11] Significant price rises have also been seen with regard to food, particularly fruit and vegetables.[12] With the addition of broad-scale cuts in social security spending,[13] the post-recession years have seen increased levels of poverty[14] and the spread of hunger and malnutrition across the country.[15] The nation's heightened state of food insecurity raises serious concerns with regard to the UK's compliance with its international human rights obligations in relation to the human right to food. As this section concludes, the UK is in breach of a range of obligations imposed by the international human right to food.

2.2 The Human Right to Food

Article 11(1) of the Covenant recognises the right of everyone to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions. Article 11(2) guarantees the fundamental right of everyone to be free from hunger, and obliges State Parties (i.e. those countries that have ratified the Covenant, hereafter referred to as ´states´) to take steps in this regard, including the improvement of methods of distribution of food, and dissemination of knowledge concerning the principles of nutrition.

According to the CESCR,[16] the right to adequate food is realised when "every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement."[17] Similarly, the UN Special Rapporteur on the Right to Food[18] defines the right to food as "the right to have regular, permanent and free access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear."[19]

[11] DCLG, *English Housing Survey Households 2011-12,* 2013, p. 22, available at: http://tinyurl.com/q84tqfc.
[12] DEFRA*, Food Statistics Pocketbook 2013,* 2013, p. 21, available at: http://tinyurl.com/ph3f9c3.
[13] HM Treasury, Budget 2014, 2014, p. 26, available at: http://tinyurl.com/q5f2s97.
[14] DWP, *Low Income and Material Deprivation in the UK, 11/12,* first release, 2013, p. 8, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/206850/first_release_1112.pdf.
[15] See Trussell Trust, *Latest foodbank figures top 900,000, 2014,* available at: http://tinyurl.com/ojzvz4a.
[16] The CESCR is the body of independent experts that monitors implementation of the Covenant by its States Parties – see http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx.
[17] CESCR, *General Comment 12, The right to adequate food (art. 11),* 1999, para. 6, available at: http://www.unhchr.ch/tbs/doc.nsf/0/3d02758c707031d58025677f003b73b9; A General Comment is an authoritative interpretation of the right given by the body mandated to monitor the implementation of ICESCR, including the right to food.
[18] The UN Special Rapporteur on the Right to Food is an independent expert appointed by the UN to examine, monitor, advise and publicly report on realisation of the right to food – see http://www.srfood.org/en.
[19] UN Special Rapporteur on the Right to Food, *Jean Ziegler, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development*, 2008, para. 17, available at: http://www.righttofood.org/wp-content/uploads/2012/09/AHRC75.pdf.

2.2.1 The UK´s international obligations in respect of the right to food

The UK has taken positive steps towards securing the right to food by signing and ratifying an array of international treaties which recognise this fundamental right, including the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW),[20] the Convention on the Rights of the Child (CRC),[21] as well as the Convention on the Rights of Persons with Disabilities (CRPD).[22] The UK is also a party to a number of regional human rights treaties which indirectly guarantee the enjoyment of adequate food as a human right, including the European Social Charter[23] and the Charter of Fundamental Rights of the European Union.[24]

Yet on a deeper analysis, the UK appears to be reluctant to make itself accountable for any failure to give effect to the right to food. This is manifested by the UK's failure to ratify the Optional Protocol to the ICESCR (2009),[25] which enables individual complaints to be made to the CESCR. In a similar vein, the UK has refused to ratify the Additional Protocol to the European Social Charter (1995),[26] which provides for a system of collective complaints and has adopted a Protocol to the Charter of Fundamental Rights of the European Union.[27] This Protocol attempts to ensure that, firstly, the economic and social rights which are found in the 'Solidarity' Chapter of the Charter, which include the right to social assistance,[28] are not justiciable in the UK, and, secondly, that the rights guaranteed by the Charter only apply to the UK to the extent that the rights are already recognised in UK law.[29]

2.2.2 Key elements of the right to food

There are a number of key elements to the right to food. These are discussed below.

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[20] The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979, Article 12(2), available at: http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm.
[21] The Convention on the Rights of the Child (UNCRC), 1989, Article 24 (2)(c) and (e) and Article 27(3), available at: http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf.
[22] The Convention on the Rights of Persons with Disabilities, 2006, Article 25(f) and Article 28(1), available at: http://www.un.org/disabilities/convention/conventionfull.shtml.
[23]European Social Charter, 1961 Article 4(1), available at: http://conventions.coe.int/Treaty/en/Treaties/Html/035.htm; The right to food is indirectly protected by, amongst other provisions, Article 4(1) of the European Social Charter, which recognises "the right of workers to a remuneration such as will give them and their families a decent standard of living."
[24] Charter of Fundamental Rights of the European Union, 2000, Article 34, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF.
[25] Optional Protocol to the ICESCR, 2008, available at: http://www.ohchr.org/Documents/HRBodies/CESCR/OProtocol_en.pdf.
[26] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, 1995, available at: http://www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=158&CM=7&DF=26/10/2008&CL=ENG.
[27] Protocol on the Application of the Charter of the European Union to Poland and the United Kingdom, 2007, Arts 1-2, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0156:0157:EN:PDF
[28] Charter of Fundamental Rights of the European Union, 2000, Article 34, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF.
[29]Whether the Protocol is successful in achieving its objective remains a matter of legal debate - see Peers, S., "The 'Opt-out' that Fell to Earth: The British and Polish Protocol Concerning the EU Charter of Fundamental Rights", *Human Rights Law Review,* Vol 2, 2012, pp. 375-389, available at: http://hrlr.oxfordjournals.org/content/early/2012/04/22/hrlr.ngs008.

Food Security

According to the UN Food and Agriculture Organisation (FAO),[30] food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life.[31] The four pillars of food security are availability, stability of supply, access and utilisation.[32]

The CESCR has observed that the notion of sustainability is intrinsically linked to the notion of food security, requiring that food be accessible for both present and future generations.[33] The UN Special Rapporteur on the Right to Food has asserted that food security and the right to food are best seen as complementary tools by which the international community may guarantee the availability of food in quantity and quality sufficient to satisfy the dietary needs of individuals; physical and economic accessibility for everyone, including vulnerable groups, to adequate food, free from unsafe substances and acceptable within a given culture; or the means of its procurement.[34] Similarly, the FAO guidelines suggest that "a human rights-based approach to food security emphasizes the achievement of food security as an outcome of the realization of existing rights."[35]

Adequate, accessible and available food

According to the CESCR, Article 11 ICESCR guarantees the right to adequate, accessible and available food.[36] Adequacy means that the food must satisfy dietary needs, taking into account the individual's age, living conditions, health, occupation, sex, etc.[37] Food should also be safe for human consumption, free from adverse substances, such as contaminants from industrial or agricultural processes, and should be culturally acceptable.[38]
Accessibility encompasses both economic and physical accessibility. [39] Economic accessibility means that food must be affordable. Individuals should be able to afford food for an adequate diet without compromising on any other basic needs,[40] such as heating or housing. For example, the affordability of food can be guaranteed by ensuring that wages or social security benefits are sufficient to meet the cost of nutritious food and other basic

[30] The FAO is an agency of the United Nations that leads international efforts to defeat hunger. The FAO acts as a neutral forum where all nations meet as equals to negotiate agreements and debate policy - see http://www.fao.org/about/who-we-are/en/.
[31] FAO, *Rome Declaration on Food Security and World Food Summit Plan of Action*, 1996, para 1.
[32] FAO, Declaration of the World Summit on Food Security, 2009, available at: http://www.fao.org/fileadmin/templates/wsfs/Summit/Docs/Final_Declaration/WSFS09_Declaration.pdf
[33] CESCR, *General Comment 12, The right to adequate food (art. 11),* 1999, para. 7.
[34] See FAO, *Voluntary guidelines to support the progressive realisation of the right to adequate food in the context of national food security,* 2004, p. 5, available at: http://www.fao.org/docrep/009/y7937e/y7937e00.htm; See also UN Human Rights Council, *Report submitted by the Special Rapporteur on the Right to Food, Olivier De Schutter,* A/HRC/19/59, 2011, p. 3, para 1, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59_en.pdf.
[35] See FAO, *Voluntary guidelines to support the progressive realization of the right to adequate food in the context of national food security*, 2004, para 19.
[36] CESCR, *General Comment 12, The right to adequate food (art. 11),* 1999, para. 7.
[37] Office of the High Commissioner for Human Rights (OHCHR), *The Right to Adequate Food Fact Sheet No. 34, 2010,* p. 3, available at: http://www.ohchr.org/Documents/Publications/FactSheet34en.pdf.
[38] OHCHR, *The Right to Adequate Food Fact Sheet No. 34, 2010,* p. 3.
[39] CESCR, *General Comment 12, The right to adequate food (art. 11),* 1999, para. 13.
[40] OHCHR, *The Right to Adequate Food Fact Sheet No. 34, 2010,* p. 3.

needs.[41] Physical accessibility means that food should be accessible to all, including to the vulnerable, such as children, the sick, disabled people or older persons, for whom it may be difficult to go out to get food.[42]

Availability refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand.[43] In other words, availability requires on the one hand that food should be available from natural resources, either through the production of food, by cultivating land or animal husbandry, or through other ways of obtaining food, such as fishing, hunting or gathering.[44] On the other hand, it means that food should be available for sale in markets and shops.[45]

Progressive realisation

The principal obligation reflected in Article 2(1) ICESCR is to take steps "with a view to achieving progressively the full realisation of the rights recognised" in the Covenant. The concept of progressive realisation constitutes recognition of the fact that full realisation of all economic, social and cultural rights will not be able to be achieved by all states immediately; however, the phrase imposes an obligation on all states to move as expeditiously and effectively as possible towards that goal.[46]

States must take all necessary steps to the maximum of their available resources to realise the right to food. According to the CESCR, the phrase "to the maximum of its available resources" refers to both the resources existing within a state and those available from the international community through international cooperation and assistance." [47] It is about the real resources available to the state – not just current budgetary allocations.[48] The duty to use maximum available resources requires states to take steps to secure the right to food through their fiscal and economic policy, including that relating to government expenditure, systems of revenue, borrowing and debt, and monetary policy and financial regulation.[49]Even where a state can demonstrate that the resources available to it are inadequate in terms of enabling it to ensure the right to food, it is still under an obligation to strive to ensure the widest possible enjoyment of that right under the prevailing circumstances

[41] OHCHR, *The Right to Adequate Food Fact Sheet No. 34, 2010,* p. 3.
[42] OHCHR, *The Right to Adequate Food Fact Sheet No. 34, 2010,* p. 2.
[43]CESCR, *General Comment 12, The right to adequate food (art. 11),* 1999, para. 12.
[44] OHCHR, *The Right to Adequate Food Fact Sheet No. 34, 2010,* p. 2.
[45] OHCHR, *The Right to Adequate Food Fact Sheet No. 34, 2010,* p. 2.
[46] CESCR, *General Comment 3, The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant),* 1990, para. 9.
[47] CESCR, *General Comment 3, The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 1990, para. 13.
[48] For more on this point, see R. O'Connell, A. Nolan, C. Harvey. M. Dutschke & E. Rooney, *Applying a Human Rights Framework to State Budget Allocations: Rights and Resources,* Routledge, 2014, Chapter 3.
[49]See D. Elson, R. Balakrishnan & J. Heintz, 'Public Finance, Maximum Available Resources and Human Rights' in Nolan, A. et al (eds), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights*, Hart Publishing, 2013,13; See also O De Schutter, *Report of the Special Rapporteur on the Right to Food—Mission to Brazil*, 2009, para 36, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.33.Add.6_en.pdf.

Duties to respect, protect and fulfil

The right to adequate food imposes three levels of obligations on states: the obligations to respect, to protect and to fulfil. The obligation to respect existing access to adequate food requires states not to take any measures that result in preventing such access. For example, states must not pass legislation or policies that interfere with people's existing enjoyment of the right to food.[50]

The obligation to protect requires measures by the state to ensure that non-state actors like commercial enterprises or individuals do not deprive people of adequate food. For instance, states should adopt the measures needed to protect people, especially children, from advertising and promotions of unhealthy food so as to support the efforts of parents and health professionals to encourage healthier patterns of eating.[51] The obligations to respect and protect the right to food are both of an immediate nature, and must be implemented straight away.[52]

The obligation to fulfil incorporates the obligations to promote, facilitate and provide.[53] The obligation to promote requires states to advance awareness and acceptance of human rights by ensuring the broadest access to knowledge and information about human rights standards and principles.[54]The obligation to facilitate means the state must take active steps to strengthen people's access to resources and means to ensure their livelihood, including food security.[55] Further, whenever people are unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, the state has the obligation to provide that right directly.[56] For example, states must provide food assistance or ensure social safety nets for the most deprived.[57]

In addition to progressive duties that must be realised over time, Article 2(1) ICESCR also imposes a number of immediate duties on states, including the UK. These are the obligations of non-discrimination, non-retrogression and guaranteeing the minimum core content of the right to food.

Immediate duties: Non-discrimination, minimum core, non-retrogression

Any discrimination in access to food on prohibited grounds,[58] with the purpose or effect of impairing the equal enjoyment of this right, constitutes a violation of the Covenant.[59] Both direct and indirect forms of differential treatment can amount to discrimination under Article 2(2) ICESCR.

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[50]CESCR, *General Comment 12, The right to adequate food (art. 11),* 1999, para. 15.
[51] OHCHR, *The Right to Adequate Food Fact Sheet No. 34,* 2010, p. 18.
[52] CESCR, General Comment 12, *The right to adequate food (art. 11)*, 1999, para 16.
[53] CESCR, *General Comment 12, The right to adequate food (art. 11),* 1999, para. 15.
[54] OHCHR, *The Right to Adequate Food Fact Sheet No. 34,* 2010, p. 17.
[55]OHCHR, *The Right to Adequate Food Fact Sheet No. 34,* 2010, p. 17.
[56] FAO, *The Right to Food in Practice, Implementation at the National Level,* 2006, p. 2, available at: http://www.fao.org/docrep/016/ah189e/ah189e.pdf.
[57] OHCHR, *The Right to Adequate Food Fact Sheet No. 34,* 2010, p. 19.
[58] Prohibited grounds include race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status; See CESCR, *General Comment 12, The right to adequate food (art. 11),*1999, para. 18, available at: http://www.unhchr.ch/tbs/doc.nsf/0/3d02758c707031d58025677f003b73b9.
[59] CESCR, *General Comment 12, The right to adequate food (art. 11),* 1999, para. 18.

Direct discrimination occurs when an individual is treated less favourably than another person in a similar situation on the basis of gender, age, disability, race or any other prohibited ground.[60] Indirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on particular groups' enjoyment of the right to food, or other Covenant rights.[61] Ensuring non-discrimination is not just about abolishing laws and policy that are discriminatory 'on their face, it also requires acknowledging and responding to the needs of different groups in laws and policy. For example, in setting social security measures, ensuring equal enjoyment of the right to food requires states to take into account the different dietary needs of specific population groups (such as children, pregnant and breastfeeding mothers, disabled people or an illness) so that the level of assistance ensures their access to adequate food.[62]

Every state has a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights in the ICESCR.[63] For example, a state in which any significant number of individuals is deprived of essential food is, prima facie, failing to discharge its obligations under the Covenant.[64] Thus, violations of the Covenant occur when a state fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger.[65]If a state seeks to argue that resource constraints make it impossible to provide access to food for those who are unable to secure such access by themselves, the state has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.[66]

States cannot allow backward steps (so-called 'retrogressive measures') with regard to the existing enjoyment of the right to food unless there are strong justifications for them.[67] For example, withdrawing without justification existing social security entitlements which guarantee access to basic living essentials, such as cooking equipment and subsistence food provisions, could constitute backward steps (i.e. retrogression) under the ICESCR.[68] Any deliberately retrogressive measures require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant (including the right to food) and in the context of the full use of the maximum available

[60] CESCR, *General Comment 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the ICESCR),* 2009, para. 10, available at: http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.GC.20.doc.
[61] CESCR, *General Comment 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the ICESCR),* 2009, para. 10.
[62] OHCHR, *The Right to Adequate Food Fact Sheet No. 34,* 2010, pp. 20-21.
[63] CESCR, *General Comment 12, The right to adequate food (art. 11),* 1999, para. 17.
[64] CESCR, *General Comment 3, The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 1990, para. 10, available at: http://www1.umn.edu/humanrts/gencomm/epcomm3.htm.
[65] CESCR, *General Comment 12, The right to adequate food (art. 11),* 1999, para. 17.
[66] CESCR, *General Comment 12, The right to adequate food (art. 11),* 1999, para. 17.
[67] OHCHR, *The Right to Adequate Food Fact Sheet No. 34,* 2010, pp. 21-22; See also M Sepulveda, ´The Nature of the Obligations under the International Covenant on Economic Social and Cultural Rights´ Intersentia, 2003, p. 323.
[68] See commentary on the prohibition of retrogression in Nolan, A. et al, *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights*, Hart publishing, 2013.

resources.[69] We will discuss further below about the issue of the permissibility of backward steps (or not) in a time of economic crisis.

Domestic legislation and strategies

When implementing the right to food at the national level, states must adopt a strategy to ensure food and nutrition security for all.[70] Such a strategy should coordinate efforts across Government departments, guarantee adequate resources and set time-bound targets to be achieved.[71]

Having developed a strategy, states must monitor the realisation of the right to food. As a result of these monitoring efforts, states should be able to determine whether everyone has access to adequate food, and identify any failures in terms of compliance with the right. States must identify the barriers affecting the realisation of the right to food, and should facilitate the adoption of corrective measures.[72]

Procedural Requirements

The right to food should lie at the heart of law and policy making processes.[73] In this regard, states must at all times, take economic, social and cultural rights into account. Legislation, strategies and policies should be reviewed to ensure that they are compatible with obligations arising from the Covenant, and should be repealed or amended if inconsistent with Covenant requirements.[74] Adopting laws or policies which are manifestly incompatible with legal obligations relating to the right to food amounts to a violation of the ICESCR, as does repealing or suspending legislation which is necessary for the continued enjoyment of the right to food.[75]

Adopting a rights-based approach to food means that decision-making processes should be guided by the human rights principles of participation, accountability, non-discrimination, transparency, human dignity, empowerment and rule of law,[76] commonly referred to as the 'PANTHER' framework.[77] Accountability requires that public authorities be held accountable for their actions through judicial procedures or other mechanisms, ensuring effective remedies where the right to food is violated. Transparency requires that people have access

[69] CESCR, *General Comment 3, The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 1990, para. 9.
[70] CESCR, *General Comment 12, The right to adequate food (art. 11),* 1999, para. 21.
[71] CESCR, *General Comment 12, The right to adequate food (art. 11),* 1999, paras. 22-27.
[72] CESCR*, General Comment 12, The right to adequate food (art. 11),* 1999, para. 31.
[73] OHCHR, *Principles and guidelines for a human rights approach to poverty reduction strategies,* 2006, para 19, available at: http://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf. The UN Committees has stated that States should consider adopting a framework law for the right to food (i.e. a statute which is drafted in general terms and lays down a framework for the realisation of the right to food, mostly in the form of overall principles, objectives and guidelines) - see CESCR, *General Comment 12, The right to adequate food (art. 11),* 1999, para 29.
[74] CESCR, *General Comment 19, The right to social security (art. 9),* 2007, para. 67, available at: http://www1.umn.edu/humanrts/gencomm/escgencom19.html.
[75] CESCR, *General Comment 12, The right to adequate food (art. 11),* 1999, para. 19.
[76] CESCR, *General Comment 12, The right to adequate food (art. 11),* 1999, paras. 23-24.
[77] FAO Right to Food Unit, *Guide to Conducting a Right to Food Assessment,* 2009, available at: http://www.fao.org/fileadmin/templates/righttofood/documents/RTF_publications/EN/3_toolbox_Assessment_guide.pdf.

to information regarding the right to food (e.g. statistics detailing food insecurity levels and food bank referral figures).

Effective remedies

According to the CESCR, if the right to food is violated, rights-holders should have access to effective remedies at both national and international levels.[78] While states ought to provide judicial remedies with respect to justiciable rights, [79] non-judicial remedies, such as ombudsman procedures, can also be effective in providing relief.[80]Furthermore, the UN Committee has encouraged states to incorporate the Covenant, including the right to food, into domestic law, in order to enhance the scope and effectiveness of remedial measures.[81]

Economic crisis

The CESCR has affirmed that "even in times of severe resources constraints whether caused by a process of adjustment, [or] economic recession ... the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes."[82] Similarly, in a 2013 issue paper, the Council of Europe Commissioner for Human Rights affirmed that economic, social and cultural rights are not expendable in times of economic hardship, but are essential to a sustained and inclusive recovery. In 2012, the Chairperson of the CESCR reminded states that all measures adopted in response to the economic crisis must be compliant with the Covenant – including the right to food.

> In a 2012 letter addressed to states, the Chairperson of the CESCR recognised that any proposed adjustment in response to the crisis has to meet the following requirements: "first, the policy must be a **temporary** measure covering only the period of crisis. Second, the policy must be **necessary** and **proportionate**, in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights. Third, the policy **must not be discriminatory** and must comprise all possible measures, including tax measures, to support social transfers to mitigate inequalities that can grow in times of crisis and to ensure that the rights of the disadvantaged and marginalised individuals and groups are not disproportionately affected. Fourth, the policy must identify the **minimum core content** of rights or a social protection floor, and ensure the protection of this core content at all times."

[78] CESCR, *General Comment 3, The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 1990, para. 5
[79] CESCR, *General Comment 3, The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 1990, para. 5
[80] UN General Assembly, *The role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights,* 2013, available at: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/RES/67/163
[81] CESCR, *General Comment 12, The right to adequate food (art. 11),* 1999, para. 33
[82] CESCR, *General Comment 3, The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 1990, para. 12; Council of Europe Commissioner for Human Rights, *Safeguarding human rights in times of economic crisis,* 2013, p. 7, available at: http://tinyurl.com/o9rnjyl

2.2.3 Compliance of the UK Legal and Policy Framework with the Right to Food

In this section we analyse whether the UK legal and policy framework is compliant with Covenant obligations regarding the right to food. At a domestic level, the UK has adopted a bifurcated approach to human rights. While the rights of the European Convention on Human Rights (ECHR)[83] were 'brought home' under the Human Rights Act (HRA),[84] and are legally justiciable in domestic courts, the right to food, and many economic and social rights, remain unenforceable[85]because the ICESCR has not been incorporated into UK law.
Rather than seeking to secure the right to food through a human rights-based approach, which recognises individuals as rights-holders and public authorities as duty bearers (i.e. institutions obligated to secure the enjoyment of human rights), the UK Government has said that it aims to guarantee the right to food through the legislation and regulations of the welfare state.[86] While public authorities are required to act consistently with the rights contained within the ECHR, which is incorporated into domestic law by way of the HRA,[87] there is no equivalent duty on public authorities to act consistently with (or respect, protect and fulfil) the right to food. To this extent, the UK is failing to provide a legal framework which is capable of ensuring that all duty-bearers comply with their obligations under the Covenant concerning the right to food.

Domestic legislative procedures

Domestic legislative procedures evidence an apparent indifference on behalf of the UK with regard to the right to food. Section 19 HRA requires the Government to make a declaration indicating their view as to whether the draft legislation in question conflicts with Convention rights;[88] there is no equivalent duty to take the right to food, or other rights contained in the ICESCR, into account when enacting legislation and policy. For instance, the Welfare Reform Bill was passed by Parliament with minimal amendments despite clear warnings from the Joint Committee on Human Rights (JCHR)[89] in their report examining the compatibility of the Bill with international human rights law, including the ICESCR, that "the cumulative impact of the Bill's provisions may lead to retrogression which is not justified by the factors set out in the General Comments of the UN Committees."[90]

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[84] HRA, 1998, available at: http://www.legislation.gov.uk/ukpga/1998/42/data.pdf.
[85] It is important to note that the right to education is recognised by Article 2, Protocol 1 to the ECHR, and that other economic and social rights have been indirectly enforced through ECHR adjudication – see Palmer, E*,. Judicial Review, Socio-economic Rights and the Human Rights Act,* Hart Publishing, 2007.
[86] CESCR, *Fifth periodic reports submitted by States parties under articles 16 and 17 of the Covenant, United Kingdom of Great Britain and Northern Ireland,* 2007, pp. 39-40, available at: http://tinyurl.com/qgecy25.
[87] HRA, 1998, s. 6, available at: http://www.legislation.gov.uk/ukpga/1998/42/data.pdf.
[88] HRA, 1998, s. 19, available at: http://www.legislation.gov.uk/ukpga/1998/42/data.pdf.
[89] The JCHR is a select committee of both the House of Commons and House of Lords which is charged with considering human rights issues in the UK – see http://www.parliament.uk/jchr.
[90] JCHR, *Legislative Scrutiny: Welfare Reform Bill,* 2011, p. 24, available at: http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/233/233.pdf.

The partial nature of the UK's framework of human rights protection belies an unwillingness on the part of successive governments to give the right to food domestic legal effect. This in turn reflects a broader failure to recognise economic and social rights as human rights imposing legal duties of compliance on the UK. During the 2009 CESCR review of the UK, for example, the Government declared that ICESCR rights, including the right to food, constitute mere declaratory principles and programmatic objectives rather than legal obligations,[91] thus negating the rights based approach which lies at the heart of the Covenant.

The absence of a UK rights-based food strategy

Domestic laws and policies cannot guarantee the right to adequate food for everyone in the UK unless they are connected by an overarching national rights-based food strategy. In accordance with General Comment 12 of the CESCR,[92] such a strategy should, firstly, coordinate efforts across Government departments, secondly, guarantee adequate resources and, thirdly, set time-bound targets to be achieved.

In June 2014, the UK Government submitted its report for the purposes of its sixth periodic review to the CESCR.[93] In its submissions on Article 11, it was only able to report that the Scottish Government is in the process of implementing a "National Food and Drink Policy" that seeks to address issues of quality, health and wellbeing and environmental sustainability.[94] No rights-based food strategy currently exists in the UK. Firstly, instead of coordinating efforts across Government departments, food-related policy straddles the Department for Environment, Food and Rural Affairs (DEFRA), the Department for Communities and Local Government (DCLG) and the Department for Work and Pensions (DWP) without clear lines of responsibility or leadership. Secondly, rather than guaranteeing adequate resources, funding has been actively depleted due to public service spending cuts and the termination of crisis loans, which previously provided emergency hardship payments to meet the costs of food and other basic essentials, thereby raising serious questions about the Government's use of maximum available resources to realise the right to food. Thirdly, with regard to the setting of targets, successive UK Governments have failed to define benchmarks or indicators by which levels of food security and progressive realisation of the right to food may be effectively measured.

Failure to monitor realisation of the right to food

Having drafted a strategy, states must monitor the realisation of the right to adequate food.[95] According to the 2014 report commissioned by DEFRA on food aid, however, the UK suffers from a lack of essential, thematic monitoring and evidence gathering on food insecurity and

[91] CESCR, Concluding Observations of the CESCR: *United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories,* 2009, p. 3, available at: http://tinyurl.com/nkag223.
[92] See CESCR, *General Comment 12, The right to adequate food (art. 11),* 1999, paras. 21-27.
[93] United Nations International Covenant on Economic, Social and Cultural Rights, *United Kingdom, British Overseas Territories, Crown Dependencies 6th periodic report*, 2014, available at: https://www.justice.gov.uk/downloads/human-rights/ICESCR-sixth-periodic-report.pdf,; http://www.gov.scot/Topics/Business-Industry/Food-Industry/national-strategy
[94] Ibid, para 127-128
[95] CESCR, *General Comment 12, The right to adequate food (art. 11),* 1999, para 31.

food aid uptake."[96] In particular, the DWP remains unwilling to track Government food bank 'signposting',[97] and denies the causative connection between the implementation of recent welfare reform measures and increased reliance on food banks.[98]The UK is falling behind other OECD states, such as the United States and Canada, who both routinely collect data on food insecurity.[99]

This lack of Government data makes it more difficult to measure and assess UK compliance with the right to food than it should be. In the context of this report, for example, we have been unable to analyse official figures concerning levels of UK food bank usage. Instead, we have had to rely on data from non-governmental sources, including academic institutions, national charities and civil society organisations. In human rights terms, the Government's failure to monitor the realisation of the right to adequate food indicates an apparent reluctance to comply with the ICESCR duties of transparency and accountability.[100]

UK anti-Poverty Frameworks

Existing welfare and social security legislation is plainly relevant to the UK's protection of economic and social rights.[101] For example, the Government has retained the Child Poverty Act (CPA),[102] which imposes legal duties on public authorities, and sets time-bound targets for their realisation. As this report demonstrates however, the CPA and related measures have not resulted in universal enjoyment of the right to food by all in the UK.

UK food policies

There have been some encouraging developments from the perspective of the right to food within individual departments. In September 2013, in particular, the Department for Education announced that all infant school pupils in state funded schools in England, as well as disadvantaged students at sixth form colleges and further education colleges, will be

[96] DEFRA, *Household Food Security in the UK: A Review of Food Aid Final Report,* 2014, p. 59, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/283071/household-food-security-uk-140219.pdf.
[97] BBC, "Numbers relying on food banks triple in a year", *BBC News*, 16 October 2013, available at: http://www.bbc.co.uk/news/business-24536817.
[98] See e.g. Hansard, *House of Commons Debates, Topical Questions,* 9 September 2013, column 681, available at: http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130909/debtext/130909-0001.htm#13090914000030
[99] Fabian Commission, *Fabian Commission on Food and Poverty, Working Paper 1: Money and affordability*, November 2014, pp. 5-6, available at http://foodandpoverty.org.uk/wp-content/uploads/2014/11/Hearing-One-WorkingPaper.pdf
[100] CESCR, *General Comment 12, The right to adequate food (art. 11),* 1999, pp. 6-7, paras. 23-24; See also FAO Right to Food Unit, *Guide to Conducting a Right to Food Assessment,* 2009, available at: http://www.fao.org/fileadmin/templates/righttofood/documents/RTF_publications/EN/3_toolbox_Assessment_guide.pdf.
[101] CESCR, *Fifth periodic reports submitted by States parties under articles 16 and 17 of the Covenant, United Kingdom of Great Britain and Northern Ireland,* 2007, pp. 39-40, available at: http://tinyurl.com/qgecy25.
[102] Child Poverty Act, 2010, ss. 1-6, available at: http://www.legislation.gov.uk/ukpga/2010/9/section/1; The Child Poverty Act was introduced by the former Labour government.

eligible for a free school meal from September 2014.[103] While the policy is not framed in human rights terms, evidence indicates that the expansion of free school meals provision would advance the realisation of the right to food for school children. For example, students in receipt of free school meals were found to be on average two months ahead of their peers elsewhere, and at Key Stage Two the impact on academic achievement was between three and five percent. Similarly, with regard to nutrition, there was a 23% increase in the number of children eating vegetables at lunch and an 18% drop in those eating crisps.[104] Equally, DEFRA's decision to develop national policies to improve food sustainability, such as the Green Food Project,[105] and to combat food waste,[106] is a welcome development with regard to advancing the realisation of the right to food.

Recommendations –The Human Right to Food:

1. *We recommend that the Government formulate a national right to food strategy and action plan designed to ensure the right to food for everyone in the UK. The strategy should be based on a comprehensive analysis of the state of enjoyment of the right to food in the UK and the causes of any identified gaps in the fulfilment of the right. The action plan must include firm commitments to:*
    a. *Establish appropriate institutions for the monitoring of the right to food in the UK;*
    b. *Address the causes of any identified failings in the implementation of the right;*
    c. *Introduce indicators and benchmarks for the purposes of assessing the degree of state compliance with the right, and the efficacy of policies introduced to improve the UK state's compliance with the right;*
    d. *Conduct right to food impact assessments for all new legislation, and oblige all relevant actors to consider and measure the likely impact of their policies and actions on the right to food;*
    e. *Introduce time-bound targets to improve fulfilment of the right to food in the UK.*

2.3 Food accessibility:

Food accessibility encompasses both economic and physical accessibility. Economic accessibility means that food must be affordable. For example, individuals should be able to afford food to ensure an adequate diet without compromising on other basic needs, such as those related to heating or rent. Physical accessibility means that food should be accessible to all, including to those members of society who are social, physically and economically vulnerable, including children, the sick, people with disabilities or older persons, for whom it may be more difficult to acquire food. In this section of the report, we consider the effect of employment, housing and social security policies on food accessibility, and find that static incomes, unaffordable housing costs and wide-ranging welfare reforms have impacted significantly on the realisation of the right to food. However, given their central position in the

[103] Department for Education, *Free school lunch for every child in infant school,* 2013, available at: https://www.gov.uk/government/news/free-school-lunch-for-every-child-in-infant-school.
[104] Dimbleby, H, *The School Food Plan, 2013,* pp. 116-117, available at: http://www.schoolfoodplan.com/wp-content/uploads/2013/07/School-Food-Plan-2013.pdf.
[105] DEFRA, *Green Food Project Conclusions,* 2012, available at: https://www.gov.uk/government/publications/green-food-project-conclusions.
[106] DEFRA, *Waste prevention programme for England,* 2013, available at: https://www.gov.uk/government/publications/waste-prevention-programme-for-england; See also DEFRA, *Government review of waste policy in England*, 2011, available at: https://www.gov.uk/government/publications/government-review-of-waste-policy-in-england-2011.

national debate around food insecurity, we start our assessment with the issue of food banks.

2.3.1 Food Banks

Food banks provide food aid to people in acute need, often following referral by a health or social care professional, or other agency.[107] In the UK, food banks are run by a range of volunteer-based organisations, redistributing food donated by consumers, retailers and the food industry.[108] The largest network is co-ordinated by the Trussell Trust which has more than 400 food banks UK-wide.[109]

Individuals are being referred to food banks in ever increasing numbers. 1,084,604 people, including 396,997 children, received three days' emergency food from Trussell Trust food banks in 2014/15. This is the first time that the number exceeded a million and represents a 19 per cent increase since 2013/14.,[110] compared to 346,992 in 2012-13.[111]

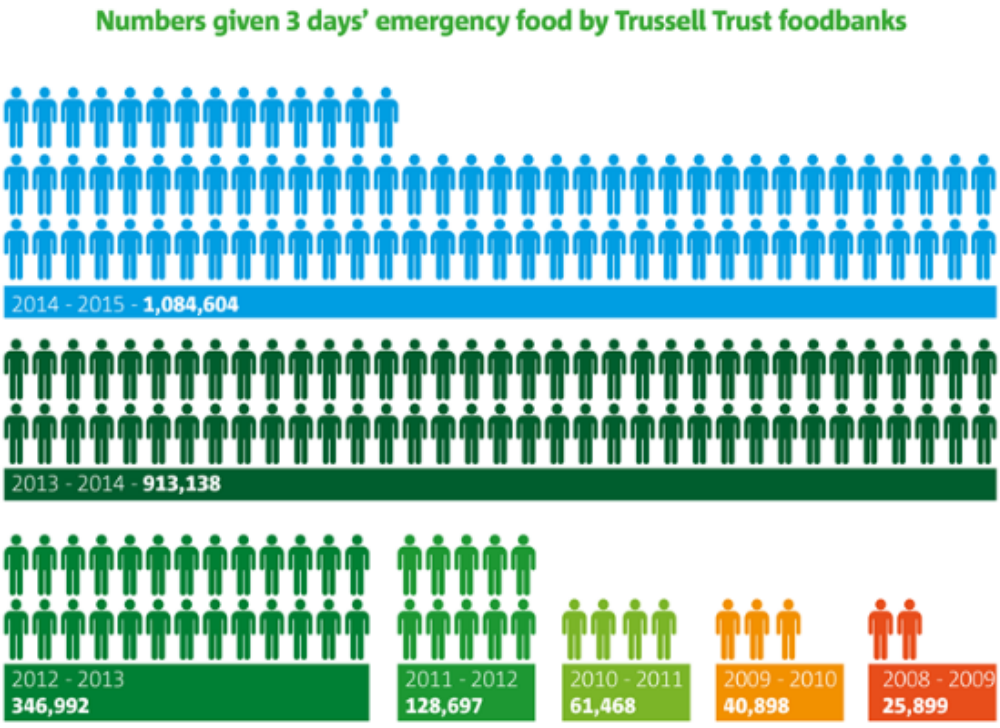

Figure 2Foodbank use tops one million for the first time *(The Trussell Trust, 2014)*

[107] House of Commons Library, *Food Banks and Food Poverty*, 2013, p. 1, available at: http://www.parliament.uk/business/publications/research/briefing-papers/SN06657/food-banks-and-food-poverty.
[108] House of Commons Library, *Food Banks and Food Poverty*, 2013, p. 1.
[109]http://www.trusselltrust.org/stats.
[110] The Trussell Trust, *Foodbank use tops one million for the first time says Trussell Trust*, 2015, available at http://www.trusselltrust.org/resources/documents/Press/Trussell-Trust-foodbank-use-tops-one-million.pdf
[111] Trussell Trust, Latest foodbank figures top 900,000, 2014; See also Oxfam, *Walking the breadline: The scandal of food poverty in 21st century Britain,* 2013, p. 5, available at: http://www.church-poverty.org.uk/walkingthebreadline/info/report/walkingthebreadlinefile.

The UN Special Rapporteur on the Right to Food recently commented that, "[Food banks] represent the best and most up-to-date source of data on social marginalisation in our societies ... food bank usage tells us where specifically [society] is broken, and which groups of people are falling through the cracks."[112] For this reason, it is important to determine why food bank usage in the UK has increased significantly since 2008.

2.3.2 Causes of increased food bank usage

A report commissioned by DEFRA on food aid identified the following factors as potential triggers for the recent upsurge in food bank usage: loss of, reductions in or problems associated with, social security benefit payments; low income; indebtedness; and homelessness.[113]Correspondingly, as shown in Figure 1, the leading causes for referral to Trussell Trust food banks are benefit delays (30.93 %); low income (20.29 %); benefit changes (16.97 %); debt (7.85 %); and refusal of a crisis loan (4.29 %).[114]

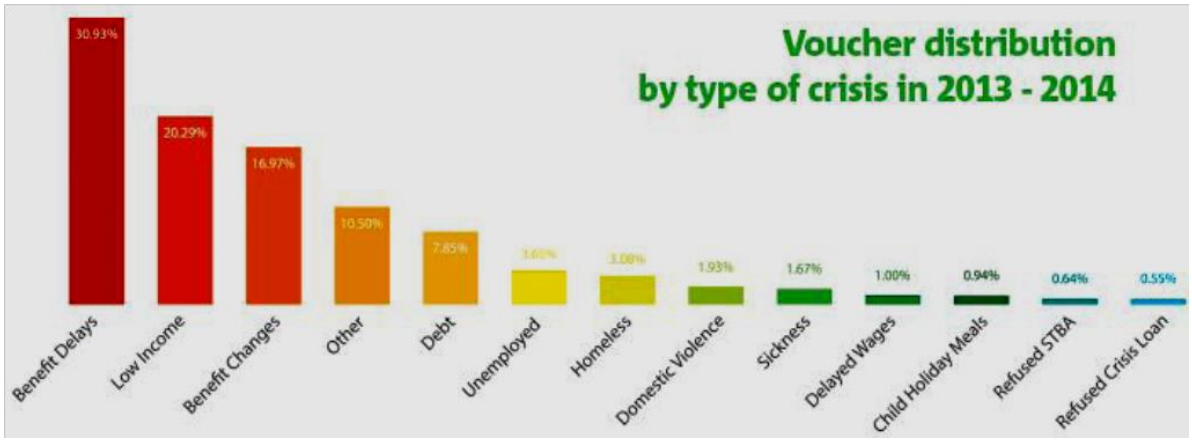

Figure 3 Trussell Trust food voucher distribution, *(The Trussell Trust, 2013)*

2.3.3 Implications for the right to food

Food banks combat immediate hunger, rather than seeking to guarantee long term food security. Trussell Trust food banks, for example, provide a minimum of three days emergency food and support to people experiencing crisis in the UK. All recipients must be referred to Trussell Trust food banks by a frontline care professional and may only receive up to three consecutive referral vouchers to help avoid dependency.[115]The Trussell Trust

[112] Schutter, O, "Food banks can only plug the holes in social safety nets, "*The Guardian,* 27 February 2013, available at: http://www.theguardian.com/commentisfree/2013/feb/27/food-banks-social-safety-nets.
[113] See DEFRA, *Household Food Security in the UK: A Review of Food Aid Final Report,* 2014, p. 30, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/283071/household-food-security-uk-140219.pdf.
[114] See Trussell Trust, *Latest foodbank figures top 900,000, 2014,* available at: http://tinyurl.com/ojzvz4a.
[115] House of Commons Library, *Food Banks and Food Poverty*, 2013, p. 3.

model successfully navigates the tension between addressing immediate presenting symptoms and tackling root causes of household food insecurity by signposting recipients to other agencies or organisations for further help, and providing a supportive environment and a 'listening ear.'[116]

The targeted approach of UK food banks is in keeping with the findings of the DEFRA commissioned report, which found that food aid provides "immediate relief for household members", but has "a limited impact on overall household food security status",[117] to the extent that it is "not able to address and overcome wider determinants (root causes) of household food insecurity,"[118]such as loss of, reductions in or problems associated with, social security benefit payments; low income; indebtedness; and homelessness.[119]

However, according to Chris Mould, Chairman of the Trussell Trust, food banks are increasingly filling gaps caused by welfare reform, and providing support which was previously delivered by jobcentres and the DWP.[120] At a national level, the DWP, via its network of jobcentres, ´signposts´ individuals to food banks when they "can offer no more help".[121] According to a "high level process"[122]put in place by the DWP, the four reasons to recommend a food bank when claimants ask for help are: hardship caused by benefit changes; benefit payment delays; a benefit advance having been refused; or the advance not being enough to meet their needs. At a local level, 140 out of 323 councils directly subsidised food banks between 2012-14, spending nearly £3 million in total to combat food insecurity.[123]

In April 2014, research by the Sheffield Political Economy Research Institute (SPERI)[124] found that "food bank demand appears to be signalling the inadequacy of both social security provision and the processes through which it is delivered." SPERI suggest that there appear to be two likely lines of development in this regard:

> *On the one hand, philanthropic food banking could become increasingly part of the welfare state, should local assistance schemes formalise referrals to food banks as part of their provision, and if practices become embedded and localised systems of formal and informal support develop. …On the other hand, food banks may remain*

[116] DEFRA, *Household Food Security in the UK: A Review of Food Aid Final Report,* 2014, p. 38.
[117] DEFRA, *Household Food Security in the UK: A Review of Food Aid Final Report,* 2014, p. 35.
[118] DEFRA, *Household Food Security in the UK: A Review of Food Aid Final Report,* 2014, p. 36.
[119] See DEFRA, *Household Food Security in the UK: A Review of Food Aid Final Report,* 2014, p. 30.
[120] Butler, P., Food banks are filling gaps left by jobcentres and the DWP, 18 March 2014, *The Guardian*, available at: http://www.theguardian.com/voluntary-sector-network/2014/mar/18/dwp-jobcentres-food-banks-gaps
[121] House of Commons Library, *Food Banks and Food Poverty*, 2013, p. 4.
[122] Butler, P., "DWP advising jobcentres on sending claimants to food banks", *The Guardian,* 11th March 2014, available at: http://www.theguardian.com/society/2014/mar/11/food-bank-jobcentre-dwp-referrals-welfare.
[123] BBC News, "Councils spending £3m on food poverty and food banks", *BBC News*, 3 March 2014, available at: http://www.bbc.co.uk/news/uk-26369558.
[124] SPERI, *Food bank provision & welfare reform in the UK,* 2014, p. 2 available at: http://speri.dept.shef.ac.uk/wp-content/uploads/2014/01/SPERI-British-Political-Economy-Brief-No4-Food-bank-provision-welfare-reform-in-the-UK.pdf. This research is based on fifty interviews conducted with strategic staff and co-coordinators of local emergency food projects in South and West Yorkshire, the Cotswolds and the South West.

distinct philanthropic initiatives but find themselves working in the absence of the state.

As such, there is a real concern that food banks are, in practice, becoming a substitute for an adequate social security system, as a result of welfare reform and increased benefit sanctions and delay (see 2.5, 2.5)). According to the UN Special Rapporteur on the Right to Food:

> *… food banks […] should not be seen as a substitute for the robust social safety nets to which each individual has a right. Instead social protection systems – including unemployment and child benefits – must be set at levels that take into account the real cost of living and ensure adequate food for all, without compromising on other essentials. And governments should not be allowed to escape their obligations because private charities make up for their failures.*

2.4 Costs of Living

Decent work and adequate wages are integral to the enjoyment of the right to adequate food.[125]In the UK, the right to food remains under threat due to a long-term decline in real wage earnings, set against an accelerated climb in food prices.

2.4.1 Fall in real wages

The OECD has calculated that the average income of the bottom 20% of households in the UK is $9,530, which is significantly lower than in France ($12,653) and Germany ($13,381). [126] The UK Government recognised in its Summer Budget 2015, that the UK has a higher incident of low pay than other advanced economies. One fifth of UK workers are low paid in comparison whereas the average for OECD countries is one sixth.[127]

While the Government has sought to combat in-work poverty by cutting income tax for low earners and lowering the minimum income tax bracket, [128] levels of pay have fallen considerably since the start of the recent economic downturn. Real wage growth averaged 2.9% in the 1970s and 1980s, 1.5% in the 1990s, 1.2% in the 2000s, but has fallen to minus 2.2% since the first quarter of 2010.[129] Although pay levels marginally recovered in late 2013,[130]overall, the post-2010 fall in real wages amounts to the longest period of decline since 1964 (see Figure 2 below). Reflecting these shifts, the average disposable income per

[125] CESCR, *The Right to Work, General comment No. 18*, 2005, p. 1, available at: http://www1.umn.edu/humanrts/gencomm/escgencom18.html.
[126] *Feeding Britain,* p.11
[127] HM Treasury, *Summer Budget 2015*, para. 1.120, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/443232/50325_Summer_Budget_15_Web_Accessible.pdf
[128] HM Treasury, *Budget 2013,* 2013, p. 5, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/221885/budget2013_complete.pdf. The efficacy of these measures remains disputed – see further para. 106.
[129] ONS*, An Examination of Falling Real Wages, 2010 - 2013*, 2014, p. 17.
[130] ONS, *Annual Survey of Hours and Earnings, 2013 Provisional Results,* 2014, pp. 11-12 .

household decreased by almost £1,200 (or 4.0%) between 2007/08 and 2011/12,[131] and overall, 900,000 more people were in absolute low income in 2011/12 than in 2010/11.[132] Taking these factors into account, the number of workers earnings less than a living wage - the amount considered adequate to achieve a minimum standard of living (including access to adequate food) - rose from 3.4 million in 2009 to 4.8 million in 2012.[133]

The Fabian Commission on Food and Poverty concluded that "[t]he rise of low wage jobs, coupled with stagnation of pay levels has meant, for the first time, the majority of people in poverty in the UK are in a working household"[134]. According to recent research conducted by the Institute for Fiscal Studies (IFS), nearly two-thirds of British children in poverty live in working families.[135]

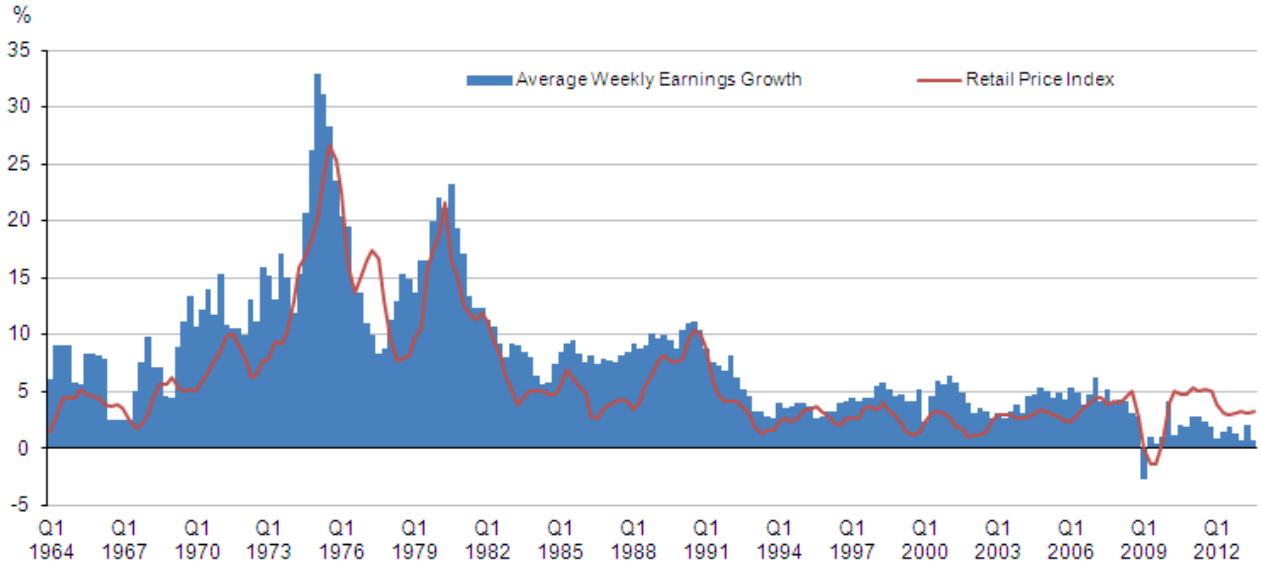

Figure 4 Wage growth and RPI inflation, Q1 1964 to Q3 2013, (Office for National Statistics, An Examination of Falling Real Wages, 2014, p. 2)

2.4.2 Rise in food prices and the cost of living

The post-recession drop in UK real wage earnings has been mirrored by an upsurge in food prices. As shown in Figure 3, food prices have risen more quickly than inflation since 2007, meaning that in total they are 41% higher than in 2002.[136] Fruit and vegetables, which are

[131] ONS, *The Effects of Taxes and Benefits on Household Income, 2011/12,* 2013, p. 11, available at: http://www.ons.gov.uk/ons/dcp171778_317365.pdf; Figures account for inflation and household structure.
[132] See DWP, *Low Income and Material Deprivation in the UK,* 11/12, first release, 2013, pp. 5 and 8, available at: http://tinyurl.com/norq62o; Absolute low income measures the %age of individuals who receive less than 60 per cent of average income in that given year adjusted by inflation.
[133] Resolution Foundation, *Low Pay Britain 2013*, 2013, p. 14, available at: http://tinyurl.com/kzka5c3.
[134] *Fabian Commission on Food and Poverty, Working Paper 1: Money and affordability,* p. 5, citing Donald Hirsch (JRF), *A Minimum Income Standard for the UK in 2014,* 2014
[135] Institute of Fiscal Studies, IFS Press Releases, *Nearly two-thirds of children in poverty live in working families, 16 July 2015,* aavailable at http://www.ifs.org.uk/publications/7880
[136] Joseph Rowntree Foundation, *Monitoring Poverty and Social Exclusion*, 2013, p. 22, available at: http://www.jrf.org.uk/sites/files/jrf/MPSE2013.pdf.

key to the enjoyment of a healthy and nutritious diet, were among the food items which increased most sharply in cost, rising by 34% and 31% respectively between 2007 and 2013.[137]

Figure 5 Rises in the price of food, and the cost of living, from 2002 to 2012, (Joseph Rowntree Foundation, Monitoring Poverty and Social Exclusion, 2013, p. 23)

The impact of rising food costs has been compounded by increases in the cost of living more generally. For instance, as shown in Figure 3 above, the cost of electricity, gas and other fuels more than doubled, rising by 140 %.[138] Domestic water charges rose by 69 %. The cost of personal transport rose by 71 %, while the cost of public transport rose by 87 %.[139]

Whereas a threshold of 30 % of income has been widely adopted as a measure for assessing housing affordability,[140] UK weekly rental payments for private renters in 2013 stood at 51 % of income.[141]As a result, a 2013 YouGov poll for Shelter found that 31 % of people surveyed had cut back on food in the past year in order to meet their housing costs.[142] Food prices have fallen in the year May 2014 and 2015.[143]

[137] DEFRA, *Food Statistics Pocketbook 2013,* 2013, p. 21; See also DEFRA, *Farming and Food Brief,* 2013, p. 9, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/263436/foodfarmbrief-04dec13.pdf.
[138] Joseph Rowntree Foundation, *Monitoring Poverty and Social Exclusion*, 2013, p. 22.
[139] Joseph Rowntree Foundation, *Monitoring Poverty and Social Exclusion*, 2013, p. 22.
[140] See for example, UN Special Rapporteur on the Right to Food, *Mission to Canada*, 2012, p. 12, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/AHRC2250Add.1_English.PDF.
[141] DCLG, *English Housing Survey Households 2011-12,* 2013, p. 27, available at: http://tinyurl.com/q84tqfc.
[142] Shelter, *4 out of 10 families cut back on food to stay in their homes*, 2013, available at: http://england.shelter.org.uk/news/march_2013/4_out_of_10_families_cut_back_on_food_to_stay_in_their_homes.
[143] Department for Environment Food & Rural Affairs, *June 2015 Farming and Food Brief,* 2015, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/442250/foodfarmbrief-06jul15.pdf

2.4.3 Spending more, eating less

According to research conducted on behalf of Kellogg's by the independent Centre for Economics and Business Research, households have increased food spending since 2007 in an effort to access an adequate and nutritious diet. However, in real terms, households are eating less, due to the gap between wages and the cost of food. Overall, from 2007 to 2012, expenditure on food in the UK rose sharply – by 19.9 %, despite a steep decline in the actual volume of food consumed – consumption declined by 7.3 % over the same time period,[144] as illustrated in Figure 4 below.

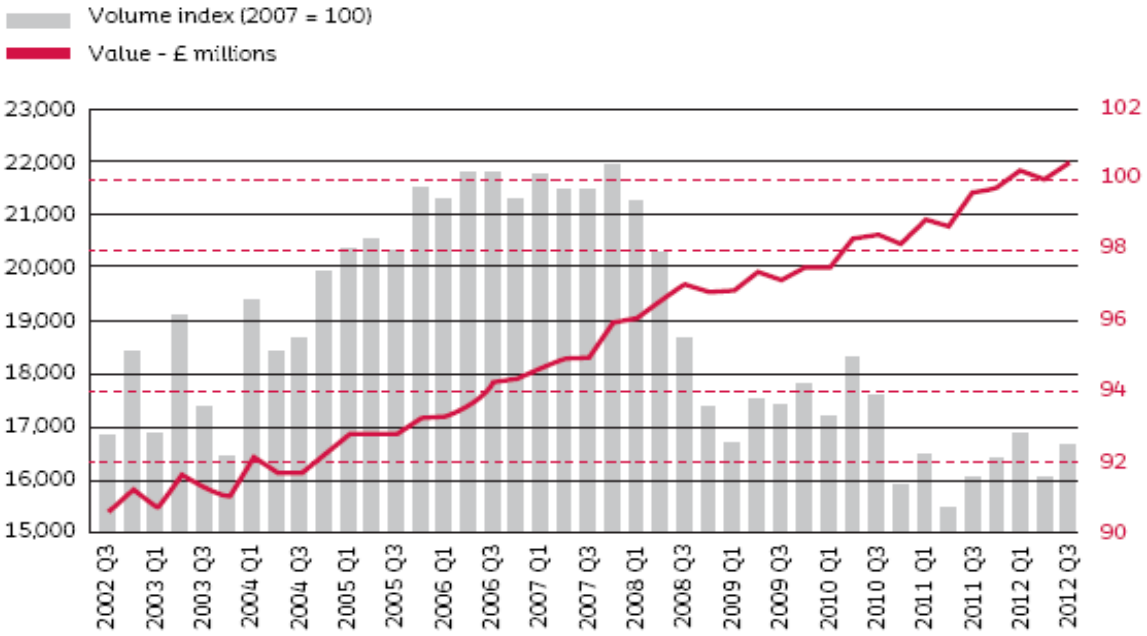

Figure 6 Consumption of food and non-alcoholic beverages in the UK, (Centre for Economics and Business Research, Hard to Swallow, 2013)

As an example of this overall trend, expenditure on vegetables has risen by 15.3 % yet the volume consumed has fallen by 8 %.[145] Likewise, according to research published by the Institute for Fiscal Studies (IFS), over the period of 2005–07, households purchased, on average, 2086 calories per adult-equivalent per day; in 2008–09, households purchased 38 (1.8%) fewer calories on average; and by 2010–12, they purchased 74 (3.6%) fewer calories than in 2005–07.[146] To this extent, food has become food increasingly inaccessible for households across the UK, as a result of the growing gap between income and the cost of food.[147]

[144] Kellogg's and the Centre for Economics and Business Research, *Hard to Swallow, The Facts about Food Poverty,* 2013, pp. 12-13, available at: http://tinyurl.com/ostx2cd.
[145] Kellogg's and the Centre for Economics and Business Research, *Hard to Swallow, The Facts about Food Poverty,* 2013, pp. 12-13.
[146] IFS, *Food expenditure and nutritional quality over the Great Recession,* 2013, p. 6, available at: http://www.ifs.org.uk/bns/bn143.pdf.
[147] CESCR, *General Comment 12, The right to adequate food (art. 11),* 1999, para. 7.

2.4.4 National Minimum Wage

The national minimum wage is currently £6.50 per hour.[148] It will increase to £6.70 per hour on 1 October 2015 for those over 25.[149] The NMW has advantages in setting a minimum floor below which pay cannot fall. However, the revised NMW rate is still well below the definition of low pay, as set by the Organisation for Economic Co-operation and Development,[150] which equates to two-thirds of the median full-time hourly wage - about £7.71 an hour in UK terms.

The Government announced that it was going to introduce a National Living Wage from April 2016, which will be set at £7.20 for those over 25.[151] This is well below the £9.15 per hour within London and the £7.85 per hour in the rest of the UK that the Living Wage Foundation believes is necessary to cover the basic costs of living.[152] As recognised by the UN Special Rapporteur on the Right to Food,[153] Articles 6 and 7[154] of the Covenant require that the minimum wage set in legislation should be, at least, a "living wage," that "provides an income allowing workers to support themselves and their families".[155]

2.5 Social security

Since its inception, the UK welfare state has acted as a safety net to prevent marginalised and disadvantaged groups from falling into a state of destitution and hunger.[156] Recent welfare reforms have significantly undermined this safety net, with 16.97% of Trussell Trust food bank referrals in 2013 being made as a result of benefit changes (as shown in Figure 3).[157]

2.5.1 Welfare reform

Welfare reform is a main plank of the 2010 Coalition Government Agreement. It seeks to "encourage responsibility and fairness in the welfare system ... [by] providing help for those who cannot work, training and targeted support for those looking for work, but sanctions for those who turn down reasonable offers of work or training".[158] According to the Prime

[148] Ibid, para. 1.118
[149] ACAS, National Minimum Wage: advice and guidance, available at http://www.acas.org.uk/index.aspx?articleid=1902
[150] See Organisation for Economic Co-operation and Development, *An Overview of Growing Income Inequalities in OECD Countries: Main Findings,* 2011, available at: http://www.oecd.org/els/soc/49499779.pdf.
[151] *Summer Budget 2015*, para. 1.121
[152] Living Wage Foundation, available at http://www.livingwage.org.uk/what-living-wage
[153] UN Special Rapporteur on the Right to Food, *Mission to Canada,* 2012, p. 20.
[154] ICESCR, 1966, Art 6 and 7.
[155] CESCR, *General comment No. 18 on the right to work,* (2005), para. 7.
[156] See Beveridge, W., "Social Insurance and Allied Services (the Beveridge Report)", 1942, Cmd 6404, available at: http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/19_07_05_beveridge.pdf.
[157] Trussell Trust, *Latest foodbank figures top 900,000, 2014;* See also Figure 1 above.
[158] HM Government, *The Coalition: Our programme for government,* 2010, p. 23, http://tinyurl.com/cog3trw; The former Labour Government also increased use of sanctions and conditionality - see Welfare Reform Act, 2009, available at: http://www.legislation.gov.uk/ukpga/2009/24/contents.

Minister, welfare reform is "at the heart of [the Government´s] long-term economic plan – and it is at the heart, too, of [the Government´s] social and moral mission in politics today":

> *… our long-term economic plan for Britain is not just about doing what we can afford, it is also about doing what is right. Nowhere is that more true than in welfare. For me the moral case for welfare reform is every bit as important as making the numbers add up: building a country where people aren't trapped in a cycle of dependency but are able to get on, stand on their own two feet and build a better life for themselves and their family.*[159]

As recognised by the JCHR report on the Welfare Reform Bill, "the Government's aim to support more people, and in particular people who might otherwise be disadvantaged in the employment market, into work as the most effective route out of poverty ... is consistent with many international human rights instruments which recognise the right to work and the right to an adequate standard of living".[160] However, a number of elements of the recent welfare reforms constitute serious threats to the realisation of the right to food.

2.5.2 Benefit levels

There is a real risk that existing benefit levels are insufficient to guarantee enjoyment of the right to food for everyone in the UK. As noted above, the DEFRA- commissioned report on food aid identified the loss of, reductions in or problems associated with, social security benefit payments as the leading triggers for the recent increase in food bank usage.[161]

Analysis by the Joseph Rowntree Foundation[162] found that basic out-of-work benefits generally leave people significantly short of what the public thinks is needed for an adequate standard of living,[163] including access to adequate food. In particular, out-of-work benefits provide only 38% of the minimum income required for an adult with no children, and 57-58% for families with children.[164] Similarly, the European Committee of Social Rights (the body tasked with interpreting the European Social Charter) recently found that the minimum levels of UK welfare entitlements, particularly short-term incapacity benefits (£71 per week) and job seeker's allowance (£67 per week), are manifestly inadequate as they fall below 40% of the Eurostat median equivalised income.[165]

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[159] Cameron, D., *Why the Archbishop of Westminster is wrong about welfare*, 19 February 2014, available at: http://www.telegraph.co.uk/news/politics/david-cameron/10646421/David-Cameron-Why-the-Archbishop-of-Westminster-is-wrong-about-welfare.html.

[160] Joint Committee on Human Rights, *Legislative Scrutiny: Welfare Reform Bill,* 2011, p. 8.

[161] See para 45.

[162] JRF, *A Minimum income standard for the UK in 2013*, 2013, pp. 14-16, available at: http://www.jrf.org.uk/sites/files/jrf/income-living-standards-full.pdf.

[163] The Minimum Income Standard (MIS) is the income that people need in order to reach a minimum socially acceptable standard of living in the UK today, based on what members of the public think. It is calculated by specifying baskets of goods and services required by different types of household in order to meet these needs and to participate in society – see JRF, *A Minimum income standard for the UK in 2013*, 2013, available at: http://www.jrf.org.uk/sites/files/jrf/income-living-standards-full.pdf.

[164] JRF, *A Minimum income standard for the UK in 2013*, 2013, pp. 14-16.

[165] European Committee of Social Rights, Conclusions XX-2 2013: Great Britain, 2014, pp. 18-19, available at: http://www.coe.int/t/dghl/monitoring/socialcharter/conclusions/State/UKXX2_en.pdf.
N.B. the current rate of JSA is £73.10 for those over 25 and £57.90 for those aged between 18 and 24 see: https://www.gov.uk/jobseekers-allowance/what-youll-get

Benefit Indexing

Concerns are further heightened as a result of the Government decision to index benefits to the Consumer Price Index (CPI), rather than the Retail Price Index (RPI). Whereas the RPI rose at a rate of 4.6% in 2011/12, the CPI grew by only 3.1% during the same period.[166]As recognised by the Government's Impact Assessment, this means that most benefits are increased less than if they had remained indexed to the RPI,[167] thus causing the gap to widen between social security payments and food prices.

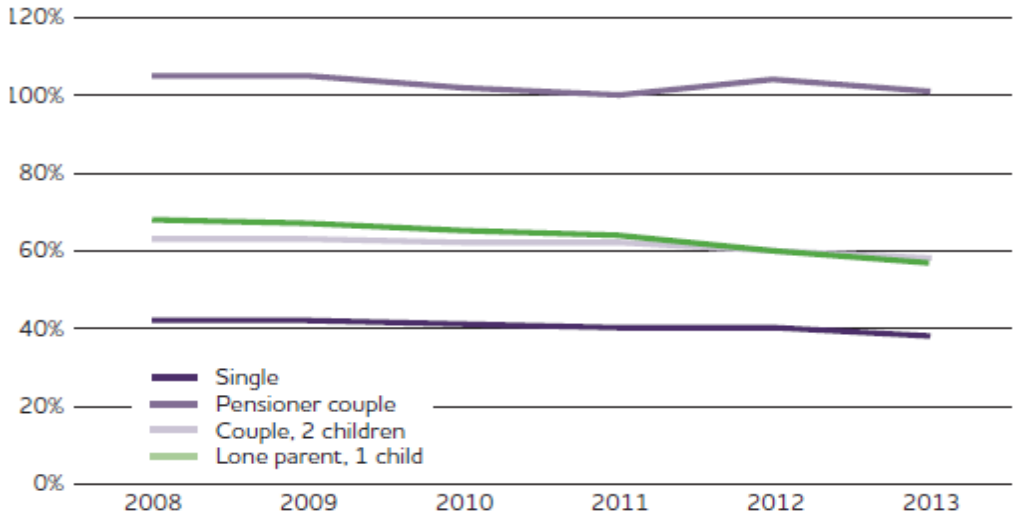

Figure 7 Percentage of Minimum Income Standard provided by benefits (Joseph Rowntree Foundation, A Minimum income standard for the UK, 2013, p. 16)

Benefit Capping

Over the past five years, there has been a gradual but steady fall in the adequacy of benefits in these terms for working-age families (see Figure 7).[168] The Joseph Rowntree Foundation found that the adequacy of benefits declined in 2013, with working-age benefits rising by just one percent from April 2013 as a result of the ´benefit cap´,[169] compared to three to four percent rises in the minimum required for an acceptable standard of living.[170]

The SPERI research on food banks[171] found that "welfare reforms are impacting on need for food banks in two distinct ways: people are turning to food banks as a result of (i) changes to entitlements which are leaving them worse off and (ii) inadequate processes which leave

[166] DWP, *Benefit uprating: Equality impact assessment, Social Security Benefits uprating 2011*, 20 12, p. 4, available at: http://tinyurl.com/prbacym.
[167] DWP, *Benefit uprating: Equality impact assessment, Social Security Benefits uprating 2011*, 2011, p. 4.
[168] JRF, *A Minimum income standard for the UK in 2013*, 2013, p. 16; please note that for pensioners the adequacy of the Pension Credit safety-net has fluctuated rather than shown any distinct trend.
[169] From April 2013 total household benefit payments for working-age claimants have been capped at £500 per week for couples and lone parent households, and £350 per week for single adults - please see DWP, *Benefit Cap, Equality impact assessment,* 2012, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/220153/eia-benefit-cap-wr2011.pdf.
[170] JRF, *A Minimum income standard for the UK in 2013*, 2013, p. 5.
[171]See para 49.

them without an income."[172] Reforms impacting on income include the cap to benefit payments.[173]

We are particularly concerned that these reforms have been introduced on a permanent basis, in order to achieve ´moral´ objectives,[174] rather than merely be being of a temporary nature as required by the guidance issued by the Chairperson of the CESCR in 2012.[175]Thus, real concerns arise as to whether the decision to cap and re-index benefits is retrogressive, to the extent that the impact of these measures is projected to worsen over time,[176] thus leading to a growing gap between benefit levels and food costs.

2.5.3 Benefit delays – sanctions and maladministration

Available evidence suggests that the post-recession rise in UK hunger is intimately connected to the rise in benefit delays, caused by an increase in both benefit sanctioning,[177] as well as maladministration (particularly with regard to late payment and underpayment).[178] In 2001, 279,840 Job Seekers Allowance (JSA) sanctions were imposed; by 2013, this number had risen to 553,000.[179] A wealth of reported cases present evidence of benefit claimants being forced into hunger for prolonged periods as a result of enhanced sanctions procedures.[180]

According to SPERI,[181] "decision-making around sanctions [is …] particularly problematic from the perspective of food banks, where decisions were seen as unfair and/or arbitrary." More generally, SPERI found that "ineffective administration of welfare payments was also seen to be an important driver of need, where people's payments are delayed or stopped and they are left with no or heavily reduced income."
The All Party Parliamentary Inquiry into Food Poverty heard evidence that:

> *"[one] claimant said... [h]is Jobcentre Plus adviser had asked him to apply for two specific jobs as part of his job search. The companies were to send the job application forms directly to him. However both forms arrived after the closing date had passed for those jobs, and he was then sanctioned and exposed to hunger*".[182]

[172] SPERI, *Food bank provision & welfare reform in the UK,* 2014, p. 1.
[173] SPERI, *Food bank provision & welfare reform in the UK,* 2014, p. 2.
[174]See para 60.
[175] Chairperson of the CESCR, *Letter addressed by the Chairperson of the CESCR to States parties to the ICESCR,* 2012.
[176] IFS, *Child and Working-Age Poverty in Northern Ireland from 2010 to 2020,* 2013, p. 29, available at: http://www.ifs.org.uk/comms/r78.pdf - please note, this report analyses the impact of welfare reforms across all of the UK, and not only in Northern Ireland.
[177] Stricter sanctions and conditionality regulations were introduced by the Coalition Government on 22nd October 2012 – see DWP, *Conditionality, sanctions and hardship',* 2011, pp. 9-10, available at: http://tinyurl.com/ogshrue.
[178]See, e.g., Oxfam, *Walking the breadline: The scandal of food poverty in 21st century Britain,* 2013, p. 13.
[179] DWP, *Ad-hoc analysis on the number of Jobseeker's Allowance (JSA) sanctions and disallowances(1st April 2000 to 21st October 2012),* 2013, available at: http://tinyurl.com/oub4lnr.
[180]See, e.g., Citizens Advice, *Citizens Advice Bureau set to give out more than 100,000 vouchers for emergency food this year,* 2013, available at: http://www.citizensadvice.org.uk/index/pressoffice/press_index/press_20131216.htm.
[181] SPERI, *Food bank provision & welfare reform in the UK,* 2014, p. 2.
[182] *Feeding Britain,* p. 39; Benefit sanctions are the cessation of benefit payments for a period of 4 – 156 weeks, in circumstances where the Department of Work and Pensions finds that the person has

The Public Accounts Committee (PAC) found that the average weekly underpayment in Income Support for affected customers was £24, a considerable proportion (29%) of their weekly payment.[183] In 2012/13, £0.5bn of total benefit expenditure (0.3%) was underpaid due to official error, an increase compared to £0.4bn recorded in 2011/12.[184] The high percentage of successful appeals against welfare benefit decisions provides further confirmation of the prevalence of poor administration.[185]

According to Trussell Trust figures, 30.93% of food bank referrals were as a result of benefit delays.[186] Citizen's Advice, which issued more than 100,000 food bank vouchers in 2013, found that sanctions and delays in benefit payments were among the main drivers of hunger among its clients.[187]

2.5.4 Crisis loans and community care grants

Previously, when individuals faced hunger due to sanctions or late payment, they could potentially rely on crisis loans to obtain vital short-term expenses, such as food or clothes, or community care grants[188] to obtain basic living essentials, such as cooking equipment. However, fiscal responsibility for crisis loans and community care grants was transferred to local authorities in April 2013.[189] The potential for crisis loans to assist in securing access to food was greatly diminished by localisation, as many councils restricted eligibility criteria for the fund. As a result, only 20% of the money available had been spent during the first six months of the transfer, with some councils allocating as little as 1% of their crisis loan budgets.[190] In January 2014, the Government announced that the fund would be cut completely by April 2015.[191]

In turn, individuals in crisis are increasingly being forced to turn to 'pay day loans' and food aid in order to access adequate food. In 2013/14, for example, 1% of food bank referrals

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not done everything they can to find work: https://www.gov.uk/government/publications/jobseekers-allowance-sanctions-leaflet/jobseekers-allowance-sanctions-how-to-keep-your-benefit-payment

[183] House of Commons Committee of Public Accounts, *Reducing errors in the benefits system*, 2011, p. 5, available at: http://www.publications.parliament.uk/pa/cm201011/cmselect/cmpubacc/668/668.pdf.

[184] DWP, *Fraud and Error in the Benefit System: 2012/13 Estimates,* 2014, pp. 3-5, available at: http://tinyurl.com/oc7g9f9.

[185] See DWP, *Employment and Support Allowance: Appeal Outcome,* 2012, available at: http://tinyurl.com/pqqx96w.

[186] See Trussell Trust, *Latest foodbank figures top 900,000, 2014.*

[187] Citizens Advice, *Citizens Advice Bureau set to give out more than 100,000 vouchers for emergency food this year,* 2013

[188] Further information on Community Care Grants and Crisis Loans is available at https://www.gov.uk/crisis-loans.

[189] DWP, *Local welfare assistance to replace Social Fund Community Care Grants and Crisis Loans for general living expenses,* 2011, available at: http://tinyurl.com/q3yo9nm.

[190] Danczuk, S,. "Amid growing poverty, councils have failed to save fund for those in need", The Guardian, 7 January 2014, available at: http://www.theguardian.com/local-government-network/2014/jan/07/council-crisis-funds-scrapped-poverty.

[191] See DCLG, *Provisional local government finance settlement 2014 to 2015: Spending power summary,* 2014, available at: https://www.gov.uk/government/publications/change-in-spending-power; See also Butler, P, "Government to stop funding for low-income families facing emergencies," *The Guardian*, 4th January 2014, available at: http://www.theguardian.com/society/2014/jan/03/government-stops-emergency-funds-low-income-families.

were made as a result of the refusal of a crisis loan, 8% were due to debt,[192] and 78% of people taking out a pay day loan did so to afford food.[193]

Following the decision to abolish crisis loans and community care grants, there is a real risk that the social security system is failing to guarantee the minimum core of the right to food, to the extent that a growing number of individuals are increasingly unable to access the minimum essential benefit levels required to be free from hunger.[194]

Recommendations - Food accessibility

Food Banks

1. W*e recommend that the Government undertake further research in order to determine why food bank usage has significantly increased in recent years. In doing so, particular attention should be paid to the following factors: loss of, reductions in or problems associated with, social security benefit payments; low income; indebtedness; and homelessness. The Government should take all necessary action to address the causes that they identify.*

2. *We also recommend that the Government monitor the Department for Works and Pensions' 'sign-posting' to food banks, and take immediate steps to ensure that food banks are not used as a substitute for a comprehensive social security system administered by the state.*

Costs of Living

3. *Taking into account the rising cost of living, including food, fuel and housing prices, we recommend that Government investigate whether incomes are sufficient to guarantee the right to food for all. Where incomes are found to be inadequate, Government should adopt restorative measures. Restorative measures may include the introduction of employment legislation to ensure the minimum wage is a 'living wage' based on actual living costs.*

Welfare Reforms

4. *We recommend that the Government review benefit levels to determine whether those benefits provide recipients with the minimum essential level of income to prevent hunger. To the extent that benefit levels, and benefit administration more generally, are found to be inadequate, we recommend that the Government take immediate steps to fulfill the right to food, which may include the following:*
5. *Revise, or terminate, the benefit cap, and the decision to index benefits to the CPI, in order to reverse the growing gap between benefit levels and food costs;*

[192] See Trussell Trust, *Latest foodbank figures top 900,000, 2014.*
[193] Christians against poverty, *Payday lending customers are typically hungry, cold and worried about eviction*, 2013, p. 1, available at: https://capuk.org/downloads/press/paydaylendingPDF.pdf.
[194] CESCR, *General Comment 12, The right to adequate food (art. 11),* 1999, para 17: See also SPERI, *Food bank provision & welfare reform in the UK,* 2014, p. 2.

i. *Urgently reform the benefit sanctions scheme, and take steps to reduce benefit delay;*

ii. *Following the abolition of crisis loans and community care grants, introduce measures to ensure individuals in crisis are able to obtain vital expenses for essential foodstuffs.*

2.6 Equality and Non-Discrimination

As detailed above, ICESCR Art 2(2), when read alongside Article 11, imposes a duty to ensure equal enjoyment of the right to food for everyone, free from discrimination on a wide range of grounds. While the effects of the recession on food security and enjoyment of the right to food broadly have been alarming generally, they have had a disproportionate adverse impact on the enjoyment of the right to food of disadvantaged groups, including women, children and disabled people. We discuss the position of these groups below.

2.6.1 Women

Article 2(2) ICESCR prohibits discrimination on the ground of ´sex´ in terms of giving effect to the right to food provisions guaranteed under Article 11 ICESCR. Furthermore, Article 10(2) of the Covenant affords special protection to mothers during a reasonable period before and after childbirth, including paid leave or leave with adequate social security benefits.[195] Article 12(2) CEDAW also ensures the right of women to adequate nutrition during pregnancy and lactation. In the absence of immediate action to ensure that all laws, policies and programmes, do not discriminate on the prohibited ground of gender, the UK will remain at risk of violating ICESCR and CEDAW prohibitions of discrimination with the regards to the right to food.

In 2012, research produced by Netmums indicated that approximately one in five mothers were missing meals to ensure their children were adequately fed.[196] Data released by Gingerbread in 2013, shows that 67% of single parents, 91% of whom are women, have cut back on food for themselves, and 1 % have cut back on food for their children (as shown in Figure 9).[197]

[195] Article 10(2) ICESCR

[196] Netmums, *Feeling the Squeeze Survey Results,* 2012, pp. 2 and 5, available at: http://www.netmums.com/files/Feeling_the_Squeeze_Survey_Summary.pdf; Netmums surveyed 1,924 parents between 9th and 15th February 2012. The survey allowed members to include a comment and 330 chose to do so. In addition, individual stories were invited on a thread in the Netmums Coffee House forum where 110 people posted their thoughts and discussed the issues at the time of writing. The thread was viewed over 10,000 times.

[197] Gingerbread, *Paying the Price Single parents in the age of austerity,* 2013, p. 35, available at: http://www.trustforlondon.org.uk/wp-content/uploads/2013/12/full.pdf; cutting back generally took the form of smaller or less healthy meals for parents, or plain food that helped to make them feel full (for example, carbohydrates), with larger portions or healthier food reserved for children. The Gingerbread research used a 'mixed methods' approach to demonstrate the ongoing impact of austerity, chiefly focusing on: Living Costs and Food Survey (LCF) data on household spending, as well as other national datasets; Surveys of single parents; Qualitative interviews with 30 single parents.

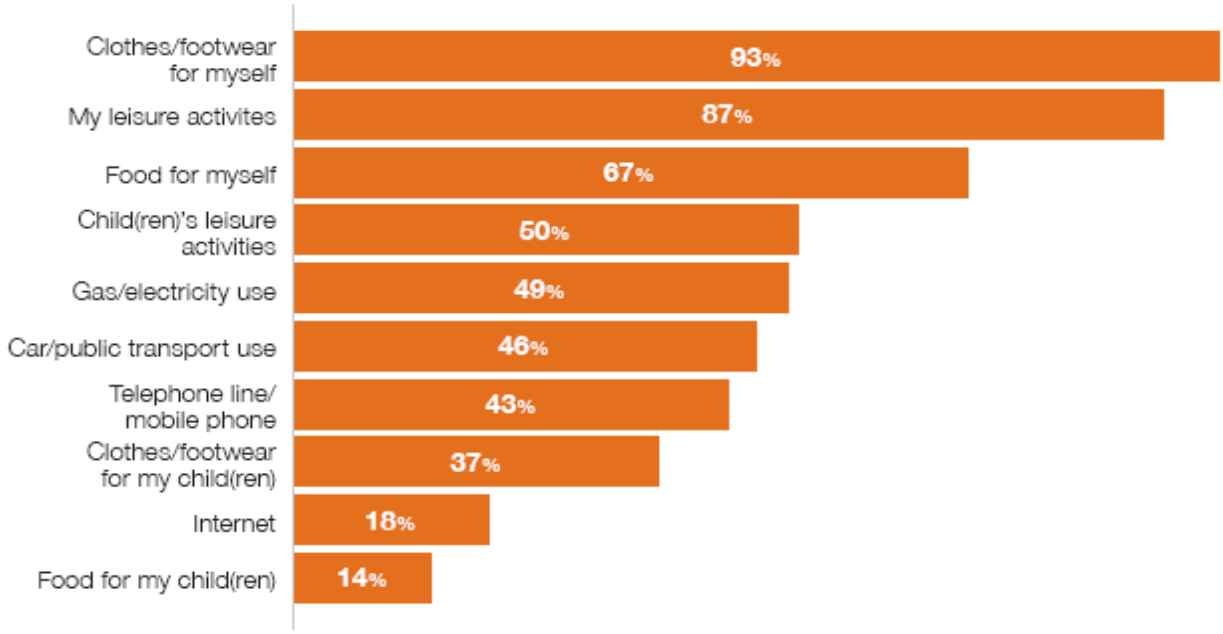

Figure 8 Share of single parents who have cut back their spending in the last 12 months, (Gingerbread, Paying the Price: Single parents in the age of austerity, 2013, p. 35)

Likewise, according to research published by the Centre for Economics and Business Research in 2013,[198] single parent households, 91% of whom are women,[199] are more likely than any other group to find themselves in a state of food insecurity, particularly if they have children and already live on a low income. As shown in Figure 8, single parent households with more than one child spent the greatest share of their income on food in 2013 (13.2 %).[200] This can be compared with a working age couple with no children, who spent just above 6 % of their income on food.[201] Furthermore, single person households with one child and more than one child are expected to see their annual average food bills increase by £244 and £341 respectively over the next five years, partly due to the impact of benefit reforms.[202]

[198] Kellogg's and the Centre for Economics and Business Research, *Hard to Swallow, The Facts about Food Poverty,* 2013, p. 15.
[199] Office for National Statistics, *Families and Households*, 2013, p. 5, available at: http://www.ons.gov.uk/ons/dcp171778_332633.pdf/
[200] Kellogg's and the Centre for Economics and Business Research, *Hard to Swallow, The Facts about Food Poverty,* 2013, pp. 20-21.
[201] Kellogg's and the Centre for Economics and Business Research, *Hard to Swallow, The Facts about Food Poverty,* 2013, pp. 20-21.
[202] Kellogg's and the Centre for Economics and Business Research, *Hard to Swallow, The Facts about Food Poverty,* 2013, pp. 20-21.

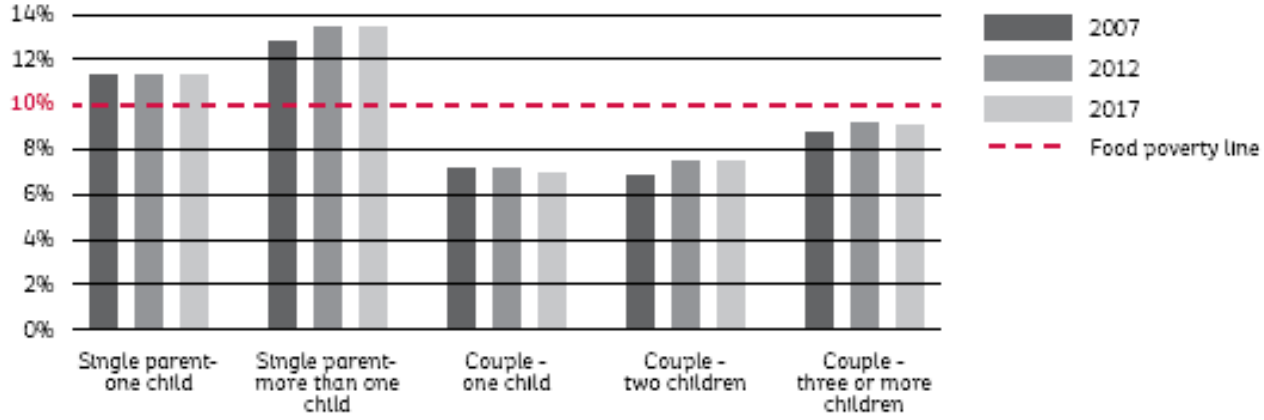

Figure 9 Expenditure on food and non-alcoholic beverages as a share of gross income, by working age household composition, (Centre for Economics and Business Research, *Hard to Swallow*, 2013, p. 12)

2.6.2 Persons with disabilities

Article 2(2) ICESCR prohibits discrimination on the ground of disability.[203] Article 25(f) UNCRPD prohibits the denial of food for reasons connected with a person's disability, while Article 28(1) recognises the right of all people with disabilities to an adequate standard of living, including adequate food.[204] The right to food is especially important for people with disabilities, many of whom have specific nutritional and dietary needs, which are vital to health and well-being, but which also tend to be more expensive,[205] thus making people with disabilities especially vulnerable to food insecurity.

Welfare reforms have impacted heavily on disabled people's enjoyment of the right to food. For instance, a survey carried out by the Disability Benefit Consortium found that among those people with disabilities who have been affected by welfare reforms, as many as 15% are using food banks[206] in order to ensure the satisfaction of the basic levels needed to avert hunger.

The food budgets of people with disabilities have been particularly restricted as a result of reforms to the spare room subsidy (also known as the ´under-occupancy penalty´, and the ´bedroom tax´), which cuts the amount of housing benefit that people can get if they are deemed to have a spare bedroom in their council or housing association home. The calculation of how many bedrooms a household needs fails to take into account the legitimate needs of disabled people for additional space. For example, a spare room may be needed when children or a couple cannot share a bedroom for health reasons, or when they

[203] CESCR, *General Comment 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the ICESCR),* 2009, para. 28.
[204] The Convention on the Rights of Persons with Disabilities, 2006, Article 25(f) and Article 28(1), available at: http://www.un.org/disabilities/convention/conventionfull.shtml.
[205] See Mencap, *Diet and people with a learning disability,* 2008, available at: http://tinyurl.com/o75quwg.
[206] Disability Benefit Consortium, *Food banks become lifeline for disabled people as benefit changes hit,* 2013, available at: http://disabilitybenefitsconsortium.wordpress.com/2013/12/17/food-banks-become-lifeline-for-disabled-people-as-benefit-changes-hit/; Welfare reforms measured include housing benefit changes and council tax revisions: For further information regarding the impact of austerity and spending cuts on the rights of people with disabilities, please also see Just Fair, *Dignity and Opportunity for All*, 2014, available at: www.just-fair.co.uk

need space to store essential medical equipment.[207] Out of the total 660,000 people affected by the under-occupancy penalty, 63% (420,000) have disabilities.[208]

While an extra £25 million was allocated to the £20 million baseline Discretionary Housing Payment (DHP) funding to specifically help those who live in specially adapted homes, including those with long term medical conditions, research by the Papworth Trust indicates that one in three disabled people have been refused a DHP.[209] In terms of the right to food, nine in ten disabled people who were refused said they had cut back on food and drink and/or household bills.[210] Similarly, the UN Special Rapporteur on the Right to Housing received testimonies during her country mission to the UK in 2013 which highlighted how the under-occupancy penalty has required tenants to make "hard choices, between food, heating or paying the rent."[211] Finally, SPERI has found that the under-occupancy penalty has increased need for food banks by reducing incomes and making it harder for people to make ends meet.[212]

In its report on the Welfare Reform Bill, the JCHR expressed concern with regard to the rights of disabled people "that the cumulative impact of the [Welfare Reform] Bill's provisions may lead to retrogression which is not justified by the factors set out in the General Comments of the UN Committee."[213]In this regard, there is an immediate need to ensure that all laws, policies and practices, particularly welfare reforms, such as the under-occupancy penalty, do not disproportionately affect the enjoyment of the right to food for people with disabilities, contrary to the ICESCR and UNCRPD.

2.6.3 Children

Article 24 of the UNCRC imposes a duty to combat malnutrition through the provision of adequate nutritious foods. Article 27 recognises the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development, including adequate nutrition.[214]Scientific research shows that hunger impairs thinking, and

[207] Shelter, *What's wrong with the bedroom tax?,* 2013, p. 2, available at: http://england.shelter.org.uk/__data/assets/pdf_file/0020/650630/Bedroom_tax_-_Shelter_briefing_March_2013.pdf.
[208] DWP, *Housing Benefit: Size Criteria for People Renting in the Social Rented Sector,* 2012, p. 12, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/220154/eia-social-sector-housing-under-occupation-wr2011.pdf.
[209]Papworth Trust, *Making Discretionary Housing Payments work for disabled people,* 2013 available at: http://www.papworth.org.uk/downloads/makingdiscretionaryhousingpaymentsworkfordisabledpeople_130710181752.pdf.
[210] Papworth Trust, *Making Discretionary Housing Payments work for disabled people,* 2013, pp. 1-2 , available at: http://www.papworth.org.uk/downloads/makingdiscretionaryhousingpaymentsworkfordisabledpeople_130710181752.pdf.
[211] UN Special Rapporteur on the Right to Adequate Housing, *Mission to the United Kingdom of Great Britain and Northern Ireland,* A/HRC/25/54/Add.2, 2013, p. 12, available at: http://direitoamoradia.org/wp-content/uploads/2014/02/A_HRC_25_54_Add.2_ENG.pdf.
[212] See SPERI, *Food bank provision & welfare reform in the UK,* 2014, p. 2.
[213] Joint Committee on Human Rights, *Legislative Scrutiny: Welfare Reform Bill,* 2011, p. 24; See also Demos, *Destination Unknown,* 2013, p. 1, available at: http://www.demos.co.uk/files/Table1-headline.pdf.
[214] UNCRC, 1989, Article 24 (2)(c) and (e) and Article 27(3).

that behavioural, emotional and academic problems are more prevalent among hungry children. For instance, a 2012 study of nearly 1,400 children aged from six to 16 demonstrated that those who had eaten breakfast performed at least twice as well on six measures of cognitive function as those who had not.[215] Equally, skipping breakfast leads to poorer overall eating habits and is a recognised contributor to childhood obesity. For instance, research carried out in 2013 in eight European countries found that children aged 10-12 who skipped breakfast were 80% more likely to be obese.[216]

We can expect to see progress made with regard to children's enjoyment of the right to food as a result of the expansion of free school meals breakfast clubs across the UK (see Chapter II (3) above). Improved enjoyment can also be expected as a result of the new tax-free childcare scheme for working families.[217]These initiatives do not provide a complete solution, however - not least because children continue to experience difficulties during school holidays and weekends when they are not in school.

A growing body of statistical evidence suggests that, without urgent action, the UK is at risk of failing to adopt all measures necessary to prevent children from experiencing a disproportionate impact in terms of their enjoyment of the right to food, compared to other groups in society. For instance, according to research published by the IFS in 2013, households with young children saw the largest reductions in real food expenditure[218] between 2005–07 and 2010–12, as shown in Figure 10 below.[219]

[215] Dimbleby, H, *The School Food Plan,* 2013, pp. 116-117.
[216] Children´s food trust, *The Children´s Food Conference*, 2013, available at: http://www.childrensfoodtrust.org.uk/assets/childrens-food-conference/childrens-food-conference-2013/cfconf2013_15michael_nelson.pdf; See also Dimbleby, H, *The School Food Plan,* 2013.
[217] HM Treasury, *Budget 2013,* 2013, p. 5; However, a group of children´s charities have warned that 900,000 families will be excluded from receiving any extra help, in the case where a parent earns less than £10,000 a year - the threshold for paying income tax - see Child Poverty Action Group, *Government risks throwing away chance to tackle in-work poverty for the poorest parents*, 2014, available at: http://www.cpag.org.uk/sites/default/files/CPAG%20Childcare%20consortium%20press%20release%20Oct%202013.pdf.
[218] Real food expenditure is nominal food expenditure on food purchases brought into the home, divided by the food component of the consumer price index.
[219] IFS, *Food expenditure and nutritional quality over the Great Recession,* 2013, p. 9.

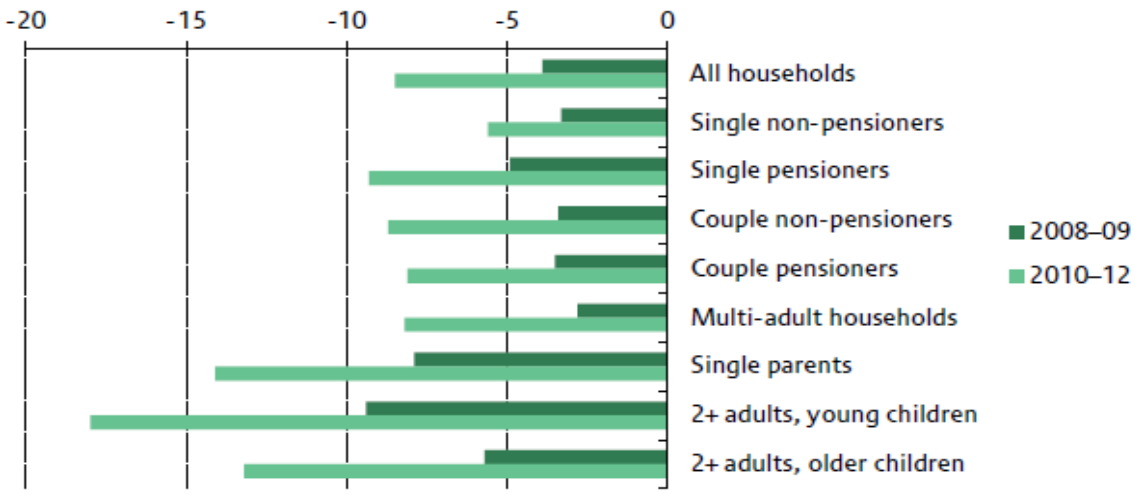

Figure 10 Percentage change in real food expenditure from 2005-07 to 2010-12, (IFS, *Food expenditure and nutritional quality over the Great Recession*, 2013)

Households with young children also reduced their real expenditure per calorie by the largest amount of all types of household; the decline for this group in real expenditure per calorie was 9.0%. This is despite the fact that households with children (of all ages) had the lowest expenditure per calorie in the pre-recessionary period.[220]

Recommendations – Equality and Non-Discrimination

2. *We recommend that the Government take all necessary steps to prevent and eliminate discrimination in enjoyment of the right to food, particularly with regard to women, children and disabled people. This will include reforming, or abolishing, the under-occupancy penalty (widely known as the ´bedroom tax´) to ensure people with disabilities are not forced to cut back on essential foodstuffs.*

2.7 Food adequacy

In human rights terms, 'adequacy' means that food must satisfy dietary needs, taking into account the individual's age, living conditions, health, occupation, sex, etc.[221] Following the recession, available evidence indicates that food adequacy is under threat as a result of deteriorating dietary patterns,[222] including a substitution away from fruit and vegetables towards processed food, as well as a corresponding rise in malnutrition rates.[223]

Since 2010, the Government have introduced a range of policies in order to tackle modern malnutrition and obesity, including the 2011'Healthy Lives, Healthy People' call to action on obesity, mandatory food standards in schools, and collective business pledges via the Public Health Responsibility Deal, as well as improved labelling on food and new guidance on

[220] IFS, *Food expenditure and nutritional quality over the Great Recession,* 2013, p. 10.
[221] See para 11.
[222] IFS, *Food expenditure and nutritional quality over the Great Recession,* 2013, p. 12.
[223] UK Government House of Commons, Hansard, Malnutrition, 12 Nov 2013, Column 619W, available at: http://tinyurl.com/q32tp4j.

physical activity.[224] While these policies indicate a clear willingness on behalf of the Government to tackle obesity and malnutrition, the measures fail to recognise the urgency and scale of the challenge posed to food adequacy following the recession, as seen from recent changes in nutritional quality, which are detailed below.

2.7.1 Changes in nutritional quality

According to research published by the IFS,[225] the average nutritional quality of foods purchased by almost every[226] household type declined from 2005–07 to 2008–09 and again to 2010–12. In particular, households have increased the amount of calories which they eat per gram of food (calorie density), largely due to a switch from fruit and vegetables to processed sweet and savoury foods,[227] which are higher in fat and sugar and therefore less healthy. The average calorie density of household purchases increased by 4.8%, on average, between 2005–07 and 2010–12.[228]These changes coincided with a cut in real expenditure on food brought into the home. Over 2005–07, the average household spent £102 each month per adult-equivalent; this had fallen by £4.00 (3.9%) on average by 2008–09 and was £8.70 (8.5%) lower than in 2005-07 by 2010–12.[229]

2.7.2 Malnutrition rates

The post-recession decline in food adequacy has been matched by a rise in malnutrition.[230]Figure 11 below shows that the number of malnutrition-related admissions to hospital in England has increased by 74 % since 2008-09,[231] in close correlation with the recent upsurge in food bank usage.[232] Whereas 3,161 patients were admitted to hospital in 2008-09 for malnutrition, this figure had increased to 5,499 in 2012-13. Statistics from the Health and Social Care Information Centre (HSCIC) demonstrate that diagnoses of rickets, a disease associated with poor diet and vitamin D deficiency, have also risen by 25 %, from 561 in 2008/09 to 702 in 2012/13.[233]Further data released by the HSCIC in 2014, highlights a marked increase in the proportion of adults that were obese between 1993 and 2012 from 13.2 % to 24.4 % among men and from 16.4 % to 25.1 % among women.[234]As such,

[224] Department for Health, *Reducing obesity and improving diet,* 2013, available at: https://www.gov.uk/government/policies/reducing-obesity-and-improving-diet.
[225] IFS, *Food expenditure and nutritional quality over the Great Recession,* 2013, p. 14.
[226] With the exception of households with older children measured using the %age of calories not deemed to be 'less healthy' and of multi-adult households using the same measure for the change from 2005–07 to 2010–12.
[227] IFS, *Food expenditure and nutritional quality over the Great Recession,* 2013, pp. 2 and 13.
[228] IFS, *Food expenditure and nutritional quality over the Great Recession,* 2013, p. 12 .
[229] IFS, *Food expenditure and nutritional quality over the Great Recession,* 2013, p. 6.
[230] UK Government House of Commons, Hansard, Malnutrition, 12 Nov 2013, Column 619W; Malnutrition is a serious condition that occurs when a person's diet does not contain the right amount of nutrients – see NHS Choices, *Malnutrition*, 2014, available at: http://www.nhs.uk/Conditions/Malnutrition/Pages/Introduction.aspx.
[231] UK Government House of Commons, Hansard, Malnutrition, 12 Nov 2013, Column 619W
[232] British Medical Journal, *The rise of food poverty in the UK,* 2013, BMJ 2013;347:f7157, available at: http://press.psprings.co.uk/bmj/december/foodpoverty.pdf.
[233] Cheng, M., "Rickets Making Comeback In The UK, Doctors Say", *Huffington Post,* 11 August 2013, available at: http://www.huffingtonpost.com/2013/11/08/rickets-uk-children_n_4240360.html.
[234] Health and Social Care Information Centre, *Statistics on Obesity, Physical Activity and Diet: England 2014,* 2014, p. 5, available at: http://www.hscic.gov.uk/catalogue/PUB13648/Obes-phys-acti-diet-eng-2014-rep.pdf ; Poor diet, particularly over-consumption of foods high in saturated fats and

available evidence highlights a worrying backward trend (i.e., retrogression) with regard to diet and food adequacy.

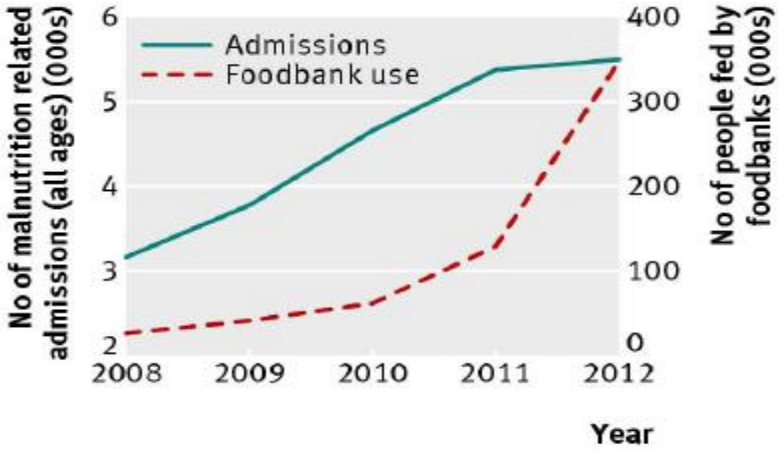

Figure 11 Admissions related to malnutrition and number of people using food banks since the economic crisis, (British Medical Journal, The rise of food poverty in the UK, 2013)

Such a conclusion is supported by recent public health findings published in the British Medical Journal. According to leading UK public health scientists, the rise of malnutrition, when viewed against a backdrop of rising food prices, can be seen directly to correlate with the exponential rise in the number of people being issued food bank vouchers by frontline care professionals, and, as such, "has all the signs of a public health emergency that could go unrecognised until it is too late to take preventive action".[235] In this regard, available evidence appears to suggest a failure on behalf of the UK Government to take expeditious and effective steps in order to progressively achieve the full realisation of the right to adequate and nutritious food.

Recommendations - Food Adequacy

> *We recommend that the Government review and revise policies for tackling malnutrition, taking into account the correlation between rising food bank usage and increased malnutrition-related hospital admissions.*

2.8 Food availability

Availability requires on the one hand that food should be available from both natural resources and for sale in markets and shops.[236] The availability of food is restricted in parts of the UK, however, as a result of food scarcity and the expansion of ´food deserts´ (i.e. areas where there is limited local availability of healthy food).[237]

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sugar, is also a primary cause of obesity – see NHS Choices, *Obesity,* 2014, available at: http://www.nhs.uk/Conditions/Obesity/Pages/Causes.aspx.

[235] British Medical Journal, *The rise of food poverty in the UK,* 2013, BMJ 2013;347:f7157.

[236] See para 13.

[237] See Wrigley, N, "Food Deserts in British Cities", Economic and Social Research Council, 2004, available at: http://eprints.soton.ac.uk/15645; See also Just Fair, *Freedom from Hunger: Realising the Right to Food in the UK,* 2013, p. 8, available at: http://tinyurl.com/nbkvftb.

The conclusions of the Green Food Project, the Government initiative aimed at improving the environment and increasing food production, recognise that "to achieve a truly sustainable food system, which improves on its economic outputs and environmental outcomes, a more joined up and collaborative whole supply chain is needed; both vertically between farmers and those they are selling produce on to, and horizontally between retailers, the food service sector or between farm businesses themselves".[238] To this end, the Government is actively taking steps to ensure healthy nutritious food is readily available across the UK, including the adoption of measures to promote farmers' markets and encouraging urban food growing.[239]

However, food scarcity remains common-place among people on low incomes across the UK.[240] The Royal College of Physicians has recognised that the closure of shops in deprived areas (leading to increased cost, poor quality and choice in remaining local shops), and the development of out-of-town supermarkets, has left the poorest people in 'food deserts' without access to affordable, healthy food.[241] Superstores are difficult to reach for people on low-incomes; 85% of households with weekly incomes under £150 do not have a car.[242]

The existence of UK food deserts runs contrary to the ICESCR requirement that food should be available both from natural resources and for sale in markets and shops.[243] As such, the Government must strive to make healthy food, including fresh fruit and vegetables, more readily available, particularly for disadvantaged individuals and groups. The UN Secretary General has noted that the supply of fruits and vegetables can be improved by supporting local sustainable production and building up an efficient local supply chain.[244] Similarly, the UN Special Rapporteur has recognised the value of local food systems in improving the availability of fresh and nutritious food for urban consumers', particularly fruits and vegetables, and in making a shift towards healthier diets.[245]

Recommendations - Food availability

> *We recommend that the Government combat the growth of UK food deserts, particularly among disadvantaged communities. This will require the adoption of measures targeted to secure food availability, including:*
>
> *a. Support for local food growing;*

[238] DEFRA, *Green Food Project Conclusions,* 2012, pp. 21-22.
[239] See DEFRA, *Farm shops and farmers markets,* 2013, available at: https://www.gov.uk/farm-shops-and-farmers-markets; See also DCLG, *Space for Food Growing,* 2012, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/7595/2203624.pdf.
[240] Wrigley, N, "Food Deserts in British Cities", Economic and Social Research Council, 2004; The UN Special Rapporteur on the Right to Food has also recognised that "food deserts are developing throughout many rich countries, [where] poor neighbourhoods are under served by retailers that provide affordable access to fresh food" – see Just Fair, *Freedom from Hunger: Realising the Right to Food in the UK,* 2013, p. 8.
[241] Royal College of Physicians of the UK, *Food Poverty and Health: Briefing Statement,* 2005, p. 3, available at: http://www.fph.org.uk/uploads/bs_food_poverty.pdf.
[242] Oxfam, *Walking the breadline: The scandal of food poverty in 21st century Britain,* 2013, p. 7.
[243] See ICESR Art 11; See also CESCR*, General Comment 12, The right to adequate food (art. 11),* 1999, para 12.
[244] UN Secretary General, *Prevention and control of non-communicable diseases,* 2011, p. 15-16, para. 60, available at: http://www.ghd-net.org/sites/default/files/UN%20Secretary-General's%20Report%20on%20NCDs.pdf.
[245] UN Human Rights Council, *Report submitted by the Special Rapporteur on the Right to Food, Olivier De Schutter* A/HRC/19/59, 2011, p. 19, available at: http://tinyurl.com/nrtlxrd.

b. *Promotion of local sourcing of healthy foods for public institutions, such as schools;*
c. *Adequate infrastructure investments linking local food producers to urban consumers.*

2.9 Maximum available resources

As mentioned in Chapter I, the story of UK food insecurity is intimately connected with the domestic response to the global economic crisis. Even during times of economic crisis, however, states have an obligation to progressively realise the right to food making use of their maximum available resources.[246] In assessing UK compliance with the duty of progressive realisation through the employment of the maximum of the resources available to it, it is important to recognise that the Government has sought to prioritise and safeguard specific Covenant rights, through the ring-fencing of health (Article 12 ICESCR) and education (Article 13 ICESCR) spending.[247]

Ring-fencing of spending related to one Covenant right can result in deeper cuts to another where steps are not taken to avoid this. In the UK context, ring-fencing of health and education has resulted in heavier cuts in other areas, particularly social security and local government,[248] which have directly impacted on the realisation of the right to food.

The Government embarked upon its term of office with an explicit commitment to fairness, in order to "ensure that every part of society makes a contribution to deficit reduction while supporting the most vulnerable".[249] Furthermore, the Government has attempted to cushion the blow of austerity for those on the lowest incomes by raising the tax personal allowance, and lifting the basic rate limit for income tax,[250] though the efficacy of such measures remains disputed.[251]

Taking into account the scope of UK austerity programmes, as well as the methods used in order to deliver savings, there is evidence that the way in which the post-economic crisis fiscal austerity agenda in the UK has been implemented is not compliant with the requirements of ICESCR Art(2)(1) and the right to food.[252]The International Monetary Fund (IMF), for instance, has advised that UK austerity measures were implemented ´too hard and too fast´,[253] and without full consideration of alternatives, including options to build capital rather than reduce assets and credit.[254]

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[246] Chairperson of the CESCR, *Letter dated 16 May 2012 addressed by the Chairperson of the CESCR to States parties to the ICESCR,* CESCR/48th/SP/MAB/SW, 2012, p. 1.
[247] HM Government, *The Coalition: Our programme for government,* 2010, p. 24.
[248] See, for example, the analysis of social security and local governments cuts in Centre for Welfare Reform, *A fair society?,* 2013, pp. 11-12, available at: http://tinyurl.com/a4vsxnb).
[249] HM Treasury, *Budget 2010,* 2010, p. 3.
[250] HM Treasury, *Budget 2013,* 2013, p. 5; See above para 52 above.
[251] Various academics and think-tanks have suggested that tax cuts will not benefit the poorest households - see for instance, IFS, *Observations: A £10,000 personal allowance: who would benefit, and would it boost the economy?*, 2012, available at: http://www.ifs.org.uk/publications/6045; See also Resolution Foundation, *Will future tax cuts reach struggling working households?* 2013, available at: http://tinyurl.com/csthrak.
[252] ICESCR, Art 2(1), 1966.
[253] IMF, *2012 Article IV consultation with the United Kingdom: IMF Country Report No. 12/190*, 2012, pp. 4-5, available at: http://www.imf.org/external/pubs/ft/scr/2012/cr12190.pdf; See also Hardman, I.,

We are particularly concerned that the Government´s fiscal policies appear to be neither necessary nor proportionate, contrary to the guidance issued by the Chairperson of the CESCR in 2012, in the sense that the adoption of other policies would be less detrimental to the right to food.[255] According to HM Treasury data, shown in Figure 10, the existing tax gap[256] amounts to approximately 7.0% of total tax liabilities. As such, on the basis of HM Revenue and Customs (HMRC) figures, more than £35 billion could be saved per year by closing the UK tax gap. In contrast, Tax Research estimate that the gap stands at £120 billion, when World Bank data on tax evasion, and HMRC data on late payments, are taken into account.[257] In comparison, cuts to social security are projected to save £7 billion per year,[258] while placing substantial restrictions on the right to food.

In its recent report examining the UK tax system, the PAC found that HMRC "does not use the full range of sanctions at its disposal to pursue vigorously all unpaid tax, and its measure of the tax gap does not capture all the avoided tax that it should be collecting".[259] Thus, taking the above evidence into account, the UK is plainly failing to take all necessary steps, to the maximum of its available resources, to progressively realise the right to food. In order to comply with Article 2(1) ICESCR, the Government must consider adopting revenue measures which can close the budget deficit without impacting so heavily on the right to food.

"The IMF's 'too far, too fast' warning", *The Telegraph*, 25 August 2012, available at: http://blogs.spectator.co.uk/coffeehouse/2012/08/the-imfs-too-far-too-fast-warning/

[254] IMF, *2012 Article IV consultation with the United Kingdom: IMF Country Report No. 12/190*, 2012, pp. 38-40.

[255] Chairperson of the CESCR, *Letter addressed by the Chairperson of the CESCR to States parties to the ICESCR,* 2012.

[256] The tax gap is the difference between the amounts of tax that should be collected, against what is actually collected. The tax gap includes estimates for tax avoidance, tax evasion and tax paid late – see HMRC, *Measuring tax gaps 2013 edition: Tax gap estimates for 2011-12,* 2013, available at: http://www.hmrc.gov.uk/statistics/tax-gaps/mtg-2013.pdf.

[257] HMRC, *Measuring tax gaps 2013 edition: Tax gap estimates for 2011-12,* 2013, p. 6.

[258] HM Treasury, *Spending Review 2010,* 2010, p. 8, available at: http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_191696.pdf.

[259] House of Commons Committee of Public Accounts*, HMRC Tax Collection: Annual Report & Accounts 2012–13,* 2013, p. 3, available at: http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/666/666.pdf.

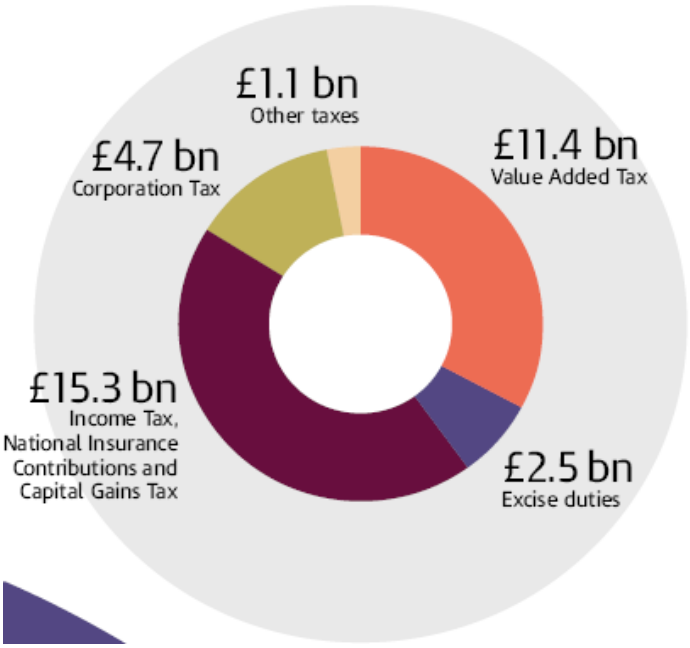

Figure 12 Value of the tax gap by type of tax, (HMRC, Measuring tax gaps 2013 edition, 2013, p. 3)

A State claiming that it is unable to carry out its obligations for reasons beyond its control, such as recession or economic crisis, has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.[260] This is particularly challenging for the UK, however, following the Government's decision "not [to] support the proposal for a regulation on the fund for European Aid to the Most Deprived", which had been proposed for the "distribution of material assistance", including sleeping bags and food, on the basis that "measures of this type are better and more efficiently delivered by individual member states through their own social programmes."[261] The position, taken by UK officials, means that Britain will draw down just €3.5m (£2.9m) from the fund compared with €443m for France which is around the same size as the UK. Britain is taking the same amount as Malta, the smallest EU member state with a population of 450,000.[262]

Recommendations - Maximum available resources

> *Take steps to review and, as appropriate, alter fiscal policy (including that relating to expenditure and revenue) to ensure that the Government makes use of the maximum of available resources in order to progressively realise the right to food.*

[260] ICESCR, Art 2(1), 1966; CESCR, *General Comment 12, The right to adequate food (art. 11),*1999, para 28.
[261] Watt, N, "Government under fire for rejecting European Union food bank funding", *The Guardian,* Tuesday 17 December 2013, available at: http://www.theguardian.com/society/2013/dec/17/government-under-fire-eu-funding-food-banks.
[262] Watt, N, "Government under fire for rejecting European Union food bank funding", *The Guardian,* Tuesday 17 December 2013.

2.10 Conclusion

According to the evidence analysed in this report, the UK Government is violating the right to adequate, accessible and available food. We have observed with concern that food banks are, in practice, filling gaps in the welfare state caused by welfare reform and increased levels of benefit conditionality and maladministration. We are particularly concerned that these welfare reforms, which have been introduced to pursue a 'moral' vision of individual initiative, are permanent rather than temporary. We have demonstrated that food has become increasingly inaccessible for households across the UK, with people spending more on food, but eating less, due to the gap between wages, subsistence benefit levels, and the rising cost of living. Without access to crisis loans, we have seen that sanctioned claimants are being forced to turn to food aid and pay day lenders in order to access adequate food. We have also observed a marked decline in food adequacy, set against a growth in the number of malnutrition-related hospital admissions, prompting experts to warn of a public health emergency.

In response, we have called upon the Government to formulate a national right to food strategy and action plan, monitor DWP ´sign-posting´ to food banks without delay, and adopt restorative measures to ensure that incomes are sufficient to guarantee the right to food for all. To the extent that subsistence benefit levels fall below the minimum essential standards necessary to prevent hunger and malnutrition, we have recommended that the DWP consider terminating the benefit cap, reforming the benefit sanctions scheme and introducing replacement measures to ensure individuals in crisis are able to obtain vital expenses for essential foodstuffs.

Since the recession, securing the right to food has increasingly become a national priority. As the All Party Parliamentary Group on Hunger and Food Poverty arrange to launch a parliamentary inquiry into food poverty in Britain, and as the Department for Education prepare to invest more than £600 million in implementing the free school meals plan, we call upon the Government to safeguard the human right to adequate and nutritious food for all.

Recommendations

The Human Right to Food:

1. *We recommend that the Government formulate a national right to food strategy and action plan designed to ensure the right to food for everyone in the UK. The strategy should be based on a comprehensive analysis of the state of enjoyment of the right to food in the UK and the causes of any identified gaps in the fulfilment of the right. The action plan must include firm commitments to:*
    a. *Establish appropriate institutions for the monitoring of the right to food in the UK;*
    b. *Address the causes of any identified failings in the implementation of the right;*
    c. *Introduce indicators and benchmarks for the purposes of assessing the degree of state compliance with the right, and the efficacy of policies introduced to improve the UK state's compliance with the right;*

d. *Conduct right to food impact assessments for all new legislation, and oblige all relevant actors to consider and measure the likely impact of their policies and actions on the right to food;*
e. *Introduce time-bound targets to improve fulfilment of the right to food in the UK.*

Food Banks

2. W*e recommend that the Government undertake further research in order to determine why food bank usage has significantly increased in recent years. In doing so, particular attention should be paid to the following factors: loss of, reductions in or problems associated with, social security benefit payments; low income; indebtedness; and homelessness. The Government should take all necessary action to address the causes that they identify.*
3. *We also recommend that the Government monitor the Department for Works and Pensions' ´sign-posting´ to food banks, and take immediate steps to ensure that food banks are not used as a substitute for a comprehensive social security system administered by the state.*

Costs of Living

4. *Taking into account the rising cost of living, including food, fuel and housing prices, we recommend that Government investigate whether incomes are sufficient to guarantee the right to food for all. Where incomes are found to be inadequate, Government should adopt restorative measures. Restorative measures may include the introduction of employment legislation to ensure the minimum wage is a ´living wage´ based on actual living costs.*

Welfare Reforms

5. *We recommend that the Government review benefit levels to determine whether those benefits provide recipients with the minimum essential level of income to prevent hunger. To the extent that benefit levels, and benefit administration more generally, are found to be inadequate, we recommend that the Government take immediate steps to fulfil the right to food, which may include the following:*
    a. *Revise, or terminate, the benefit cap, and the decision to index benefits to the CPI, in order to reverse the growing gap between benefit levels and food costs;*
    b. *Urgently reform the benefit sanctions scheme, and take steps to reduce benefit delay;*
    c. *Following the abolition of crisis loans and community care grants, introduce measures to ensure individuals in crisis are able to obtain vital expenses for essential foodstuffs.*

Equality and non-discrimination

6. *We recommend that the Government take all necessary steps to prevent and eliminate discrimination in enjoyment of the right to food, particularly with regard to women, children and disabled people. This will include reforming, or*

abolishing, the under-occupancy penalty (widely known as the ´bedroom tax´) to ensure people with disabilities are not forced to cut back on essential foodstuffs.

Malnutrition

7. *We recommend that the Government review and revise policies for tackling malnutrition, taking into account the correlation between rising food bank usage and increased malnutrition-related hospital admissions.*

Food Deserts

8. *We recommend that the Government combat the growth of UK food deserts, particularly among disadvantaged communities. This will require the adoption of measures targeted to secure food availability, including:*
    a. *Support for local food growing;*
    b. *Promotion of local sourcing of healthy foods for public institutions, such as schools;*
    c. *Adequate infrastructure*

Maximum Available Resources

9. *Take steps to review and, as appropriate, alter fiscal policy (including that relating to expenditure and revenue) to ensure that the Government makes use of the maximum of available resources in order to progressively realise the right to food.*

The Right to Health in the United Kingdom

SECTION III

3. THE RIGHT TO HEALTH IN THE UK (ARTICLE 12)

3.1 Introduction

This section considers the right of everyone to the highest attainable standard of physical and mental health protected by Article 12 CESCR by focussing on the rights of refugees,[1] asylum seekers,[2] undocumented migrants[3] and people with mental health conditions.

This section begins by providing an overview of the United Kingdom's obligations in relation to the right to health, as well as explanatory information on the United Kingdom's National Health Service (NHS). Economic and language barriers for migrants are considered as well as the health of those placed in immigration detention.

[1] Under the Convention on the Status of Refugees, four conditions must be fulfilled for a person to be categorized as a 'refugee' : "1) they are outside their country of origin; 2) they are unable or unwilling to seek or take advantage of the protection of that country, or to return there; 3) such inability or unwillingness is attributable to a well-founded fear of being persecuted; 4) the persecution feared is based on reasons of race, religion, nationality, membership of a particular social group or political opinion." See Goodwin-Gill G., McAdam J., The Refugee in International Law (3rd ed. Oxford, Oxford University Press 2007), p. 37; Also see: Art. 1(A)(2) Convention Relating to the Status of Refugees, 1951 and art. 1(2) Protocol Relating to the Status of Refugees 1966. The UK is party to the Refugee Convention and Protocol and these treaties are now part of the UK law. See Goodwin-Gill G., McAdam J., The Refugee in International Law (3rd ed. Oxford, Oxford University Press 2007), p. 44. Under UK law, a person becomes a refugee when his/her claim for asylum is accepted by the government. Refugee Council, available at http://www.refugeecouncil.org.uk/policy_research/the_truth_about_asylum/the_facts_about_asylum

[2] Art 14(1) of the Universal Declaration of Human Rights proclaims that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution." Under international law, asylum seekers are individuals in the process of seeking asylum, whose refugee status has not yet been confirmed. See UNHCR website, available at http://www.unhcr.org/pages/49c3646c137.html ; Refugee Council, available at http://www.refugeecouncil.org.uk/policy_research/the_truth_about_asylum/the_facts_about_asylum. A failed (or refused) asylum seeker is "a person whose asylum applications and any subsequent asylum appeals have been finally rejected." See Kelley N. and Stevenson J., See *Refugee Council, First do no harm: denying healthcare to people whose asylum claims have failed*, 2006, p. 5. available at: http://www.refugeecouncil.org.uk/assets/0001/7074/Health_access_report_jun06.pdf. In the UK, according to the Nationality, Immigration and Asylum Act 2002, an asylum seeker is an individual of at least 18 years, who is in the UK and has submitted a claim for asylum, while the claim has not yet been decided upon. Section 18(1), Nationality, Immigration and Asylum Act 2002.

[3] According to the UN Special Rapporteur on the Commission of Human Rights, migrants are "(a) Persons who are outside the territory of the State of which they are nationals or citizens, are not subject to its legal protection and are in the territory of another State; (b) Persons who do not enjoy the general legal recognition of rights which is inherent in the granting by the host State of the status of refugee, naturalised person or of similar status; (c) Persons who do not enjoy either general legal protection of their fundamental rights by virtue of diplomatic agreements, visas or other agreements. See Gabriela Rodríguez Pizarro, Special Rapporteur of the Commission on Human rights in A/57/292, Human rights of migrants, Note by the Secretary-General. 9 August 2002 para. 25. Different categories of migrants can be identified in the context of international migration, including irregular or undocumented migrants. They are "people who enter a country, usually in search of employment, without the necessary documents and permits." See Castles S., International migration at the beginning of the twenty-first century: global trends and issues, International Social Science Journal 2000, p. 270

The final component of this section addresses the diverse issues facing people with mental health conditions in the UK. Issues addressed include inequalities in relation to the enjoyment of the right to health, stigma attached to mental health problems, compound vulnerability, issues with compulsory treatments, and the impact of austerity measures.

3.2 The right to health under international law and States' obligations

Everyone has the right to the enjoyment of the highest attainable standard of physical and mental health, as recognised by article 12 of the ICESCR and other international human rights instruments.[4] The right to health includes the right to health care and to the underlying determinants of health, such as safe food, water and sanitation, and housing.[5] The right to health requires that health facilities, goods and services are available, accessible, acceptable and of good quality.[6] Accessibility has four dimensions: non-discrimination, physical accessibility, economic accessibility and information accessibility.[7] It is particularly important to note that the right to health imposes on States the obligation to ensure equal access to the health system, without discrimination.[8]

States parties to the ICESCR are required to realise the right to health in a progressive manner, within the State's maximum available resources.[9] There is a presumption of inadmissibility of retrogressive measures, requiring the State party to justify that retrogressive measures have been adopted only after taking into consideration all alternatives, in light of its maximum available resources and the realisation of all other rights recognised by the Covenant.[10] The minimum core content of the right to health must however be realised immediately, otherwise the right to health, and the Covenant itself, would be deprived of their essence. Therefore the principle of progressive realisation does not apply to the minimum core obligations arising from the right to health: these obligations must be realised immediately. Minimum core obligations include: ensuring the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups; ensuring access to essential underlying determinants of health, including nutritionally adequate food, adequate shelter and water and sanitation; providing essential drugs; ensuring equitable distribution of all health facilities, goods and services and to adopt and implement a national health strategy and plan of action.[11] Other obligations of comparable priority include the provision of immunization against major infectious diseases and ensuring reproductive, maternal and child health care.[12] The CESCR has affirmed that core

[4] Article 25(1), Universal Declaration of Human Rights; article 5 (e) (iv), International Convention on the Elimination of All Forms of Racial Discrimination of 1965; articles 11.1 (f) and 12, Convention on the Elimination of All Forms of Discrimination against Women of 1979; article 24, Convention on the Rights of the Child of 1989.
[5] Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), UN Doc. E/C.12/2000/4, para 11.
[6] Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14, para 12.
[7] Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14, para 12(b)
[8] Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), UN Doc. E/C.12/2000/4, para 12(b); Paul Hunt, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 2008, UN Doc A/HRC/7/11 para 42.
[9] Article 2(1) ICESCR; CESCR, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 1990, UN Doc E/1991/23, para 9.
[10] CESCR, General Comment 3, para 9; and CESCR, General Comment 14, para 32.
[11] CESCR, General Comment 14, para 43.
[12] CESCR, General Comment 14, para 44.

obligations under the right to health are non-derogable and non-compliance with core obligations is not justifiable under any circumstance.[13]

3.3 Health care in the UK

The UK National Health Service (NHS) was established by the National Health Service Act 1946 and into operation in 1948. It provides health services to those who are 'ordinarily resident' in the UK, free of charge (with the exception of some charges for prescriptions, optical and dental services)[14] at the point of use, and is financed by taxes.[15] The underlying principle is to provide care and treatment based on people's needs rather than ability to pay.[16]

The NHS is best understood as being divided into primary and secondary healthcare. Primary healthcare is usually the first port of contact with the NHS through General Practitioners (GPs), dentists, optometrists, NHS walk-in centres and a telephone service (111). Secondary care includes accident and emergency, most planned hospital care, rehabilitative care, community health services and mental health and learning disability services.[17] Since the Health and Social Care Act 2012 entered into force, Clinical Commissioning Groups commission most secondary care services.[18]

3.3.1 Status-based restrictions on access to healthcare

Individuals who are 'ordinarily resident' in the UK are entitled to free NHS hospital services, apart from a few exceptions (such as prescriptions).[19] Individuals who are not ordinarily resident in the UK are not precluded from accessing primary healthcare and GPs have a discretion to accept any person including migrants as a patient and to receive free treatment.[20]

[13] CESCR, General Comment 14, para 47.
[14] http://www.nhs.uk/NHSEngland/thenhs/about/Pages/overview.aspx, see below for an explanation of the definition of a resident.
[15] Doctors of the World, *Legal Report on Access to Healthcare in 12 Countries*, 2015, p. 124, available at https://mdmeuroblog.files.wordpress.com/2014/05/mdm-legal-report-on-access-to-healthcare-in-12-countries-3rd-june-20151.pdf
[16] Doctors of the World, *Legal Report on Access to Healthcare in 12 Countries*, 2015, p. 124, available at https://mdmeuroblog.files.wordpress.com/2014/05/mdm-legal-report-on-access-to-healthcare-in-12-countries-3rd-june-20151.pdf
[17] http://www.nhs.uk/NHSEngland/thenhs/about/Pages/authoritiesandtrusts.aspx; https://www.sbs.nhs.uk/primary-care-services
[18] http://www.nhs.uk/NHSEngland/thenhs/about/Pages/authoritiesandtrusts.aspx
[19] Department of Health, Guidance on Implementing the Overseas Visitor Hospital Charging Regulations 2015, p. 3, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/418634/Implementing_overseas_charging_regulations_2015.pdf; Department of Health, The National Archives available at: http://webarchive.nationalarchives.gov.uk/+/www.dh.gov.uk/en/Healthcare/Entitlementsandcharges/OverseasVisitors/Browsable/DH_074374
[20] NRPF Network Factsheet, NHS healthcare for migrants with NRFP, June 2015, p.1 available at: http://www.nrpfnetwork.org.uk/Documents/NHS-healthcare.pdfLiberty, 'Liberty's response to the government's consultation on access to healthcare and data sharing in the NHS', p.9, available at: https://www.liberty-human-rights.org.uk/sites/default/files/Liberty's-response-to-the-Home-Office-and-Department-of-Health-Consultations-on-access-to-NHS-services-August-2013.pdf

Individuals who are not 'ordinarily resident' in the UK are only entitled to limited free secondary healthcare in emergency departments and for certain infectious diseases, unless they qualify for an exemption from charges.[21]

The concept of ordinary residence was developed through case law, and refers to people living in the UK lawfully and who are properly settled, regardless of the duration of their stay.[22] People who are not 'ordinarily resident' include overseas visitors, such as short-term visitors, as well as undocumented migrants.[23] The recently adopted Immigration Act 2014 defines 'persons not ordinarily resident' in UK as:

a) persons who require leave to enter or remain in the United Kingdom but do not have it, and

b) persons who have leave to enter or remain in the United Kingdom for a limited period"[24].

This provision suggests that the category of persons considered to be not ordinarily resident has been extended to exclude "those currently living and working in the UK with limited leave to remain".[25] Consequently, the Immigration Act 2014 recognises only permanent residents (i.e. UK citizens residing in the UK and migrants with indefinite permission to remain) as being 'ordinarily resident'.

3.3.2 Exemptions from charges for NHS services

There are a number of groups who are exempt from paying for NHS Services. These include:

(i) refugees;

(ii) asylum seekers whose claim for international protection has not yet been determined;

(iii) persons whose asylum claim has been refused but who continue to be eligible for support;

[21] Doctors of the World, *Legal Report on Access to Healthcare in 12 Countries*, 2015, p. 128, available at https://mdmeuroblog.files.wordpress.com/2014/05/mdm-legal-report-on-access-to-healthcare-in-12-countries-3rd-june-20151.pdf

[22] The concept of ordinary residence is defined in *R v Barnet LBC, ex parte Shah* as "a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration". See *R v Barnet LBC, ex parte Shah*, 1983, House of Lords. In *R v Secretary of State for Health*, it was established that a legal right or explicit permission to remain in the UK, granted by the UK immigration authorities, is necessary in order to be considered 'ordinarily resident' in the UK. Temporary admission, instead, was not considered as residence. See *R v Secretary of State for Health*, 2009, Court of Appeal. See also Doctors of the World, *Legal Report on Access to Healthcare in 12 Countries*, 2015, p. 125, available at https://mdmeuroblog.files.wordpress.com/2014/05/mdm-legal-report-on-access-to-healthcare-in-12-countries-3rd-june-20151.pdf

[23] Doctors of the World, *Legal Report on Access to Healthcare in 12 Countries*, 2015, p. 124-5, available at https://mdmeuroblog.files.wordpress.com/2014/05/mdm-legal-report-on-access-to-healthcare-in-12-countries-3rd-june-20151.pdf

[24] Immigration Act 2014, Section 39(1).

[25] Doctors of the World, *Legal Report on Access to Healthcare in 12 Countries*, 2015, p. 128, available at https://mdmeuroblog.files.wordpress.com/2014/05/mdm-legal-report-on-access-to-healthcare-in-12-countries-3rd-june-20151.pdf

(iv) looked after children;[26]

(v) victims of trafficking;[27] and

(vi) prisoners or detainees.[28]

The position for failed asylum seekers is different in Scotland and Wales to that in England. The Regulations in both Wales and Scotland exempts those who have made a formal application for refugee status and makes no provision for support to be withdrawn once the application has been determined.[29]

Some NHS services are free for everyone, which means that nobody, regardless of immigration status, can be charged for these services. Exempted health services include: accident and emergency services, family planning services, diagnosis and treatment for sexually transmitted infections, diagnosis and treatment for specified infectious diseases, treatment required for a physical or mental condition caused by torture, female genital mutilation, domestic and sexual violence.[30] When treatment is considered immediately necessary[31] by doctors, it must be provided immediately regardless of whether the patient had made a payment or deposit. Consequently, immediately necessary treatment cannot be withheld, even in the event that the patient has indicated his/her inability to pay. However, the patient who received the treatment will be charged after the treatment.[32]

3.3.3 Charges for overseas visitors

The Immigration Act 2014 establishes that persons subject to immigration control (which means nationals of countries from outside the EEA) coming to the UK for longer than six months will be required to pay a health surcharge as a precondition of entry.[33] Third-country nationals already in

[26] Regulation 15 of the National Health Service (Charges to Overseas Visitors) Regulations 2015.
[27] Regulation 16 of the National Health Service (Charges to Overseas Visitors) Regulations 2015.
[28] Regulation 19 of the National Health Service (Charges to Overseas Visitors) Regulations 2015.
[29] For Scotland see: Regulation 4 of the National Health Service (Charges to Overseas Visitors) (Scotland) Regulations 1989/364; for Wales see: Regulation 4(c) of the National Health Service (Charges to Overseas Visitors) Regulations 1989/306
[30] Department of Health, Guidance on Implementing the Overseas Visitor Hospital Charging Regulations 2015, p. 10, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/418634/Implementing_overseas_charging_regulations_2015.pdf ; Doctors of the World, *Legal Report on Access to Healthcare in 12 Countries*, 2015, p. 128-9, available at https://mdmeuroblog.files.wordpress.com/2014/05/mdm-legal-report-on-access-to-healthcare-in-12-countries-3rd-june-20151.pdf
[31] Immediately necessary treatment is a treatment that is considered necessary to save a life on the basis of clinical considerations made by the doctor on a case-by-case basis. See Treatment of Asylum Seekers Report 2007 p. 45, available at: http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/81/81i.pdf
[32] Department of Health, Guidance on Implementing the Overseas Visitor Hospital Charging Regulations 2015, p. 4, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/418634/Implementing_overseas_charging_regulations_2015.pdf; Doctors of the World, *Legal Report on Access to Healthcare in 12 Countries*, 2015, p. 128-9, available at: https://mdmeuroblog.files.wordpress.com/2014/05/mdm-legal-report-on-access-to-healthcare-in-12-countries-3rd-june-20151.pdf
[33] Immigration Act 2014, Part 3, Chapter 2, Section 38(1)(a); see also Home Office, *Immigration Bill Factsheet: National Health Service*, 2013. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249315/Factsheet_08_-_Health.pdf ; Doctors of the World, *Legal Report on Access to Healthcare in 12 Countries*, 2015, p. 128, available at: https://mdmeuroblog.files.wordpress.com/2014/05/mdm-legal-report-on-access-to-healthcare-in-12-countries-3rd-june-20151.pdf

the UK who apply to extend their stay will also be required to pay the surcharge.[34] Once the health surcharge is paid, they have access to free NHS service, on the same basis as people ordinarily resident in the UK (permanent residents) for the duration of their permit/visa. Therefore they cannot be charged for health services (subject to some exceptions for particularly expensive discretionary treatments).[35] Migrants who are not subject to the health surcharge (i.e. lawful migrants coming to the UK for less than 6 months)[36] are not exempted from charges when accessing healthcare,[37] consequently they will have to pay for health services if they need them during their stay in the UK. Certain categories of persons, including asylum seekers and refugees, are exempt from the health surcharge.[38]

3.4 Refugees, Asylum Seekers and Undocumented Migrants

For refugees',[39] asylum seekers',[40] and undocumented migrants'[41] access to health services within the United Kingdom continues to give rise to specific human-rights related concerns. These concerns cover a lack of accessibility to the health services, discrimination in the access of care, as well as concerns over the quality of care provided in immigration detention centres. All of these issues have been compounded by the government's recent austerity measures which, with the implementation of the Immigration Act 2014, has both restricted the number of migrants eligible for free healthcare,[42] as well as introduced new charges for others.[43]

3.4.1 Accessibility

Economic barriers to access to healthcare

The Health System in the UK should be commended for providing accessible and largely free healthcare not only to UK citizens living in the UK but also to foreigners, who are ordinarily resident in the UK and to specific vulnerable groups, such as refugees and asylum seekers. Nevertheless concerns arise regarding the fact that the category of non-ordinarily resident people, who are

[34] Doctors of the World, *Legal Report on Access to Healthcare in 12 Countries*, 2015, p. 128, available at: https://mdmeuroblog.files.wordpress.com/2014/05/mdm-legal-report-on-access-to-healthcare-in-12-countries-3rd-june-20151.pdf
[35] Home Office, *Immigration Bill Factsheet: National Health Service*, 2013, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249315/Factsheet_08_-_Health.pdf; Department of Health, Guidance on Implementing the Overseas Visitor Hospital Charging Regulations 2015, p. 3 available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/418634/Implementing_overseas_charging_regulations_2015.pdf
[36] Visas and Immigration Department, UK Home Office, available at: https://www.gov.uk/healthcare-immigration-application/overview
[37] Department of Health, Guidance on Implementing the Overseas Visitor Hospital Charging Regulations 2015, p. 10-11, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/418634/Implementing_overseas_charging_regulations_2015.pdf
[38] Home Office, *Immigration Bill Factsheet: National Health Service*, 2013. available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249315/Factsheet_08_-_Health.pdf
[39] See Right to health section, footnote 1.
[40] See Right to health section, footnote 2.
[41] See Right to health section, footnote 3.
[42] By limiting the definition of 'ordinarily resident' (the criteria by which people are granted free healthcare on the NHS) only to migrants who are granted permission to reside in the United Kingdom indefinitely. See Immigration Act 2014, No. 1820, chapter 2, paragraph 39.
[43] Immigration Act 2014, No. 1820, chapter 2, paragraph 38.

excluded from free access to NHS service, is a wide and composite group including children of undocumented migrants and pregnant women.

Undocumented migrants are commonly recognised by UN human rights treaty-bodies and charter-bodies as a vulnerable group requiring particular attention.[44] It has been reported that in the UK undocumented migrants who are working are likely to be paid below the minimum wage and at times face problems in receiving their salary, suggesting that they are financially disadvantaged.[45] The approximately 500,000 undocumented migrants in the UK make up the largest group of chargeable overseas visitors. Many of these individuals have few resources to pay charges that may be incurred in order to access healthcare.[46] Research indicates that, due to their limited resources, many migrants will either not seek the care they need (at least not until they are critically ill), or will simply be unable to pay for any treatment provided.[47]

The fact that undocumented migrants are chargeable for NHS service, because they fall within the category of those who are not ordinarily resident, constitutes an economic barrier to access to healthcare in the UK. Under international law, the right to health requires States to ensure that healthcare is economically accessible to all. Economic accessibility does not require that health services are available for free for all, rather it requires that chargeable health services are affordable for everyone: "Payment for health-care services […] has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups."[48]

Due to their lack of financial resources and vulnerable status, charges for health services may mean that undocumented migrants do not seek the medical care and treatment they need, with adverse impacts on their health. Even when immediately necessary healthcare is provided up front without waiting for the payment, patients are required to pay after the treatment.[49] This shows that charges for healthcare hinder undocumented migrants' access to healthcare on an equal basis with other groups who are not charged (or who have enough financial means to sustain health costs).

While it is not reasonable to require that the UK provide free access to all health care service to all individuals within its territory, including visitors, the UK has an obligation, under the Covenant, to

[44] United Nations, The Economic, Social and Cultural Rights of Migrants in an Irregular Situation (New York and Geneva 2014) p. 40; Human Rights Council, "Expert consultation on access to medicines as a fundamental component of the right to health" (A/HRC/17/43), para. 34

[45] Undocumented Worker Transitions, EU Sixth Framework Programme, United Kingdom Country Report, July 2007, page 24. Available at: http://www.undocumentedmigrants.eu/library/v99354_3.pdf; Black, R., Collyer, M., Skeldon, R. and Waddington, C. (2005) A survey of the illegally resident population in detention in the UK, Home Office Online Report 20/05.

[46] Department of Health, *'Sustaining services, ensuring fairness: Evidence to support review 2012 policy recommendations and a strategy for the development of an Impact Assessment', p.9.*

[47] Liberty, 'Liberty's response to the government's consultation on access to healthcare and data sharing in the NHS', p.9, available at: https://www.liberty-human-rights.org.uk/sites/default/files/Liberty's-response-to-the-Home-Office-and-Department-of-Health-Consultations-on-access-to-NHS-services-August-2013.pdf

[48] CESCR. General Comment 14, para 12(b)

[49] FRA, Fundamental Rights of Migrants in an Irregular Situation, p. 75. According to FRA, of the 19 European Union (EU) countries that provide access to emergency medical care, 11 require migrants to pay for it. Another European study noted that, according to staff in accident and emergency departments, many irregular migrants found it difficult to access health care to which they were entitled because, for example, they had to pay extra costs or could not afford essential follow-up medicines. See Marie Dauvrin and others, "Health care for irregular migrants: pragmatism across Europe – a qualitative study", BMC Research Notes, vol. 5, No. 99 (2012). Available from www.biomedcentral.com/1756-0500/5/99.

provide healthcare that is affordable to everyone on an equal basis. In light of their vulnerability, for the purpose of healthcare charges, undocumented migrants should be considered as a distinct category from other overseas visitors, and their access to basic healthcare should be ensured on an equal basis.

Affordability is intertwined with discrimination. When services are not affordable for undocumented migrants, this results in discrimination against a particular group (undocumented migrants), on the basis of their immigration status.

Realising the right to health in a non-discriminatory manner is a core obligation of States party to the Covenant.[50] Commenting on prohibited grounds for discrimination, including nationality, the CESCR affirmed that "[t]he Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, *regardless of legal status and documentation*."[51] States have an obligation to ensure that all persons, including migrants have equal access to preventative, curative and palliative health services, regardless of their legal status and documentation.[52] On this basis legal status and documentation do not constitute permissible grounds for discrimination, and access to health services cannot be limited for undocumented migrants solely on the basis of their status.

Undocumented migrants are a vulnerable group, due to their undocumented status and precarious financial situation. The problems outlined above with the current charging framework indicate that the UK is failing to provide affordable health services on a non-discriminatory basis for all.

Particularly vulnerable groups: children of undocumented migrants and pregnant women

Charges to access healthcare are of particular concern with regards to children of undocumented migrants and pregnant women, in light of their particular vulnerability. Children of undocumented migrants are not exempt from charges for healthcare services through the NHS in the UK. Charges for secondary care are applied to children of undocumented migrants in the same way as adult undocumented migrants.[53] Similarly, vaccination is available for all children and adults through their GP and baby clinics. However, in practice, children are only accepted by GPs if at least one of their parents is already registered. Human rights, including the right to health, must be realised for all children, including the children of undocumented migrants, irrespective of their nationality or immigration status.[54] Significantly, child health care has been recognised by the CESCR as an obligation of comparable priority to minimum core obligations.[55]

[50] CESCR. General Comment 14, para 43 (a).
[51] CESCR. General Comment 20, para 30. Emphasis added. See also UNICEF and National University of Lanus (Argentina), Economic, Social And Cultural Rights of Migrant Children and Children Born to Migrant Parents: Challenges, Good Practices and Recommendations, draft (2010), p. 2.
[52] CESCR, General Comment No. 14, para 34; UN Office of the High Commissioner of Human Rights, *The Economic, Social and Cultural Rights of Migrants in Irregular Situation*, November 2014, available at: http://www.ohchr.org/Documents/Publications/HR-PUB-14-1_en.pdf, p.49
[53] Doctors of the World, *Legal Report on Access to Healthcare in 12 Countries*, 2015, p. 131, available at https://mdmeuroblog.files.wordpress.com/2014/05/mdm-legal-report-on-access-to-healthcare-in-12-countries-3rd-june-20151.pdf
[54] Committee on Economic, Social and Cultural Rights, General Comment No. 6, para 12 (2009); UN Office of the High Commissioner of Human Rights, *The Economic, Social and Cultural Rights of Migrants in Irregular Situation*, November 2014, available at: http://www.ohchr.org/Documents/Publications/HR-PUB-14-1_en.pdf; UNICEF and National University of Lanus (Argentina), Economic, Social And Cultural Rights of

In the UK, undocumented pregnant women are charged for maternity care. Maternity care, encompassing antenatal, delivery and postnatal care is regarded as secondary care, and does not fall under the exemptions listed above.[56] Normally hospitals charge patients approximately 4,000 Euros for a full course of maternity care, as long as no complications arise.[57] The Department of Health has stressed that maternity care is considered as immediately necessary treatment that cannot be withheld irrespective of ability to pay.[58] Yet, evidence from Maternity Action and Doctors of World and Refugee Council,[59] demonstrates that vulnerable and destitute women, including failed asylum seekers, are either being deterred from seeking help or have had maternity care denied or delayed when payment cannot be made upfront.

These charges constitute a barrier for undocumented pregnant women, hindering access to maternity care. Significantly, the CESCR has recognised maternal care as an obligation of comparable priority to minimum core obligations.[60] **It is therefore recommended that charges for undocumented pregnant women be removed.**

Accessibility-related recommendations

In light of the access issues identified above it is recommended that the United Kingdom desists from pursuing or issuing National Health Service charges against undocumented migrants that are genuinely without funds. Undocumented migrants are a particularly vulnerable group at risk whose human rights must be protected. Additionally, it is noted that charges, or confusion related to the payment system, may deter undocumented migrants from seeking healthcare.

Language barriers affecting access to healthcare services

When patients and health professionals do not speak the same language, communication difficulties may have negative implications on: understanding the medical problem and treatment,

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Migrant Children and Children Born to Migrant Parents: Challenges, Good Practices and Recommendations, draft (2010), p. 1.

[55] CESCR, General Comment 14 para 44(a).

[56] Doctors of the World, *Legal Report on Access to Healthcare in 12 Countries*, 2015, p. 131, available at https://mdmeuroblog.files.wordpress.com/2014/05/mdm-legal-report-on-access-to-healthcare-in-12-countries-3rd-june-20151.pdf

[57] Doctors of the World, *Legal Report on Access to Healthcare in 12 Countries*, 2015, p. 131, available at https://mdmeuroblog.files.wordpress.com/2014/05/mdm-legal-report-on-access-to-healthcare-in-12-countries-3rd-june-20151.pdf

[58] Doctors of the World, *Legal Report on Access to Healthcare in 12 Countries*, 2015, p. 131, available at https://mdmeuroblog.files.wordpress.com/2014/05/mdm-legal-report-on-access-to-healthcare-in-12-countries-3rd-june-20151.pdf; Department of Health, 2013, *Guidance on implementing the Overseas Visitors Charging Regulations*, p. 54, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/418634/Implementing_overseas_charging_regulations_2015.pdf

[59] This information is limited to the small number of women who contacted the Refugee Council for help. The Refugee Council does not provide data on the number of women in similar situation in the UK. See Kelley, N., and Stevenson, J., 2006, *First do no harm: denying healthcare to people whose asylum claims have failed*, Refugee Council & Oxfam UK, p. 11-12, available at: http://www.refugeecouncil.org.uk/assets/0001/7074/Health_access_report_jun06.pdf [Accessed February 2015].

[60] CESCR, General Comment 14, para 44(a).

access to health services, and health outcomes.[61] A way to address these obstacles is through interpreting services.

Studies conducted on refugees, asylum seekers and migrants in the UK report that communication and language constitute barriers in accessing healthcare and other services. Certain issues identified include, *inter alia*, difficulties in registering and making appointments, difficulties effectively communicating and understanding during consultations with medical practitioners,[62] insufficient availability of interpreting services,[63] reliance on family and friends as interpreters,[64] under-usage or unavailability of interpreting services, and under-utilization of telephone interpreting services.[65]

Identified issues arising as a consequence of these language barriers include: an inability to make an appointment to see a doctor; recourse to accident and emergency in situations where a general practitioner visit may have been more appropriate; feelings of discrimination on the basis of an inability to speak English; and frustration at the level of care received as a consequence of communication difficulties.[66] Inadequate information and insufficient translation support have been identified as key issues.[67] Migrant mothers also experienced language and communication difficulties while attending ante-natal care.[68]

As these examples show, effective communication between patient and health workers is essential for the realisation of the right to health. Language barriers and an inability to effectively communicate in English hinder access to health care services as well as access to health-related information for people who are not fluent in English, including refugees, asylum seekers and undocumented migrants. This may result in unequal access to healthcare services, when these groups experiencing language barriers are prevented from accessing healthcare services, or experience more difficulties in accessing healthcare in comparison to other people.

Ensuring access to healthcare on a non-discriminatory basis, especially for vulnerable or marginalized groups is a core obligation arising from the right to health.[69] This obligation implies removing existing barriers that preclude or hinder access to health for particular groups compared

[61] Gerrish K. et al., Bridging the language barrier: the use of interpreters in primary care nursing, 12(5) Health and Social Care in the Community, 2004 p. 413.
[62] Aspinall P. and Watters C., Refugees and Asylum Seekers: A Review from an Equality and Human Rights Perspective, Equality and Human Rights Commission Research Report 52, 2010, p. 20.
[63] Aspinall P. and Watters C., Refugees and Asylum Seekers: A Review from an Equality and Human Rights Perspective, Equality and Human Rights Commission Research Report 52, 2010, p. 20.
[64] Aspinall P. and Watters C., Refugees and Asylum Seekers: A Review from an Equality and Human Rights Perspective, Equality and Human Rights Commission Research Report 52, 2010, p. 20.
[65] Nottingham and Nottinghamshire Refugee Forum, 2012 Focus Group Report and Recommendations: Understanding the Health Experiences and Needs of Refugees and Asylum Seekers in Nottingham City, 2012, p. 18. Available at: http://nottsrefugeeforum.org.uk/wp-content/uploads/2015/02/Focus-Group-Report_1-26092012.pdf
[66] Nottingham and Nottinghamshire Refugee Forum, 2012 Focus Group Report and Recommendations: Understanding the Health Experiences and Needs of Refugees and Asylum Seekers in Nottingham City, 2012, p. 18-19. Available at: http://nottsrefugeeforum.org.uk/wp-content/uploads/2015/02/Focus-Group-Report_1-26092012.pdf
[67] Jayaweera, H. (2014, September 30). Health of Migrants in the UK: What Do We Know? p. 5, available at http://www.migrationobservatory.ox.ac.uk/sites/files/migobs/Briefing - Health of Migrants in the UK_0.pdf
[68] Phillimore, J., Thornhill, J., Latif, Z., Uwimana, M., & Goodson, L. (2010, November 1). Delivering In An Age Of Super-Diversity. Retrieved July 20, 2015, page 6, from http://www.better-health.org.uk/sites/default/files/consultations/responses/Delivering in an Age of Super-diversity v5.pdf
[69] CESCR, General Comment 14, para 43(a).

to others. According to the former Special Rapporteur on the Right to Health, Paul Hunt, "[t]he twin human rights principles of equality and non-discrimination mean that outreach (and other) programmes must be in place to ensure that disadvantaged individuals and communities enjoy, in practice, the same access as those who are more advantaged."[70] In the context of the UK, this entails removing language barriers and adopting measures to facilitate refugees, asylum seekers and undocumented migrants' access to healthcare services. This may include measures such as intensifying and improving interpreting services wherever these are unavailable or inadequate, with a view to ensuring equal access to health services. The fact that language barriers in access to health care are still experienced by refugees, asylum seekers and undocumented migrants suggests that the UK is falling short of fulfilling its obligations under the Covenant. In particular, it appears that insufficient and inadequate measures have been taken by the UK to remove such barriers and to ensure access to health services for vulnerable groups on an equal basis.

It is therefore recommended that the UK improve its translation and interpretation services, with a view to removing communication and language barriers hindering access to healthcare services and health-related information.

3.4.2 Retrogression

As discussed previously, entitlements to healthcare services in the UK are determined on the basis of the concept of 'ordinarily resident'.[71] The Immigration Act 2014 introduced a narrower definition of ordinary residence excluding a wider category of people from free access to NHS services.[72] While undocumented migrants are not affected by this change, they retain their not ordinarily resident status and are therefore excluded from free NHS care. On the other hand regular migrants with temporary permits have now been designated as not ordinarily resident, and are consequently no longer entitled to free NHS services.

Therefore the Immigration Act 2014, with the amendment to the definition of ordinary resident, results in an additional burden upon migrants with a temporary permit and migrants wishing to extend their stay. This results in charges being levied against people who were previously exempt from them, which can be said to be retrogressive. These changes in the regulatory framework may also result in confusion vis-à-vis migrants' entitlements.

The National Health Services (Charges to Overseas Visitors) Regulations 2015 state that in the case of any person other than an ordinarily resident of another European Economic Area (EEA) State or Switzerland, "the charge payable in respect of each relevant service provided to an overseas visitor shall be equal to the tariff for that relevant service multiplied by 150 per cent."[73] An increased tariff amounts to an additional burden, compared to the previous regulation. This may have an adverse impact on low-income households. This can be said to be retrogressive.

In addition to this, the Department of Heath Visitor and Migrant Cost Recovery Programme proposes to subject accident and emergency healthcare services to charges, pending further

[70] Hunt P., Report of the Special Rapporteur on the right to health, 2007, UN Doc A/HRC/7/11, para 42.
[71] See Section 3.
[72] See Section 3.
[73] The National Health Service (Charges to Overseas Visitors) Regulations, England 2015, Section 7(3), available at: http://www.legislation.gov.uk/uksi/2015/238/pdfs/uksi_20150238_en.pdf

consultation.[74] These services are always exempt from charge regardless of the patient's immigration status, according to previous regulations. If such an amendment is approved, it would amount to retrogression.

The CESCR has stressed the strong presumption that retrogressive measures are not permissible, unless carefully justified in light of all alternatives, maximum available resources and the totality of all other rights protected by the Covenant.[75]

It is recommended that the UK review its legislation, with a view to avoid retrogression in the realization of the right to health.

3.4.3 Quality of health care in immigration detention

In the UK, Home Office policy stipulates that all individuals held in immigration detention should have access to "the same range and quality of services as the general public receives from the National Health Service."[76] Under international human rights law, the right to health requires that everyone have access to good quality health facilities and services.[77] The right to health must also be realised without discrimination, ensuring equal access to health care.[78]

In the UK, immigrants are detained in Immigration Removal Centres, which provide primary care to detainees, either directly or through subcontractors.[79] Individuals in immigration detention have the same basic health needs as the wider population. In addition to the evidence on the pre-existing health needs of this group, there is evidence to suggest that detention has a deleterious impact on both physical and mental health. The stress of the detention centre environment can manifest itself in physical symptoms, including gastrointestinal, respiratory, and sleep disorders.[80]

All detainees are entitled to receive NHS care.[81] However, the standard of care provided in Immigration Removal Centres has frequently been criticised as sub-standard.[82] The Report of the Joint Inquiry by the All Party Parliamentary Group on Refugees and the All Party Parliamentary Group on Migration highlights several shortcomings in the provision of healthcare in immigration detention, including *inter alia* delay or unavailability of necessary treatment, inadequacy of the initial screening process to properly identify health issues of detainees, inadequacy and inappropriateness of on-going healthcare after the initial screening, delay in accessing necessary

[74] Department of Health Visitor and Migrant Cost Recovery programme, 2014- 2016, p. 10, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/329789/NHS_Implentatation_Plan_Phase_3.PDF
[75] CESCR, General Comment 14, para 32.
[76] Detention Services Operating Standards manual for Immigration Service Removal Centres 2002, p. 34, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257352/operatingstandards_manual.pdf
[77] CESCR, General Comment 14, para 12(d)
[78] CESCR, General Comment 14, para 19
[79] NHS Commissioning, Health and Justice, available at: http://www.england.nhs.uk/commissioning/health-just/#immig
[80] British Medical Association (2002) *Asylum seekers: meeting their healthcare needs.* London: BMA; HM Inspectorate of Prisons and Independent Chief Inspector of Borders and Immigration (2012) *The effectiveness and impact of immigration detention casework.* London: HMIP/CIBI
[81] Regulation 19 of the National Health Service (Charges to Overseas Visitors) Regulations 2015.
[82] Submission From The British Medical Association To The Parliamentary Inquiry Into The Use Of Immigration Detention, para. 3.1, available at: https://detentioninquiry.files.wordpress.com/2015/02/british-medical-association.pdf

medication, unavailability and under-utilisation of interpreters.[83] The Tenth Report from the Joint Committee on Human Rights in 2007 drew attention to the concerns of various organisations, which ranged from routine failures of investigation – particularly as regards the identification of victims of torture; a lack of appropriate care for detainees with HIV/AIDS and mental health problems; and a shortage of female medical staff in female immigration removal centres. It concluded that the quality of healthcare provided to asylum seekers in detention may not be "fully compliant with international human rights obligations, in particular, the rights to freedom from inhuman and degrading treatment and to the enjoyment of the highest attainable standard of physical and mental health."[84]

Official Inspectorates have repeatedly found significant gaps and shortcomings in healthcare provision in Immigration Removal Centres.[85] In the separate investigations into the death of two immigrant detainees, the Prison and Probation Ombudsman found that standard of clinical care provided in immigration detention was below the standard he would have expected to receive from NHS care in the community.[86] For instance, in the last 3 years the High Court has ruled in 4 instances that the treatment of a mentally ill individual in immigration detention was so severe as to meet the threshold for 'inhuman and degrading treatment' in breach of Article 3 of the European Convention on Human Rights.[87] The health conditions available to immigration detainees are inadequate, and not equivalent to the level of service provided by the NHS.[88] It is therefore recommended that adequate safeguards are put in place to protect the right of detainees to adequate healthcare. In denying detainees adequate health services, the UK is in violation of its

[83] The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom A Joint Inquiry by the All Party Parliamentary Group on Refugees & the All Party Parliamentary Group on Migration, Page 53-55, *https://detentioninquiry.files.wordpress.com/2015/03/immigration-detention-inquiry-report.pdf*

[84] Joint Committee on Human Rights – Tenth Report (2007) London: House of Lords/House of Commons. Also see: Submission From The British Medical Association To The Parliamentary Inquiry Into The Use Of Immigration Detention, para. 3.1, available at: https://detentioninquiry.files.wordpress.com/2015/02/british-medical-association.pdf

[85] HMIP, Inquiry into the quality of healthcare at Yarl's Wood Immigration Removal Centre (20-24 February 2006) by HM Chief Inspector of Prisons. http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/yarls-wood/yarls_wood_inquiry_final-rps.pdf. 2006.HMIP, Report on an announced inspection of Harmondsworth Immigration Removal Centre 11–15 January 2010, http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/harmondsworth/Harmondsworth_2010_rps.pdf. 2010.HMIP, Report on an unannounced inspection of Harmondsworth Immigration Removal Centre, 5–16 August 2013, http://www.migrantsrights.org.uk/files/news/14.01.16-HMIP-Harmondsworth-IRC-5-16-August-2013.pdf. 2013.

[86] PPO, Investigation into the death of a man in July 2013 at Pennine House Short Term Holding Centre, Manchester Airport. Prison and Probation Ombudsman. http://www.ppo.gov.uk/wp-content/uploads/2015/01/J083-13-Death-of-a-male-detainee-Pennine-House-IRC-26-07-2013-Nat-41-50.pdf#view=FitH 2015; PPO, Investigation into the circumstances surrounding the death of a man at Colnbrook Immigration Removal Centre in July 2011. Prison and Probations Ombudsman. http://www.ppo.gov.uk/wp-content/ReddotImportContent/Colnbrook_-_2_July_2011_-_Death_of_a_male_detainee.pdf#view=FitH. 2012.

[87] S, R (on the application of) v The Secretary of State for the Home Department [2011] EWHC 2120 (Admin) (05 August 2011). http://www.bailii.org/ew/cases/EWHC/Admin/2011/2120.html. 2011.BA, R (on the application of) v Secretary of State for the Home Department [2011] EWHC 2748 (Admin) (26 October 2011). http://www.bailii.org/ew/cases/EWHC/Admin/2011/2748.html. 2011. D, R (on the application of) v Secretary of State for the Home Department [2012] EWHC 2501 (Admin) (20 August 2012). http://www.bailii.org/ew/cases/EWHC/Admin/2012/2501.html. 2012.

[88] PPO, Investigation into the death of a man in July 2013 at Pennine House Short Term Holding Centre, Manchester Airport. Prison and Probation Ombudsman. http://www.ppo.gov.uk/wp-content/uploads/2015/01/J083-13-Death-of-a-male-detainee-Pennine-House-IRC-26-07-2013-Nat-41-50.pdf#view=FitH 2015.

obligations under the covenant by 'denying the access to health facilities, goods and services to particular individuals, or groups, as a result of *de jure* or *de facto* discrimination'.[89]

The need for health professionals and other public sector workers to be educated on the Covenant's provisions and its application was highlighted by the CESCR in response to the United Kingdom's fifth periodic report. In light of the situation described above this continues to be relevant.

It is recommended that the UK act upon the recommendation the CESCR and educate its health professionals and public sector workers on the provisions of the Covenant.

3.5 Mental Health and Wellbeing

The Preamble of the World Health Organisation Constitution defines 'health' as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'.[90] The 1948 Universal Declaration of Human Rights also mentions health as part of the right to an adequate standard of living.[91]

In 2009 the Committee on Economic Social and Cultural Rights recommended that the UK take, 'immediate steps to address, as a matter of priority, the poor health conditions for persons with mental disabilities, as well as the regressive measures taken in funding mental health services'.[92]

3.5.1 Background to mental health provision in the United Kingdom

Under the Covenant on Economic, Social and Cultural Rights, the UK has an obligation to, 'recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.[93] To achieve this, international human rights law obliges the UK to take steps, such as providing adequate healthcare for all physical and mental aspects of persons with mental health problems.[94]

Mental ill health is the single largest cause of ill-health and disability in the UK, contributing up to 22.8% of the total burden, compared to 15.9% for cancer and 16.2% for cardiovascular disease.[95] The wider economic costs of mental illness in England have been estimated at £105.2 billion each year.[96] This includes direct costs of services, lost productivity at work and reduced quality of life. In 2008/9, the NHS spent 11% of its annual secondary healthcare budget on mental health services, which amounted to £10.4 billion. Service costs which include NHS, social and informal care amounted to £22.5 billion in 2007 in England.[97]

[89] CESCR General Comment 14, para 50.
[90] Available at: www.who.int/governance/eb/who_constitution_en.pdf
[91] Universal Declaration of Human Rights, Article 25.
[92] Concluding Observations of the Committee on Economic, Social and Cultural Rights, E/C.12/GBR/CO/5 12 June 2009, para 33, p. 9.
[93] Article 12, International Covenant on Economic, Social and Cultural Rights
[94] U.N. Doc. E/C.12/2000/4 paragraphs 36 and 52.
[95] 32nd National Report on the implementation of the European Social Charter submitted by the Government of United Kingdom, RAP/Cha/GBR/32(2013), page 44.
[96] 32nd National Report on the implementation of the European Social Charter submitted by the Government of United Kingdom, RAP/Cha/GBR/32(2013), page 44.
[97] 32nd National Report on the implementation of the European Social Charter submitted by the Government of United Kingdom, RAP/Cha/GBR/32(2013), page 31. These are the most recently available figures.

In February 2011 the Department of Health published the Government's Mental Health Strategy 'No Health without Mental Health' and on 24 July 2012 launched the Implementation Framework for the Strategy. The Strategy states 'good mental health and resilience are fundamental to our physical health, our relationships, our education, our training, our work and to achieving our potential' and the Framework translates the Strategy's vision into specific actions, setting out the contribution which specific organisations can make and shows how improving mental health will help organisations meet their broader objectives.[98]

The Antenatal and Postnatal Mental Health Guidelines of February 2007, [99] make recommendations for the prediction, detection and treatment of mental disorders in women during pregnancy and the postnatal period (up to one year after delivery). They include advice on the care of women with an existing mental disorder who are planning a pregnancy, and on the organisation of mental health services.[100]

3.5.2 Inequalities in the enjoyment of the highest attainable standard of health

"People with mental disorders are at much higher risk of descending into poverty than other people."[101] For instance, they may not be able to work because of their illness. They may also be less competitive than others in applying for jobs or promotions, due to possible lack of opportunities to develop skills. "Poverty also exposes people to risk factors for developing or worsening mental disorders. For example, limited educational and employment opportunities, exposure to adverse living environments and deprivation (such as poor housing or homelessness), debt, substance abuse and violence are all positively associated with poor mental health."[102]

Likewise, the correlation between growing up in a low-income household and poor mental health is well established.[103]Childhood poverty has been associated with low psychological and intellectual development.[104]

Under international human rights law, the UK has the obligation to realise the underlying determinants of health,[105] and to provide goods and services that are accessible to all without

[98] Available at: http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_123766
[99] Available at: https://www.nice.org.uk/guidance/cg45
[100] 32nd National Report on the implementation of the European Social Charter submitted by the Government of United Kingdom, RAP/Cha/GBR/32(2013), page 49.
[101] Funk, M., Drew, N., & Knapp, M. (2012). Mental health, poverty and development. *Journal of Public Mental Health, 11*(4), 166-185. Retrieved July 21, 2015, from http://eprints.lse.ac.uk/47609/1/Mental health poverty and development (lsero).pdf) (WORLD HEALTH ORGANIZATION 2004. *Global status report: alcohol policy*, available at: https://www.google.ru/?gws_rd=ssl#newwindow=1&q=WORLD+HEALTH+ORGANIZATION+2004.+Global+status+report+:+alcohol+policy
[102] Funk, M., Drew, N., & Knapp, M. (2012). Mental health, poverty and development. *Journal of Public Mental Health, 11*(4), 166-185. Retrieved July 21, 2015, from http://eprints.lse.ac.uk/47609/1/Mental health poverty and development (lsero).pdf) (WORLD HEALTH ORGANIZATION 2004. *Global status report: alcohol policy*, available at: https://www.google.ru/?gws_rd=ssl#newwindow=1&q=WORLD+HEALTH+ORGANIZATION+2004.+Global+status+report+:+alcohol+policy
[103] Bradshaw, 2001; Costello *et al.*, 2001; DCSF,2007; Fabian Society, 2006; HM Treasury, 2008;Huston, 1991; Mayer, 2002.
[104] Aber *et al.*, 1997 in Griggs, J. and Walker, R. 2008. The costs for child poverty for individuals and society. A literature review. Joseph Rowntree Foundation.

discrimination.[106] By failing to provide equal and adequate access to health promoting resources such as housing or work, the UK is violating these obligations. Such discrimination has the effect of nullifying or impairing the equal enjoyment or exercise of the right to the highest attainable standard of mental health.

The CESCR has recognised that persons who suffer from mental health problems experience significantly poorer health conditions than those without mental health problems. This includes higher risk of bowel cancer and breast cancer, and much shorter life expectancy.[107] People with mental health conditions have high mortality risks for a number of reasons. They are much more likely to abuse drugs and alcohol, smoke heavily, and have eating disorders.[108] These behaviours all have negative physical consequences and lead to diseases. Depression, for example, has a strong link with obesity, one of the primary causes of diabetes.[109] Depression is also a probable risk factor for hypertension.[110] Having a serious mental health condition has a bigger impact on life expectancy than a number of physical risks like smoking, diabetes, and obesity.[111]

Everyone has the right to achieve the best attainable standard of physical and mental health. If a part of the population (people with mental health conditions) is more prone to develop health problems then another part of the population (people without mental health conditions), then there is *de facto* inequality in the realization of the right to health. The above mentioned facts clearly suggest that people suffering from mental health conditions are a vulnerable group and must be given targeted attention.

The achievement of the right to health is subject to progressive realization. The UK has taken some steps to progressively realize the right to health for this particular group of people. For instance, in 2003, the Tackling Health Inequalities: A Programme for Action (2003) was launched, to work towards a sustainable reduction in health inequalities. The Programme has recognized and targeted mentally ill people as a vulnerable group in need of support.[112]

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[105] Committee on Economic, Social and Cultural Rights, General Comment No.14, 'Right to the Highest Attainable Standard of Health', UN Document E/C.12/2000/4, 11 August 2000, Paragraph 11.
[106] Committee on Economic, Social and Cultural Rights, General Comment No.14, 'Right to the Highest Attainable Standard of Health', UN Document E/C.12/2000/4, 11 August 2000, Paragraph 12(b)(i).
[107] Concluding observations of the Committee on Economic, Social and Cultural Rights, E/C.12/GBR/CO/5, 12 June, 2009, para 33, p. 9.
[108] Chesney, E., Goodwin, G., & Fazel, S. (2014). Risks of all-cause and suicide mortality in mental disorders: A meta-review. *World Psychiatry, 13*, 153-160. Retrieved July 20, 2015, from http://onlinelibrary.wiley.com/doi/10.1002/wps.20128/epdf
[109] Luppino, F., De Wit, L., Bouvy, P., Stijnen, T., Cuijpers, P., Penninx, B., & Zitman, F. (2010). Overweight, Obesity, And Depression: A Systematic Review And Meta-analysis Of Longitudinal Studies. *Archives of General Psychiatry, 67*(3), 220-229. Retrieved July 20, 2015, from http://archpsyc.jamanetwork.com/article.aspx?articleID=210608
[110] Meng, L., Chen, D., Yang, Y., Zheng, Y., & Hui, R. (2012). Depression increases the risk of hypertension incidence. *Journal of Hypertension, 30*(5), 842-851. Retrieved July 20, 2015, from http://www.ncbi.nlm.nih.gov/pubmed/22343537
[111] Chang, C., Hayes, R., Perera, G., Broadbent, M., Fernandes, A., Lee, W., . . . Scott, J. (2011). Life Expectancy at Birth for People with Serious Mental Illness and Other Major Disorders from a Secondary Mental Health Care Case Register in London. *PLoS ONE, 6*(5), E19590-E19590. Retrieved July 20, 2015, from http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0019590
[112] Replies by the Government of the United Kingdom of Great Britain and Northern Ireland to periodic the list of issues (E/C.12/GBR/Q/5) to be taken up in connection with the consideration of the fifth report of the United Kingdom of Great Britain and Northern Ireland (E/C.12/GBR/5) May, 2009, p. 37

The Committee, in its concluding observations in 2009 to the UK, recommended that the UK take immediate steps to address as a matter of priority the poor health conditions for persons with mental disabilities.[113]

It is recommended that the UK continue efforts to bridge the existing inequalities between the levels of enjoyment of right to health by people suffering from mental conditions and other segments of the population.

3.5.3 Stigma attached to mental health problems

High levels of prejudice and discrimination have been reported against people with mental health problems and against those using mental health services.[114] Such discrimination contributes to damaging outcomes for those it affects, as well as causing perpetuating self-stigmatisation and a contribution to low self-esteem.[115] People with mental health problems experience prejudice and discrimination in almost every aspect of their lives. Many have said that the stigma of mental ill health is more disabling than the illness itself. Research has shown that people with mental health problems are pre-judged, and find it harder to get jobs and sustain friendships and relationships. Research has also shown that ignorance, fear, and stereotypes presented in the newspapers, on the TV and at the cinema, all contribute to negative attitudes towards mental ill health. Most people have little knowledge about mental illness and their opinions are often factually incorrect.[116]

The UK has taken certain positive steps to address this issue of stigmatization of people experiencing mental health conditions. Anti-Stigma campaigns, such as 'See Me' and 'Time to Change', have been provided with funding and support for their activities. These campaigns have been given support by the UK Department of Health and the Scottish government along with organizations such as Mind, Comic Relief and the Big Lottery Fund. A study and subsequent report in 2014 conducted by TNS (Taylor Nelson Sofres) and the Institute of Psychiatry, Kings College London shows that since the second phase of Time to Change's campaign (2011), two million people have improved attitudes towards people with mental illnesses and 2012-2013 showed the biggest annual shift in the last decade regarding people's improved attitudes towards people suffering with mental health issues.[117]

The 'See Me' campaign is currently provided with £1 million per year from the Scottish government and an additional £500, 00 per year from Comic Relief.[118] Until March, 2015, 'Time to Change'

[113] Concluding observations of the Committee on Economic, Social and Cultural Rights, E/C.12/GBR/CO/5, 12 June, 2009, page. 9.
[114] Mehta N, Kassam A, Leese M, Butler G, Thornicroft G. Public attitudes towards people with mental illness in England and Scotland, 1994-2003. *Br J Psychiatry* 2009; 194: 278–84.
[115] Mehta N, Kassam A, Leese M, Butler G, Thornicroft G. Public attitudes towards people with mental illness in England and Scotland, 1994-2003. *Br J Psychiatry* 2009; 194: 278–84.
[116] Institute of Psychology, Psychiatry and Neuroscience, Kings College London, 'Discrimination and Stigma', available at: http://www.mentalhealthcare.org.uk/discrimination_and_stigma
[117] Effect of the Time to Change anti-stigma campaign on trends in mental-illness-related public stigma among the English population in 2003–13: an analysis of survey data, volume 1, No.2, p121–128, July 2014, available at: http://www.thelancet.com/journals/lanpsy/article/PIIS2215-0366(14)70243-3/abstract)
[118] Reducing Stigma and Discrimination, Scottish Government website, available at: http://www.gov.scot/Topics/Health/Services/Mental-Health/Strategy/Reducing-Stigma-Discrimination

received its funding from the UK Department of Health and Comic Relief. In 2012-13, 'Time to Change' received £1,059,458 in funding.[119]

Programmes such as these have delivered tangible improvements, but significant work remains to be done especially with public sectors that are entrenched in stigmatising and discriminators attitudes and practices. The programmes mentioned above are dependent on government funding, and this funding is currently at risk in light of the current government's austerity policies.

It is therefore recommended that anti-stigma campaigns continue to receive funds from the UK.

3.5.4 Social exclusion and Compound vulnerability

Mental health problems are prominent among vulnerable groups/ populations that experience other forms of social exclusion and/or discrimination, resulting in a situation of compound vulnerability. For instance, people reporting as being from a mixed ethnic group and of African or Chinese origin were at higher risk of mental health-detention, particularly long-term detention compared to those from a White Scottish background.[120] Detention rates under the Mental Health Act during 2012/13 were 2.2 times higher for black African, 4.2 times higher for black Caribbean and 6.6 times higher for black other ethnic groups than the nationwide average.[121] Equally, it is noted that women are up to 40% more likely than men to develop mental health conditions in the UK.[122]

Up to 20% of women develop a mental illness during pregnancy or within the first year of giving birth.[123] These not only adversely impact on the mother but also have been shown to compromise the healthy emotional, cognitive and even physical development of the child, with serious long-term consequences.[124] Almost half of the pregnant women and new mothers in the UK do not have access to specialist perinatal mental health services, potentially leaving them and their babies at risk.[125] Suicide is one of the leading causes of death for women during pregnancy and the first year after birth.[126]

[119] Time to Change, Annual Report 2012/13, available at: http://www.time-to-change.org.uk/sites/default/files/Time%20to%20Change%20Annual%20Report%202012-13.pdf
[120] Bansal et al., 2013.
[121] Care Quality Commission (2014) Monitoring the Mental Health Act in 2012/2013 - England statistic
[122] Freeman, Daniel, The Stressed Sex, Oxford University Press, as referenced in 'Women 40% more likely than men to develop mental illness, study finds', The Guardian, James Ball, May 2013, available at: women-men-mental-illness-study
[123] Baeur, A., Parsonage,M., Knapp,M., Lemmi, V. & Adelaja, B. 2014. The costs of perinatal mental health problems. Report summary. Centre for Mental Health and LSE, p.3, available at: http://www.centreformentalhealth.org.uk/perinatal
[124] Baeur, A., Parsonage,M., Knapp,M., Lemmi, V. & Adelaja, B. 2014. The costs of perinatal mental health problems. Report summary. Centre for Mental Health and LSE, p.4, available at: http://www.centreformentalhealth.org.uk/perinatal
[125] Baeur, A., Parsonage,M., Knapp,M., Lemmi, V. & Adelaja, B. 2014. The costs of perinatal mental health problems. Report summary. Centre for Mental Health and LSE, p.3, available at: http://www.centreformentalhealth.org.uk/perinatal
[126] Baeur, A., Parsonage,M., Knapp,M., Lemmi, V. & Adelaja, B. 2014. The costs of perinatal mental health problems. Report summary. Centre for Mental Health and LSE, p. 6, available at: http://www.centreformentalhealth.org.uk/perinatal

The number of children being admitted to hospital in England for self-harm is at a five-year high, figures show. Between 2009/10 and 2013/14, there has been an increase in admissions by almost 93% for girls and by 45% for boys.[127]

This suggests that ethnic minorities, women and children experience additional vulnerabilities with regard to mental health conditions.

It is therefore recommended that the UK rebalance the existing funding inequality to ensure spending reflects the growing need and demand as well as to commit to real term increases in funding for mental health services for both adults and children. It is also recommended that the UK implements early detection and intervention programmes, like the ones in England managed by the Early Intervention Foundation.[128] Such programmes should include women's access to mental health support during and after pregnancy as well as raising children's awareness of mental health by putting it on the national curriculum and training teachers and school nurses.

3.5.5 Compulsory treatment

The Mental Health Act, 1983, as amended in 2007, (as applicable to England and Wales) provides a statutory framework for non-consensual 'detention' for compulsory treatment of patients suffering from mental health conditions. There are a number of provisions for compulsorily admitting patients to hospital under the MHA, pertaining to a range of circumstances. Section 2 provides for admission for the purposes of assessment for a period of 28 days or under.[129] Section 3 provides for admission for treatment, in the first instance for a period not exceeding six months, renewable for a further six months upon expiration of this first period, and thereafter for a year at a time. The use of compulsory treatment under the Mental Health Act continues to grow as increasing numbers of people are subject to 'community treatment orders'.[130] Between 2011/12 and 2012/13 there was a 6% rise in the number of people detained in England in hospital or under a community treatment order. Since 2010, the number of detentions in hospital has increased by 9%; an increase which is not accounted for by population growth.[131] The number of children being detained is also high; in 2012, 313 under-18s were detained under the Mental Health Act in England, and 305 were held during the first 11 months of 2013.[132] A qualitative study of over 80 service users' experiences of coordinated care for people with complex mental health needs revealed that a majority of

[127] Self- Harm Hospital Admissions Among Children 'At Five Year High', Sima Kotecha, December 2013, available at: http://www.bbc.co.uk/news/health-30414589; Additional statistics are available at: Lorenza Bacino, Shock figures show extent of self-harm in English teenagers, available at: http://www.theguardian.com/society/2014/may/21/shock-figures-self-harm-england-teenagers

[128] Details on the programmes managed by the Early Intervention Foundation are available at: http://www.eif.org.uk/our-work/

[129] Mental Health Act (MHA) 1983, s.2(4)

[130] Inpatients formally detained in hospitals under the Mental Health Act 1983, and patients subject to supervised community treatment: Annual report, England, 2013/14, Published 29 October 2014, Community and Mental Health Team, Health and Social Care Information Centre, available at: http://www.hscic.gov.uk/catalogue/PUB15812/inp-det-m-h-a-1983-sup-com-eng-13-14-rep.pdf

[131] Inpatients formally detained in hospitals under the Mental Health Act 1983, and patients subject to supervised community treatment: Annual report, England, 2013/14, Published 29 October 2014, Community and Mental Health Team, Health and Social Care Information Centre, available at: http://www.hscic.gov.uk/catalogue/PUB15812/inp-det-m-h-a-1983-sup-com-eng-13-14-rep.pdf

[132] http://www.bbc.co.uk/news/uk-25900085

participants reported that forced treatment/ care was damaging to their recovery.[133] Several participants regarded the over-reliance on psychiatric diagnoses as undermining a "whole person" approach to care. The study also reported instances of racism and sexism in some services. Such practices and imposition of treatment, as highlighted by the Special Rapporteur on the Right to Health, are contrary to the right of community integration.[134] It is therefore recommended that the United Kingdom improve the availability and access of tailored mental health services, to ensure that detention occurs only when absolutely necessary.[135]

There is concern that bed shortages may be forcing mental health professionals to detain patients in order to secure a bed.[136] The Mental Health Act of England has certain safeguards in place for compulsory treatment. Even though the law allows for people to be compulsorily treated, their consent must always be sought at first instance.[137] A second opinion appointed doctor (SOAD) service is run by the Care Quality Commission and seeks to safeguard the rights of patients detained in hospital under the Mental Health Act who refuse treatment at that particular time.[138] Their role is to check whether the proposed treatment is appropriate for an individual patient, and whether a patient's opinion and rights have been properly considered. The Act provides that people, who have been 'sectioned' under Section 3, can be released on a 'Community Treatment Order'. [139] Conditions are attached to a CTO, such as staying at a particular address, attending for treatment at a particular time or place, or taking medication.[140]

The right to personal liberty is enshrined in English common law. The UK is a party to the European Convention on Human Rights, which also protects the right to personal liberty.[141] Given the gravity inherent in depriving someone of his/her liberty, it is crucial that proper safeguards exist to ensure that such detention is both necessary and just.[142] In 2005, the Special Rapporteur on the Right to Health stated that, '[d]ecisions to isolate or segregate persons with mental disabilities,

[133] Community Care website, available at: http://www.communitycare.co.uk/2013/02/11/compulsory-mental-health-act-treatment-hinders-recovery-service-users-warn/; Service users' experiences of recovery under the 2008 Care Programme Approach , A Research Study - Dorothy Gould, 2012, executive Summary, available at: http://www.mentalhealth.org.uk/content/assets/PDF/publications/CPA_exec_summary.pdf?view=Standard

[134] Paul Hunt, Special Rapporteur on the Right to Health, 2005 report, UN Doc. E/CN.4/2005/51, paragraph 86.

[135] Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, GA Resolution 46/119 UN Doc. A/Res./46/119, 17 Dec. 1991, Principle 9 paragraph 1 and 2 - The treatment and care of every patient shall be based on an individually prescribed plan, discussed with the patient, reviewed regularly, revised as necessary and provided by qualified professional staff.

[136] Both the Health Select committee and the Care Quality Commission have expressed concern. [references needed]

[137] Mental Health Law, Institute of Psychiatry, Psychology and Neuroscience, Kings College London, available at: http://www.mentalhealthcare.org.uk/mental_health_act

[138] Mental Health Law, Institute of Psychiatry, Psychology and Neuroscience, Kings College London, available at: http://www.mentalhealthcare.org.uk/mental_health_act

[139] Mental Health Law, Institute of Psychiatry, Psychology and Neuroscience, Kings College London, available at: http://www.mentalhealthcare.org.uk/mental_health_act

[140] Mental Health Law, Institute of Psychiatry, Psychology and Neuroscience, Kings College London, available at: http://www.mentalhealthcare.org.uk/mental_health_act

[141] Article 5, European Convention on Human Rights, 1950.

[142] Perrin, H. Challenging Compulsory Admission to Hospital Under the Mental Health Act 1983, Plymouth Law Review (2010) 1, p.1, available at: http://www.pbs.plymouth.ac.uk/plr/vol3/Perrin.pdf

including through unnecessary institutionalization, are inherently discriminatory and contrary to the right of community integration enshrined in international standards.'[143]

The UK should ensure that sectioning or 'detention' is carried out, 'subject to specific and restrictive conditions, respecting best practices and applicable international standards, including the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.'[144] In particular, the UK must ensure that every patient has, 'the right to be treated in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs and the need to protect the physical safety of others.'[145]

3.5.6 Austerity measures

Mental Health trusts in England have seen their budgets fall by more than 8.25% in real terms in 2014-2015.[146] In 2014, Birmingham City Council reduced its budget for adult mental health by an incredible 94%, according to replies to a Freedom of Information request made by Young Minds.[147] Likewise, Camden and Islington Foundation Trust reduced more than 100 beds between 2011 and 2014 (approximately 19.1%) and witnessed the largest reduction in nursing staff (18%).[148] In particular, the percentage of the population who experience mental health difficulties in the UK has increased following the onset of the recession and rollout of austerity measures.[149] This association does not appear to be limited to those out of employment nor those whose household income has declined,[150] albeit the effects are more pronounced among these groups.

Loss of livelihood, reduced employment opportunities, declining income, growing insecurity, and deteriorating conditions in the workplace have resulted in an increasing demand for mental health support services. It is estimated that by 2030 there will be approximately two million more adults in the UK with mental health problems than there are today.[151] In early 2014, NHS England and Monitor mandated a 20% greater cut to mental health and community services budget than their acute counterparts, despite the demand for an increase in mental health support services.[152]

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[143] Paul Hunt, Report of the Special Rapporteur on the Right to Health, 2005, UN Doc E/CN.4/2005/51, paragraph 54.
[144] Committee on Economic, Social and Cultural Rights, General Comment No.14, 'Right to the Highest Attainable Standard of Health', UN Document E/C.12/2000/4, 11 August 2000, Paragraph 34.
[145] Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care – Principle 9. These Principles were adopted by General Assembly resolution 46/119 of 17 December 1991, Office of the High commissioner for Human Rights.
[146] Mental health service budgets 'cut by 8%', Jeremy Cooke, available at: http://www.bbc.co.uk/news/health-27942416
[147] Mental health services cuts 'affecting children', Jeremy Cooke, available at: http://www.bbc.co.uk/news/health-27942416
[148] http://www.bbc.co.uk/news/health-27942416
[149] The Austerity Britain Report: The Impact of the Recession on the UK's Health, According to GPs, 2012, p12, available at http://www.cellohealthinsight.com/downloads/austerity-britain-key-findings-august-2012.pdf
[150] Trends in population mental health before and after the 2008 recession: a repeat cross-sectional analysis of the 1991–2010 Health Surveys of England, Latikireddi et all, available at: http://bmjopen.bmj.com/content/2/5/e001790.full.pdf+html
[151] Mental Health Network, NHS Confederation, Discussion Paper: The Future of Mental Health. Issue 16, March 2014, available at: http://www.nhsconfed.org/~/media/Confederation/Files/Publications/Documents/The_future_of_mental_health.pdf
[152] *"Mind reveals 'unacceptably low' spending on public mental health"*, October 2014, available at: http://www.mind.org.uk/news-campaigns/news/mind-reveals-unacceptably-low-spending-on-public-mental-health/#.VQrxxbezVdg

Funding for mental health services has been cut in real terms for three years in a row.[153] These cuts to mental health care have resulted in half of early intervention programmes targeted at young people being cut and 54% of the budget for psychotic illness is spent on inpatient care rather than on preventive community services.[154]

It is estimated that the hospitalisation of those diagnosed with psychosis costs the NHS £350 per person daily as compared to an average of £13 if supported in the community.[155] This indicates that a shift in approach towards community services could result in a significant saving for the NHS.

It has been reported that a minimum of 1,711 mental health beds have been closed since April 2011, including 277 between April and August 2013. This represents a 9% reduction in the total number of mental health beds - 18,924 - available in 2011/12.[156] Despite the existence of cost-effective treatments, along with mental health accounting for 23% of the total burden of disease, mental health receives only 13% of NHS health expenditure.[157]

In 2005, the Special Rapporteur on the Right to Health noted that small budgetary allocations to mental health pose a significant barrier to persons with mental disabilities enjoying their right to health.[158] Cuts in funding for mental health services may cause restrictions in access to such services for the people who require them. This may have an adverse impact on their level of health, generally.

Budgetary cuts and reduction in the number of available beds for people with mental health conditions, adversely affect the availability of mental health-related services for people who require them. The CESCR affirmed that "[f]unctioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party."[159] In light of the increased demand for mental health services, the budgetary cuts to these services may cause a step back in the enjoyment of the right to health for people who are not able to access these services. Indeed, Reclaiming Our Futures Alliance has recently affirmed that "provisions of mental health services in the UK have retrogressed over recent years".[160]

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[153] Mental health Services Needed Targeted Investment, Not Even More Cuts, Rebecca Cotton, available at: http://www.theguardian.com/society/2014/mar/26/mental-health-investment-not-cuts-nhs-simon-stevens

[154] Knapp, Martin, Andrew, Alison, McDaid, David, Iemmi, Valentina, McCrone, Paul, Park, A-La, Parsonage, Michael, Boardman, Jedand Shepherd, Geoff (2014) *Investing in recovery: making the business case for effective interventions for people with schizophrenia and psychosis*. PSSRU, The London School of Economics and Political Science, and Centre for Mental Health, London, UK.

[155] 'Investing in Recovery' by Rethink Mental Illness and the London School of Economics, p3.

[156] England's mental health services 'in crisis', Michael Buchanan, available at: http://www.bbc.co.uk/news/health-24537304

[157] The Mental Health Policy Group – General Election 2015, 'A Manifesto for Better Mental Health', last accessed: 12/04/2015, available at: http://www.mentalhealth.org.uk/content/assets/PDF/publications/manifesto-better-mental-health-manifesto.pdf; All Party Parliamentary Group on Mental Health, Parity in progress? Inquiry into parity of esteem for mental health, March 2015, p. 20, available at: https://www.rcpsych.ac.uk/pdf/APPG%20on%20Mental%20Health-%20Parity%20in%20Progress.pdf

[158] Paul Hunt, Report of the Special Rapporteur on the Right to Health, 2005, UN Doc E/CN.4/2005/51, paragraph 58.

[159] CESCR, General Comment 14, para 12

[160] Retrogression in mental health: Article 25 - Health, Reclaiming Our Futures Alliance, 15 October 2014, available at: http://www.rofa.org.uk/category/un_article/article-25-health/

The CESCR has underscored that "even in times of severe resource constraints, whether caused by a process of adjustment, of economic recession, or by other factors, the vulnerable, most disadvantaged and marginalized members of society must be protected."[161] People with mental health problems and conditions are a vulnerable group, subject to stigma and discrimination in society and whose problems and needs for services lack a strong advocacy base.[162] The UK government cuts in mental health budgets, reducing the availability of services, harm this vulnerable group.

It is recommended that the United Kingdom ensure that the healthcare budget reflect the needs of this vulnerable group.

3.5.7 People with mental health conditions in the custody of the State

People suffering from mental health conditions who are in the custody of the State, either in prison, police custody or psychiatric hospitals are a particularly vulnerable group, in need of specific attention. The State should ensure the protection of their human rights, including their right to life and right to health.[163] This includes taking steps to foster good mental health.[164] In detention and police custody, a safe environment must be ensured, that is respectful of the dignity of the person.[165] However, several shortcomings exist in the protection of the human rights of detainees with mental health conditions.

According to the Equality and Human Rights Commission, it is important to ensure that prisons monitor detainees with mental health conditions and that appropriate arrangements are made for their treatment.[166] It should be taken into consideration that for certain convicted persons, rehabilitation in community or psychiatric hospitals might be more appropriate than imprisonment.[167] There have been cases of failure to monitor detained patients at risk, including

[161] CESCR, *Statement of the CESCR on "An Evaluation Of The Obligation To Take Steps To The "Maximum Of Available Resources" Under An Optional Protocol To The Covenant",* 2007, UN Doc E/C.12/2007/1, para 4; *Bringing Human Rights to Bear in Times of Crisis: A Human Rights Analysis of Government Responses to the Economic Crisis*, ESCR-net, 2010. Also, *Human Rights and the Global Economic Crisis: Consequences, Causes and Responses, Center for Economic and Social Rights*, New York, 2009.

[162] David Stuckler et al., Responding to the economic crisis: a primer for public health professionals, Journal of Public Health, Vol. 32, p. 298- 306, available at: http://jpubhealth.oxfordjournals.org/content/32/3/298.full.pdf+html

[163] Equality and Human Rights Commission, 'Preventing Deaths in Detention of Adults with Mental Health Conditions: An Inquiry by the Equality and Human Rights Commission' February 2015, p. 4-9, available at: http://www.equalityhumanrights.com/sites/default/files/publication_pdf/Adult%20Deaths%20in%20Detention%20Inquiry%20Report.pdf

[164] Equality and Human Rights Commission, 'Preventing Deaths in Detention of Adults with Mental Health Conditions: An Inquiry by the Equality and Human Rights Commission' February 2015, p. 4-9, available at: http://www.equalityhumanrights.com/sites/default/files/publication_pdf/Adult%20Deaths%20in%20Detention%20Inquiry%20Report.pdf

[165] Equality and Human Rights Commission, 'Preventing Deaths in Detention of Adults with Mental Health Conditions: An Inquiry by the Equality and Human Rights Commission' February 2015, p. 24, available at: http://www.equalityhumanrights.com/sites/default/files/publication_pdf/Adult%20Deaths%20in%20Detention%20Inquiry%20Report.pdf.

[166] Equality and Human Rights Commission, 'Preventing Deaths in Detention of Adults with Mental Health Conditions: An Inquiry by the Equality and Human Rights Commission' February 2015, p. 7, available at: http://www.equalityhumanrights.com/sites/default/files/publication_pdf/Adult%20Deaths%20in%20Detention%20Inquiry%20Report.pdf.

[167] Equality and Human Rights Commission, 'Preventing Deaths in Detention of Adults with Mental Health Conditions: An Inquiry by the Equality and Human Rights Commission' February 2015, p. 7, available at:

patients at risk of self-inflicted death.[168] Bullying, threats and disrespectful treatment by prison staff and other detainees can have a detrimental impact on inmates' mental health and can increase their level of risk. Evidence shows that bullying and threats may lead to self-inflicted death.[169]

It has been recognized by the National Policing Improvement Agency that the custody officer must ensure that appropriate medical attention is given as soon as practicable to any detainee who appears to be suffering from mental ill health (or disablement, or difficulty that means that the detainee is likely to be mentally vulnerable or require additional support).[170] Her Majesty's Inspectorate of Constabulary (HMIC) published a thematic report, which states that people with mental health problems spent long periods of time in police custody waiting for a mental health bed to become available, despite repeated efforts by custody sergeants and custody healthcare staff to secure one.[171]

There is an inconsistency and lack of monitoring in the way that records are maintained for the use of force in police custody, which is particularly concerning when force is used to restrain people with mental health conditions, who are at risk of harming themselves.[172] HMIC found a lack of evidence to understand how far the use of force was proportionate and safe for the detainees in their custody.[173] It has been found that approximately half of all deaths in or following police custody involve detainees with some form of mental health issue.[174]

In addition to this, certain issues exist with 'metal health detentions' under the Mental Health Act. Under section 135 of the Mental Health Act, the police can, on the authority of a Magistrate, enter premises and remove to a place of safety a person who is thought to have a mental disorder and who has been or is being ill-treated or neglected or kept otherwise than under proper control or, if living alone, is unable to care for themselves.[175] Under section 136 of the 1983 Act, the police can

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http://www.equalityhumanrights.com/sites/default/files/publication_pdf/Adult%20Deaths%20in%20Detention%20Inquiry%20Report.pdf.

[168] Equality and Human Rights Commission, 'Preventing Deaths in Detention of Adults with Mental Health Conditions: An Inquiry by the Equality and Human Rights Commission' February 2015, p. 29, available at: http://www.equalityhumanrights.com/sites/default/files/publication_pdf/Adult%20Deaths%20in%20Detention%20Inquiry%20Report.pdf.

[169] Equality and Human Rights Commission, 'Preventing Deaths in Detention of Adults with Mental Health Conditions: An Inquiry by the Equality and Human Rights Commission' February 2015, p. 29, available at: http://www.equalityhumanrights.com/sites/default/files/publication_pdf/Adult%20Deaths%20in%20Detention%20Inquiry%20Report.pdf; Also see: Prison and Probation Ombudsman, Learning Lessons Bulletin: Young Adult Prisoners, April 2014.

[170] Guidance on the Safer Detention and Handling of Persons in Police Custody, Association of Chief Police Officers, 2nd Edition, p. 22, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117555/safer-detention-guidance-2012.pdf

[171] Her Majesty's Inspectorate of Constabulary (HMIC)Report, The Welfare of Vulnerable People in Police Custody, March 2015, p. 19, available at: http://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/the-welfare-of-vulnerable-people-in-police-custody.pdf

[172] Her Majesty's Inspectorate of Constabulary (HMIC)Report, The Welfare of Vulnerable People in Police Custody, March 2015, p. 22, available at: http://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/the-welfare-of-vulnerable-people-in-police-custody.pdf

[173] Her Majesty's Inspectorate of Constabulary (HMIC)Report, The Welfare of Vulnerable People in Police Custody, March 2015, p. 22, available at: http://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/the-welfare-of-vulnerable-people-in-police-custody.pdf

[174] Mental Health Deaths, Inquest, available at: http://www.inquest.org.uk/issues/mental-health-deaths

[175] Guidance on the Safer Detention and Handling of Persons in Police Custody, Association of Chief Police Officers, 2nd Edition, p. 141, available at:

remove from a public place to a place of safety a person who appears to have a mental disorder and to need immediate care or control.[176] In both instances, the person can be detained for assessment at the place of safety for up to seventy-two hours. Under this power police custody is viewed as a 'place of safety', where a person can be held without harm until they are assessed by an approved doctor and an approved social worker (ASW).[177]

However, it has been found in several cases that people suffering from mental health conditions who are kept in police custody under these provisions have been mistreated. In one particular case, jurors at Birmingham coroner's court found that prolonged restraint and a failure to provide basic medical attention led to a man's death.[178] Since 1990 it has been government policy that police custody should only be used as a last resort. Yet in 2011-12, nearly 9,000 people taken off the streets by police using emergency powers under the Mental Health Act ended up in police stations rather than hospitals.[179]

It is recommended that staff training be implemented at detention facilities, for medical professionals as well as police officials, on the relevant provisions of the Mental Health Act regarding detention under Sections 135 and 136 as well as the Guidance Policy published by the National Policing Improvement Agency. It is also recommended that there be proper recording of any force used to restrain persons with mental health conditions and complete transparency in such records, so that these may be scrutinized and the relevant authorities be held to account if the need arises. It is also recommended that staff members in detention facilities are trained to identify vulnerable detainees and refer them in a timely manner to healthcare professionals for assessment.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117555/safer-detention-guidance-2012.pdf

[176] Guidance on the Safer Detention and Handling of Persons in Police Custody, Association of Chief Police Officers, 2nd Edition, p. 141, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117555/safer-detention-guidance-2012.pdf

[177] Police Custody as a "Place of Safety": Examining the Use of Section 136 of the Mental Health Act 1983, IPCC Research and Statistics Series, paper 11, p. 2, available at: http://webarchive.nationalarchives.gov.uk/20100908152737/http://www.ipcc.gov.uk/section_136.pdf

[178] Jurors at Birmingham coroner's court ruled that Kingsley Burrell was failed by both police officials and medical staff, when he was detained in 2011. He was taken into custody and died of a heart attack four days later in Queen Elizabeth hospital in Birmingham. There had been a violent struggle with the police in the back of the ambulance, following which he had wet himself and was left handcuffed on the hospital floor for five or six hours while waiting to be assessed. Following a six-week inquest, jurors found that prolonged restraint and a failure to provide basic medical attention led to Burrell's death. See Kingsley Burrell Inquest: Restraint 'contributed' to death, May 2015, available at: http://www.bbc.co.uk/news/uk-england-birmingham-32754484

[179] Mental Health Deaths, Inquest, available at: http://www.inquest.org.uk/issues/mental-health-deaths

Dignity & Opportunity for All

SECTION IV

4. SECURING THE RIGHTS OF DISABLED PEOPLE IN THE AUSTERITY ERA

In the decade prior to the global financial crisis the UK made some significant progress in realising disabled people's right to independent living, through the adoption of progressive and enabling policies in several policy areas including social care, employment, social security, transport and housing. However, in its 2012 report *Implementation of disabled people's right to independent living*, the Joint Committee on Human Rights (JCHR) expressed its concern that changes in certain policy areas, and the cumulative impact of these changes on disabled people, risked constituting impermissible retrogression in relation to the right to independent living set out in UNCRPD Article 19.

4.1 The UK's obligations under ICESCR and UNCRPD

The UK Government is currently implementing a policy of unprecedented public spending cuts, the stated aim of which is to eliminate the structural economic deficit following the global financial crisis in 2008. The reduction in public spending over the next few years is forecast by the Office for Budget Responsibility to take UK Government consumption of goods and services to its smallest share of Gross Domestic Product since 1948.[1]

Both the UN Committee on Economic, Social and Cultural Rights[2] and the Commissioner for Human Rights of the Council of Europe[3] have recently emphasized the obligation on nation States to continue to make progress towards realising economic, social and cultural rights and to avoid retrogressive measures, despite the global economic crisis. These actors have emphasised the need to avoid measures that have a discriminatory impact on disadvantaged groups, including disabled people, and to ensure that States' core obligations under the UN treaties are met. The Council of Europe Commissioner for Human Rights explained[4]:

> *Economic policy is not exempt from the duty of member States to implement human rights norms and procedural principles. As embodied in international human rights law, civil, political, economic, social and cultural rights are not expendable in times of economic hardship, but are essential to a sustained and inclusive recovery.*

In its 2011 report on the Welfare Reform Bill, and its 2012 report on independent living, the parliamentary Joint Committee on Human Rights expressed concern that there was a risk of impermissible retrogression (i.e. backward steps contrary to international human rights law) in relation to the rights of disabled people, arising from various Government reforms and spending

[1] Office of Budget Responsibility (2013), *Economic and Fiscal Outlook* (Cm 8748).
[2] CESCR, Letter to States Parties dated 16 May 2012, Reference CESCR/48th/SP/MAB/SW.
[3] Council of Europe Commissioner for Human Rights (2013) *Safeguarding human rights in times of economic crisis issue paper*.
[4] Council of Europe Commissioner for Human Rights, *Safeguarding human rights in times of economic crisis*, p 7.

decisions.[5] This section of the report includes an assessment of the degree to which some of the risks identified by the JCHR have materialised, and makes recommendations to mitigate the impact of spending decisions and reforms on disabled people.

The section explains the scope and nature of the specific Convention rights covered by this report and of the general obligations of the Government to respect, protect and fulfil those rights.

4.1.1 The right to live independently and to be included on the community

Article 19 of the United Nations Convention on the Rights of People with Disabilities (UNCRPD) requires the Government to take appropriate measures to ensure the full enjoyment by disabled people of the right to live in, participate in and enjoy full inclusion in the community, with choices equal to others. Disabled people should be able to choose where and with whom to live on an equal basis with others. They should not be obliged to live in a particular living arrangement. Living options and support should be sufficient to ensure such choice and inclusion and, in particular, to prevent isolation or segregation from the wider community.

Article 19 brings together a number of existing rights under other international human rights treaties[6] and makes them relevant to the specific experiences of disabled people. Particular examples include the right to liberty[7] (that is, the right not to be confined to an institution or become a prisoner in one's own home) and to private and family life[8] (to be the author of one's own life, to have relationships and to 'be in the world').[9] It is also instrumental to the protection and promotion of a number of other rights, such as the right not to be subject to inhuman and degrading treatment[10] – a very real risk faced by people who are institutionalised or isolated, as exemplified by the scandals at Winterbourne View[11] and the high incidence of abuse and neglect of older disabled people.[12]

As the Government has acknowledged, independent living is not about disabled people doing everything for themselves, *'but it does mean that any practical assistance people need should be based on their own choices and aspirations.'*[13] According to the Council of Europe Commissioner on Human Rights:[14]

> *…living and being included in society is about being able to share in those schemes available and utilised by people in that society. It is about the opportunity to access the public sphere: being able to access housing markets and transportation systems just like anyone else: being able to walk down the high street, to seek out friends and develop relationships with others. It is the opportunity to take risks, be responsible for one's life, and in doing so, to be accorded the same, even if incomplete, safety net and protection*

[5] See Sections 3.5 and 4.3.4 below.
[6] JCHR, *Implementation of disabled people's right to independent living*.
[7] Article 9 International Covenant on Civil and Political Rights (ICCPR).
[8] Article 17 ICCPR.
[9] JCHR, *Implementation of disabled people's right to independent living*, para 15.
[10] Article 7 ICCPR; Article 15 UNCRPD.
[11] Department for Health (2013) *Winterbourne View Hospital - Review and Response*.
[12] HCISC (2013), *Abuse of Vulnerable Adults in England - 2012-13, Provisional report, Experimental statistics*.
[13] Disability Rights Commission (2002) as referenced in Office for Disability Issues (2012), *Fulfilling Potential Discussion Paper*.
[14] Council of Europe Commissioner on Human Rights (2012) *The right of people with disabilities to live independently and be included in the community, issues paper*.

available to other members of the community. Reaffirming the right to live in the community means making this baseline a reality for people with disabilities, and in that process responding to the preferences and desires of each person.

4.1.2 The rights to an adequate standard of living, social protection and social security

Article 9 ICESCR secures the right of everyone to social security, including social insurance. ICESCR Article 11 (1) guarantees the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

Article 28 of the UNCRPD reaffirms disabled people's right to an adequate standard of living and social protection. This is especially important given the fact that disabled people and people with long term health conditions face a much higher risk of living in poverty. This arises from reduced opportunities to raise income through paid employment, from extra disability-related costs of living, and from barriers in accessing basic 'goods' such as suitable housing.[15] Hence Article 28 requires the Government to address disability-related poverty proactively. This will include ensuring that disabled people and their families living in situations of poverty receive assistance from the State with disability-related costs, ensuring access by persons with disabilities to public housing programmes, and guaranteeing equal access by persons with disabilities to retirement benefits and programmes.[16]

The UN Committee on Economic, social and Cultural Rights (CESCR) has provided an authoritative interpretation of the right to social security under ICESCR. According to that body, the right to social security encompasses the right to access or maintain benefits either in cash or in kind to ensure protection against loss or lack of income from paid employment as a result of sickness, disability or employment injury.[17] The means via which governments are required to meet their obligations regarding the right to social security must be available, adequate, accessible and affordable.[18] States must not subject people to arbitrary and unreasonable restrictions of existing social security programmes or entitlements.[19] States must ensure the participation of beneficiaries of social security schemes, including disabled people, in the administration of those schemes.[20]

Availability: A social security system should be established under domestic law, and public authorities must take responsibility for the effective administration or supervision of the system.[21]

Adequacy: benefits, whether in cash or in kind, must be adequate in amount and duration in order that everyone can realise his or her rights to family protection and assistance, an adequate

[15] Office for Disability Issues (2013) *Building Understanding Slide Deck* 78-84 and 104.
[16] Article 28 UNCRPD.
[17] UN Committee on Economic, Social and Cultural Rights, General Comment No 19 on the Right to Social Security, UN Doc E/C 12/GC/19 (2008), para 2.
[18] See CESCR, General Comment No 19, paras 9-28.
[19] CESCR, General Comment No 19, para 9.
[20] CESCR, General Comment No 19, para 26.
[21] CESCR, General Comment No 19, para 11.

standard of living and adequate access to health care, as set out in Articles 10, 11 and 12 of ICESCR.[22]

Accessibility: all persons should be covered by the social security system, especially individuals belonging to the most disadvantaged and marginalised groups.[23] Furthermore, qualifying conditions for benefits must be reasonable, proportionate and transparent. The withdrawal, reduction or suspension of benefits should be circumscribed, based on grounds that are reasonable, subject to due process, and provided for in national law.[24] The UN Disability Committee has also discussed the requirements of 'accessibility' for social protection regimes.[25]

Affordability: the direct and indirect costs and charges associated with making contributions must be affordable for all, and must not compromise the realisation of other Covenant rights.[26]

In addition to these elements, benefits must be provided in a timely manner and beneficiaries, including those with disabilities, should have physical access to the social security services in order to access benefits and information, and make contributions where relevant.[27]

4.1.3 The rights to work and to just and favourable conditions of work

Article 6 of ICESCR safeguards the right to work, while Article 7 sets out the right of everyone to the enjoyment of just and favourable conditions of work, including fair wages and equal remuneration for work of equal value without distinction of any kind, and equal opportunity for promotion. Article 8 of ICESCR safeguards trade union rights, including the right of all peoples to join and form such bodies.[28] Disabled people's right to work and employment is reaffirmed by Article 27 of the UNCRPD, which includes the right of persons with disabilities to work, on an equal basis with others, the opportunity to gain a living by work freely chosen or accepted in a labour market and a work environment that is open, inclusive and accessible to persons with disabilities.

Under Article 27 of the UNCRPD the Government must safeguard the right to work by taking appropriate steps, including through legislation, to prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment. The Government must also protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, and promote employment opportunities and career advancement for persons with disabilities in the labour market. They must provide assistance to persons with disabilities in finding, obtaining, maintaining and returning to employment and employ them in the public sector. Moreover, the UK should promote the employment of persons with disabilities in the private sector through appropriate policies and measures. The Government must also ensure that reasonable accommodation is provided to persons with disabilities in the workplace, as well promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

[22] CESCR, General Comment No 19, para 22.
[23] CESCR, General Comment No 19, para 23.
[24] CESCR, General Comment No 19, para 24.
[25] See UN Committee on the Right of People with Disabilities, General Comment No.2 on Article 9: Accessibility, UN CRPD/C/GC/2 (2014) , paras 40, 42.
[26] CESCR, General Comment No 19, para 25.
[27] CESCR, General Comment No 19, para 27.
[28] The obligations imposed by these rights are discussed in detail in UN Committee on Economic, Social and Cultural Rights, General Comment No 5 on People with Disabilities, UN Doc E/1995/22 (1994), paras 20-27.

4.2 What are governments required to do to implement their obligations under UNCRPD and ICESCR?

4.2.1 Respect, protect and fulfil

In its report on disabled people's right to independent living, the UK Parliamentary Joint Committee on Human Rights (JCHR) discussed the nature of the Government's obligations arising from its international human rights treaty obligations under UNCRPD:

> *The obligation to respect means that States must not interfere with the enjoyment of the rights of people with disabilities. For example, they must respect their right to education by not excluding them from school on the basis of their disability and must respect their right to health by not carrying out medical experiments on them without their free and informed consent.*
>
> *The obligation to protect means that States must take positive steps to protect the rights of disabled people against violation by third parties, including private individuals and organisations. For example, the State must protect people with disabilities against inhuman and degrading treatment by privately run prisons or care homes, and must protect their right to work by ensuring that private businesses cannot discriminate against employees on grounds of their disability.*
>
> *The obligation to fulfil means that States must take appropriate actions (including legislative, executive, administrative, budgetary, and judicial actions) towards the full realisation of economic, social and cultural rights (as described in both ICESCR and UNCRPD). For example, the State must fulfil the right not to be abused or mistreated by taking positive steps to ensure that adequate training and information are provided to health professionals, police and prison officers, and must fulfil the right of disabled people to take part in the life of their community by taking steps to enhance accessibility.*[29]

The same typology of "respect, protect, fulfil" has been used to analyse the obligations under ICESCR.[30]

4.2.2 The obligation to adopt, reform or develop domestic legislation, policies and strategies

Article 4(1)(a) of the UNCRPD obliges States Parties to adopt all appropriate measures to implement the rights set out in the convention. Such measures include legislation, strategies, administrative measures, policies and programmes. Existing legislation, strategies and policies should be reviewed to ensure that they are compatible with human rights obligations, and should be repealed, amended or otherwise changed if inconsistent with the requirements of those instruments.[31]

4.2.3 Progressive realisation and maximum available resources

[29] JCHR, *Implementation of disabled people's right to independent living*.
[30] This system of categorising obligations has been a feature of all of the Committee on Economic, Social and Cultural Rights' General Comments on substantive rights under ICESCR since 1999.
[31] Article 4 UNCRPD.

Recognising that resources are necessarily finite and that not every aspect of the rights under ICESCR and the UNCRPD can be achieved immediately, ICESCR Article 2(1) and UNCRPD Article 4(2) require governments to take steps, to the maximum of their available resources, with a view to *achieving progressively* the full realisation of the economic, social and cultural rights set out in the conventions.[32]

However, far from indefinitely postponing the achievement of the rights, the conventions impose an obligation to move as expeditiously and effectively as possible towards that goal and also impose obligations which have immediate effect.[33] In its General Comment on the scope of the right to social security under ICESCR, the CESCR explained:

> *To demonstrate compliance with their general and specific obligations, States Parties must show that they have taken the necessary steps towards the realisation of the right to social security within their maximum resources, and have guaranteed that the right is enjoyed without discrimination and equally by men and women.*[34]

The 'duty to take steps' under ICESCR Article 2(1) has been interpreted as imposing an immediate obligation on governments to adopt a national strategy and plan of action to realise economic, social and cultural rights.[35] With regard to social security, the strategy and action plan should take into account the equal rights of the most disadvantaged and marginalised groups and respect people's participation.[36] The strategy should also set targets to be achieved and the time-frame for their achievement, together with corresponding indicators, against which they should be continuously monitored.[37] It must also contain mechanisms for obtaining financial and human resources.[38] UNCRPD Article 33 requires States to establish, maintain or strengthen a framework to monitor implementation of the Convention; monitoring processes must involve, and ensure the participation of, civil society and in particular disabled people.

4.2.4 Equality and non-discrimination

Under Article 2(2) of ICESCR, the UK Government is under an obligation to guarantee the rights contained in the Covenant without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status ('prohibited grounds'). This includes disability. With regard to disabled people, UNCRPD Article 5 prohibits all discrimination on the basis of disability and guarantees to persons with disabilities equal and effective legal protection against discrimination on all grounds. These are immediate obligations that the State must give effect to straight away. They are not subject to progressive realisation or the extent of the resources available to the State. UNCRPD Article 5 requires the UK to take all

[32] Guidance for Human Rights Monitors published by the Office of the High Commissioner on Human Rights implies that the principles and comments developed by the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child should be considered to apply to interpretation of UNCRPD – see Office of the High Commissioner on Human Rights (2010) *Monitoring the Convention on the Rights of Persons with Disabilities - Guidance for Human Rights Monitors*, Professional training series No 17.
[33] See UN Committee on Economic Social and Cultural Rights, General Comment No 3 on on The Nature of States Parties' Obligations (Art 2 (1)), UN Doc E/1991/23 (1990), para 9.
[34] CESCR, General Comment No 19, para 62.
[35] See, eg, CESCR, General Comment No 19, para 68.
[36] CESCR, General Comment No 19, paras 68, 69.
[37] CESCR General Comment No 19, para 68.
[38] CESCR General Comment No 19.

appropriate steps to ensure that reasonable accommodation is provided in order to promote equality and eliminate discrimination. Articles 6 and 7 of the UNCRPD draw particular attention to the need to consider the rights of disabled women and disabled children, respectively.

Article 2(2) of ICESCR prohibits both direct discrimination (when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground)[39] and indirect discrimination (laws, policies or practices which appear neutral at face value, but have a discriminatory impact on the exercise of Covenant rights).[40] UNCRPD Article 5 requires governments to take all appropriate steps to ensure that 'reasonable accommodation' is provided to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of *all* human rights and fundamental freedoms – including those under ICESCR and UNCRPD.[41] The CESCR has also highlighted that some individuals or groups of individuals face discrimination on more than one of the prohibited grounds of discrimination.[42] This is true of disabled women, for instance. According the Committee, such 'multiple discrimination' has a unique and specific impact on individuals and merits particular consideration and remedying.[43]

4.2.5 Non-retrogression

The duty of progressive realisation entails a strong presumption against deliberate retrogressive measures (or backward steps) in terms of rights enjoyment.[44] This is of particular relevance in the current economic climate in the UK given the Coalition Government's adoption of fiscal austerity resulting in deep reductions in public expenditure. The CESCR has said:[45]

> *Violations [of the right to social security] include, for example, the adoption of deliberately retrogressive measures incompatible with the core obligations […] the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to social security; [...] active denial of the rights of women or particular individuals or groups. Violations through acts of omission can occur when the State Party fails to take sufficient and appropriate action to realise the right to social security. In the context of social security, examples of such violations include the failure to take appropriate steps towards the full realisation of everyone's right to social security; the failure to enforce relevant laws or put into effect policies designed to implement the right to social security [...]*

It has also said that:[46]

> *a general decline in living and housing conditions, directly attributable to policy and legislative decisions by the States Parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant.*

[39] UN Committee on Economic, Social and Cultural Rights, General Comment No 20 on Non-discrimination in Economic, Social and Cultural Rights (Art 2, Para 2 of the Covenant), UN Doc E/C 12/GC/*20* (2009), para 10.
[40] CESCR, General Comment No 20, para 10.
[41] Article 5 UNCRPD – Non Discrimination.
[42] CESCR, General Comment No 20, para 17.
[43] CESCR, General Comment No 20, para 17.
[44] CESCR, General Comment No 3, para 9.
[45] CESCR, General Comment No 19, para 64.
[46] UN Committee on Economic Social and Cultural Rights, General Comment No 4, The right to adequate housing, para 11.

In the context of considering the right to social security, the CESCR has explained that:[47]

> *if any deliberately retrogressive measures are taken, the State Party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State Party. The Committee will look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realisation of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level.*

4.2.6 Core obligations

Economic, social and cultural rights impose a minimum core obligation on States to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights.[48] With regard to the right to social security, the UK must ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.[49] The UK must also respect existing social security schemes and protect them from interference.[50]

Concerning the core obligations imposed by the right to work, the UK must ensure the right of access to employment, especially for disadvantaged and marginalised individuals, avoid any measure that results in discrimination and unequal treatment in the private and public sectors, and adopt and implement a national employment strategy and plan of action based on and addressing the concerns of all workers on the basis of a participatory and transparent process.[51]

In order for a State Party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those obligations: [52]

> *…even where the available resources are demonstrably inadequate, the obligation remains for a State Party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints [...]*

[47] CESCR, General Comment No 19, para 42.
[48] CESCR, General Comment No 3, para 10.
[49] CESCR, General Comment No 19, para 59.
[50] CESCR, General Comment No 19, para 59.
[51] CESCR, General Comment No 18 on the Right to Work, UN Doc E/C.12/GC/18 (2006), para 31.
[52] CESCR, General Comment No 3, paras 11.

4.2.7 Taking the human rights of persons with disabilities into account

Under Article 4(1)(c) of the UNCRPD the UK must take into account the protection and promotion of the human rights of disabled people including economic, social and cultural rights, in all policies and programmes. For instance, before any action is carried out by the State Party, or by any other third party, that interferes with the right of an individual to social security, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and include: (a) an opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies.[53] Under no circumstances should an individual be deprived of a benefit on discriminatory grounds or of the minimum essential level of benefits.[54]

4.2.8 Effective remedies

In terms of Article 2(1) of ICESCR, any persons or groups who have experienced violations of their economic, social and cultural rights should have access to judicial, administrative or other effective remedies at both national and international levels.[55] For example, all victims of violations of their right to social security should be entitled to adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition.[56] National ombudspersons, human rights commissions, and similar national human rights institutions should be permitted to address violations of the rights.[57] The CESCR has emphasised on a number of occasions that the incorporation in the domestic legal order of the ICESCR can significantly enhance the scope and effectiveness of remedial measures.[58] As noted above, this has not occurred in the UK.

4.2.9 Assessing whether the Government is in breach of its obligations in a time of crisis

In response to the worldwide economic crisis, the CESCR declared that States Parties should avoid, at all times, taking decisions which might lead to the denial or infringement of economic, social and cultural rights.[59] The Committee has established criteria in order to determine whether governments may be in breach of their obligations:

1. Measures must be temporary, covering only the period of crisis.

2. Measures must be necessary and proportionate, in the sense that the adoption of any other policy would be more detrimental to economic, social and cultural rights.

[53] CESCR, General Comment No 19, para 78.
[54] CESCR, General Comment No 19, para 78.
[55] See, eg, UN Committee on Economic, Social and Cultural Rights, General Comment No 9 on The Domestic Application of the Covenant, UN Doc. E/C.12/1998/24 (1998), para 9.
[56] CESCR, General Comment No 19, para 77.
[57] See, eg, UN Committee on Economic Social and Cultural Rights, General Comment No.14 on The Right to the Highest Attainable Standard of Health (Art 12), UN Doc E/C 12/2000/4 (2000), para 59; UN Committee on Economic Social and Cultural Rights, General Comment No.12 on The Right to Adequate Food, UN Doc. UN Doc E/C 12/1999/5 (1999), para 32.
[58] See, eg, CESCR, General Comment No 19, para 79; CESCR, General Comment No.14, para 33.
[59] CESCR, Letter to States Parties dated 16 May 2012, Reference CESCR/48th/SP/MAB/SW.

3. Measures must not be discriminatory and must comprise all possible measures, including tax measures, to support social transfers to mitigate inequalities that can grow in times of crisis, and to ensure that the rights of disadvantaged and marginalised individuals and groups are not disproportionately affected.

4. Measures must identify the minimum core content of rights or a social protection floor, as developed by the International Labour Organisation, and ensure the protection of this core content at all times.[60]

4.2.10 Conclusion

The UK accepted a range of specific obligations upon ratifying the ICESCR and the UNCRPD. In the following parts of this section we will explore the degree to which the UK Government is meeting these obligations across a number of policy areas affecting the lives of disabled people.

4.3 Disabled people's right to independent living

The right to independent living is a vital element of the United Nations Convention on the Rights of People with Disabilities (UNCRPD) and has also been a key priority for disabled people since the start of the independent living movement in the 1970s and 1980s.[61] In its 23rd report, published in March 2012,[62] the parliamentary Joint Committee on Human Rights (JCHR) addressed the UK's progress in realising the right to independent living, focusing particularly on UNCRPD Article 19. A detailed analysis of this Article is provided in Section 2.2.1.

4.3.1 Independent living in the UK

Independent living in the UK has older roots than the UNCRPD and the following definition,[63] originally adopted by the Disability Rights Commission and predating the UNCRPD, is widely accepted and used by both Government and disability organisations:

> *[Independent living means] all disabled people having the same choice, control and freedom as any other citizen—at home, at work, and as members of the community. This does not necessarily mean disabled people "doing everything for themselves", but it does mean that any practical assistance people need should be based on their own choices and aspirations.*

In its evidence provided for this report, Inclusion London has suggested a fuller description of independent living, as follows:

> *Independent living for disabled people is nothing more or less than having the same opportunities, choices and rights as other citizens. It's about being able to choose when to go bed, what to eat. Independent living is being able to live in your own home with people you choose to live with, being able to leave that home to get out and about - go shopping, go to see a band, go to court! It's about having the chance to be a parent and friend, have a*

[60] CESCR, Letter to States Parties dated 16 May 2012, Reference CESCR/48th/SP/MAB/SW.
[61] See eg, J Evans (2003), *The independent living movement in the UK*.
[62] JCHR, *Implementation of disabled people's right to independent living*.
[63] JCHR, *Implementation of disabled people's right to independent living*, para 8, quoting several sources including the Government's Independent Living Strategy (2009).

family and social life. Independent living is taking part in community and public life having the opportunity to get a job, build a career, have an education and volunteer. Independent living is being able to contribute, participate and be included.

As the independent living movement developed in the 1970s and 80s, disabled people's organisations[64] concluded that a number of components are necessary to support the degree of choice, control and freedom envisaged, including: information; counselling and peer support; housing; aids and equipment; personal assistance; transport; physical access; employment; education and training; income and benefits; advocacy.[65] Thus enjoyment of the right to independent living is dependent on access to a wide range of services and facilities across all aspects of life, and a diminution in access to any of these is likely to have a retrogressive impact.

It is important to note that disabled people do not have an explicit right to independent living under UK domestic law. Implementation of the right to independent living in the UK has involved a complex web of legislation, policy, practices and resources. These various components are underpinned by different, often competing assumptions and definitions, are led by different agencies at both national and local level and their availability and quality can vary significantly between different localities.

4.3.2 Recent achievements in the realm of independent living

In its report, the JCHR commended the significant progress made by the UK in recent years. Indeed, it was noted that the UK Government had been instrumental in negotiating the UNCRPD and had ratified early, in 2009. The Committee made particular mention of the following policies and legislation as having been instrumental in making positive progress towards realising disabled people's right to independent living:[66]

- The Disability Discrimination Act (DDA) 1995, amended and extended by other regulations and statutes, notably the DDA 2005, which imposed duties on public authorities to take a more pro-active role in promoting disabled people's rights;
- The Human Rights Act 1998, which enshrines the European Convention on Human Rights in UK law;
- The Equality Act 2010, which superseded the Disability Discrimination Acts, extending the protection of disabled people;
- The introduction of direct payments,[67] giving disabled people control over their social care support, enabling them to employ personal assistants of their choice;
- The Welfare Reform Act 2009, which introduced the right to control, piloted by 'trailblazer' local authorities;[68]

[64] Notably, Hampshire Coalition of Disabled People, 1989.
[65] C Barnes and G Mercer (2006) *Independent Futures: Creating user-led disability services in a disabling society* (Bristol: Policy Press).
[66] JCHR, *Implementation of disabled people's right to independent living*, paras 38-47.
[67] The Community Care (Direct Payments) Act 1996.

- The Health Act 2009, which introduced personal health budgets;[69]

- The establishment of the Disability Rights Commission in 2000 (now superseded by the Equality and Human Rights Commission);

- The seminal cross-departmental report, 'Improving the Life Chances of Disabled People', which aimed to help 'disabled people to achieve independent living by moving progressively to individual budgets for disabled people, drawing together the services to which they are entitled and giving them greater choice over the mix of support they receive in the form of cash and/or direct provision of services';[70] and the establishment of Equality 2025 to advise on how to achieve the report's aims by 2025;

- The establishment of the Office for Disability Issues within the Department for Work and Pensions (DWP), charged with co-ordinating disability policy across Government;

- The publication of the Independent Living Strategy[71] in 2008, which included commitments across Government to improve accessibility, increase inclusion and promote personalisation of services – including housing, transport, health, social care, employment, among others – and established an Independent Living Scrutiny Group to report annually on progress;

- The Valuing People[72] and Valuing People Now[73] strategies to adopt human rights principles in supporting people with learning disabilities;

4.3.3 The importance of personalisation and self-directed support

Much of the progress in the realisation of disabled people's right to independent living over the last 20 years or more has come via the introduction of direct payments[74] in lieu of traditional homecare services and through the development of personalisation, including via personal budgets - although clearly these can only be effective if they are adequately funded. Direct payments in particular have enabled disabled people to choose who they employ as personal assistants (PAs) to support them, and when and how their PAs provide support – which in turn has enabled many disabled people to have successful careers. For disabled people with particularly high support needs, the Independent Living Fund (ILF)[75] has supplemented and complemented local authority support.

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[68] The Right to Control gives disabled people more choice and control over their support by combining funding from six different sources and allowing them to decide how best to meet their needs. It was piloted in seven local authority 'trailblazer' areas.
[69] A personal health budget is an amount of money allocated to support a patient's identified healthcare and wellbeing needs, planned and agreed between the patient and their NHS team.
[70] Cabinet Office (2005) *Improving the Life Chances of Disabled People*.
[71] Office for Disability Issues (2008) *Independent Living: A cross-government strategy about independent living for disabled people*.
[72] Department of Health (2001) *Valuing People: A new strategy for learning disability for the 21st century: Implementation.*
[73] Department of Health (2009*) Valuing People Now: a new three-year strategy for people with learning disabilities.*
[74] Community Care (Direct Payments) Act 1996.
[75] The Independent Living Fund is a trust run under the auspices of the Department for Work and Pensions.

4.3.4 Accessibility of housing and transport

Since the mid-1990s there has also been significant progress in increasing the accessibility of housing and transport, two key elements in realising disabled people's right to independent living. In 1999 the Building Regulations were changed to include, for the first time, basic accessibility standards for new homes.[76] More recently, encouraged by the first edition of the London Plan published by the Greater London Authority in 2004, there has been pressure for all new homes to be built to a higher accessibility standard, notably the Lifetime Homes standard,[77] which seeks to ensure new homes can more easily be adapted to accommodate the needs of individuals and families at different stages in their lives and particularly the advent of impairment. It is also, of course, important for some new housing to be built to full wheelchair access standard, for which there is readily available design guidance.[78] However, in a recent review[79] the Government has declined to enforce a default accessibility standard equivalent to the Lifetime Homes standard, thus missing an important opportunity to implement the higher access standards that are needed in the private housing sector, in which there is currently a dearth of accessible housing.[80]

More than 90% of housing in the UK is not accessible for disabled people.[81] This means that disabled facilities grants (DFGs), which provide financial assistance to disabled and older people to make their homes more accessible and suitable for their needs, play a very important part in enabling disabled people to live independently. From 2010/11 DFG funding from central Government was not ring-fenced, and from April 2015 the funding will be paid via the Better Care Fund (BCF), a fund managed jointly by social care services and NHS clinical commissioning groups. There is concern that increasing pressure on local authority and NHS funding will further reduce the amount available for adaptations, and that allocation of funding will be directed towards narrow health and care focused outcomes, as explained by Habinteg Housing Association:[82]

> *Local BCF success will be measured on how far emergency admissions are reduced and on how far targets in five other 'metrics' are met. These are: admissions to residential and care homes; effectiveness of reablement; delayed transfers of care; the patient / service user experience; and a locally-proposed metric. As time goes by there is a risk that the concept of adaptations and Disabled Facilities Grants may be increasingly influenced by these specific 'metrics', or measurements. While adaptations could help in meeting some of these targets, funding for adaptations may also be sought by disabled people to support aspects of their lives not linked to such medical and care scenarios. This could mean the potential for some groups of disabled people to lose out and, at the same time, for a narrower, more medicalised, view of disability to be reinforced.*

The accessibility of transport is mainly delivered through regulations that provide for progressive improvement, with deadlines by which certain modes of transport must be accessible. For example, incremental increase in the proportion of accessible buses is governed by the Public

[76] The Building Regulations (Amendment) Regulations 1998.
[77] See http://www.lifetimehomes.org.uk/.
[78] S Thorpe (2006) *Wheelchair Housing Design Guide* (Habinteg Housing Association, 2nd Edition).
[79] Department for Communities and Local Government, 'Building Regulations', Note supporting the written ministerial statement on the housing standards review, 13th March 2014.
[80] Currently, for many disabled people who need accessibility features, suitable housing can only be found in the social rented sector (see section on housing benefit, below).
[81] Habinteg Housing Association (2015) *Briefing: Disabled Facilities Grants 2015.*
[82] Habinteg Housing Association, *Briefing: Disabled Facilities Grants 2015,* p6.

Service Vehicle Accessibility Regulations 2000 and a number of amendment regulations,[83] under the DDA 1995. In relation to rail travel, Network Rail is currently rolling out its Access for All programme,[84] progressively undertaking accessibility works to stations over the course of several years.

4.4 The impact of austerity

It is clear that, at least prior to 2008, the UK made significant efforts to realise disabled people's right to independent living, via a range of measures addressing issues as diverse as housing, transport, social care, peer support via disabled people's user-led organisations and others. However, despite the strong presumption against retrogression that runs through the treaty framework, [85] there is evidence that the policy response to the 2008 financial crisis has compromised progress in implementing disabled people's right to independent living.

In relation to the rights of disabled women, in its Concluding Observations on the UK's seventh period report in July 2013, the UN Committee on the Elimination of Discrimination against Women expressed its concern at the impact of austerity measures:[86]

> *The Committee is concerned that the cuts have had a negative impact on women with disabilities and older women…. [and] urges the State Party to mitigate the impact of austerity measures on women and the services provided to women, especially women with disabilities and older women….*[87]

4.4.1 The impact of austerity measures in other States Parties to UNCRPD

It is clear from the experience of other States Parties that difficulties in funding and enabling support for independent living are not confined to the UK. A few developed countries that have also ratified the UNCRPD have already been examined or have received recommendations from the UN Disability Committee in relation to Article 19.

In relation to Sweden the Committee expressed its concern that:[88]

> *… State-funded personal assistance has been withdrawn for a number of people since 2010…*

and that

> *… persons who still receive assistance have experienced sharp cutbacks without known or seemingly justified reason.*

The Committee went on to recommend:[89]

[83] The Public Service Vehicle Accessibility Regulations 2000, as amended in 2000, 2002, 2003 & 2004.
[84] Access for All http://www.networkrail.co.uk/improvements/access-for-all/.
[85] CESCR, General Comment No 19 , para 1.
[86] Committee on the Elimination of Discrimination against Women, Concluding observations on the seventh periodic report of the UK, July 2013, paras 20 and 21.
[87] Bold in original text removed.
[88] Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Sweden, April 2014, para 43.

…. that the State Party ensure that personal assistance programmes provide sufficient and fair financial assistance to ensure that a person can live independently in the community.

In relation to Austria, the Committee expressed its concern that people with 'psychosocial' and 'intellectual disabilities' were excluded from 'personal assistance programmes' and recommended that 'personal assistance programmes' should be properly funded and made available to 'all persons with intellectual and psychosocial disabilities'.[90]

Since these reports and recommendations form a growing body of jurisprudence under the UNCRPD it is important that the UK takes account of the Committee's comments and recommendations when deciding policies which affect disabled people's enjoyment of their Article 19 right to independent living.

4.5 Risks to independent living highlighted by the Joint Committee on Human Rights

In its 23rd report, "Implementation of the Right to Independent Living", published in March 2012, the Joint Committee on Human Rights (JCHR) raised concern that:[91]

The range of reforms proposed to housing benefit, Disability Living Allowance, the Independent Living Fund, and changes to eligibility criteria (for social care) risk interacting in a particularly harmful way for disabled people. Some disabled people risk losing DLA and local authority support, while not getting support from the Independent Living Fund, all of which may force them to return to residential care. As a result, there seems to be a significant risk of retrogression of independent living and a breach of the UK's Article 19 obligations.

The following sections will attempt to identify the extent to which these risks have been realised, now the details of the changes under the Welfare Reform Act 2012 have been enshrined in regulations and are being implemented, and there has been more time to observe the impact of austerity measures on the ability of local authorities to continue to provide social care services that promote independent living.

This section therefore examines the following policy areas:

- Changes to housing benefit
- The replacement of disability living allowance by personal independence payment
- The independent living fund
- Social care support
- The cumulative impact of various policies and reforms

[89] CRPD, Concluding Observations on the initial report of Sweden, para 44.
[90] Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Austria, September 2013, para 38.
[91] JCHR, *Implementation of disabled people's right to independent living*, para 161.

4.5.1 Changes to housing benefit

The availability of accessible, affordable housing is a key factor in enabling disabled people to enjoy the right to independent living[92] and to 'choose their place of residence and where and with whom they live on an equal basis with others'.[93] Since disabled people are less likely to own their own homes[94] and are more likely to live in poverty,[95] changes to housing benefit are likely to have a disproportionate impact on their lives. In its 23rd report the JCHR cited several housing-related benefit issues that were of concern in relation to disabled people's enjoyment of the right to independent living. These included the overall benefit cap,[96] restrictions on local housing allowance for homes in the private rented sector,[97] the social sector size criteria,[98] the adequacy of discretionary housing payments to mitigate the impact of proposed changes on disabled people[99] and restrictions on the payment of mortgage interest through income support.[100]

Following its success in the General Election in May 2015, the Conservative Government introduced the Welfare Reform and Work Bill in Parliament on 09.07.2015.[101] The Government has proposed a four-year freeze on the level of benefits; this freeze includes housing benefit and the local housing allowance (for those living in private rented accommodation). The Government's impact assessment[102] suggests that disabled people will not be affected by this measure because disability benefits including PIP, DLA and ESA (support group component only) are not included in the freeze. However, there are many disabled people who don't qualify for these benefits, and even those who do will still have their housing benefit/local housing allowance frozen, so they will have to divert money intended to cover everyday living and disability-related expenses to supplement their housing benefit and ensure their rent is paid.

For social housing tenants whose housing benefit does not cover their whole rent, there may be some small benefit arising from the Government's intention to reduce social housing rents by 1% per year over the next 10 years, although this advantage is likely to be cancelled out by the freezing of housing benefit for the next four years. Over the longer term, however, the reduction in social housing rents will have a negative impact on the ability of social landlords to build more housing.[103] This will have a particularly significant impact on disabled people, for whom the development of new social housing, built to higher access standards than private housing, is especially important.

[92] Office for Disability Issues (2008) *Independent Living Strategy*, Executive Summary para 14(3).
[93] UNCRPD Article 19(a).
[94] Office for Disability Issues (2009) *Access to Goods and Services*, Executive Summary.
[95] Leonard Cheshire (2008) Disability Poverty in the UK.
[96] JCHR, *Implementation of disabled people's right to independent living*, para 154.
[97] JCHR, *Implementation of disabled people's right to independent living*, para 154.
[98] JCHR, *Implementation of disabled people's right to independent living*, para 154.
[99] JCHR, *Implementation of disabled people's right to independent living*, para 160.
[100] JCHR, *Implementation of disabled people's right to independent living*, para 155.
[101] Welfare Reform and Work Bill 2015-16, UK Parliament, http://services.parliament.uk/bills/2015-16/welfarereformandwork.html
[102] Department for Work and Pensions (July 2015) *Welfare Reform and Work Bill: Impact Assessment of the Benefit rate freeze.*
[103] Office for Budget Responsibility (2015), *Economic and Fiscal Outlook*, Cm 9088, July 2015.

The impact of the benefit cap

The benefit cap was introduced by the Welfare Reform Act 2012.[104] At the time, the Government decided to exempt from the overall benefit cap any household in which the claimant, their partner or children are in receipt of certain disability benefits, including disability living allowance (DLA), personal independence payment (PIP) and the support group component of employment and support allowance (ESA).[105] Whilst this is a positive step, it should be noted that the tighter criteria for PIP (as explained below) will mean some households become liable to the benefits cap when family members claiming DLA are reassessed for PIP.

Under the Welfare Reform and Work Bill 2015, the Conservative Government has proposed to decrease the benefit cap to £20,000 per annum outside Greater London and £23,000 per annum inside Greater London. The many households that include disabled people who do not qualify for PIP, DLA or ESA Support Group are likely to find it much harder – or impossible - to make ends meet and/or to identify rental properties they can afford within the cap. Some households in private rented accommodation, claiming Jobseekers Allowance (JSA) or the work-related activity component of ESA, may actually have their lease terminated by their landlord, if the landlord is aware of the cap and its impact.[106] In addition, as more disabled people in receipt of Disability Living Allowance (DLA) are reassessed for PIP, more will be subject to the cap; the most recent Government statistics show that 23% of DLA claimants are unsuccessful when they are reassessed for PIP (see below for more detail).[107]

Local housing allowance for private sector tenants

The Local Housing Allowance (LHA) was introduced by the last Labour Government in 2008. Broadly, the calculation of LHA is based on the claimant's circumstances (notably their income and the size of their family) and the level of rents in the local area.[108] In 2009 the Equality and Human Rights Commission challenged[109] the last Labour Government on its failure to consider the impact of the changes on disabled people, who often need extra space or particular facilities for reasons connected with their impairment. In addition, the Work and Pensions Select Committee highlighted the failure to conduct an equality impact assessment or comply with the public sector duty to promote disability equality, and raised concerns that:[110]

> *… the current LHA rules constitute a real barrier to independent living for disabled people who require an extra bedroom…*

The Committee urged the Government to make reasonable adjustments to the policy for disabled people.

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[104] S.69 Welfare Reform Act 2012
[105] Housing Benefit (Benefit Cap) Regulations 2012.
[106] 'Benefit Cap – IDS's Easterhouse epiphany shows he has a heart!' SPeye Joe (Welfarewrites), 23 July 2015.
[107] Department for Work and Pensions (17 June 2015) *Tables: Personal Independence Payment: Official Statistics, GB* (April 2013 – April 2015).
[108] Welfare Reform Act 2007, part 2 (amended by the Welfare Reform Act 2012).
[109] C Stothart, 'DWP is probed for 'neglecting equality'', Inside Housing, 30 October 2009.
[110] House of Commons Work and Pensions Select Committee (2010) *Local Housing Allowance,* Fifth Report of Session 2009–10, para 167.

Changes to the LHA were introduced in April 2011[111] to allow an extra bedroom for a non-resident overnight carer. Following the *Burnip, Trengove & Gorry* case[112], in which it was successfully argued that the current rules were discriminatory under Article 14 of the European Convention on Human Rights, and in which judgement was handed down by the Court of Appeal in May 2012, an allowance has also been made for an extra bedroom for a child who is unable to share a bedroom for a disability-related reason (although this was not formalised in regulation until October 2013).[113]

From 2011[114] LHA rates have been based on the 30th percentile of local rents, meaning that LHA covers the rent for only about a third of properties in a local area. There are caps on the maximum amount of benefit that can be paid for each size of property[115] (reviewed periodically to take account of inflation) and the four-bedroom LHA rate is the maximum payable.[116]

Submissions to the Work and Pensions Select Committee in 2009[117] made it clear that, despite very limited exemptions, LHA would have a significant impact on the enjoyment by disabled tenants and their families of the right to independent living. Many disabled people have additional requirements that restrict the range of accommodation available to them – for example, they might need a ground floor flat or space to store mobility equipment, or to live close to informal support networks.[118]

In addition, the non-dependant deduction system fails to recognise the need for some disabled children to continue to live at home as adults so they can be supported by their family.[119] These adverse impacts were raised in written evidence to the JCHR, notably by Disabled People Against Cuts, and the Committee reflected these concerns in its report.[120]

The size criteria for housing benefit claimants in social housing

Under the Welfare Reform Act 2012, similar reforms to the LHA have been made to housing benefit for claimants in social housing, although the impact has been different, due to both the nature of social housing and the way in which these latter reforms have been rolled out. Respondents to the online survey undertaken to inform this report attached significant importance to the impact of the size criteria on claimants in the social rented sector and on disabled people's right to independent living; it therefore demands detailed scrutiny.

The size criteria, or under-occupation penalty[121] (termed the 'bedroom tax' by opponents and the 'removal of the spare room subsidy' by the Government), decreases the amount of housing benefit received by social housing tenants deemed to have more bedrooms than they need, necessitating

[111] Housing Benefit (Amendment) Regulations 2010.
[112] *Burnip v Birmingham City Council & Anor,* Court of Appeal, (Rev 1) [2012] EWCA Civ 629 (15 May 2012).
[113] Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2013.
[114] Housing Benefit (Amendment) Regulations 2010 (SI 2010/2835).
[115] Housing Benefit (Amendment) Regulations 2010 (SI 2010/2835).
[116] Housing Benefit (Amendment) Regulations 2010 (SI 2010/2835).
[117] Memoranda submitted by CPAG (LH 49), EHRC (LH 97), Mencap (LH 91) and others to the Work and Pensions Select Committee; see Work and Pensions Committee (2010) *Local Housing Allowance*, Fifth Report of Session 2009-10.
[118] Memorandum submitted by Leonard Cheshire Disability; see Work and Pensions Select Committee (2010) *Impact of the changes to Housing Benefit announced in the June 2010 Budget* (Ev39 w140).
[119] Memorandum submitted by Leonard Cheshire Disability; see Work and Pensions Select Committee, *Impact of the changes to Housing Benefit announced in the June 2010 Budget*.
[120] JCHR, *Implementation of disabled people's right to independent living*, para 154.
[121] Housing Benefit (Amendment) Regulations 2012, Reg 5, B13.

tenants in this position to top up their rent from other income or move to a smaller property. The policy applies to housing benefit claimants of working age living in social housing and has been presented as 'replicating the size criteria that apply to Housing Benefit claimants in the private rented sector'.[122] However, unlike the introduction of the local housing allowance (see above page *Local housing allowance for private sector tenants*, page 153), the under-occupation penalty applies to existing tenancies; therefore, in April 2013, the penalty immediately reduced the amount of housing benefit payable to those affected, many of whom had lived in their homes and claimed housing benefit for many years. The stated aims of the policy are to make larger homes available to tenants living in over-crowded conditions and to make savings to the housing benefit bill by not awarding full benefit when homes are 'under-occupied'.[123]

Impact assessment of the social housing size criteria on disabled people's right to independent living

Surprisingly, despite the concerns expressed by the JCHR in its report, the Government stated in its impact assessment[124] that the under-occupation penalty had no impact on human rights. The assessment did, however, draw attention to the fact that about two-thirds of the households affected by the measure include a disabled person and also acknowledged the impact on disabled tenants whose homes had significant adaptations.

The JCHR, however, explained that adaptations are not the only factor to be considered in relation to the role of housing in the enjoyment of the right to independent living: [125]

> *We welcome the Government's statements that they do not wish to see people forced to move from houses which have undergone adaptation, but the interaction between where a person lives and other elements of the right to independent living go further than the issue of adaptations alone.*

The Government's impact assessment also failed to address the specific role played by social housing (as opposed to private rented housing) in enabling disabled people to live independently. The vast majority of accessible homes are available in the social sector; it is relatively rare for private sector landlords to sanction or fund adaptations and owner-occupation is an option for relatively few disabled people.[126] Disabled people are also less likely to be in work. The greater likelihood of disabled people living in social housing **and** claiming benefits renders them particularly vulnerable to the impact of the new size criteria. Furthermore, social housing tenants often have limited say in where they live, with social housing allocated by local authorities or housing associations rather than chosen by tenants.[127] Disabled people may be deliberately allocated homes with one extra bedroom, often to provide more space or in case overnight care is needed in the future, to store disability-related equipment, or because there were no homes of the

[122] Department for Work and Pensions (2012) *Housing Benefit: Under-occupation of social housing impact assessment,* Evidence base para 5.
[123] DWP, *Housing Benefit: Under-occupation of social housing impact assessment*.
[124] DWP, *Housing Benefit: Under-occupation of social housing impact assessment*.
[125] JCHR, *Implementation of disabled people's right to independent living*, para 159.
[126] Office for Disability Issues (2009), *Access to Goods and Services*, Executive Summary.
[127] Oral evidence from Steve Wilcox, formerly Professor of Housing Policy, University of York. See Work and Pensions Committee (2014) *Support for housing costs in the reformed welfare system*, Fourth Report of Session 2013–14 (HTC 720), transcript of oral evidence, 6 November 2013, Q 54.

'correct' size or type (such as adapted or ground floor homes) available.[128] Indeed, many disabled people have a disability-related need for more space.

The Government's impact assessment demonstrates an awareness that the policy would have a disproportionate impact on disabled people but fails to acknowledge the breadth of the difficulties, focusing principally on those facing disabled people living in adapted accommodation.[129]

Mitigation of housing benefit changes through discretionary housing payments

Rather than exempt disabled people from the social housing size criteria – or indeed the local housing allowance - the Government's approach has been to mitigate the policy's disproportionate impact on disabled people by providing extra funding for local councils to award discretionary housing payments (DHPs) to those having difficulty meeting the shortfall in their rent. In relation to the social housing size criteria, the Government's intention was that DHPs would be particularly targeted to those disabled people with significantly adapted homes,[130] but the nature of a discretionary fund is such that, although guidance can be provided, local authorities cannot be instructed to use the fund to help a particular group of people.

Concerns about the adequacy of DHPs to mitigate the impact of the various changes to housing benefit were raised in the JCHR report:[131]

> *We welcome the increase in the Discretionary Housing Fund, but are concerned that its discretionary nature means it will not provide an adequate guarantee that the right of disabled people to exercise choice and control over where they live will be consistently upheld in the light of reductions in Housing Benefit.*

There is evidence, both anecdotally and from recent research, that the JCHR's concerns in this respect have been realised; using DHPs to mitigate the discriminatory effects of the under-occupation penalty has not had the desired outcome - of protecting disabled tenants, especially those with significantly adapted properties or who have a disability-related reason for needing more space, from the impact of the under-occupation penalty.[132] In December 2013 the National Housing Federation reported[133] the results of a survey that showed almost one-third of disabled people who applied for a DHP were unsuccessful, with a huge variation across the country; in Kent, for example, only one in ten disabled people who applied for a DHP were successful. In addition, the only way in which a decision not to award a DHP can be challenged is by making an application to the High Court for judicial review – a very different matter from appealing a housing benefit decision.

[128] Cambridge Centre for Housing and Planning Research (2011) *Under-occupation and the New Policy Framework*, p 8.
[129] DWP, *Housing Benefit: Under-occupation of social housing impact assessment*.
[130] DWP, *Housing Benefit: Under-occupation of social housing impact assessment*, Evidence base para 11.
[131] JCHR, *Implementation of disabled people's right to independent living*, para 160.
[132] See, eg, Papworth Trust (2013) *Making discretionary housing payments work for disabled people*; Aragon Housing Association (2013) *Should I stay or should I go?*; National Housing Federation (2013) *The bedroom tax in Merseyside*.
[133] 'Vulnerable cut off from bedroom tax relief as demand for emergency help triples', National Housing Federation, 19 December 2013.

The Appeal Court judges in the *Burnip* case[134] made *obiter*[135] comments to the effect that it was not appropriate to expect disabled people to use income-replacement benefits (such as ESA) or benefits designed to meet the extra costs of disability (DLA) to top up their rent.[136] However, there is evidence that some local authorities are not respecting disabled people's need to use their DLA to meet their disability-related needs, with many suggesting to disabled people that they should use their DLA to top up their housing benefit.[137] It was reported in January 2014[138] that permission has been granted for a judicial review to be brought against Sandwell Council's decision to take DLA into account when making decisions on the award of DHPs, and reports of further progress in this case are awaited.

The failure of local authorities to respect the purpose of DLA and exclude this benefit in decisions on the award of DHPs to disabled people affected by the size criteria is of particular concern, since the availability of payments to help meet the extra costs of disability has been one of the key methods by which the UK enables disabled people to realise their right to independent living. In this respect it is clear that local authorities are not taking account of their obligations under UNCRPD in relation to exercising their discretion to award DHPs to disabled tenants affected by the under-occupation penalty.

In the case of *Hardy, R v Sandwell Metropolitan Borough Council*,[139] Mr Justice Phillips ruled that the policy of taking into account the care component of DLA when assessing claimants' income for the purposes of deciding applications for discretionary housing payments (DHPs) is unlawful and amounts to a breach of Section 29(6) of the Equality Act 2010 and Article 14 of the European Convention on Human Rights. This decision should lead other councils to review their DHP policies to ensure that other disabled people are not discriminated against in this way but can receive the help they need to remain in their homes.

Evidence of the impact of the social housing size criteria

There have been a number of high profile cases in the media in which disabled people with significant adaptations, or who need an extra room because, for example, a disabled person is unable to sleep in the same room as his or her partner or an extra room is required for home dialysis or equipment storage, have experienced significant hardship and stress due to mounting rent arrears. Research by disability charities,[140] housing academics and housing associations[141] has also indicated the significant impact of this policy on independent living.

The impact on of the social sector size criteria on independent living has also been reported by the UN Special Rapporteur on Housing following her visit to the UK in August/ September 2013, during

[134] *Burnip v Birmingham City Council & Anor* Court of Appeal [2012] EWCA Civ 629 (15 May 2012).
[135] Although such comments are not part of the binding precedent of the case, they are considered authoritative.
[136] *Burnip v Birmingham City Council & Anor*, para 45.
[137] Papworth Trust (2014) *Discretionary housing payments need to work for disabled people.*
[138] 'Green Light For Judicial Review Into Sandwell Council's Discretionary Housing Payment Assessment', Irwin Mitchell solicitors, 23 January 2014.
[139] Hardy, R (on the application of) v Sandwell Metropolitan Borough Council [2015] EWHC 890 (Admin) (30 March 2015).
[140] Papworth Trust, *Making discretionary housing payments work for disabled people*.
[141] Eg, Northern Housing Consortium and University of York (2013 and 2014) *Real Life Reform Reports 1, 2 and 3*; National Housing Federation (2013) *The Bedroom Tax in Merseyside - 100 days on.*

which she took evidence from individual claimants on the impact of the under-occupation penalty:[142]

> *At the root of many testimonies lies the threat to a hard-won right to live independently. For persons with physical and mental disabilities, as well as for the chronically ill, adequate housing means living in homes that are adapted to specific needs; close to services, care and facilities allowing them to carry out their daily routines; and in the vicinity of friends, relatives or a community essential to leading lives in dignity and freedom. Often, the compounded impact of an acute shortage of adapted and affordable accommodation, combined with other changes to the welfare system, has left them "between a rock and a hard place": downsizing or facing rent arrears and eviction. Many testimonies refer to anxiety, stress and suicidal thoughts as a result, precisely the type of situations that should be avoided at all costs…. The Department for Work and Pensions has made available additional funding under the DHP scheme to assist those affected by this measure, but… DHPs are time-bound and limited in scope.*

Several respondents to the online survey highlighted their own experiences and views in relation to the under-occupation penalty, for example:

> **Case study (from online survey on the We are Spartacus website):**
>
> *Bedroom tax: I'm full-time active wheelchair user. I do not need a carer, although I frequently do when I'm ill. My concern is that as a wheelchair user I need an extra room to store disability equipment such as a spare wheelchair and medical and incontinence equipment. I also need a larger area in which to move around. Although as a single disabled person I was allocated and need a 2-bedroom home, I am not entitled to discretionary housing payments because my DLA is taken into account. If I was to move I would need to find an equally adapted home. I discovered that the local authority would not fund a further disabled facilities grant (DFG) if I left an adapted home - but I would need this. I assume this is intentional; it's concerning, as the Government says moving is possible even for disabled people, which is incorrect.*

More recently, the Work and Pensions Select Committee has expressed significant concern about the impact of the social sector size criteria (SSSC) on disabled claimants:[143]

> *We note that the SSSC is affecting many people with disabilities who have adapted homes or who need a spare room to hold medical equipment or to accommodate a carer. We are deeply concerned that the policy is causing severe financial hardship and distress to people with disabilities, many of whom will not easily be able to move. We do not believe that Discretionary Housing Payments are able to provide effective support to these households because of their short-term and temporary nature, the variability in award and the distress that having to re-apply can cause to affected households.*

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[142] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, on her mission to the United Kingdom of Great Britain and Northern Ireland. Human Rights Council, 25th Session, Agenda Item 3, Promotion of the protection of all human rights, civil, political, social, economic and cultural including the right to development, (29 August–11 September 2013) HRC/25/54/Add 2, para 65.

[143] Work and Pensions Select Committee (2014) *Support for housing costs in the reformed welfare system,* Fourth Report 2013-14, para 77.

Use of the human rights framework by courts and tribunals considering the social housing size criteria

The social housing size criteria regulations have been challenged by judicial review and also through housing benefit appeals to tribunal. An application for judicial review of the regulations was heard in the High Court and in the Court of Appeal, which gave its judgement in January 2014.[144] Although UNCRPD Article 19 cannot be directly relied upon before the courts, part of the claimants' case was that the policy was in breach of Article 14 of the European Convention on Human Rights, which prohibits discrimination in the enjoyment of the human rights outlined in that Convention (and incorporated into domestic law the HRA). In their judgment, the Court of Appeal found for the Government on the basis that although the policy has a disproportionate impact on disabled people and is therefore indirectly discriminatory,[145] it was not 'manifestly with reasonable foundation',[146] whilst the provision of DHPs represents appropriate mitigation.[147]

A separate application for judicial review, brought by the Rutherfords,[148] who are raising their severely disabled grandson in an adapted home that includes a room for an overnight carer (without whom the grandparents would be unable to continue to care for their grandson at home), also failed. The regulations permit a extra bedroom when the claimant or their partner need a night carer, but there is no similar provision for children who need carers. However, in this case, the judge expressed the view that the availability of DHPs, and the expectation that they would continue to be available to the Rutherfords, meant that they suffered no financial disadvantage from the reduction in their housing benefit. The case was distinguished from *Burnip*, where DHPs were deemed too uncertain and inadequate to justify the cut in housing benefit. Following the Rutherford decision it may be that DHPs have to be paid indefinitely in all similar cases to avoid a breach of Article 14.

Human rights arguments have been used more successfully in the First Tier Tribunal. In October 2013 it was reported[149] that a First Tier Tribunal in Glasgow had allowed an appeal against the under-occupation penalty on the grounds that applying the penalty to a couple who cannot share a room because of one partner's disability is a breach of their human rights. Similarly, in April 2014 one of the appellants in the MA case, Ms Carmichael, won her individual appeal in the Tribunal.[150] Both cases were distinguished from *MA* on the grounds that couples who cannot share a bedroom due to one or both partners' disability are a specific, identifiable group of claimants.

However, the First Tier Tribunal is only concerned with the particular facts of the case before it and not the general merits of the policy. Its decisions do not set a judicial precedent, so other tribunal judges remain free to take a different view. It is noticeable however that the number of successful cases in the Tribunal appears to be on the increase.

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[144] *MA & Ors v Secretary of State for Work and Pensions*, Court of Appeal [2014] EWCA Civ 13 (20 February 2014).
[145] See section 2.3.4 for more on indirect discrimination.
[146] This is the test applied by the English courts when considering whether a discriminatory policy can be justified. The threshold is deliberately low and affords considerable deference to Parliament.
[147] *MA & Ors v Secretary of State for Work and Pensions*, para 80-82.
[148] *Rutherford &Ors v Secretary of State for Work And Pensions* [2014] EWHC 1613 (Admin) (30 May 2014).
[149] 'Disabled woman wins bedroom tax appeal', Inside Housing website, 4 October 2013.
[150] 'Ignoring the Court of Appeal?' Nearly Legal website, 24 April 2014.

The social housing size criteria and the "maximum use of available resources"

Each State Party to ICESCR and UNCRPD is expected to progressively realise economic, social and cultural rights to the maximum extent of its available resources,[151] and there is also a 'strong presumption' against measures that would be retrogressive in their impact, even in a time of financial austerity.[152] In this context it should be noted that one of the key objectives in adopting the social housing size criteria was to save public funds by reducing the housing benefit bill,[153] but doubts have been raised over the amount of money that the policy will actually save. Research by the University of York,[154] published in October 2013, concluded that savings from the under-occupation penalty would be considerably lower than anticipated and that the policy actually increases costs for both local authorities and housing associations. Thus it appears that, at the same time as having a retrogressive impact on disabled people's enjoyment of the right to independent living, the application of the size criteria is also proving ineffective in saving money; in relation to this policy, this would appear to undermine any justification that maximum use is being made of available resources to progressively realise disabled people's right to independent living.

In the longer term, the under-occupation penalty poses risks to housing associations'[155] ability to invest,[156] due to the likelihood of continuing rent arrears, including from tenants who have never been in arrears before the policy came into effect.[157] This necessarily has implications for the availability of resources to increase the supply of accessible, affordable homes necessary to progressively realise disabled people's right to independent living and other economic, social and cultural rights, and calls into question the extent to which the policy fulfils the UK's obligations under UNCRPD to make maximum use of available resources to progressively realise disabled people's economic, social and cultural rights.

Conclusion and recommendations

Evidence from case studies, research, select committee inquiries and the record of legal proceedings suggests that the concerns expressed by a number of bodies, including the JCHR and civil society organisations, have been realised. Both the local housing allowance and the under-occupation penalty are compromising disabled people's right to independent living by threatening the support they enjoy by reason of their home and its proximity to local informal support. There is also evidence that the financial impact of the under-occupation penalty on housing associations is likely to restrict their ability to invest in accessible and affordable housing, the provision of which is an essential element of the progressive realisation of the right to independent living.

[151] ICESCR Article 2(1); UNCRPD Article 4.
[152] CESCR, Letter to States Parties dated 16 May 2012, Reference CESCR/48th/SP/MAB/SW.
[153] *MA & Ors v Secretary of State for Work and Pensions* [2013] EWHC 2213 (QB) (30 July 2013).
[154] R Tunstall (2013) *Testing DWP's assessment of the impact of the social rented sector size criterion on housing benefit costs and other factors* (Centre for Housing Policy, University of York).
[155] Housing associations, also known as registered social landlords, are independent, not-for-profit organisations that provide homes for people in housing need. Many local authorities have transferred their social housing stock to housing associations.
[156] Oral evidence from Carol Matthews, Group Chief Executive, Riverside, to Work and Pensions Select Committee (2014), *Support for housing costs in the reformed welfare system* (HC 720), 4 December 2013, Q124.
[157] National Housing Federation, *The bedroom tax in Merseyside - 100 days on*.

We recommend that the Government re-evaluate recent changes to housing benefit, notably the local housing allowance and the social housing size criteria, in the light of its obligations under Article 19 of the UNCRPD. There is prima facie evidence that the policies are retrogressive, threatening disabled people's occupation of accessible and affordable housing to enable them to live independently, exercising their right to choose where they live on an equal basis with others. Specific attention should be paid to the following issues:

- **Disabled people's needs for 'extra' rooms (or more space) for disability-related reasons;**
- **The financial and other pressures on disabled tenants for whom moving to a smaller home is either impossible (due to a shortage of suitable, smaller homes), impractical or would prevent them from taking advantage of adaptations or other provision, such as local support networks, that enable them to exercise their right to independent living;**
- **The impact of the policy on the resources available to housing associations to invest in social housing that supports independent living.**

It is also recommended that consideration be given to recent recommendations from the Work and Pensions Select Committee to include more exemptions for disabled people, either on the basis of eligibility for DLA or PIP, or on the basis of a disability-related need for an extra room - for example for medical equipment, or for a carer – including a partner carer or part-time carers.[158]

4.5.2 The reform of disability living allowance

Disability living allowance (DLA) is of fundamental importance to independent living, as its purpose is to help disabled people meet the extra costs that arise from disability, especially the costs of achieving greater independence. It is simply more expensive to live as a disabled person[159] and the principle that the State should recognise this in the benefits system has enjoyed cross-party support since DLA was first introduced in 1992. Support with the extra costs that arise from being a disabled person is a key element in the policy framework that supports the right to independent living; as Baroness Campbell explained during debate in the House of Lords on the Welfare Reform Bill;[160]

> *...DLA helped to pay the extra costs experienced by disabled people to allow them to participate in their communities and to work where social and economic barriers excluded them. The barriers still exist. Discrimination legislation has not wiped them away. It will take years before the transport infrastructure allows full access. This leaves many disabled people dependent on DLA mobility support.*

Under the Welfare Reform Act 2012, DLA is being replaced by Personal Independence Payment (PIP) for working age disabled people; there are no current plans to include adults of pension age or children in this reform. The Government stated its intention at the outset that the introduction of

[158] Work and Pensions Select Committee (2014) *Support for housing costs in the reformed welfare system*.
[159] E Brawn (2014) *Priced out: ending the financial penalty of disability by 2020* (Scope).
[160] Hansard, Baroness Campbell, HL deb, col GC159, 14 November 2011.

PIP will save 20% of the cost of this benefit for working age claimants[161] by the time the new benefit has been fully rolled out. Many organisations have expressed concern that a primary aim of saving 20% of the cost may not be compatible with protecting disabled people's right to independent living.[162] As stated earlier, under ICESCR and UNCRPD it may be legitimate to re-focus expenditure in a time of recession or financial crisis, but there remains a strong presumption against adopting deliberately retrogressive measures.[163]

In its 23rd report, the JCHR expressed concern that tightening the eligibility criteria, such that around 500,000 existing DLA claimants would fail to be eligible for PIP and a number of claimants would receive a reduced level of support, would result in fewer disabled people being able to overcome barriers to independent living.[164] Many claimants who fail to qualify for PIP are likely to be those currently claiming the lowest rate of the care component of DLA, which is not replicated in PIP; the concern is that if help is taken away from those for whom a small amount of support enables them to live independently, their situation could deteriorate, compromising their independence.[165]

There are potentially three considerations in assessing the extent to which the concerns highlighted by the JCHR in its 23rd report have materialised: the adequacy of the impact assessments undertaken by DWP, the criteria and other information contained within the PIP regulations and guidance, and thirdly the outcomes for PIP claimants. However, since PIP is being rolled out gradually,[166] evidence from the lived experience of claimants is limited at this stage.

Impact assessments of DLA reform/PIP

An overriding theme of both the 21st and 23rd JCHR reports was concern about the adequacy of the Government's assessment of the impact of its welfare reforms on disabled people's human rights, particularly the right to independent living. The impact assessments on DLA reform[167] were last updated in May 2012 (before the details of PIP had been finalised), although Government responses to consultations have included sections on equality impact and analysis. It appears that only the Government's response to the consultation on the "moving around activity",[168] published in October 2013, mentions the relevance to PIP of the right to independent living enshrined in UNCRPD Article 19; significantly, the Equality and Human Rights Commission (EHRC) had drawn attention to this issue in its response[169] to that particular consultation:

> *The guiding principles of the CRPD include individual autonomy and independence of persons with disabilities, together with their full and effective participation and inclusion in society. The UK Government ratified this Convention in June 2009 and is expected to take sufficient measures to implement its requirements in policy formation. Article 19, for*

[161] DWP (2012) *Disability Living Allowance reform Impact Assessment*; DWP (2012) *Disability Living Allowance reform Equality Impact Assessment*.
[162] JCHR, *Implementation of disabled people's right to independent living*, para 140.
[163] CESCR, Letter to States Parties dated 16 May 2012, Reference CESCR/48th/SP/MAB/SW.
[164] JCHR, *Implementation of disabled people's right to independent living*, para 146.
[165] Disability Rights UK (2012) *Response to PIP assessment criteria and thresholds consultation*, pp 27-28.
[166] Department for Work and Pensions (2013) *Timetable for PIP replacing DLA*.
[167] DWP (2012) *Disability Living Allowance reform Impact Assessment*.
[168] Department for Work and Pensions (2013) *The Government's response to the consultation on the PIP assessment moving around activity*, Annex 3, Equality Analysis.
[169] Equality and Human Rights Commission (2013) *Response to the consultation on the PIP assessment moving around criteria*.

example, recognises the equal right of people with disabilities to live in the community with choices equal to others...[170]

Given the anticipated impact on the autonomy and independence of persons with disabilities and their ability to participate fully in society, we recommend that the Government reconsider the proposal to reduce the moving around criteria [to 20m] in the light of the CRPD and the UK's obligations under Article 8 of the European Convention on Human Rights.[171]

Although very few DLA claimants have yet completed the claim process for PIP, disabled people have understandable concerns about its impact:

Case study (from online survey on the We are Spartacus website):

If I lose my DLA I lose my only means of getting out of my home, I won't be able to afford the extra costs my disability causes such as incontinence pads, higher fuel bills because I have more washing, bathing & heating needs than able bodied people plus appliances that help me cope like dishwasher & tumble dryer, mobile phone for emergencies etc. Whilst the media are portraying people as scroungers for having things like these, they are assisting me to cope with my life.... if I lose my DLA my husband will also lose the carer [allowance] he claims for me which will cause us even more hardship. I don't sleep very well anymore and feel like I am just a burden to everyone, I never used to feel like this until this Government started these measures. Even though in constant pain I was a happy person knowing that all the bills were paid and my husband could afford to care for me, now my future is so uncertain I am just living in fear. (Woman)

Eligibility criteria for PIP

The eligibility criteria for PIP are self-evidently a critical determinant of the extent to which the new benefit fulfils its purpose – to help with the extra costs that arise from disability. If the criteria are drawn too tightly, or fail to address issues that give rise to extra costs, disabled people faced with significant extra costs will fail to qualify for the benefit that is supposed to help with these; as the JCHR intimated,[172] the danger in a primary policy aim of saving money is that many disabled people who need help could be denied it.

This is not the place to set out in detail the eligibility criteria for PIP but, in summary, they are based on a set of activities and descriptors[173] for a 'daily living' component and a 'mobility' component. There are ten activities relating to the daily living component including, for example, 'preparing food', 'washing and bathing', 'communicating verbally' etc, and two activities relating to the mobility component: 'planning and following a journey' and 'moving around'. Each activity includes several descriptors, by which a number of points is awarded depending on which descriptor offers the best fit with the needs of the claimant. For each component, an aggregate score (across the activities relevant to that component) is derived to determine whether an award is made at the standard or enhanced rate of that component. It is important to note that in order to

[170] EHRC, *Response to the consultation on the PIP assessment moving around criteria*, para 5 (relevant principles)
[171] EHRC, *Response to the consultation on the PIP assessment moving around criteria*, para 15 (conclusion)
[172] JCHR, *Implementation of disabled people's right to independent living*, para 140.
[173] Social Security (Personal Independence Payment) Regulations 2013 No. 377, Schedule 1, Part 3.

be deemed able to undertake an activity, a claimant must be able to do so 'safely, to an acceptable standard, repeatedly and in a timely fashion'.[174]

There has been significant concern that the adoption of a narrow set of criteria, or 'activities', in the PIP assessment makes the benefit a lot more restricted in scope. In the words of Disability Rights UK:[175]

> *The difference is stark; for DLA, anything to do with the body and its functions can count. For PIP the assessment is much more restrictive and will impede many disabled people accessing support.*

One of the Government's stated aims in relation to DLA reform was to take more account of the needs of disabled people with non-physical impairments;[176] this is reflected, to a certain extent, in the PIP activities. In relation to the mobility component, the 'planning and following a journey' activity seeks to assess the needs of claimants who have mobility difficulties related to going out, navigating outside and coping with journeys, whereas the 'moving around' activity seeks to assess the needs of claimants who have physical mobility difficulties. Significantly, in contrast to the eligibility criteria for the mobility component of DLA (in which, with a few exceptions, the higher rate is not generally available to claimants who have non-physical mobility difficulties), a claimant can be awarded the enhanced rate of the mobility component under the 'planning and following a journey' activity alone. Along with the inclusion of daily living activities of particular relevance to people with non-physical impairments, this is designed to meet the Government's stated policy aim of taking a 'fairer' approach to the needs of disabled people with different types of impairment.

Charities, disabled people's organisations and disabled people have identified a number of issues with the criteria for PIP,[177] in relation to the impact on particular groups of disabled people who will either lose their eligibility or receive PIP at a lower rate than their current DLA award, with consequent impacts on their independence. Disability Rights UK, which has significant expertise in the areas of benefits and independent living, has explained[178] that the principal support needs that PIP fails to acknowledge include:

- Moving around indoors, including using stairs, getting in and out of bed, getting to the toilet and other indoor activities;[179]

- General supervision to keep disabled people safe - lack of supervision could put disabled people in danger of injuring themselves during an epileptic fit or a fall, or due to the risk of self-harm;[180]

- Assistance at night time[181] – under the PIP criteria there is no specific provision for assistance required during the night, the nature of which can be very different from the assistance required during the day.

[174] The Social Security (Personal Independence Payment) (Amendment) Regulations 2013, No. 455.
[175] Disability Rights UK, *Response to PIP assessment criteria and thresholds consultation*, page 17.
[176] DWP, *The Government's response to the consultation on the PIP assessment moving around activity*.
[177] All 173 organisations' responses to the PIP assessment and thresholds consultation are available on the Government's website.
[178] Disability Rights UK, *Response to PIP assessment criteria and thresholds consultation*.
[179] Disability Rights UK, *Response to PIP assessment criteria and thresholds consultation*, pp 17-18.
[180] Disability Rights UK, *Response to PIP assessment criteria and thresholds consultation*, pp 18-22.

Those organisations and individuals who have responded to the various consultations have given detailed analyses of the impacts of the narrower and stricter criteria for PIP, in comparison to DLA, both on disabled people themselves and on public services and other Government budgets.[182]

Individual disabled people have also explained the likely impact of the introduction of PIP:

> **Case study (from online survey on the We are Spartacus website):**
>
> *I'll cost more to NHS as my physio compliance will be low (It's pretty much the only effective treatment other than expensive non NHS treatments such as massage & acupuncture), instead of having annual rehab I'll probably need physio more regularly, I'll be at my GP more frequently, have more mental health issues, need more pain relief as my tolerance increases, more referrals, less likely to get back to work & my finances will become even tighter… (Woman)*

The most recent PIP statistical release from Government shows that 23% of DLA claimants who have been reassessed for PIP have lost entitlement to the benefit,[183] although this proportion may change when DLA claimants with indefinite awards are reassessed, a process which started in July 2015 and is expected to be completed by late 2017.[184]

Eligibility criteria for the "moving around" activity

Perhaps the most controversial aspect of PIP has been the descriptors and points for the 'moving around' activity. Under the regulations, for claimants who have physical difficulties moving around, the enhanced mobility component of PIP is only available to those unable to move, without a wheelchair, more than 20 metres. Most disability organisations and disabled people have pointed out that this is a much shorter distance than 50 metres, the distance used in other policy areas,[185] and that a very large number of current DLA claimants who receive the higher rate mobility component will lose that vital support, including the benefits of the Motability scheme.[186] Charities have made the point that the extra costs faced by disabled people who can move up to 50 metres are not significantly lower than those faced by people who can only move up to 20 metres.[187] The impact of this change, made after the main consultation stages relating to PIP had ended, prompted an application for judicial review, lodged in April 2013.[188]

In their response to an additional consultation on the "moving around" activity,[189] organisations and individuals highlighted the significant impact the introduction of a 20-metre benchmark distance

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[181] Disability Rights UK, *Response to PIP assessment criteria and thresholds consultation*, pp 22.
[182] Eg, Disability Rights UK, *Response to PIP assessment criteria and thresholds consultation*, pp 3-16.
[183] Department for Work and Pensions (17 June 2015) *Tables: Personal Independence Payment: Official Statistics, GB* (April 2013 – April 2015).
[184] Department for Work and Pensions (August 2015) *Timetable for PIP replacing DLA*.
[185] Eg, Department for Transport *Inclusive Mobility* (referenced in Building Regulations Approved Document M), Section 3.4 (Seating) and Section 5.1 (Car parking provision).
[186] The Motability Scheme enables disabled people to lease a new car, scooter or powered wheelchair, using the Higher Rate Mobility Component of Disability Living Allowance, the Enhanced Rate of the Mobility Component of Personal Independence Payment (PIP) , the War Pensioners' Mobility Supplement or the Armed Forces Independence Payment.
[187] Disability Benefits Consortium (undated) *Briefing: The PIP 20 metre rule.*
[188] 'Legal action begins against Government disability reforms', Leigh Day & Co, 8 April 2013.
[189] DWP, *Response to the consultation on the PIP assessment moving around criteria*.

would have on disabled people's ability to enjoy the right to independent living,[190] for example in relation to their ability to travel to medical appointments, shops, social activities, volunteering, employment, their children's schools and elsewhere. The Equality and Human Rights Commission highlighted the importance of UNCRPD Article 19 (see above) in this respect, and in addition explained that:[191]

> *The Human Rights Act 1998 requires the Government to act compatibly with the European Convention on Human Rights as far as its statutory powers and duties allow them to. The European Court of Human Rights has clarified that the cluster of rights protected by Article 8 of the Convention (the right to respect for private and family life) includes participating in society.[192] Examples of participation include the ability to interact with other members of society, to form wider relationships beyond the family and to develop one's potential as a citizen.*

The Government has justified the impact of the use of a 20 metre benchmark walking distance on people with physical mobility impairments as an inevitable consequence of making PIP 'fairer' to claimants with non-physical impairments.[193] However, no mitigation has been offered to help those disabled people who will inevitably find it more difficult to travel independently as a result of losing their higher/enhanced rate mobility component and, in many cases, their access to the Motability scheme. (Whilst Motability has announced transitional support, [194] this is independent of Government). A number of current DLA claimants have explained the difficulties they would face if they lost their eligibility for the Motability scheme, for example:[195]

> *If I lost my access to the Motability scheme and subsequently my car I would have to give up my job meaning I would lose my house in a heartbeat and the consequences of this on my condition would be absolutely disastrous. I know I don't have a long time left at work and I need all the help I can get. Public transport is an absolute no-go for me these days. I would have to get two buses and walk a long distance from bus stop to work. I would have no energy by the time I got to work; I wouldn't be able to do my job. If I had to find another job at my age, with my health issues, it would be near impossible to get one - especially considering the economy so I would just need jobseekers allowance instead of my DLA and wouldn't contribute anything back in tax and national insurance. The security of transport makes me a more attractive prospect to an employer.*

The Government's own projections show that by the time PIP has been fully implemented (May 2018), more than 400,000 fewer claimants will be eligible for the enhanced mobility component than are currently eligible for the higher rate mobility component of DLA.[196] However, this is an underestimate of the impact on claimants with physical mobility difficulties, since the total number claiming the enhanced mobility component under PIP will include those who qualify for the

[190] Eg, Disability Benefits Consortium (undated) *Response to the consultation on the PIP assessment moving around criteria*.
[191] EHRC, *Response to the consultation on the PIP assessment moving around criteria*, para 6.
[192] *Gaskin v UK* 1990 and *Pretty v UK* 2002
[193] DWP, *Response to the consultation on the PIP assessment moving around criteria*, para 6.26.
[194] Lord Sterling, Chair of Motability (2013), Statement on Motability's one-off transitional support package for customers who, following their initial reassessment by Government for the new PIP benefit, will no longer be eligible for the Motability Scheme.
[195] Disability Benefits Consortium, *Response to the consultation on the PIP assessment moving around criteria*, p 10.
[196] Department for Work and Pensions (2012) *PIP Re-assessment and Impacts.*

enhanced rate under the 'planning and following a journey' activity, who would not have qualified for the higher rate mobility component of DLA. Baroness Hollis has therefore estimated the total number of physically disabled people who will lose their higher/enhanced mobility component to be around 600,000.[197] Thus more than half a million people with physical mobility difficulties will receive less help to get out and participate in the community under the new benefit.

In March 2015, ITV News[198] published figures released by Motability, indicating that out of 8,000 DLA claimants who had been assessed for PIP, 3,000 (37.5%) had lost their entitlement to the scheme. More recently, Motability has said:[199]

> *To date, we have seen 15,669 customers whose reassessments from DLA to PIP have been completed. Of these, 9,394 (60%) have retained the higher level of mobility allowance and therefore have no issues in relation to the Scheme. However, 6,275 (40%) have not retained the higher level of mobility allowance and, as a consequence, have left the Scheme (or are in the process of doing so) and received our transitional support package including a payment of (in most cases) £2,000. Some of these individuals will be pursuing reconsiderations and appeals but we have no contact with them once they leave the Scheme.*

Although 40% of those DLA claimants who use the Motability scheme and have been reassessed for PIP have not been awarded the enhanced rate mobility component and have therefore lost their vehicle,[200] no figures are available for the number of these claimants who become eligible for the scheme again because they have been awarded the enhanced rate mobility component through reconsideration or appeal. It is also important to note that the figures may change a little when DLA claimants with indefinite awards are reassessed.

These figures, and the case studies highlighted in the ITV News report on 13 March 2015, confirm fears about the impact of the introduction of PIP on disabled people's ability to get around and therefore their enjoyment of the right to independent living.

The impact of the claim process for PIP

The roll-out of PIP for new claimants began in April 2013 and the gradual roll-out of reassessments for some current DLA claimants (mainly those whose awards are due for renewal in selected postcodes) started in October 2013. The claim process, which includes an initial phone call, submission of a detailed claim form and, for most claimants, a face to face assessment, is taking a great deal longer than expected.[201] This can have a particularly serious impact on newly disabled claimants, who experience the stress of many weeks or months of uncertainty, during which time they receive no benefit[202] (although when payment starts it is backdated to the initial date of claim), at a time when they may be experiencing extra financial pressures. As the roll-out of PIP continues it will be important to take account of the difficulties faced by claimants in coping with the claim process, including any delays.

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[197] Hansard, Baroness Hollis, HL deb, col 940, 25 February 2013.
[198] ITV News 'Thousands of disability claimants lose cars in cuts', 13 March 2015.
[199] Information provided by Motability, 5 August 2015.
[200] Since DLA is no longer paid after the date of decision, Mutability is unable to let customers retain their vehicles while they challenge the decision through reconsideration and, if necessary, appeal.
[201] National Audit Office (2014) *Personal Independence Payment: early progress*.
[202] NAO, *Personal Independence Payment: early progress*.

In *MS C & Anor, R (On the Application Of) v Secretary of State for Work and Pensions*[203] two claimants, who had experienced particularly long delays in the processing of their claims for PIP, applied for a judicial review of the claim process. In the High Court Mrs Justice Patterson ruled that the waiting times of 13 months and 9 months respectively that the claimants had endured respectively was not only unacceptable but was also unlawful, meaning there had been a breach of duty on the part of the Secretary of State to act without unreasonable delay in determination of the cases. However, the judge declined to grant a declaration of unlawfulness in relation to the experience of other claimants, whose circumstances would have been different.

Over time, the delays in processing PIP claims have reduced, such that by April 2015 the average time taken to process a new claim under normal rules (ie not the special rules for claimants who are terminally ill) was 11 weeks.[204] It would therefore be expected that barriers to independent living presented by the time taken to process claims are no longer significant.

Citizens Advice has recently reported that PIP is now the most common problem for which help is sought from its local bureaux.[205] The organisation likened the problems experienced by claimants to those experienced by ESA claimants when that benefit was introduced and drew particular attention to queries relating to eligibility, the claim process, including delays, and appeals. Scope has also reported problems with poor decision-making and issues with the assessment by the Healthcare Professional employed by Atos or Capita.[206]

Conclusion and recommendations

While the Government produced an impact assessment of DLA reform, and included impact analysis within its responses to consultations, it does not appear to have assessed the impact of PIP on disabled people's Article 19 right to independent living, although the relevance of Article 19 was acknowledged in its response to the consultation on the moving around activity.[207] This is of particular concern given the significant support currently provided by DLA to help mitigate the impact of disability-related costs and contribute towards the cost of support for independent living.

The restrictions inherent in the PIP eligibility criteria, in comparison to the more 'open-ended' criteria for DLA, are likely to have a significant impact on disabled people's enjoyment of the right to independent living, including those for whom a small amount of support enables them to retain their independence and prevent their situation from deteriorating. In addition, disabled people and their organisations have pointed out that the very restrictive benchmark walking distance of 20 metres to determine eligibility for the enhanced mobility component for disabled people with physical difficulties moving around is likely to have a significantly negative impact on the ability of many physically disabled people to travel independently to access work and social activities and to play their full part in family and community life.

[203] *MS C & Anor, R (On the Application Of) v Secretary of State for Work and Pensions* [2015] EWHC 1607 (Admin) (05 June 2015).
[204] Department for Work and Pensions (17 June 2015) *Personal Independence Payment: Official Statistics to April 2015.*
[205] 'PIP failures are risking people's ability to live independently, says Citizens Advice', Citizens Advice, 16 August 2015.
[206] E Dugan, 'One in four claiming disability benefits faces serious difficulties including delays, unfair dismissals and confusion over eligibility', The Independent on Sunday, 16 August 2015.
[207] DWP, *Response to the consultation on the PIP assessment Moving around activity*, para 6.19.

With the most recent statistics showing that 23% of DLA claimants who have been reassessed for PIP have lost entitlement to the benefit, and 40% of Motability customers have lost their vehicles on reassessment, it is clear that the Government's intention, to reduce the claimant count, is proving to be successful, with thus far unresearched impacts on individual DLA claimants. However, it would seem reasonable to suggest that those who lose their Motability vehicle, and are unable to purchase a replacement, may be unable to travel independently to access work and social activities and to play their full part in family and community life.

Having assessed the likely impact of PIP on disabled people's right to independent living, it is recommended that the reviews already planned for PIP should address the impact on disabled people's rights under Article 19. Specifically, any evaluations and reviews should include:

- Qualitative analysis of the impact of PIP (both the assessment criteria and the claim process) on disabled people's day to day lives and the lives of their families, focusing on the impact on independence, including independent mobility and participation.

- Identifying any transfer of costs to other budget areas (for example, any increased demand for hospital transport and ambulance services and any impact on adult social care services), to help identify the extent to which disabled people have become reliant on other services.

Reviews and impact assessments should be undertaken with the intention of making changes to the PIP regime, if the findings indicate that PIP has had a detrimental impact on disabled people's enjoyment of the right to independent living.

4.5.3 The independent living fund

The history and role of the independent living fund

Although now closed to new applicants, the independent living fund (ILF) provides discretionary funding for disabled people with significant support needs to enable them to pay for the services of a personal assistant (either privately employed or sourced via an agency), with the particular aim of enabling fund users to live in the community rather than in a residential setting.[208] It is therefore unsurprising that the JCHR recorded specific concerns that the proposed closure of the fund would breach the UK's obligation under Article 19(a) to allow disabled people to choose where and with whom they live, and lead to retrogression in relation to 19(b), which describes the kinds of support necessary for disabled people to live independently.[209]

Eligibility criteria for the ILF changed as the fund changed and developed during the 1990's but, importantly, all but the earliest applicants had to be eligible for the highest rate care component of disability living allowance and be receiving a certain level of funding from their local authority adult social care service department (most recently around £340 per week). Although the fund was closed to new applicants in December 2010 it continues to support its existing users. In its response to a consultation on its future, the Government explained the background to the ILF as follows:

[208] House of Commons Library (2013) *Independent Living Fund standard note,* SN/SP/5633.
[209] JCHR, *Implementation of disabled people's right to independent living*, para 152.

The original purpose of the ILF was to provide the additional funding disabled people needed to live at home when the alternative was residential care. The original motivation for the LA contribution to care packages of £200 per week was that figure was the approximate cost of residential care in 1993. The ILF payments were intended to be top up funding needed to employ carers and personal assistants to allow users to live at home.[210]

4.5.4 Proposed closure of the ILF

The current Government has decided to close the fund completely in 2015 and devolve the resources to local government social care departments. As the JCHR reports,[211] this decision caused considerable concern amongst disabled people and voluntary sector organisations, especially in the light of long term pressures on resources within local authority adult social care departments (due to a combination of the economic downturn, increased demand from an ageing society and cuts to local authority funding). In evidence to the JCHR inquiry, the Association of Directors of Adult Social Services said they 'simply have not got the money to make up the shortfall',[212] and the JCHR further reports the ADASS's concerns in more detail:[213]

The Association of Directors of Adult Social Services confirmed that the closure of the Fund was having "an adverse impact". In evidence to us they said that "we are already experiencing people coming to us in adult social care who previously would clearly have gone to the Independent Living Fund" and that "with the majority of authorities having eligibility criteria of substantial or critical, there is little doubt that there will be many people who cannot now be assisted in the way that the Independent Living Fund was able to assist people".

In its response to the consultation on the proposed closure of the fund in 2015, the Government reported that the majority of respondents expressed concern that, if and when funding was passed to local authorities, and particularly if it were not ring-fenced, users would not receive the same degree of support.[214] Some respondents recognised the complexity and illogicality of having both local and national sources of funding in combination to support each user[215] and, in general, the concern about closure of the ILF wasn't so much about where the funding comes from, but about the very real fear that care packages would be reduced if funding was devolved to local authorities' adult social care budgets.[216]

Case study of ILF user, sent to Just Fair in response to call for evidence:

I am now 21 and having [personal assistants] is still so important to me. I am a role model for young disabled people and I have a really busy, full life. I am a volunteer at Imagineer in Halifax which is an organisation that helps people direct their own support and I help provide training courses about disability and equality. I also have a new job at Triangle which is a team that promotes communication with children and young people where I will

[210] Department for Work and Pensions (2012) *Government response: Consultation on the future of the independent living fund*, ch 4, para 11.
[211] JCHR, *Implementation of disabled people's right to independent living*, para 148.
[212] JCHR, *Implementation of disabled people's right to independent living*, para 148.
[213] JCHR, *Implementation of disabled people's right to independent living*, para 150.
[214] DWP, *Government response: Consultation on the future of the independent living fund*, qu 1, para 1.
[215] DWP, *Government response: Consultation on the future of the independent living fund*, Executive Summary, para 5.
[216] JCHR, *Implementation of disabled people's right to independent living*, para 149.

also be helping give training for deaf and disabled people. I regularly give speeches in conferences and Universities with students about my story and experience. For all of these things I need a PA with me so I can travel to the various places I need to be, to interpret using sign language and to help with my personal needs throughout the day.

If I was to lose the independent living fund, which would mean that a stranger from a care agency to visit me for a maximum of 1 hour and 20 minutes each day, there would be no possible way I could achieve any of the things I am already working towards. My family are extremely supportive and already help me so much but they should not be expected to care for me, they are my family, not my PAs. They should not be expected to give up their life in exchange for mine. If these cuts happen I would be isolated, depressed and vulnerable. I would have no life. My life would not be my own but would belong to the people who made the cuts and therefore worthless to me. (young woman)

Judicial review of the decision to close the ILF

Five ILF users applied for judicial review of the Government's decision to close the fund. The Court of Appeal found for the applicants[217] on the grounds that the then Minister for Disabled People failed to comply with her duty to promote equality under the Equality Act 2010 Section 149 (the public sector equality duty, PSED), by not having paid due regard to the need to advance equality of opportunity between disabled people and non-disabled people. The words of Lord Justice Elias are of particular significance in relation to the use of the UNCRPD to assist in the interpretation of the PSED:[218]

> *… there is no evidence that [the Minister for Disabled People] had her attention drawn to the positive obligation to advance equality of opportunity, nor indeed (although it was not suggested that this was of itself directly a breach of the PSED) to the more specific obligations which the UK has undertaken with respect to the disabled in the United Nations Convention on the Rights of Persons with Disabilities and which ought to inform the scope of the PSED with respect to the disabled. I have in mind in particular Article 19 which requires States to take effective and appropriate measures to facilitate the right for the disabled to live in the community, a duty which would require where appropriate the promotion of independent living. There was no evidence that any of these considerations were in the mind of the Minister...*

In his judgement Lord Justice Coombe concluded that although the Minister was told that ILF users could see their care packages reduced[219] there was no evidence that the Minister's attention was drawn to detailed consultation responses from local authorities that warned of the threat to independent living – to ILF users' ability to live in their own homes and participate in employment or education - if the ILF was closed.[220]

[217] *Bracking v Secretary of State for Work and Pensions*, Court of Appeal, [2013] EWCA Civ 1345 (6 November 2013).
[218] *Bracking v Secretary of State for Work and Pensions*, para 77.
[219] *Bracking v Secretary of State for Work and Pensions*, para 62.
[220] *Bracking v Secretary of State for Work and Pensions*, paras 50-64.

Final decision to close the ILF

Since the PSED, and hence the Court of Appeal's judgement, concerns the decision-making process rather than the substance of a decision, the Minister for Disabled People has since made a statement to the effect that the fund will close in June 2015.[221]

The ILF closed on 30 June 2015. Former ILF users in Scotland and Northern Ireland receive the same level of funding as they received before the ILF closure, from the Independent Living Fund Scotland.[222] The scheme in Wales consists of a special grant from the Welsh Government to Welsh local authorities, until March 2017, to enable them to provide ILF recipients with the same level of funding as they received under the ILF; the policy after March 2017 will be dependent on the level of funding provided to the Welsh Government.[223]

However, provision for former ILF users in England has been much less clear. Funding devolved from the ILF to individual local authorities, limited to the first year following closure, was not ring-fenced,[224] so the impact of the fund's closure on individual users has been dependent on decisions taken at local level. Just days before the closure of the fund it was clear that there was considerable confusion and delay in relation to the transition process, as funding was transferred from central to local Government and ILF users were left anxious about the extent of their future support.[225] Dr Tom Shakespeare, of UEA's Norwich Medical School, who has undertaken research into the experience of former ILF users, explained:[226]

> *Our research also shows that transition arrangements between ILF and local authorities have generally been poor, with a lack of communication and clarity. This has caused considerable stress and distress to former ILF users, some of whom feel that they are not being treated like human beings.*
>
> *There is also considerable concern that funding for independent living is not ring-fenced in the long term, and that local authorities may spend this budget on other things after the initial transition period. One of the people we interviewed, for example, said they were afraid of being left bed-bound due to funding cuts.*

Conclusion and recommendations

Due to the nature and purpose of the Independent Living Fund, the legal arguments and Court of Appeal judgement in the ILF case were, of necessity, clearly focused on the threat the fund's closure would pose to disabled people's enjoyment of the right to independent living, as the JCHR warned in its 23rd report.[227] While the decision of the Court of Appeal that the closure of the ILF was unlawful did not depend on Article 19, the court clearly considered the UK's obligations under

[221] Rt Hon Mike Penning MP, Minister of State for Disabled People (2014) *Statement on the future of the Independent Living Fund*, 6 March 2014.
[222] The Scottish Government *Independent Living Fund Scotland* (The Scottish Government website).
[223] The Welsh Government (13 March 2015) *Written Statement: Future care and support arrangements for Independent Living Fund recipients in Wales.*
[224] DWP (18 December, no year indicated on document) *Closure of Independent Living Fund (ILF) and integration into mainstream care and support system*
[225] 'Councils apologise over ILF delays and confusion, but blame government' Disability News Service, 19 June 2015
[226] 'UEA research shows disability support payments short-change disabled people' University of East Anglia Press Release, 24 June 2015.
[227] JCHR, *Implementation of disabled people's right to independent living*, para 152.

UNCRPD, and Article 19 in particular, as highly relevant to Ministers' obligations to pay due regard to the need to promote equality of opportunity under the PSED enshrined in Section 149 of the Equality Act 2010.[228]

From the above it seems fair to conclude that the key issue, when evaluating the Government's final decision to proceed with the closure of the ILF, is that any change in support that threatens fund users' enjoyment of the right to independent living would constitute impermissible retrogression in relation to UNCRPD Article 19. It is therefore incumbent on the Government to ensure the ongoing provision of sufficient support to enable fund users to choose where and with whom they live and to participate as they are currently able to, whether that be through paid work or in other ways.

Given the real risk of impermissible retrogression in relation to the right to independent living under Article 19, the progress of ILF users should be monitored during and after the closure of the fund. Local authorities should be provided with sufficient funding to ensure that outcomes previously achieved are sustained when responsibility for ILF users' support is transferred to the local authority. These outcomes provide positive models of independent living, which depends not on which organisation administers the funding but on the way in which it is used to promote independent living and equality of opportunity.

4.5.5 Social care

The role of social care in enabling independent living

Social care, particularly self-directed support via personal budgets and/or direct payments, is one of the most important factors in enabling disabled people to realise their right to independent living.[229] Since the 1980s, spearheaded by the independent living movement, thousands of disabled people, most notably those with physical impairments, have used direct payments to recruit and employ personal assistants of their choice to enable them to live active, fulfilling lives in the community, with many undertaking paid work and bringing up families.[230] Under the 'Putting People First' initiative,[231] personal budgets have been widely implemented across adult social care services, benefiting people with all kinds of impairment, with the aim of giving service users more choice and control over their support, whether they manage the budget for their support themselves or have it managed for them. It is important to note, however, that personal budgets and personalisation are not synonymous with independent living;[232] if the personal budget is insufficient to meet an individual's support needs or there is a lack of flexibility permitted in its use, merely delivering services in this way will not enable independent living.

Tightening eligibility criteria for social care

Despite the positive development of direct payments and personal budgets, funding of social care has proven inadequate in meeting both existing and future projected demand.[233] Older people are living longer, but not necessarily in good health, and more children and adults are surviving injuries

[228] *Bracking v Secretary of State for Work and Pensions*, para 77 (Lord Justice Elias).
[229] JCHR, *Implementation of disabled people's right to independent living*, para 165.
[230] J Evans, *The independent living movement in the UK*.
[231] Department of Health (2007) *Putting People First*.
[232] All Party Parliamentary Local Government Group and All Party Parliamentary Disability Group (2013) *Promoting independence, preventing crisis* (Scope).
[233] APPLGG and APPDG, *Promoting independence, preventing crisis*, pp 9-11.

and conditions that would once have been fatal but now result in some degree of long-term impairment.[234]

Over the last few years, under both the current and previous Governments, many local authorities have tightened their eligibility criteria, so that fewer disabled people are eligible for support.[235] Quality Watch has reported that:[236]

> *…. this trend to move public funding away from those with more moderate needs predates the financial crisis. The proportion of councils restricting public funding to those people with needs that are judged to be "substantial" or above has grown steadily from 65 per cent of councils in 2006/07 to 87 per cent of councils in 2013/14.*

This has led to 69,000 working age disabled adults with moderate needs and 8,000 with substantial needs losing their eligibility for social care.[237]

Since most local authorities now only provide support to those facing substantial or critical risks to their independence, and a few restrict eligibility to those whose risk is critical, some of the major charities have recently raised concerns about the lack of support for disabled people who face moderate risks to their independence.[238] In their report, the charities make the following bleak observations about the impact of tightening eligibility criteria for social care on working age disabled people:[239]

> *New evidence from our survey shows that disabled adults:*
>
> *are failing to have their basic needs met: with nearly four out of ten (36 %) unable to eat, wash, dress or get out of the house due to underfunded services in their area.*
>
> *are withdrawing from society: with nearly half (47 %) saying the services they receive do not enable them to take part in community life and over one third (34 %) being unable to work or take part in volunteering or training activities after losing support services.*
>
> *are increasingly dependent upon their family: with nearly four in ten (38 %) seeking support services saying they experienced added stress, strained relationships and overall decline in the wellbeing of friends and family.*
>
> *are experiencing isolation, stress and anxiety as a result: with over half (53 %) saying they felt anxious, isolated, or experienced declining mental health because they had lost care and support services.*

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[234] P Beresford et al (2011) *Supporting People* (Policy Press), pp 19-21.
[235] APPLGG and APPDG, *Promoting independence, preventing crisis*, pp 27-28.
[236] Ismail, Thorlby and Holder (2014) *Focus On: Social care for older people - Reductions in adult social services for older people in England*, Quality Watch report (The Health Foundation and Nuffield Trust).
[237] APPLGG and APPDG, *Promoting independence, preventing crisis*, using modelling from Fernandez, Snell, Forder and Wittenberg (2013) *Implications of setting eligibility criteria for adult social care at moderate needs level*, DP2851 (PSSRU at LSE).
[238] E Brawn, M Bush, C Hawkings and R Trotter (2013) *The other care crisis: making social care funding work for disabled adults in England*. Report by Scope, Mencap, National Autistic Society, Sense, Leonard Cheshire Disability, p 8.
[239] E Brawn et al, *The other care crisis: making social care funding work for disabled adults in England*, p 8.

Some responses to the online survey also expressed concern at the tightened eligibility criteria for social care support:

> **Case study (from online survey on the We are Spartacus website):**
>
> *My father has dementia. Social services wouldn't even assess his needs. The reason they gave? His needs aren't critical. There's a loophole in the law such that if he doesn't appear to be eligible for care, they don't have to actually assess his needs. Then they refused to assess my needs as a carer because they haven't assessed him as needing a carer. Meanwhile, I don't get any support from social services despite having a severe and enduring mental illness.*

In a situation that may be analogous to the issue of eligibility criteria in the UK, the UN Disability Committee has expressed its concern[240] that eligibility for social services in Spain was linked to specific 'grades' of disability and that personal assistants could only be hired by disabled people with 'level 3 disabilities', and only for work and education. The Committee's Concluding Observations are therefore likely to be particularly relevant to the UK:[241]

> *The Committee encourages the State Party to ensure that an adequate level of funding is made available to effectively enable persons with disabilities: to enjoy the freedom to choose their residence on an equal basis with others; to access a full range of in-home, residential and other community services for daily life, including personal assistance; and to so enjoy reasonable accommodation so as to better integrate into their communities.*
>
> *The Committee encourages the State Party to expand resources for personal assistants to all persons with disabilities in accordance with their requirements.*

Under Part 1 of the Care Act 2014, there are now national eligibility criteria in place for adult social care services, which should lead to greater consistency between local authorities in relation to who they support. However, since the Act only came into force in April 2015, its impact on disabled people's enjoyment of the right to independent living is not yet apparent.

Worryingly, research undertaken by the Local Government Association in early 2015[242] showed that the majority of local authorities were concerned that they would not have sufficient funds to implement the Act; only 3% of local authorities were confident of having sufficient resources to do so. In its annual budget survey report, the Association of Directors of Adult Social Care Services (ADASS), [243] highlighted the problems caused by the combination of reduced funding to local authorities and increased demand due to demographic trends, with the most significant increases in demand coming from increased numbers of older people and adults with learning disabilities.

[240] Committee on the Rights of Persons with Disabilities, Concluding observations under Article 35 of the Convention on reports submitted by Spain, September 2011.
[241] CRPD, Concluding observations on reports submitted by Spain, paras 40 & 42.
[242] Local Government Association (2015) *Care Act Implementation: Results of Local Authority Stocktake 3,* March 2015; **and** 'Councils ready for Care Act but raise concerns about costs on eve of implementation', Community Care, 25 March 2015.
[243] ADASS (2015) *ADASS Budget Survey 2015 Report.*

High charges for social care

Due to the funding crisis, a number of councils have also decided to impose higher charges for social care services.[244] Councils have discretion in the amount they charge, but their charging policies are expected to take account of Department of Health guidance[245] which seeks to set a minimum amount that must be retained by service users after paying for their social care, **and** to ensure charging policies do not discourage service users from participating in paid work. However, despite this guidance, charges imposed have a significant impact on equality of opportunity; for example, under most local authority charging policies, once disabled people have saved £23,250 - towards a home, maybe - they are forced to pay the full cost of their support package, regardless of its cost. Their non-disabled peers do not, of course, have similar constraints placed on their ability to save.

Even disabled people whose only income derives from social security benefits may be charged for their social care support. DLA is paid to disabled people to help cover the extra costs of disability, but local authorities are permitted to take this income into account when assessing ability to pay, so long as they also take account of disability-related expenditure.[246] However, there is wide variation in the willingness of local authorities to take a flexible, broad view of what constitutes disability-related expenditure,[247] leaving many disabled people losing part of their DLA but also having to meet their disability-related costs out of their remaining income.

The level of social care charges can leave disabled people with some very difficult decisions:

> **Case study: Young woman unable to afford social care**
>
> *The council wanted £72 a week for my care package which I simply cannot afford, so I've had to choose between a care package and money for transport to see friends. My care package would have provided me with support to shower, take my medication and have breakfast in the morning, prepare a meal in the evening and change for bed after a busy day. It would also have helped me get dressed after I my hydrotherapy exercises in the local swimming pool (I couldn't get NHS funding for hydrotherapy) and helped with doing laundry, making phone calls and reading/organizing post. I chose to cancel my care package to save my mental health and my emotional support network. Without it I don't go swimming, rarely shower, often sleep fully clothed and my Mum helps with laundry, food shopping, paperwork etc.*

The Care Act 2014 introduces radical reform of charges for social care services, including a more generous means test and a lifetime cap on social care charges. These reforms were intended to be brought into force in April 2016, but in July 2015 the Government decided to delay this particular aspect of the Care Act until 2020,[248] partly in response to concerns raised by local authorities about the impact of cuts to funding and increasing demand for social care services. This is a significant blow to disabled people with support needs, since the reforms would have made them

[244] 'Councils press on with home care charges increase', Community Care, 24 January 2011.
[245] Department of Health (2013) *Fairer Charging Policies for Home Care and other Non-residential Social Services*.
[246] DoH, *Fairer Charging Policies for Home Care and other Non-residential Social Services*.
[247] Coalition on Charging (2008) *Charging into Poverty?* (available from Disability Rights UK).
[248] Rt Hon Alistair Burt MP, Minister of State for Community and Social Care (2015), *Letter to Cllr Izzie Seccombe, Chair, Local Government Association*, 17 July 2015.

around £50 per week better off, and enabled them to stop paying charges once they had reached the level of the cap.[249]

Social care reform – an opportunity to fulfil UNCRPD Article 19?

It has long been recognised by both current and recent Governments, that social care needs substantial reform. The Care Act,[250] which recently received Royal Assent, constitutes the biggest overhaul to social care services since the National Assistance Act 1948. During the Care Bill's passage through Parliament the JCHR[251] and many others, including the All Party Parliamentary Disability Group and the All Party Parliamentary Local Government Group, [252] urged the Government to use the Care Bill to make further progress in implementing the right to independent living under the UNCRPD Article 19, since Article 19 (and other related provisions of international human rights law) have not so far been incorporated into UK domestic law.[253] However, the Law Commission, in its wide-ranging review of social care published in 2011,[254] and the Bill's Scrutiny Committee,[255] decided against its inclusion.

The Care Act puts an overriding obligation on local authorities to promote well-being, with a number of high level "well-being outcomes" listed in Clause 1. These outcomes are certainly not retrogressive and should make a positive contribution to the promotion of independent living:

- personal dignity (including treatment of the individual with respect);
- physical and mental health and emotional well-being;
- protection from abuse and neglect;
- control by the individual over day-to-day life (including over care and support, or support, provided to the individual and the way in which it is provided);
- participation in work, education, training or recreation;
- social and economic well-being;
- domestic, family and personal relationships;
- suitability of living accommodation;
- the individual's contribution to society.

In its evidence for this report, Inclusion London made the following comment about the dangers of failing to include the concept of independent living in the Care Bill:

> *The current "well being" definition in the Care Bill does incorporate some aspects of independent living but it leaves out vital independent living concepts of choice, access, inclusion, rights and equal participation. We need independent living and these concepts included in the Care Bill to ensure support services in the 21st century enable disabled people to play equal and active lives as citizens – out in society – making choices, participating and contributing. Without explicitly including independent living as a duty we are in danger of regressing back to a well-intentioned but ultimately paternalistic and*

[249] S Bott, 'Social Care Betrayed' Disability Rights UK blog, 13 August 2015.
[250] Care Act 2014.
[251] Joint Committee on Human Rights (2014) *Legislative Scrutiny of the Care Bill*, Eleventh Report of Session 2013-14.
[252] APPLGG and APPDG, *Promoting independence, preventing crisis*.
[253] JCHR, *Implementation of disabled people's right to independent living*, para 52.
[254] Law Commission (2011) *Adult Social Care.*
[255] Joint Committee on the Draft Care and Support Bill (2013) *Report - draft Care and Support Bill*.

> *individualistic view of disabled people that does not address the barriers and marginalisation disabled people face nor our desire for equality. We need a social care system that is committed to the full and equal participation of disabled people as much as the well-being of the individual. (emphasis added)*

Whilst the Department of Health drafted a human rights memorandum to assist the JCHR,[256] this document referred only briefly to Article 19, stating merely that Part 1 of the Bill '*is consistent with numerous provisions of the UN Convention on the Rights of Persons with Disabilities…*'.

UNCRPD Article 4 requires the Government to 'closely consult with and actively involve' disabled people in the development of policy and legislation. As befits the Bill's importance, there was extensive consultation on the Care Bill, with the active involvement of charities and organisations representing disabled people. However, whilst the need to support people to live "independently" is emphasized in background documents, it is not clear that this reflects the meaning of independent living used by the JCHR. There is limited evidence from the White Paper, impact assessments and consultations that the Government has fulfilled its obligations to take specific account of UNCRPD, and especially Article 19, and the independent living movement's understanding of independent living, in the development of the Care Act 2014.

Will the national eligibility criteria be compatible with Article 19?

In regulations under the Care Act the Government is setting national eligibility criteria, so there should be a great deal more consistency in the way disabled people's needs are assessed in different parts of the country. However, a number of organisations, including Scope[257] and Age UK,[258] have expressed concern that setting the national care threshold at "substantial"[259] will exclude thousands of disabled people from vital support with day to day tasks and personal care.[260]

These concerns were also emphasised by the JCHR in its legislative scrutiny of the Care Bill:[261]

> *....we note that the Government has not identified any provisions that might have an adverse effect on the right to independent living. For example, the new eligibility criteria for adult social care, provided for at Clause 13 of the Bill (and to be set out in further detail in regulations), could represent a potentially retrograde step in the promotion of the right to independent living under Article 19 if the national eligibility threshold is set so high as to exclude large numbers of adults from access to care and support.*

Conclusion and recommendations

The Care Act was passed at a time when many charities, local authorities and other organizations in the social care field were highlighting the serious impact of the current crisis in social care funding on disabled people's independence. While the Act contains many positive policies, it is

[256] Department of Health (undated) *Care Bill: Memorandum to the Joint Committee on Human Rights*.
[257] E Brawn et al, *The other care crisis: making social care funding work for disabled adults in England*.
[258] Eg, Age UK (2012) *Social care reform briefing,* June 2012.
[259] Department of Health (2013) *Draft national minimum eligibility threshold for adult care and support.*
[260] E Brawn et al, *The other care crisis: making social care funding work for disabled adults in England*.
[261] JCHR, *Legislative Scrutiny of the Care Bill*, para 30.

disappointing that the Government failed to include independent living (as expressed in UNCRPD Article 19) as a high level outcome.

There are also major ongoing concerns about whether there will be sufficient funding to deliver the aims of the Care Act. There is particular concern that the proposal to set the national eligibility criteria at approximately the 'substantial' level of need under the current criteria will continue to deny many disabled people the support they need to live independently. Comments and recommendations made in relation to other developed countries by the UN Disability Committee indicate the importance of allocating sufficient funding to enable disabled people to live independently as envisaged by UNCRPD Article 19.

Given the critical role of social care services in facilitating independent living, we recommend that the Government ensures sufficient investment is directed towards ensuring that disabled people receive the support they need to exercise their right to independent living. In addition to helping the UK to meet its obligations under UNCRPD, such investment has the potential to enable more disabled people to play a full part in their community, preventing avoidable deterioration in their well-being and, for many, undertaking paid work.

We also recommend that the provisions of the Care Act 2014 relating to the payment of charges for social care services be implemented as soon as possible, to enable disabled people to save for the future as non-disabled people take for granted.

4.5.6 Cumulative impact of a number of policies and reforms

Independent living depends on a wide range of policies and services

Because independent living depends on many services and facilities, including social care, housing, transport and benefits, to name but a few, policy changes in any of these areas, and others, will have an impact on disabled people's enjoyment of the right to independent living. As the JCHR explains:[262]

> *...States Parties are obliged to ensure that disabled people have access to a range of support services that they may require in order to live freely in the community, and to avoid isolation and segregation from the community.*

It is axiomatic that, since most of the necessary support services to enable independent living need funding,[263] an overall reduction in available resources is likely to have an impact on independent living. However, the degree of impact depends on how and where budget reductions are made and how various policy changes and funding reductions interact in their impact on individual disabled people.

[262] JCHR, *Implementation of disabled people's right to independent living*, ch 2, para 16.
[263] For a more detailed explanation of the different types of rights included in Article 19, see JCHR, *Implementation of disabled people's right to independent living*, ch 2, paras 34-37.

The cumulative impact of a range of reforms and budget reductions

Reflecting the submissions and evidence submitted to their inquiry, the JCHR expressed particular concern about the interaction of different policy proposals:[264]

> *…witnesses were particularly concerned that the overall cumulative impact of the reforms might lead to retrogression of the enjoyment of rights under Article 19. For example, the College of Occupational Therapists told us that current policy proposals "run the risk of substantially reducing the rights of disabled people to independent living through the possibility of unintended consequences of interacting cumulative impacts", while the Equality and Human Rights Commission said that "the cumulative—even if unintended—effects of DLA reform and cuts in local authority expenditure risk seriously eroding the enjoyment of Article 19 of the Convention".*

The JCHR expressed particular concern about the interaction between the four policy areas analysed above: housing benefit, DLA reform, closure of the ILF and social care,[265] but these represent only some of the changes that have the potential to interact negatively to undermine independent living.

The interaction of DLA reform and the benefit cap represents a simple example of the cumulative impact of the interaction of different policy changes: if a family member claims DLA, the family is exempt from the overall benefit cap, but if that family member loses entitlement following an assessment for PIP, the family's benefits will be reduced to the level of the cap, despite no other change in their circumstances; the loss of DLA (and carers' allowance, if anyone in the family claims that benefit) will also have an impact on their ability to meet disability-related expenses. This may mean the family has to move to a different area, separating them from the informal support of local friends and neighbours. The result may constitute impermissible retrogression in relation to the enjoyment of Article 19 rights as well as being more expensive in the long run, thus failing to maximise the use of available resources.

In the report of her visit to the UK in August/September 2013, the UN Special Rapporteur on Housing reinforced the JCHR's concerns about the cumulative impact of several aspects of welfare reform on disabled people's enjoyment of the right to independent living. She quoted from the JCHR's report in her own report: [266]

> *… Serious concerns about the direct impact of these reforms were already raised in 2012:[267] "The range of reforms proposed to housing benefit, Disability Living Allowance, the Independent Living Fund, and changes to eligibility criteria risk interacting in a particularly harmful way for disabled people… As a result, there seems to be a significant risk of retrogression of independent living and a breach of the UK's Article 19 [CRPD] obligations."….*

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[264] JCHR, *Implementation of disabled people's right to independent living*, para 126.
[265] JCHR, *Implementation of disabled people's right to independent living*, para 161.
[266] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, on her mission to the United Kingdom of Great Britain and Northern Ireland, Human Rights Council, 25th Session, Agenda Item 3, Promotion of the protection of all human rights, civil, political, social, economic and cultural including the right to development, (29 August–11 September 2013) HRC/25/54/Add 2, para 65.
[267] Quoting JCHR, *Implementation of disabled people's right to independent living*, para 161.

It is therefore impossible for the Government to meet its obligations to respect, protect and fulfil disabled people's Article 19 rights, and to avoid retrogression, without assessing how its various reforms and budget cuts interact in the lives of disabled people and making changes as necessary to minimise the impact.[268] However, the Government has consistently declined to attempt an assessment of the cumulative impact of its policy changes as the JCHR advised was necessary.[269]

Various civil society groups have attempted to assess this cumulative impact, albeit on disabled people in general rather than specifically in relation to their enjoyment of the right to independent living. Some of these assessments focus on the total reduction in the amount of money spent supporting disabled people[270] or the percentage of the reduction they bear, as indicators of reduced support for individual disabled people.

In "Counting the Cuts", the fourth cumulative impact assessment carried out by the Centre for Welfare Reform on behalf of the Campaign for a Fair Society,[271] Dr Simon Duffy found that, using the Government's own data it seemed that there will be an effective annual cut of £7.5 billion to social care and of £15.8 billion in benefits by 2015-16. This means that cuts are disproportionately targeted on disabled people and people in poverty:

- People in poverty (20% of the population) bear 37% of all the cuts;
- Disabled people in poverty (4% of the population) bear 14% of all the cuts;
- People with severe disabilities needing social care (3% of the population) bear 14% of the cuts.

In their Destination Unknown project, Demos and Scope attempted to assess the practical impact of the accumulation of different changes and reforms on the lives of disabled people. The project tracked a few typical, but very different disabled families showing, through a series of reports,[272] how the changes to benefits and other relevant policies affect their lives. Since the last of these reports was published in June 2012, the impact of housing benefit reforms and the reform of DLA were not included, but the report nevertheless describes the following impacts on the families studied:[273]

- Decreased social engagement: reduction in social activity and increased isolation
- Loss of support services
- Deteriorating mental health
- Increasing physical and emotional toll on family members having to provide more informal care

[268] JCHR, *Implementation of disabled people's right to independent living*, Conclusions and recommendations, para 21.
[269] Eg, Hansard, Mike Penning MP (Minister for Disabled People), HC deb, col 404, 13 March 2014.
[270] Eg, S Duffy (2014) *Counting the Cuts* (Centre for Welfare Reform, Sheffield); C Edwards (2012)*The Austerity War and the Impoverishment of Disabled People* (University of East Anglia).
[271] Duffy, *Counting the Cuts* (Centre for Welfare Reform, Sheffield); all data is available online at http://bit.ly/cuts-data2
[272] Demos/Scope (2012) *Destination Unknown, final report*.
[273] Demos/Scope *Destination Unknown, final report*, pp 14-15.

The report goes on to explain: [274]

> *Disabled households are not benefits recipients – they are parents, employees, students, home owners, older people and citizens. They rely on the same diverse range of services as everyone else, but the Government's failure to grasp the whole picture beyond the welfare reform agenda can lead to an underestimation of the cumulative impact these hundreds of individual cuts can have on each multi-service-using household. Disabled people are most vulnerable to this accumulation of cuts simply because they are more likely to rely on several benefits and several public services.... It is clear the traditional impact assessment is only fit for purpose when one reform is being implemented at a time. It is wholly inappropriate when applied to a comprehensive agenda of reforms spanning welfare and local services.*

Many disabled people and people with long term health conditions have provided accounts of the cumulative impact of two or more policy changes; the following example is by no means unusual:

> **Case study (from online survey on the We are Spartacus website):**
>
> *I have been unable to sleep and have nightmares. I started to suffer from depression that I did not have before. I think about and have saved up drugs to commit suicide if I lose my ESA. I cannot work due to multiple physical problems and no amount of bullying and hatred will make that possible... I have to pay the bedroom tax, having been allocated this property as a single person because nobody else wanted it. If I fail the arbitrary Atos test [WCA], I will also lose my home. I have no family or friends who I could turn to for help. For over 3 years my life has been governed by fear... I survive day to day, living in fear of the brown envelope coming through the door that I have to be re-tested when there is no effective treatment or cure for my conditions. (Woman)*

Despite the Government's consistent claim that it would be impossible to undertake a cumulative impact assessment of a number of reforms and policy changes on disabled people, the Institute for Fiscal Studies (IFS) has said that such an assessment is possible. However, the IFS also said it would be extremely difficult to include public services, such as social care, as well as benefit and tax changes.[275]

The Equality and Human Rights Commission (EHRC) has published research by Landman Economics and the National Institute of Economic and Social Research into the cumulative impact of tax, benefit and public spending decisions on households including individuals with one or more protected characteristics.[276] This report shows that households including one or more disabled people have been more adversely affected by reductions to benefits and public expenditure than households with no disabled people, and that households including one or more disabled children have been more adversely affected than those including one or more disabled adults. The report also makes recommendations with regard to data collection and statistical modelling by Government, to enable more accurate identification of any disproportionate impact of combined changes in tax, benefits and public spending on protected groups, including disabled people**.**

[274] Demos/Scope, *Destination Unknown, final report*, pages 17-18.
[275] 'Ministers humiliated over cumulative impact assessment', Disability News Service, 11 July 2014.
[276] Reed, H and Portes, J (2014) *Cumulative Impact Assessment: A Research Report by Landman Economics and the National Institute of Economic and Social Research (NIESR) for the Equality and Human Rights Commission* (Equality and Human Rights Commission Research Report 94).

4.5.7 Conclusion and recommendations

Despite the complexity and limitations of cumulative impact assessments, the evidence does appear to show that the JCHR's concerns about the cumulative impact of a number of reforms and policy changes on independent living have been realised. If disabled people are hit by two, three, four or even more separate changes to benefits, social care and other services, they lose much of the support they need to live independently in the community in terms of UNCRPD Article 19.

We recommend that the Government commission rigorous qualitative research to ascertain how a range of policy changes, reforms and budget reductions interact in the lives of disabled people of different ages, in a variety of family situations and in different areas of the country. The research should focus in particular on the cumulative impact of the changes on the subjects' enjoyment of the UNCRPD Article 19 right to independent living and identify practical measures to mitigate the retrogressive impact.

Under the UNCRPD, the UK is required to respect, protect and fulfil disabled people's right to independent living. There is a presumption against retrogression in terms of the realisation of the economic, social and cultural rights under that treaty and ICESCR, including during a time of economic crisis. Disabled people's enjoyment of their right to independent living is dependent on access to a range of inter-related services and support, cutting across all aspects of life. The above analysis demonstrates that those reforms and changes (such as the changes to housing benefit) that have been introduced are already resulting in backward steps in terms of the implementation of disabled people's Article 19 rights. Other changes (such as the planned closure of the ILF and the reassessment of all DLA claimants for PIP) will undoubtedly lead to further retrogression in relation to disabled people's Article 19 right to independent living if they are fully implemented in their current form. The measures resulting in retrogression do not satisfy the requirements under international human rights law and are therefore impermissible. They are not time-bound to the crisis, they are not necessary and proportionate and they do not ensure the satisfaction of the minimum core obligation imposed by Article 19.

Furthermore, in order to meet its obligations under UNCRPD Article 19, the Government must ensure that all policy-makers have a clear understanding of the meaning and importance of independent living, and of the way in which policy across all departments of Government has an impact on the ability of disabled people to enjoy their Article 19 rights. It is clear from the above analysis that at a time of far-reaching reform, in addition to undertaking rigorous equality and human rights impact assessments of individual policies, policymakers must assess how their proposals may interact with other policy areas to affect the extent to which disabled people can enjoy the right to independent living.

In addition, the importance of fulfilling disabled people's right to independent living is such that serious consideration should be given to incorporating UNCRPD Article 19 (and related international human rights protections) into UK domestic law. This could be done so as to provide an overarching statutory duty on all areas of Government to take account of the need to respect, protect and fulfil disabled people's right to independent living, and a duty to avoid retrogression, in all relevant policymaking. Such a move would have significant social and economic benefits, with disabled people empowered to play their part in society with the support they need to fulfil their potential.

4.6 Disabled people's rights to work, social security, social protection and an adequate standard of living

This part of the report focuses on an important, inter-linked set of economic, social and cultural rights enshrined in both ICESCR and UNCRPD. The specific rights examined are:

- Disabled people's right to work and to just and fair conditions of employment[277]
- Disabled people's rights to social protection,[278] social security,[279] and an adequate standard of living[280]

In the context of these rights, it is axiomatic that the enjoyment by disabled people of an adequate standard of living is dependent on both their ability to exercise their right to work, for sufficient remuneration to support themselves and their families, and their ability to exercise their right to social security at times when they are unable to work due to the impact of their impairment or health condition or because suitable work is not available. These rights are therefore inextricably linked, with the ability of disabled people to exercise one right having a direct impact on their ability to exercise others.

The preamble to UNCRPD makes reference to particular poverty-related risks faced by disabled people,[281] and disability-related poverty has also been documented in UK research:[282]

> *Disabled people are twice as likely to live in poverty as non-disabled people, and that's before the extra costs of disability are taken into account.*

The reasons for disability poverty are complex but include barriers and discrimination in relation to employment and services, the higher living costs incurred as a result of disability and, as explained in Chapter 3, charges levied by local authorities for social care services – a policy area highlighted in 2009 by a coalition of disability organisations that drew attention to the significant impact of care charges on disabled people's standard of living.[283] By definition, disabled people living in significant poverty are prevented from enjoying their ICESCR and UNCRPD right to an adequate standard of living.[284] In addition, the greater likelihood of disabled people to live in poverty, in contrast to the experience of non-disabled people, is in itself discriminatory, in violation of ICESCR Article 2 and UNCRPD Article 5.

4.6.1 Structural changes in the labour market and social security policy

During the 1980s and early 1990s significant changes in the labour market, due in large part to the decline in mining and manufacturing industry, gave rise to a cohort of people of working age experiencing long term unemployment and claiming out of work benefits, including long term

[277] ICESCR Articles 6 and 7; UNCRPD Article 27.
[278] UNCRPD Article 28.
[279] ICESCR Article 9.
[280] ICESCR Article 11; UNCRPD Article 28.
[281] Preamble to UNCRPD, para (t).
[282] S Bulloch and C Rogers (2014) *Better living, higher standards: improving the lives of disabled people by 2020* (Scope), p 6.
[283] Coalition on Charging, *Charging into Poverty*.
[284] ICESCR Article 11; UNCRPD Article 28.

sickness benefits, for an extended period.[285] Against this backdrop, and especially since the start of the New Labour era in 1997, there has been a change in emphasis in relation to the purpose of social security, which may go some way towards explaining why recent social security policies have made it harder for disabled people to maintain an adequate standard of living.

In their analysis of the changes that took place under New Labour after 1997, Carmel and Papadopoulos describe this new vision of social security as follows:[286]

> *Social security-as-support is a "hollowed out" security; its essence - protection - has been changed. In this vision, social security is not primarily about protection from failures of socio-economic conditions and processes that State action can alter. Rather, it is a "helping hand" so that an individual can alter his/her own behaviour to match the demands arising from these conditions and processes. Indeed, in this paternalistic vision of "hollowed-out security", the emphasis on "help for self-help" implies that benefit recipients are themselves to a large degree responsible for their status; with some (conditional) help, they will be able to end their status as benefit claimants.*

Thus there is now less emphasis on social protection from the impact of changes in industry, the economy or the increasing globalisation of labour markets, and more emphasis on the relationship between an individual's behaviour and their employment status. However, despite the political consensus that work is the best route out of poverty,[287] the impact of inflation and recessionary pressures on earnings means that, for many, work no longer provides financial security.[288]

Recent welfare reforms under both New Labour and the Coalition Government have sought to encapsulate this new vision of social security policies that focuses strongly on the responsibility of benefit claimants to adjust their behaviour rather than on the responsibility of the State to adopt economic and social policies that maximise employment opportunities.[289] The re-organisation of Government departments and the naming of the Department for Work and Pensions (DWP) in 2001 emphasised the centrality of paid work to the Government's emerging welfare policies for people of working age.

4.6.2 Impact of economic recession

Evidence from previous recessions[290] supports the likelihood that disabled people would be particularly badly affected by the global financial crisis in 2008 and the subsequent recession and squeeze on public expenditure in the UK. Since disabled people are much less likely to be in paid work than non-disabled people,[291] their living costs are higher[292] and they are more likely to be

[285] C Beatty, S Fothergill and T Gore (2012) *The real level of unemployment 2012* (CRESR, Sheffield Hallam University).
[286] E Carmel and T Papadopoulos (2003), 'The new governance of social security in Britain', in J Millar (ed) *Understanding Social Security: Issues for Social Policy and Practice* (Bristol: Policy Press), p 3 (online version).
[287] A Dean and R Patrick (2011), 'A New Welfare Settlement? The Coalition Government and Welfare to Work', in H M Bochel (ed), *The Conservative Party and Social Policy*, (Policy Press).
[288] Joseph Rowntree Foundation (2013) *Monitoring Poverty and Social Exclusion*.
[289] Dean and Patrick, 'A New Welfare Settlement? The Coalition Government and Welfare to Work'.
[290] Leonard Cheshire (2009) *Disability and the Downturn*.
[291] L Sayce and N Crowther (2013)*Taking control of employment support* (Disability Rights UK).
[292] Brawn, *Priced out: ending the financial penalty of disability by 2020*.

reliant on social security and public services, they are more likely to be adversely affected by a reduction in public expenditure in an economic downturn

4.7 The right to work and to fair and just conditions of employment

The right to work is safeguarded by Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), while ICESCR Article 7 secures the right of everyone to the enjoyment of just and favourable conditions of employment.

4.7.1 Recent assessments by UN committees

In 2009, the most recent report of the CESCR on the UK highlighted that progress was still needed in the area of work and employment:[293]

> *[The Committee] calls upon the State Party to reinforce its measures aimed at ensuring that persons with disabilities, including those with learning disabilities, have equal opportunities for productive and gainful employment, equal pay for work of equal value, and provide them with improved, expanded and equal opportunities to gain the necessary qualifications, in line with its general comment no. 5 (1994) on persons with disabilities.*[294]

Then in 2013, the Committee examining the UK's progress under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), ratified by the UK in 1979, expressed its concern about the high rate of unemployment among disabled women and recommended the creation of more opportunities for employment.[295]

4.7.2 What the data shows

Recent statistics suggest that around 30% fewer disabled people than non-disabled people are in paid work.[296] Whilst for some disabled people and people with long term health conditions the impact of their impairment and symptoms may be too significant to allow them to engage in paid work, this still represents a considerable gap in the rate of employment among disabled people in comparison to non-disabled people. These figures compare badly with employment rates for disabled people in other European Union countries[297] and mask particularly low levels of employment among some groups, such as young disabled people and those with few qualifications, as well as people with learning disabilities or mental health problems.[298] This illustrates the gap between disabled people's rights under the UNCRPD and ICESCR and the reality of their enjoyment of those rights in the UK; it is now necessary to examine whether the UK is taking adequate steps towards progressively realising disabled people's right to work.

[293] Committee on Economic, Social and Cultural Rights, Concluding observations on the combined fourth to fifth periodic report of the UK, June 2009 (E/C 12/GBR/CO/5) para 20.
[294] Bold in original text removed.
[295] Committee on the Elimination of Discrimination against Women, Concluding observations on the seventh periodic report of the UK, July 2013, paras 46 and 47.
[296] Sayce and Crowther, *Taking control of employment support*.
[297] European Union (2010) *Social Inclusion, Income and Living Conditions Survey*.
[298] Sayce and Crowther, *Taking control of employment support.*

4.7.3 'Right to work' versus 'welfare to work'

Within the UN framework of economic, social and cultural rights, participation in paid work with fair conditions of employment is seen as a right that should be enjoyed by disabled people on equal terms with others. UNCRPD Article 27 makes it clear that work should be "freely chosen" and that the State is expected to be pro-active in facilitating this right, for example by facilitating appropriate training, ensuring reasonable adjustments are available in the workplace and by encouraging and enabling employers to implement non-discriminatory recruitment and retention policies. It is implicit in this approach that disabled people's right to employment is seen as a benefit to disabled people, facilitated by the State, civil society organisations and employers, rather than an obligation imposed on disabled people.

Within the policy context of both the previous and current Governments, it is important to distinguish the concept of a right to paid work with fair conditions of employment - facilitated, at least in part, by the State - from the deliberate move towards 'welfare to work' policies, which in relation to the UK may be described as follows:[299]

> *Welfare-to-work concerns the policy mechanisms by which all those not currently working are encouraged, enabled and where deemed necessary, compelled to enter paid employment.*

The principal distinction between the concepts of 'right to work' and 'welfare to work' is the element of compulsion inherent in welfare to work, which has a range of impacts including the withholding of benefit for perceived non-compliance, and the denial of choice for disabled people to engage in work suited to their aptitudes and abilities.

A focus on compulsion, central to 'welfare to work' policies, is predicated on an assumption that disabled people and people with a long term health condition are insufficiently motivated. However, in research based on a sample of 550 ESA claimants in the work-related activity group (WRAG), Catherine Hale, a disabled ESA claimant, suggests this may have little basis in fact:[300]

> *…. activation programmes for the WRAG appear to be underpinned by the "culture of dependency" theory, which presumes that the receipt of benefits itself creates the main barrier to work for people on ESA, and that corrective measures are needed to restore work incentives and instil personal responsibility. We found no evidence to support these assumptions, which seem to be so central to successive governments' policies around disability, benefits and work.*

Responses to the survey underpinning the research showed that for the overwhelming majority, their most significant barrier to work was their impairment or health condition. In interpreting the research, it is important to note that the survey was only available online and that respondents were self-selecting. However, at the very least the research indicates that, for at least some ESA claimants in the WRAG, imposing obligations based on the assumption that their main barrier to work is a lack of motivation or "moral fibre" is likely to be ineffective and probably counter-productive.

[299] Deacon and Patrick, 'A New Welfare Settlement? The Coalition Government and Welfare to Work', p 162.
[300] Hale, C (2014), *Fulfilling Potential? ESA and the fate of the Work-Related Activity Group*, (Mind)

4.7.4 The implementation of welfare to work policies

The main political arguments for welfare to work policies are that, in the past, disabled people (and other groups, such as lone parents) were left to live on benefits and not supported to get into or return to work, but that in an increasingly globalised economy this state of affairs is too expensive for the taxpayer and denies citizens of working age the advantages of working.[301] This has also been a primary focus of European Union policy for nearly 15 years.[302]

In 1997 the Labour Government announced welfare to work policies as an essential element of their policy programme and stated that it planned to:[303]

> *rebuild the welfare state around work,*

adding that:

> *It is the Government's responsibility to promote work opportunities and to help people take advantage of them. It is the responsibility of those who can take them up to do so.*

During its 13 years in power, the Labour Government implemented its "New Deal" programmes to support various groups including disabled people;[304] in 2003, within the framework of the New Deal for Disabled People, Pathways to Work was piloted[305] for incapacity benefit claimants, but was later found by the National Audit Office to have delivered poor value for money.[306]

Under the Coalition Government, the existing welfare to work schemes were replaced by the Work Programme, for claimants who have been out of work for a long period of time, and Work Choice, for disabled claimants with the greatest barriers to work, although in practice it is clear that Work Choice is often not offered to disabled people with the greatest barriers to work.[307] These programmes are run by private providers who are, to an extent, paid by results, but the effectiveness of both these programmes has been relatively poor (see Section 4.2.7 below).

4.7.5 The need for a receptive labour market, free from discrimination

UNCRPD Article 27 makes it clear that a non-discriminatory labour market, receptive to the contribution of disabled people, is essential if disabled people are to enjoy a right to work. In discussing disabled people's right to work under Article 6, the UN Committee on Economic, Social and Cultural Rights emphasized that the integration of persons with disabilities into the regular

[301] Department for Work and Pensions (2000) *A new deal for welfare: Empowering people to work* (Cm 6730).
[302] European Commission (2007) *Towards Common Principles of Flexicurity: More and better jobs through flexibility and security*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Lisbon European Council 23 & 24 March 2000, European Parliament Presidency Conclusions.
[303] Department for Social Security (1998) *New ambitions for our country: A new contract for welfare*, (CM 3805), quoted in Dean and Patrick, 'A New Welfare Settlement? The Coalition Government and Welfare to Work', p 162.
[304] Department for Work and Pensions (2008) *Transforming Britain's Labour Market: Ten years of the New Deal.*
[305] DWP, *Transforming Britain's Labour Market: Ten years of the New Deal*.
[306] National Audit Office (2010) *Support to incapacity benefits claimants through Pathways to Work*.
[307] Department for Work and Pensions (2013) *Evaluation of the Work Choice Specialist Employment Programme*, referenced in Sayce and Crowther, *Taking Control of Employment Support*.

labour market should be actively supported by States.[308] In its response to the Labour Government's proposals for ESA, the Social Security Advisory Committee made the following observation in relation to progress in opening up the labour market to disabled people and people with long term health conditions:[309]

> *We have observed that the process of getting employers – in particular those operating [small and medium sized enterprises] – actively engaged and committed to working within the Government's agenda, is lagging far behind what is needed to open the labour market to people with health conditions and/or disabilities (in particular those relating to mental health), and provide an environment in which such people can be supported in sustained employment.*

Under the Equality Act 2010 (and previously the Disability Discrimination Act 1995) it is unlawful for employers to discriminate against disabled people; they are obliged to make 'reasonable adjustments' to the working environment and conditions of employment to enable disabled people to compete on equal terms with non-disabled people. However, research suggests that equality legislation has not had the impact on work opportunities for disabled people that was intended:[310]

> *…. it is worth noting that, although the DDA came into force in 1996, the evidence does not suggest that disabled people's labour market disadvantage has been significantly reduced as a result of the legislation….*
>
> *…. econometric analysis using a range of national survey data has concluded that there is "…no evidence of a positive employment effect of the introduction of the DDA",[311] and "the DDA has had no impact on the employment rate of disabled people or possibly worsened it."[312]*

If an employer discriminates against a disabled person during the recruitment process or during their employment, the disabled person can make an application to an Employment Tribunal for redress, although this is more difficult since the introduction of fees for the tribunal (albeit with a complex system of remissions for those with low savings and income). In practice, the majority of applications to the tribunal have focused on disabled people's treatment at work or cases of unfair dismissal; relatively few cases have been brought against employers who have discriminated in relation to their recruitment policies and practices.[313] This lack of effective enforcement via the judicial system has made it more difficult for this area of the law to be developed.

This concern is supported by recent research showing that disabled people still experience considerable external barriers to work in relation to employer attitudes and behaviour. In relation to

[308] CESCR General Comment No 18, para 20.
[309] Social Security Advisory Committee (2006) *19th Report, August 2005-July 2006,* p 30.
[310] N Meager and T Higgins (2011) *Disability and skills in a changing economy* (UK Commission on Employment and Skills), p 6.
[311] M Jones (2009) 'The Employment Effect of the Disability Discrimination Act: Evidence from the Health Survey for England', *Labour* 23(2), 349-369.
[312] D Bell and A Heitmueller (2005) *The Disability Discrimination Act in the UK: Helping or Hindering Employment Amongst the Disabled?,* IZA Discussion Paper 1476 (Bonn: Institute for the Study of Labor (IZA)).
[313] Meager and Higgins, *Disability and skills in a changing economy*.

attitudes, the authors of a 2013 report produced for the Equality and Human Rights Commission stated:[314]

> *Concerns among employers in relation to employing disabled people included perceived risks to productivity; concerns over the implications (financial and otherwise) of making workplace adjustments; confusion over legislation and required practices, and negative perceptions of legislation.*

Disabled people themselves also report that employer attitudes, along with difficulties relating to the accessibility of workplaces and facilities and unmet needs for support or adaptive equipment, constitute significant barriers to employment.[315]

> **Case study submitted to Just Fair in response to call for evidence:**
>
> *It was not until 2002, when I was made redundant [from my position as a technical resource manager for a computer company] because there had been a computer business crash and I had a manager who could not cope with my disability, that I experienced the misunderstanding of disability by all the business and charity sectors.*
>
> *I have 2 degrees yet cannot get into paid employment which uses my capability. Currently I work 1.5 days a week for a chemist (on minimum pay) – a job which I got by taking over my daughter's Saturday job when she went to university.*
>
> *The charity sector will use me as a volunteer but will not offer me a paid position. So I am stuck in the "hardly any cash sector".*

4.7.6 The need to incentivise employers

In a competitive, flexible and globalised labour market, in which the private sector is expected to provide the majority of employment opportunities, it is important for employers to have incentives to offer employment opportunities to disabled people, as required by UNCRPD Article 27(1)(h). The need for incentives is further underlined by evidence that employers with little or no experience of employing disabled people may perceive that disabled people are likely to be less productive or 'cost-effective' than their non-disabled peers.[316] In addition, there is evidence that employers have a need for ongoing support after recruiting disabled people:[317]

> *… the evaluation of the New Deal for Disabled People[318] suggests a demand from employers for ongoing in-work support (after the point of recruitment) from various*

[314] N Coleman, W Sykes and C Groom (2013) *Barriers to employment and unfair treatment at work: a quantitative analysis of disabled people's experiences* (Equality and Human Rights Commission, Research report 88), p xii.
[315] Coleman, Sykes and Groom, *Barriers to employment and unfair treatment at work: a quantitative analysis of disabled people's experiences*.
[316] Meager and Higgins*, Disability and skills in a changing economy*; Coleman, Sykes and Groom, *Barriers to employment and unfair treatment at work: a quantitative analysis of disabled people's experiences*.
[317] Meager and Higgins, *Disability and skills in a changing economy*, p 38.
[318] S Dewson et al (2005) *New Deal for Disabled People: Survey of Employers* (Department for Work and Pensions, Research Report no. 301); J Aston et al (2003) *Employers and the New Deal for Disabled People: Qualitative Research: First Wave* (Department for Work and Pensions, Research Report WAE14); J Aston et al (2005) *Employers and the New Deal for Disabled People: Qualitative Research: Second Wave* (Department for Work and Pensions, Research Report 231).

intermediary agencies to facilitate workplace integration of disabled recruits, help employers deal with transitional difficulties, and improve retention.

Against this background, several commentators have made the point that whilst a great deal of energy and resource is directed at disabled people, obliging them to comply with programmes of limited value in getting them into work, relatively little resource is directed towards encouraging and equipping employers to take a positive approach to employing disabled people and people with long term health conditions.[319] In its recent report 'Work in progress: Rethinking employment support for disabled people', a consortium of disability charities has suggested that an over-emphasis on the supply side of the labour market (disabled people themselves) and a lack of emphasis on the demand side (employers) is an important factor behind the poor success rate of Government employment policies:[320]

[Supply side] measures… fail to account for "demand-side" issues such as a lack of appropriate vacancies, or support for employers to better understand how to accommodate disabled people's needs. This has led to a reduced emphasis on other types of labour market policy that could benefit disabled people, such as a greater focus on job creation in local areas.

The current Government's launch of its Disability Confident campaign was clearly an attempt to provide encouragement, at least, for employers, but it is too early to assess whether the campaign has provided tangible help for employers and businesses.

4.7.7 Support for individual disabled people

The principal Government-sponsored mechanisms to support disabled people to access employment are:

- the Work Programme,
- Work Choice,
- Access to Work, and
- Disability Employment Advisers

4.7.8 The effectiveness of the Work Programme and Work Choice

The Work Programme and Work Choice are specifically intended to enable disabled people to move off out-of-work social security benefits and into work, while Access to Work, which has been in existence much longer, is intended to provide support to disabled people to overcome the barriers they experience in accessing work – such as specialist equipment, help with travelling to work or a support worker to assist them in the workplace. Disability Employment Advisers (DEAs), employed by JobCentre Plus, are trained to provide specialist advice and help to disabled people

[319] Meager and Higgins, *Disability and skills in a changing economy*, ch 6.
[320] R Trotter et al (2013) *Work in progress: Rethinking employment support for disabled people* (published by a consortium of disability charities), p 17.

seeking employment, including referring to suitable local services, but this role is seriously under-resourced.[321]

The Work Programme has not yet, at least, been very effective in helping disabled benefit claimants to get into work.[322] Against a target to secure sustained employment for 16.5% of Employment and Support Allowance (ESA) claimants (almost all in the Work Related Activity Group, see later sections for details) into work, statistics from July 2013 showed that only 5.3% of ESA claimants on the work programme were supported into work.[323]

Although the Government intended the 'prime' providers (mostly large corporations) to sub-contract to smaller, specialist voluntary sector providers, this hasn't been as successful as the Government hoped, partly as a result of the payment structure of the Work Programme contract.[324] In addition, Work Programme providers have not felt able to buy in specialist support for individual claimants.[325] Concern has been expressed that the 'black box' approach, in which Work Programme providers are free to use whatever methods they choose to help people get into work, has not led to the innovation expected. Indeed, the Institute for Government has said:[326]

> *Although the intention of the "black box" approach was to encourage providers to innovate by, for example, joining up a wide range of specialist services around individual needs, the programme remains a relatively narrow job-focused programme. On one hand, providers seem reluctant to invest in costly, specialist support services that could address individual barriers to work (e.g. skills, counselling and drug addiction treatment). On the other, providers are willing, but unable to access relevant funding pots (e.g. the skills budget) or co-ordinate with parallel employment support initiatives at the local level. This limits their ability to offer a holistic package of services to individuals.*

The figures for Work Choice were somewhat better, with 31% of participants achieving paid work.[327] However, the majority of disabled people claiming Employment and Support Allowance are not referred to this specialist programme.[328] The structure of employment support pushes ESA claimants in the work related activity group towards the Work Programme rather than Work Choice,[329] and there are not enough Disability Employment Advisers to refer disabled people and people with long term health conditions who would benefit from the more specialist support offered by the Work Choice programme.[330]

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[321] Work and Pensions Select Committee, *The role of Jobcentre Plus in the reformed welfare system*.
[322] Submission from Department for Work and Pensions to House of Commons Public Accounts Committee (2013) *Work Programme outcome statistics*, 33rd report, 2012-2013; Department for Work and Pensions (2013) *Work programme statistical summary*.
[323] Department for Work and Pensions (2013) *Statistical Summary of Work Programme Official Statistics*, referenced in Sayce and Crowther, *Taking control of employment support*.
[324] House of Commons Work and Pensions Select Committee (2013) *Can the Work Programme work for all user groups?*, 1st report 2013-14.
[325] T Gash, N Panchamia, S Sims and L Hotson (2013) *Making public service models work* (Institute for Government).
[326] Gash, Panchamia, Sims and Hotson, *Making public service models work*, p 48.
[327] Department for Work and Pensions (2013) *Work Choice Statistics – Number of Starts and Referrals* referenced in Sayce and Crowther, *Taking control of employment support*.
[328] Oral evidence from Robert Trotter of Scope: see Work and Pensions Select Committee *The role of Jobcentre Plus in the reformed welfare system*.
[329] Work and Pensions Select Committee, *The role of Jobcentre Plus in the reformed welfare system*.
[330] Work and Pensions Select Committee, *The role of Jobcentre Plus in the reformed welfare system*.

Recent research has revealed the failure of Work Programme providers - and JobCentre Plus itself - to take account of the access needs of disabled people, especially those in the Work Related Activity Group of ESA.[331] Hale reports that:[332]

> *Respondents reported no meaningful personalisation in the programmes of work-related activity for the WRAG. Half of respondents said their disability-related support needs were not acknowledged or addressed at all. This appears to stem from a structural disconnect in the ESA process between assessment and support.*

This constitutes direct discrimination in the provision of employment support. In addition, since work-related activity is mandatory for ESA claimants in the work-related activity group, this failure to take account of the impact of claimants' impairment or health condition could lead to their benefits being sanctioned (see Section 4.3.8.2). This is, in fact, what happened to Hale before she was moved from the WRAG to the Support Group.[333]

For the period until March 2013, the total cost of the Work Programme was £736 million[334] and over the next five years, the programme is projected to cost £3-5 billion.[335] This huge cost calls into question whether the Government is using the maximum resources available (as required by Article 2(1) ICESCR and Article 4(2) UNCRPD) to realise disabled people's right to work. Some of the evidence analysed below suggests that better use of this funding (aka State resources) on initiatives proven to be effective in terms of advancing disabled people's right to work could enable a greater number of disabled people and people with a long term health condition to reap the benefits of good jobs or self-employment.

4.7.9 Employment support that works well

There is good evidence available that many local organisations – in either the statutory or voluntary sectors – have the experience and contacts to be much more successful than either the Work Programme or Work Choice in helping disabled people into employment. The value of skilled local support is illustrated by the following example relating to people with serious mental health conditions:[336]

> *Since 2011/12 [Work Choice] has helped only 58 people with serious mental health problems per year (on average) get jobs in the whole of Great Britain, whereas one NHS Trust in just one area of London helped more than three times as many people (201) with serious mental health problems (239 posts in one year) to get jobs.*[337]

Two particular models of local support have been shown to be particularly effective: Individual Placement and Support (IPS), used effectively to support people with mental health problems to retain or gain employment, and Supported Employment, used effectively to support people with

[331] Hale, *Fulfilling Potential?*
[332] Hale, *Fulfilling Potential?*, p7
[333] No DWP apology for Work Programme 'discrimination and punishment', Disability News Service, 3 October 2014.
[334] Department for Work and Pensions (2013) *Work Programme – programme costs to 31 March 2013*.
[335] Sayce and Crowther, *Taking control of employment support*.
[336] Sayce and Crowther, *Taking control of employment support*, p 13.
[337] Central and North West London NHS Trust vocational employment results 2011/12.

learning disabilities into employment.[338] These models have been effectively used by local authorities and NHS trusts and are based on the following principles:

Individual Placement and Support:[339]

- *It aims to get people into competitive employment*
- *It is open to all those who want to work*
- *It tries to find jobs consistent with people's preferences*
- *It works quickly*
- *It brings employment specialists into clinical teams*
- *Employment specialists develop relationships with employers based upon a person's work preferences*
- *It provides time unlimited, individualised support for the person and their employer*
- *Benefits counselling is included.*

Supported Employment:[340]

- *Customer [disabled jobseeker] engagement*
- *Vocational profiling*
- *Employer engagement*
- *Job matching*
- *In-work support*
- *Career development*

Both these models entail highly personalised support for disabled people but their successful implementation by local authorities, NHS trusts and other organisations depends on strong leadership, changing the culture within local services and pro-actively engaging with and supporting local employers.[341] The evidence suggests that the implementation of these methods may offer better value for money than the Work Programme and represent a more efficient use of resources in fulfilling disabled people's right to work, as required under Article 2(1) ICESCR and Article 4 UNCRPD.

[338] R Greig, P Chapman, A Eley, R Watts, B Love and G Bourlet (2014) *The Cost Effectiveness of Employment Support for People with Disabilities - Final Detailed Research Report* (National Development Team for Inclusion).
[339] Centre for Mental Health: http://www.centreformentalhealth.org.uk/employment/ips.aspx.
[340] British Association for Supported Employment: http://base-uk.org/information-commissioners/what-supported-employment.
[341] Greig, Chapman, Eley, Watts, Love and Bourlet, *The Cost Effectiveness of Employment Support for People with Disabilities - Final Detailed Research Report*.

There is some evidence that cuts to local authority funding are affecting some successful supported employment services, since local authorities have no statutory requirement to offer such a service.[342]

4.7.10 The role of Access to Work

Access to Work is an enabling scheme, focused on providing direct, practical help to disabled people entering or already engaged in employment or self-employment. The scheme provides a range of support for disabled employees, such as specialist equipment, assistance with travel to work and the provision of support workers. Research undertaken for the DWP in 2009[343] showed generally high levels of satisfaction with Access to Work support among both disabled people and employers, but drew attention to a generally low level of awareness of the scheme among employers, disabled people and JobCentre Plus advisers.

There are certain restrictions on Access to Work provision,[344] including that it cannot be used to fund reasonable adjustments employers are expected to make under the Equality Act 2010. Some disabled people also experience difficulties with either the application/assessment process or the amount and quality of support, an issue highlighted by the British Deaf Association, many of whose members would be unable to work without adequate communication support funded by Access to Work.[345]

It is a positive development that Access to Work has recently become available for Youth Contract work experience, Traineeships, Sector-based Work Academies, Supported Internships and certain work trials. [346] In addition, disabled job seekers can download an 'eligibility letter' to take to interviews, to give potential employers confidence that their specific needs can be met in the workplace.

In December 2014, Work and Pensions Select Committee of the House of Commons published the findings of its enquiry into Access to Work.[347] In summary, its recommendations included:

- Clearer guidance should be provided for employers on their legal obligation to make reasonable adjustments to enable disabled people to access employment;
- There should be significant further investment in and marketing of the Access to Work programme to enable it to benefit many more disabled people, without decreasing the amount of support available per person;
- Many more disabled people with mental health difficulties and learning disabilities should be supported by Access to Work;

[342] S Salman 'Cutting employment support for learning disabled people is a false economy', The Guardian, 5 May 2015.
[343] S Dewson, D Hill, N Meager and R Willison (2009) *Evaluation of Access to Work: Core Evaluation* (Department for Work and Pensions research report 619).
[344] Liz Sayce (2012) *Open letter to Minister for Disabled People* (Disability Rights UK).
[345] British Deaf Association/Inclusion London (2014) *Access to Work consultation and draft report*.
[346] Esther McVey MP (2013) Written Ministerial Statement on Access to Work, 16 July 2013.
[347] Work and Pensions Select Committee (2014) *Improving Access to Work for Disabled People*, Second report of Session 2014-15.

- Marketing, administration, communication and transparency of Access to Work must be improved;

- The difficulties experienced by Deaf BSL users, including problems over communication with Access to Work staff and the limits placed on the funding of BSL interpreters, should be reviewed.

It was subsequently reported, in February 2015, that most Access to Work users were losing support when their cases were reviewed. Disability organisations in particular, many of which employ a majority of disabled people, reported that the reductions were proving to be very costly as they were obliged to make up the shortfall.[348]

In March 2015, the then Minister for Disabled People, Mark Harper MP, announced a package of reforms to Access to Work.[349] There were a number of positive initiatives announced in the Statement, including:

- The introduction of personal budgets for users with ongoing awards for support or travel;

- Improved communications, including by digital means, and a video relay service for BSL users (recommended by the Work and Pensions Select Committee);

- Specialist advice for self-employed disabled people;

- Improved support for people with mental health conditions (recommended by the Work and Pensions Select Committee).

However, the Statement also included plans that are likely to have a negative impact on disabled people who need to use the scheme. Of particular concern is the restriction in the value of any award for ongoing support to the equivalent of one and a half times the average salary, or £40,800 per year in October 2015. This restriction is likely to have the most significant impact on Deaf users of BSL, who need support from freelance BSL interpreters to enable them to do their jobs. In May 2015 the DWP published an Equality Impact Assessment of the changes to Access to Work,[350] in which it stated that particular account had been taken of UNCRPD Article 27.

The Coalition Government's proposed changes to Access to Work are mostly positive, but the scheme needs significantly greater investment. There is a strong case to be made for more resources, since research indicates that for every £1 spent on the programme, £1.48 comes back to the Treasury in tax, national insurance and benefit savings.[351]

4.7.11 Support for employers

As explained above, concern has been expressed about the almost exclusive focus of employment support on individual disabled people rather than employers. This is supported by research indicating that small and medium sized employers in particular feel the need for more information

[348] 'Most Access to Work recipients "have their support cut after reviews"', Disability News Service, 2 February 2015.
[349] Mark Harper MP (2015) Written Ministerial Statement on Access to Work, 12 March 2015.
[350] Department for Work and Pensions (2015), *Equality analysis for the future of Access to Work.*
[351] Sayce, L (2011) *Getting in, staying in and getting on Disability employment support fit for the future* (TSO)

and support to enable them to feel confident to employ a disabled person.[352] This targeted research indicated that such businesses would appreciate more support in employing disabled people and in meeting their obligations under the Equality Act, for example:[353]

- Access to information and advice, via an online "toolkit" or from Disability Employment Advisers in JobCentre Plus, including information and advice about the impact of different impairments and health conditions on factors such as health and safety;

- Financial assistance towards adaptations and other additional costs that might arise from employing a disabled person (this is seen as especially important during a recession; the provision of financial support to employers is one of the recommendations recently made by the UN Disability Committee,[354] to improve employment opportunities for disabled people in Sweden);

- 'Job brokers' to 'match' disabled job seekers to employers' needs;

- Work trials, either supported or unsupported;

- Advertising and promotion of support available for employers (since they cannot access help if they are not aware it is available).

The integral support for employers provided through both Individual Placement and Support and Supported Employment is likely to be a key reason for the success of these particular programmes.

4.7.12 The Disability Confident campaign

Some employers' support needs may be met through the Government's Disability Confident campaign, launched in 2013, which provides information and advice for employers on sources of support such as Access to Work and other support such as specific wage incentives for young disabled people on the Work Choice programme. Whilst the measures included in the campaign are welcome, some are restricted; for example, wage incentives could also be helpful to encourage businesses to employ older disabled people who have been out of the workplace for many years. It is too early to say whether Disability Confident has had a significant impact on meeting employers' needs for practical support.

4.7.13 Employers and the Work Programme

In theory, the Work Programme providers should act as effective job brokers, matching disabled job seekers with the needs of potential employers. However, the evidence indicates that whilst this approach is taken by some providers, especially the smaller sub-contractors, there is a tendency for prime providers to send poorly prepared candidates whose CVs are often not a good fit with the

[352] J Davidson (2011) *A qualitative study exploring employers' recruitment behaviour and decisions: small and medium enterprises* (Department for Work and Pensions research report 754).
[353] Davidson, *A qualitative study exploring employers' recruitment behaviour and decisions: small and medium enterprises*.
[354] Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Sweden, advance unedited version, April 2014.

requirements of the vacancy, as explained by Susan Scott-Parker of the Business Disability Forum in her oral evidence to the Work and Pensions Select Committee:[355]

> *The providers do not help an individual to explain what they know and can contribute to the business, nor do the providers understand what the employer requires from the person as they are coming through... they are not expert on what stops a disabled person from getting a job, which is in the control of the employer or in the control of the person. They are still just assuming that, if they throw enough people at this world of work, magically some will get through.*

Some large employers, such as Transport for London, with the resources to nurture mutually beneficial relationships with prime Work Programme providers, have encouraged and supported those providers to act as effective job brokers.[356] However, if this initiative were to come from Work Programme providers themselves, this would be of particular benefit to employers who need more support in employing disabled people and people with a long term health condition.

4.7.14 Opportunities for training, retraining and career development

The evidence shows a correlation between disability and educational attainment: disabled people (of all ages) are twice as likely to have no qualifications as non-disabled people, and are also less likely to have higher level qualifications. The correlation works both ways: disability may lead to lower educational attainment, but people who have experienced educational disadvantage are also more likely to become disabled later in life.[357]

The low skill profile of disabled people is a major barrier to employment,[358] making training, or retraining when an individual's impairment prevents them from continuing in their previous job, an important part of the mix of initiatives to help disabled people realise their right to work. The importance of skills training for disabled people is supported by a recommendation from the UN Disability Committee to Sweden to increase the provision of vocational training for disabled people.[359]

A consortium of disability charities, referring to the OECD's argument that developing skills is crucial for increasing disabled people's participation in the labour market, has emphasised that improving vocational skills must be a key element in developing employment support programmes.[360]

4.7.15 Do disabled employees enjoy fair and just conditions of employment?

In addition to the right to work, UNCRPD Article 27 and ICESCR Article 7 provide for a right to just and fair conditions of employment. It is therefore instructive to look at some of the evidence of

[355] Work and Pensions Select Committee, *Can the Work Programme work for all user groups?,* Minutes of oral evidence taken on 13 March 2013, qu 432.
[356] Work and Pensions Select Committee, *Can the Work Programme work for all user groups?,* Minutes of oral evidence taken on 13 March 2013, qu 398.
[357] Meager and Higgins, *Disability and skills in a changing economy*.
[358] Trotter et al, *Work in progress: Rethinking employment support for disabled people*.
[359] Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Sweden, advance unedited version, April 2014.
[360] Trotter et al, *Work in progress: Rethinking employment support for disabled people*, p 23.

disabled people's experiences in the workplace, especially insofar as they may differ from the experience of non-disabled workers.

Recent research indicates that disabled people and people with a long term health condition are far more likely to report harassment and unfair treatment at work – from employers, colleagues and clients/customers - than non-disabled workers.[361] And of disabled workers, those with mental health problems or learning difficulties are more likely to experience unfair treatment than those with physical impairments or long term health conditions.[362] Again, this raises issues of discrimination on the grounds of disability contrary to both ICESCR Article 2(2) and UNCRPD Article 4.

The types of unfair treatment and harassment reported by disabled workers include problems relating to workload, working hours, appraisals, not being given responsibility and treatment such as being ignored, shouted at, bullied or even physically attacked. Those with learning difficulties or mental health problems are particularly likely to experience being excluded, teased or shouted at.[363]

Disabled people perceive that much of the ill-treatment they experience is related to colleagues' and managers' reactions to their disability:[364]

> *The main reasons given by disabled people for unfair treatment at work were the attitudes or personalities of other people (52 per cent) or relationships at work (43 per cent); 30 per cent said that the unfair treatment they had experienced was because of their disability or condition.*

In relation to unfair treatment by managers, it is likely that issues relating to sickness management and the interpretation of equality legislation are a source of conflict and disagreement. In relation to ill-treatment by colleagues and clients or customers, discriminatory and negative attitudes may be a major factor.[365]

While any discriminatory or unfair treatment of employees for reasons relating to their impairment or health condition is unlawful, when employees are unable to resolve the situation informally within the workplace the only option to secure redress is to make an application to the Employment Tribunal. However, as explained in Section 4.2.5, disabled people face considerable barriers in making such an application.

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[361] 'Disabled employees more likely to experience ill-treatment at work', Cardiff University School of Social Sciences, 5 March 2013, reporting on Fevre, Robinson, Jones and Lewis (2013) 'The Ill-treatment of Disabled Employees in British Workplaces' *Work, Employment and Society*; Coleman, Sykes and Groom *Barriers to employment and unfair treatment at work: a quantitative analysis of disabled people's experiences*.

[362] 'Disabled employees more likely to experience ill-treatment at work, Cardiff University School of Social Sciences, 5 March 2013, reporting on Fevre, Robinson, Jones and Lewis 'The Ill-treatment of Disabled Employees in British Workplaces'.

[363] Coleman, Sykes and Groom, *Barriers to employment and unfair treatment at work: a quantitative analysis of disabled people's experiences.*

[364] Coleman, Sykes and Groom, *Barriers to employment and unfair treatment at work: a quantitative analysis of disabled people's experiences*, p x.

[365] 'Disabled employees more likely to experience ill-treatment at work, Cardiff University School of Social Sciences, 5 March 2013, reporting on Fevre, Robinson, Jones and Lewis 'The Ill-treatment of Disabled Employees in British Workplaces'.

4.7.16 Conclusion and recommendations

The above analysis shows that there continue to be significant barriers to disabled people's access to the labour market, compromising their enjoyment of the right to work (ICESCR Article 6 and UNCRPD Article 27) and the right to fair and just conditions of employment (ICESCR Article 7 and UNCRPD Article 27). These barriers include:

- A lack of understanding and enforcement of equality legislation;
- A lack of incentives, information and support for employers;
- The ineffectiveness of some aspects of employment support, notably the Work Programme, in supporting disabled people (and employers), despite consuming significant resources;
- A need for disabled people to have access and support to improve their education and skills;
- Unfair treatment of disabled employees in the workplace.

There are examples of good practice and effective support being implemented, but it is important that best practice is shared and supported by central and local Government and their partners. The Disability Confident campaign has the potential to make a difference, but it must be bold enough to promote policies that are proven to work.

In order to ensure that disabled people enjoy their right to work (set out in ICESCR Article 6 and UNCRPD Article 27), and to fair and just conditions of employment (set out in ICESCR Article 7 and UNCRPD Article 27), as well as non-discrimination and equality in their enjoyment of those rights, we recommend:

- **A change in the focus of employment policies, from imposing an obligation on disabled people to take 'any job' to facilitating their rights and aspirations to engage in work that is suitable for their aptitudes, interests and abilities;**
- **A reform of the assessment of work capability (see discussion of the Work Capability Assessment in Section 4.3.6 below) to align it much more closely with the world of work and the support disabled people actually need to engage in paid work;**
- **The use of an evidence-based approach to the development of policy and practice, drawing on examples of best practice ('what works'), such as Individual Placement and Support and Supported Employment;**
- **Engagement with employers and services at a local level, encouraging and supporting employers to take positive steps to employ disabled people;**
- **The placing of a greater emphasis on education and skills and making more use of workplace-based support, including work trials and in-work training such as apprenticeships;**
- **The adoption of a more personalised approach to employment support, giving disabled people and employers choice and control over the available resources with advice/brokerage where necessary;**
- **The merging of funding streams to provide 'whole person' support, including employment support, addressing the full range of disabled people's support needs.**

4.8 The Rights to Social Security, Social Protection and an Adequate Standard of Living

The original rights to an adequate standard of living and to social security are set out in Articles 9 and 11 ICESCR. Article 28 UNCRPD sets out the right to an adequate standard of living in relation to disabled people.

4.8.1 Progress in realising disabled people's rights to an adequate standard of living and to social protection

In recent years the CESCR has commended the UK Government for certain measures designed to tackle discrimination against disabled people, one of the contributory causes of disability-related poverty. For example, the Committee commended the UK for:

- the passing of the Human Rights Act 1998,[366]
- the establishment of the Disability Rights Commission[367] and subsequently the Equality and Human Rights Commission (and the equivalent bodies in Scotland and Northern Ireland),[368] and
- the introduction of the Equality Bill (now the Equality Act 2010).[369]

Disabled people's rights to social security have also been protected by specific policies, adopted by governments across the political spectrum, to refine the social security system so that it recognises the particular needs of disabled people. For example, disability living allowance[370] is specifically designed to help meet the greater costs incurred by disabled people. Working tax credits (which replaced disability working allowance) provide disabled adults with additional financial help in recognition of the disadvantages they face in the labour market, and child tax credits provide additional help to families with disabled children in recognition of the particular pressures and costs they face.[371]

There is, therefore, clear evidence that in the recent past the UK has taken some very positive steps towards progressively realising disabled people's rights to an adequate standard of living, social protection and social security. However, it is important to examine the extent to which this progress is continuing and to identify risks of retrogression arising from changing economic and social factors, policy changes and administrative challenges in relation to social security.

[366] Committee on Economic, Social and Cultural Rights: Concluding observations on the fourth periodic report of the UK, June 2002, para 4.
[367] Committee on Economic, Social and Cultural Rights: Concluding observations on the third periodic report of the UK, December 1997, para 5(d).
[368] Committee on Economic, Social and Cultural Rights: Concluding observations on the combined fourth to fifth periodic report of the UK, June 2009, para 4.
[369] Committee on Economic, Social and Cultural Rights, Concluding observations on the combined fourth to fifth periodic report of the UK, June 2009, para 6.
[370] Introduced in 1992, now being replaced by PIP, as explained in Section 3.5.2.
[371] Tax Credits Act 2002, as amended.

4.8.2 The level of basic social security benefits

One of the most fundamental considerations in relation to the right to social security (and the right to an adequate standard of living) is the adequacy of social security benefits. The CESCR has stated that it is vital that a minimum essential level of benefits is provided to all individuals and families to enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs and the most basic forms of education.[372] In January 2014, the European Committee on Social Rights, which reports on the conformity of individual States with the European Social Charter, ratified by the UK in 1962), delivered the following conclusions in relation to the adequacy of social security benefits in Great Britain:[373]

> *The Committee concludes that the situation in United Kingdom is not in conformity with Article 12§1 of the Charter on the ground that: the minimum levels [sic] of short-term and long-term incapacity benefit is manifestly inadequate; the minimum level of state pension is manifestly inadequate; the minimum level of job seeker's allowance is manifestly inadequate.*

The adequacy of benefits may also be affected by policies that require disabled people to use income from out of work benefits or disability benefits to make up for the inadequacy of other benefits. Examples of this include the social sector size criteria for housing benefit claimants in social housing (analysed in Section 3.5.1.3 above) and the replacement of council tax benefit with council tax support, with the shortfall of funding from central Government leading many local authorities to levy council tax from residents who depend on means-tested benefit income.[374]

Under the Welfare Reform and Work Bill 2015, which sets out the relevant provisions of the Summer Budget 2015, most working age benefits are to be frozen for four years. Although most disability benefits are to be exempt from the freeze, disabled people also rely on universal benefits, such as housing benefit and the basic element of working tax credit, which will be frozen. This measure will further reduce the adequacy of benefits claimed by disabled people and push them further into poverty.

The Welfare Reform and Work Bill 2015 will also make changes to tax credits. Although the disability element of working tax credit will be unaffected, all claimants of working tax credits – and the equivalent element of Universal Credit – will see their payments reduced as a result of specific cuts to in-work support.

4.8.3 The impact of changes to social security policy

The last Labour Government's reforms to long term sickness benefits[375] formed the start of a period of ambitious reform of to social security benefits, the pace and breadth of which have increased under the current Government, for which reform has been a major legislative priority. The reforms facilitated by the Welfare Reform Act 2012 are far-reaching, impacting on almost every aspect of social security. Some of these reforms have already been discussed above, in relation to their impact on disabled people's enjoyment of the right to independent living. However,

[372] CESCR, General Comment No 19, para 59(a).
[373] European Committee of Social Rights (2014), Conclusions XX-2 (2013) (Great Britain) Articles 3, 11, 12, 13 and 14 of the 1961 Charter, p 19.
[374] Joseph Rowntree Foundation (2013) *The impact of localising council tax benefit*.
[375] Welfare Reform Act 2007.

this section will examine their impact on disabled people's enjoyment of their ICESCR and UNCRPD rights to social protection, social security, and an adequate standard of living.[376]

4.8.4 The concerns of the JCHR in relation to the Welfare Reform Bill

In its report scrutinising the Welfare Reform Bill (now the Welfare Reform Act 2012), the JCHR expressed numerous concerns about the impact of the Bill on disabled people's rights to social protection and to an adequate standard of living.[377] The Committee pointed out that even in a time of austerity, there is a strong presumption in the UN human rights framework against measures resulting in retrogression in the realisation of these rights (see Section 2.3.5).

The following specific concerns were raised by the JCHR:

- The lack of detailed assessment by the Government of the human rights implications of the Bill under the relevant UN treaties, including ICESCR and UNCRPD;[378]
- The risk of destitution as a result of conditionality (sanctions), in contravention of Article 3 ECHR;[379]
- The late publication of impact assessments and the failure to assess the cumulative impact of several changes affecting individual claimants;[380]
- The failure to publish draft regulations, with clear policy explanations, impact assessments and safeguards[381] at the same time as the publication of the Bill; the Committee pointed out that without draft regulations, human rights monitoring was very much more difficult;
- The lack of detail in relation to monitoring arrangements.[382]

The Committee also expressed considerable concern about the following specific issues:

- The one-year limitation period for claims for contributory ESA for claimants assigned to the work related activity group (WRAG), combined with emerging evidence of problems with the work capability assessment (WCA), could result in a disparate impact on claimants, in breach of ECHR Article 14;[383]
- Disabled people who fail to qualify for DLA (or PIP) being adversely impacted by the benefit cap and forced to move despite having home adaptations and/or needing the support of their local community;[384]

[376] ICESCR Articles 9 and 11; UNCRPD Article 28.
[377] JCHR, *Legislative Scrutiny: the Welfare Reform Bill*.
[378] JCHR, *Legislative Scrutiny: the Welfare Reform Bill*, para 1.35.
[379] JCHR, *Legislative Scrutiny: the Welfare Reform Bill*, para 1.45.
[380] JCHR, *Legislative Scrutiny: the Welfare Reform Bill*, para 1.15.
[381] JCHR, *Legislative Scrutiny: the Welfare Reform Bill*, para 1.17.
[382] JCHR, *Legislative Scrutiny: the Welfare Reform Bill*, para 1.19.
[383] JCHR, *Legislative Scrutiny: the Welfare Reform Bill*, para 1.52.
[384] JCHR, *Legislative Scrutiny: the Welfare Reform Bill*, para 1.61.

- Disabled people being disproportionately affected by the under-occupation penalty for housing benefit claimants in social housing, specifically in relation to their need to remain close to support networks;[385] (see Section 3.5.1.3);

- DLA reform, by which DLA will be replaced by PIP with the intention of reducing the budget for the benefit by 20%, which will have a retrogressive impact on disabled people's enjoyment of the right to independent living;[386] (see Section 3.5.2);

- The retrogressive cumulative impact of the provisions in the Bill.[387]

4.8.5 In-depth examination of specific areas of concern

The following specific areas of concern in relation to disabled people's standard of living and access to social protection are examined below:

- The impact of Employment and Support Allowance (ESA), including the operation of the Work Capability Assessment (WCA), introduced under the last Labour Government,[388] and the time-limiting of contributory ESA for claimants put into the work-related activity group and mandatory reconsideration before appeal, introduced under the current Coalition Government;[389]

- Reduction in the availability of advice services, due to the withdrawal of legal aid[390] and other funding;

- The risk of destitution, for reasons including (but not confined to) conditionality (sanctions), poor administration of benefits, low wages and the high cost of living; the consequent need for short term help from non-Governmental agencies such as food banks.[391]

4.8.6 The impact of employment and support allowance and the work capability assessment

As explained above, the right to social security, set out in Article 9 ICESCR, encompasses the right to access or maintain benefits either in cash or in kind to ensure protection against loss of income from paid employment as a result of sickness, disability or employment injury.[392] If there is a failure to ensure that income replacement benefits are provided in these circumstances, the UK would be failing to protect and fulfil disabled people's rights to social security. For the majority of disabled people without alternative financial resources, this would also constitute a failure to fulfil the right to an adequate standard of living set out in Article 11 ICESCR. For disabled people experiencing the greatest poverty and disadvantage, the non-provision of basic income replacement benefits may

[385] JCHR, *Legislative Scrutiny: the Welfare Reform Bill*, para 1.65 and 1.66.
[386] JCHR, *Legislative Scrutiny: the Welfare Reform Bill*, para 1.71.
[387] JCHR, *Legislative Scrutiny: the Welfare Reform Bill*, para 1.82.
[388] Welfare Reform Act 2007.
[389] Social Security, Child Support, Vaccine Damage and Other Payments (Decisions and Appeals) (Amendment) Regulations 2013.
[390] Legal Aid, Sentencing and Punishing of Offenders Act 2012, Part 1.
[391] 'Numbers relying on food banks triple in a year', BBC News, 16 October 2013.
[392] CESCR, General Comment No 19, para 2.

result in the UK failing to satisfy its minimum core obligations under ICESCR and UNCRPD, to ensure a level of benefits sufficient to provide basic food and shelter (for details see Section 2.3.6).

The current income-replacement benefit in the UK for those claimants who are too sick or disabled to work is employment and support allowance (ESA),[393] which has been progressively replacing incapacity benefit (IB) since it was first introduced in 2008[394] - initially for new claimants, but for existing incapacity benefit claimants from 2011 (with a pilot from 2010).[395] In the context of the right to social security it is important to note that if a claimant is unsuccessful in their ESA claim, they are not normally entitled to any other income-replacement benefit unless they sign on for Jobseeker's Allowance (JSA), the benefit intended for people who are unemployed but able to work (which is conditional on active job seeking and other work-related obligations).

4.8.7 The deficiencies of the Work Capability Assessment (WCA)

Since ESA was brought in for new claimants in 2008, there has been increasing concern expressed by claimants and benefit advisers[396] about the deficiencies of the WCA, which purports to assess whether claimants are fit for work, able to engage in work-related activity with a view to getting back to work in the future, or unable to work or undertake work-related activity at all.[397] The assessment itself is undertaken by a healthcare professional employed by a corporate contractor, Atos Healthcare, but the decision on entitlement to ESA is made by a Jobcentre Plus decision-maker, using all the evidence available, including the assessment report, medical evidence and information provided by the claimant.

The work capability assessment has three possible outcomes. Claimants who are found fit for work are not entitled to continue claiming ESA. Claimants who are assessed as being able to work in the foreseeable future are placed in the ESA work related activity group (WRAG), for which receipt of ESA is conditional on engagement in some form of work related activity to prepare for a return to work. Those who are assessed as unlikely to be able to work in the foreseeable future are placed in the support group (SG) and receipt of ESA is unconditional.[398]

4.8.8 The problem of inaccurate assessments

It has been widely reported that, as a result of deficiencies in the way the WCA operates, many claimants who are seriously ill or severely disabled, and in need of an income-replacement benefit because they are unable to work, are found fit for work or placed in the WRAG when in reality they need unconditional support.[399] If claimants are found fit for work the only alternative income-replacement benefit normally available is JSA. However, JSA is only paid to claimants who are available for work, so those who are in fact too ill to work may be told by the Jobcentre that they are too ill to claim JSA or that they are unable to fulfil the conditions of JSA, imposed to

[393] Department for Work and Pensions (2012) *Employment and Support Allowance: Help if you are ill or disabled.*
[394] Welfare Reform Act 2007.
[395] The Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No.2) Regulation 2010, SI No.1907; The Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No.2) (Amendment) Regulations 2010, SI No.2430.
[396] Eg, Citizens Advice Bureau (2012) *Right First Time*.
[397] DWP, *Employment and Support Allowance: Help if you are ill or disabled*.
[398] DWP, *Employment and Support Allowance: Help if you are ill or disabled*.
[399] Eg, CAB, *Right First Time*.

demonstrate they are actively searching for and preparing for work, including keeping regular appointments at the Jobcentre.[400, 401]

Many commentators have pointed out that the WCA, including both the descriptors (criteria) against which claimants' needs are assessed and the operation of the assessment itself (including the use of medical evidence and the adequacy of the face to face assessment by the healthcare professional employed by Atos Healthcare),[402] does not take proper account of the nature and breadth of "real world" factors shaping whether a person can secure and maintain sustainable employment.[403] The impact of incorrect assessments is very often significant hardship and poverty due to the imposition of inappropriate conditions or sanctions (as discussed in Section 4.3.8.2), threatening the realisation of the right to social security and, for many, the right to an adequate standard of living. It has recently been reported that 2,380 people died between December 2011 and February 2014 after their WCA told them that they should be looking for work.[404]

Case study (comment on We are Spartacus website, November 2012)

My mother has had all payments stopped, and it has been recommended that she goes on job seekers. Some days she would not be able to make it to the job centre at all. Because of this lack of money, she has had to move in with an abusive ex-partner, which makes her illnesses worse. Her only other option that she has been offered is to move to a hostel/refuge which is miles and miles away from her children. I personally only work part time and trying to help her support herself has also put me in debt.

4.8.9 The impact of 'mandatory reconsideration before appeal'

Inaccurate assessments and incorrect decisions on entitlement to ESA have resulted in a very high number of appeals and therefore a long wait to appeal against an inappropriate decision.[405] The introduction of a mandatory reconsideration stage before an appeal can be lodged with the tribunal service is likely to exacerbate this situation, especially since there is no requirement under the regulations for the DWP to comply with any time limit for undertaking a reconsideration.

Until October 2013 any claimant who appealed the outcome of their WCA continued to receive ESA at the assessment rate pending appeal, providing them with an income. However, new regulations[406] make reconsideration of the decision by DWP mandatory before an appeal can be lodged with the tribunal service, resulting in a gap in payment, since there is no right to payment of

[400] H Barnes, J Oakley, H Stevens and P Sissons (2011) *Unsuccessful Employment and Support Allowance claims* DWP Research report 762 (Inst for Employment Studies).
[401] National Association of Welfare Rights Advisers (2013) *Submission to the Independent review of the Work Capability Assessment – Year 4*.
[402] House of Commons Public Accounts Committee (2013) *Report on DWP: Contract Management of Medical Services.*
[403] S Benstead et al (2014) *Beyond the Barriers* (Spartacus Network).
[404] Stone J (2015) 'Thousands have died soon after being found 'fit to work' by the DWP's benefit test' *the Independent*, 27.08.2015, http://www.independent.co.uk/news/uk/politics/over-4000-people-have-died-soon-after-being-found-fit-to-work-by-the-dwps-benefit-tests-10474474.html
[405] Ministry of Justice (2013) *Quarterly tribunal statistics April-June 2013*, including data from 2009/10.
[406] Social Security, Child Support, Vaccine Damage and Other Payments (Decisions and Appeals) (Amendment) Regulations 2013.

benefit pending reconsideration.[407] The Minister of State for Employment has explained[408] that claimants in this situation can apply for JSA but have their job-seeking obligations tailored to the limitations of their impairment or health condition.

Unhelpfully for claimants, there appears to be a lack of clarity in relation to the way in which a claim for an alternative benefit, such as JSA, during the reconsideration stage will work in practice. There is a very real risk that claimants who are found fit for work when assessed for ESA, but are in reality too ill or disabled to work, will have no income while their claim is being reconsidered, as illustrated by this case study from West Dumbartonshire Citizens Advice Bureau:[409]

> *A client was appealing an ESA decision which deemed him/her fit for work. Whilst awaiting the outcome of a Mandatory Reconsideration request, the only source of income s/he could claim was JSA. S/he advised JCP of potential restrictions in jobseeking caused by her physical and mental health. S/he was then told that these meant s/he was not fit for work under the JSA agreement. As a result, the client was left ineligible for payment of either sickness or jobseeking benefits.*

The way in which this policy operates in practice constitutes a failure to respect, protect and fulfil disabled people's rights to social security, set out in ICESCR Article 9 and UNCRPD Article 28, and where a claimant has no recourse to other funds to meet basic needs, their right to an adequate standard of living, set out in ICESCR Article 11 and UNCRPD Article 28.

4.8.10 The impact of multiple appeals and frequent assessments

Since the introduction of ESA there have been a large number of appeals, including a high proportion of successful appeals, against incorrect assessments. According to Ministry of Justice data, 647,527 appeals were heard between 2009 and June 2013, of which 40% were decided in favour of the claimant.[410] Figures for the proportion of successful appeals were also given in July 2013 in a written answer to a Parliamentary question.[411]

The sheer number of appeals lodged against ESA decisions is causing significant delays, which are extremely stressful for claimants. In addition, the fact that ESA is not paid during the reconsideration period means the frequency of assessments may also cause considerable financial hardship.

> **Case study (from online survey on the We are Spartacus website):**
>
> *I have worked all my life… but three years ago I became too ill to work, and had to claim benefits for the first time in my life...*
>
> *I've had three years of hell at the hands of the DWP, firstly waiting for over a year for my ESA appeal to be heard, an appeal I won, but which left me in severe pain for 4 months, as*

[407] Hansard, Lord Freud, HL deb, col 745, 13 February 2013, debate on The Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013.
[408] Hansard, Fourth Delegated Legislation Committee, col 9, 3 September 2013.
[409] West Dumbartonshire Citizens Advice Bureau (2014) *Unjust and Uncaring: A report on conditionality and benefits sanctions and their impact on clients*, p 29.
[410] Ministry of Justice, *Quarterly tribunal statistics April-June 2013* (including data from 2009/10)
[411] Hansard, HC Deb, Col 211W, 9 July 2013.

I had to struggle up three stairs, with the help of another disabled person as the appeal centre had no disability access. Even the disabled toilets were locked, when we finally got into the building. Incidentally, the DWP managed to lose 5 of my appeals which the CAB submitted, even faxed appeals which they verified they'd received.

During the year of waiting I was only able to eat as my 85 year old mother was sending me cash in the post every week, I amassed a huge amount of debts, with bank overdraft bank charges.

DWP systems do not appear to take account of the dates of appeal decisions when they trigger reassessments, meaning many claimants receive a new assessment form just weeks after winning an appeal,[412] repeating the process almost immediately due to incorrect decisions and short benefit awards. Many individual disabled people and people with long term health conditions have spoken about the stress and hardship of this 'revolving door' process:

Case study (comment on We are Spartacus website, November 2012)

I have a history of mental health problems way back to childhood; I worked very hard until my mid 30's. I rarely go out the door these days (there's a name for this condition I find hard to write). I was told 2 years ago I was HIV positive and I took an overdose of sleeping tabs and I was sectioned for a few weeks.

My last overdose was 3 weeks ago after having my 3rd round of ESA benefit forms arrive....

I first joined this merry-go-round of constant ESA forms 2 years ago; strangely I'm told stress is bad for my condition and so I just seem to get worse. Firstly I was placed into the work related group because I was unable to attend their interview even though my GP etc had written them in good time requesting they visit me at home. It was 8 months later my appeal was granted and [I was] placed the support group, and just a week later when the new ESA form dropped on my doormat, and so the process began again, and here I go 3rd time around living in fear...

It's really not about the money for my needs are very few. I am careful not to have to heating on unless it's really needed etc. I live on basic food, life really is about getting by "one day at a time". Human rights? I'm bitter and angry and Atos/Government may get me on the slab yet.

Specific concern has been expressed by disabled people about the impact on their health of frequent assessments, for example:

Case study (comment on We are Spartacus website, November 2012)

I want to share my story but am too afraid to do so – I've had trouble passing WCA, had multiple (successful) tribunals but live in constant dread of the next time. I don't trust them to not connect the dots, identify me and use it against me, so my voice feels stolen.

[412] Hansard, Westminster Hall Deb, Col 346WH, 25 October 2012.

I am sick, I've been getting sicker since the process began. My doctors are no longer sure how to treat me since I can't escape from the persistent threat that they are coming for me and the never-ending acutely anxious state it creates. My condition has been getting worse and further co-morbidity diagnoses have been added. My life is in tatters, my treatment is compromised. I'm not getting better because the WCA is in the way.

And I can't tell anyone because I'm sure they'll hold my ability to fight back as proof that I am able to function when I'm not.

Parliamentarians have also expressed their concern about the cumulative impact of frequent assessments on the health and well-being of disabled people and people with long term health conditions; for example, in October 2012 Dame Anne Begg, Chair of the Work and Pensions Select Committee, said: [413]

The Government should not underestimate the cumulative impact on vulnerable people of frequent reassessments. There is ample evidence that the WCA has been damaging individuals' health and may be a factor in some suicides.

If disabled claimants feel unable to continue claiming sickness benefits due to the stress of frequent assessments and appeals, they are unable to enjoy their right to social security set out in ICESCR Article 9. However, it is encouraging to note that in the fourth annual review of the WCA, Dr Paul Litchfield recommended that the Government consider a minimum period (eg 6 months) between a successful appeal decision and a recall notice, unless there are good grounds for believing that an earlier review is indicated.[414]

4.8.11 The 365-day limit on contributory ESA for claimants in the WRAG

As noted above, the JCHR expressed particular concern about the impact of the 365-day time limit on the payment of contributory ESA to claimants in the work related activity group. Once eligibility to contributory ESA has ceased, income-related ESA cannot be paid to any claimant whose partner earns more than a low wage of around £150 per week.[415] During debate on this issue in the House of Lords, peers pointed out that the Government estimated that it took most (over 90%) disabled people and people with a long term health condition more than one year to get back into work.[416]

The Disability Benefits Consortium explained the hardship that would be caused if the time limited of contributory ESA was implemented, using a case study:[417]

I can't believe the Government is planning to take away all my ESA after just 12 months because my wife works more than 24 hours a week. I had renal cancer and have had a kidney removed. I'm still in a lot of pain, I need a stick to walk and get awful pins and needles down my legs. Without my ESA we would find it really difficult to get by. We have

[413] Hansard: Westminster Hall Deb, Col 323WH, 25 October 2012.
[414] Dr Paul Litchfield (2013) *An Independent Review of the Work Capability Assessment – year four*, Ch 4.
[415] Hansard, HL Deb, Lord Patel, col 150, 11 January 2012.
[416] Hansard, HL Deb, Lord Patel, col 150, 11 January 2012.
[417] Disability Benefits Consortium (2012) *Briefing for Peers on amendments to Clause 51: Employment and Support Allowance time-limiting.*

used up virtually all our savings already. I have worked all my life and paid into the system but this doesn't seem to mean anything.

In written evidence to the Work and Pensions Select Committee, Sarah Hannan, who advises benefit claimants, reported the following experience with one of her clients:[418]

Two weeks after me telling a couple that they were not entitled to any means tested benefits because she worked, she kicked him out. He is now getting ESA means tested and will get housing benefit and council tax reduction when social services find him appropriate accommodation. The Work related activity group money was being used to pay their mortgage. The stress of your partner having a stroke in their 30s must be bad enough without being told that all the help you are going to get when you have a young family is DLA and child tax credits. The end of the 365 days often coincides with the end of the mortgage payments insurance.

It is reasonable to conclude that low income families especially, where one partner loses entitlement to ESA after the arbitrary period of just one year, may struggle to maintain an adequate standard of living.

Plans to abolish the WRAG

Under the Welfare Reform and Work Bill currently going through Parliament, the work-related component of ESA (for those in the WRAG) will effectively be abolished from April 2017, from which time new claimants will receive the same amount as claimants on JSA. At present rates, this will mean that new claimants will receive nearly £30 less per week than current claimants in the WRAG. (Similar changes will be made to Universal Credit, which is replacing income-related ESA). When this measure was announced in the Summer 2015 Budget, the rationale was explained as improving "work incentives".[419] However, within the structure of ESA, those placed in the WRAG have not been found "fit for work"; rather, they have been found to have "limited capability for work". Claimants in the WRAG have greater barriers to work than those on JSA and it generally takes them longer to find work than JSA claimants. Justifying the change as designed to improve work incentives implies that the main barrier to employment for claimants in the WRAG is one of motivation, although much research suggests that for most claimants in the WRAG the main barrier to employment is their impairment or health condition[420] (and employers' unwillingness to employ disabled people and people with serious long term health conditions). Paul Farmer, Chief Executive of Mind, said:[421]

Reducing the amount provided to those in the Work Related Activity Group of ESA from about £5000 to £3500 a year will make people's lives even more difficult and will do nothing to help them return to work.

People being supported by ESA receive a higher rate than those on JSA because they face additional barriers as a result of their illness or disability, and typically take longer to move into work. Almost 60 per cent of people on JSA move off the benefit within 6 months, while

[418] Written evidence submitted by Sarah Hannan; see Work and Pensions Select Committee inquiry into Employment and Support Allowance (2014).
[419] Summer Budget 2015, HC 264 2015-16, para 41.
[420] 'Budget benefit cut "insulting and misguided"', Mind, 8 July 2015 **and** Hale, *Fulfilling Potential?*
[421] 'Budget benefit cut "insulting and misguided"', Mind.

almost 60 per cent of people in the WRAG need this support for at least two years. It is unrealistic to expect people to survive on £73 a week for this length of time.

Ben Baumberg of the University of Kent has pointed out that partly due to the flaws in the WCA, many of the almost half a million claimants in the WRAG are severely disabled and some have progressive, incurable conditions. In the light of this, Baumberg suggests that the abolition of the WRAG may reduce employment of disabled people: [422]

The logical reaction to this policy for sick and disabled people will be to try and get into the Support Group, and then once on the Support Group to make sure they don't try anything 'risky' like trying to work. This is precisely the opposite behaviour that the Chancellor said he was trying to encourage in this move.

….. If the WRAG/Support Group distinction is made even sharper, then claimants, their GPs, Maximus [the company that recently took over the delivery of the WCA from Atos] assessors, and DWP decision-makers may be ever-more likely to say that there is a health risk to placing someone in the WRAG. The net result would be that people who might otherwise be placed in the WRAG are instead placed in the Support Group.

Since claimants in the WRAG face greater barriers to employment than JSA claimants, and are therefore likely to remain in receipt of income-replacement benefits for longer, it seems clear that the principal result of the abolition of the WRAG will be to impoverish disabled people even further. On the face of it, therefore, it seems clear that this proposal constitutes a failure to respect, protect and fulfill disabled people's enjoyment of the right to social security and social protection under UNCRPD Article 28 and ICESCR Articles 9 and 11.

4.8.12 Conclusion and recommendations

The key concern in relation to employment and support allowance, and the operation of the work capability assessment, is that structure of the benefit and the frequency of inaccurate assessments leaves many people with long term health conditions in a no-man's land – neither eligible for out of work benefits nor able to undertake paid work. This failure to provide income replacement benefits to disabled people and people with long term health conditions when they are unable to work constitutes a failure to respect, protect and fulfil disabled people's right to social security set out in ICESCR Article 9 and UNCRPD Article 28 and, for many disabled people, their right to an adequate standard of living set out in ICESCR Article 11 and UNCRPD Article 28.

In response to the available evidence on the impact of ESA and the WCA on disabled people's rights to social protection, social security, and an adequate standard of living, we recommend that ESA and the WCA should be fundamentally reformed, in line with the following principles:

- **The provision of a secure safety net to claimants whose ability to engage in paid work is compromised by their impairment or health condition;**
- **The removal or increase in the time-limit for claiming contributory ESA for those in the WRAG;**

[422] B Baumberg (2015) 'Why the Budget's cut to ESA may backfire', Rethinking Incapacity blog, 8 July 2015.

- **An assessment that takes account of the real barriers to employment faced by disabled people and people with a long term health condition;**
- **A much stronger link between the assessment of work capability and the support available (such as through Access to Work) to enable disabled people and people with a long term condition to return to work;**
- **Proper consideration of medical evidence in all claims for ESA;**
- **Assessments undertaken no more frequently than is reasonably necessary (taking account of medical evidence) to check the claimant's continuing eligibility for ESA;**
- **A review and appeal process that does not deny social security income to a claimant who chooses to appeal a decision on eligibility.**

4.9 Reduced availability of advice services

The processes involved in applying for social security benefits and appealing against adverse decisions are not always straightforward, so advice services run by charitable or statutory bodies are a vital source of support for disabled people and people with long term health conditions[423] to exercise their right to social security and social protection. For example, figures from Citizens' Advice have shown that representation at an employment support allowance appeal by a welfare rights adviser can increase the chances of success from around 30% or lower to around 80%.[424] However, such services have had their funding cut in recent years and struggle to provide the same level of service as previously, at a time when demand is at an all time high due to the extent and breadth of welfare reform.[425]

4.9.1 Reduction in funding for advice services

From April 2013, legal aid was removed from many areas of social welfare law.[426] In addition, reductions in local authority funding have forced councils to reduce funding of local advice charities,[427] including Citizens' Advice Bureaux. Many advice services have therefore been forced to downsize, laying off staff and reducing services at a time when increasing numbers of claimants need advice due to the impact of welfare reform.[428] The Low Commission, set up and chaired by Lord Low, has reported that:[429]

[423] Work and Pensions Select Committee Session (2010) *Decision making and appeals in the benefits system*, 2nd report of session 2009-2010.
[424] 'Citizens Advice calls for financial penalties on Atos', Citizens Advice press release, August 2012.
[425] The Low Commission (2014) *Tackling the advice deficit: A strategy for access to advice and legal support on social welfare law in England and Wales*.
[426] Legal Aid, Sentencing and Punishing of Offenders Act 2012, Part 1.
[427] D Morris and W Barr (2013), The impact of cuts in legal aid funding on charities*, Journal of Social Welfare and Family Law*, Vol 35, No 1, 79–94.
[428] Morris and Barr, 'The impact of cuts in legal aid funding on charities'.
[429] The Low Commission, *Tackling the Advice Deficit: A strategy for access to advice and legal support on social welfare law in England and Wales*.

Citizens Advice's overall income is estimated to have fallen from £177m in 2010/11 to £144m in 2013/14, a reduction of £33m (over 18.5 per cent), of which £22m is accounted for by loss of legal aid in 2013/14 and most of the remainder is from cuts in local authority funding.

4.9.2 The impact of reduced availability of advice services

In its response to the initial proposals to restrict legal aid in 2010, the Equality and Human Rights Commission[430] identified a number of human rights and equality-related difficulties with the measures that were eventually included in the Legal Aid, Sentencing and Punishing of Offenders Act 2012. It was clear that removing legal aid from most welfare benefits cases, and reducing the sustainability of advice services as a whole, was likely to have a disproportionate impact on disabled people, who are more likely to claim benefits.

In its publication, 'Out of Scope',[431] Citizens Advice gave examples of the types of cases, including those concerning social security benefits, with which it would no longer be able to assist without the financial and legal support provided by their legal aid contracts. More recently, the Low Commission recognized that the impact of reducing the availability of advice services would be greater on certain groups of people, including disabled people:[432]

…in a time of economic instability and austerity, anyone can be affected, whether they are a newly redundant worker, a highly skilled immigrant or a disabled person affected by changes to the provision of welfare support. Nonetheless, it is the most vulnerable or deprived people in society who are most likely to be affected, including many disabled people.

In its survey findings, the Low Commission identified some significant difficulties in the areas surveyed, where legal aid restrictions and reduced local authority funding were contributing to existing difficulties. Some of these findings demonstrated significant difficulties in relation to the ICESCR/UNCRPD right to an adequate standard of living, for example:[433]

In Bristol, despite the fact that the City Council has continued to be very supportive of the advice sector, there has been an 18 per cent decrease in funding for the agencies surveyed. The majority of the decrease in funding has been at the Law Centre (over £100,000), which has had to make five staff redundant. The CAB reported that it is having to manage increasing numbers of general poverty queries and seeing increasing evidence of absolute poverty.

[430] Equality and Human Rights Commission (2010) *Response to the Consultation on reform of legal aid in England and Wales*.
[431] Citizens Advice Bureau (2012), *Out of scope, out of mind: Who really loses from legal aid reform*.
[432] The Low Commission, *Tackling the Advice Deficit: A strategy for access to advice and legal support on social welfare law in England and Wales*, para 1.4.
[433] The Low Commission, *Tackling the Advice Deficit: A strategy for access to advice and legal support on social welfare law in England and Wales*, Box 3.

4.9.3 Mitigating the impact of reduced funding of advice services

The Low Commission report[434] made a number of detailed recommendations for mitigating the impact of the legal aid reforms and the reduced funding of advice services. The Commission was particularly mindful, in making its recommendations, of the need for a range of solutions that are above all cost-effective[435] during a time of economic austerity. In particular, as part of a multi-faceted solution, it recommended that problems be addressed as early in the process as possible to avoid unnecessary costs when the situation has escalated; for example, in relation to social security, resources should be concentrated on making the correct decision on entitlement first time, thus reducing the need for support with appeals and thereby ensuring resources are used wisely. Importantly, the Commission recommended:[436]

> *The next UK Government should set out and publish a National Strategy for Advice and Legal Support in England and Wales... [and] The Ministry of Justice and the Welsh Government should consult the Equality and Human Rights Commission on the development and implementation of the national strategies for advice and legal support to ensure that the needs of disadvantaged and discriminated against groups are taken into account.*

4.9.4 Conclusion and recommendations

Applying for social security benefits, including presenting evidence and appealing against an adverse decision, can be a daunting and complex task for some disabled people, due to the complexity of the benefit system and the nature of the claim process. Since disabled people are particularly likely to need support from social security, because of the barriers to paid work and the additional costs of living with an impairment, they are disproportionately affected by the reduced availability of advice services, which has an impact on their enjoyment of their ICESCR and UNCRPD right to social security and, for many, an adequate standard of living.

We recommend that the Government implement the recommendations of the Low Commission's report, 'Tackling the Advice Deficit: A strategy for access to advice and legal support on social welfare law in England and Wales' (2014), paying particular attention to the specific needs of disabled people for advice and support to exercise their right to social security and maintain an adequate standard of living.

4.10 The risk of destitution

Following the global financial crisis in 2008, increasing concern has been expressed about the incidence of absolute poverty among the working age population.[437] If the Government of a State Party fails to intervene to ensure the minimum core obligations under ICESCR and UNCRPD[438] are met, those living in that State are at risk of destitution.

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[434] The Low Commission, *Tackling the Advice Deficit: A strategy for access to advice and legal support on social welfare law in England and Wales*.
[435] ICESCR Article 2(1) and UNCRPD Article 4(2).
[436] The Low Commission, *Tackling the Advice Deficit: A strategy for access to advice and legal support on social welfare law in England and Wales*, para 2.12, recommendations R7 and R10.
[437] Eg, Institute for Fiscal Studies (2013) *Living Standards, Poverty and Inequality in the UK*.
[438] CESCR, General Comment No 3, para 10.

In 2012 the UN Special Rapporteur on the Right to Food reported on the problem of food insecurity in Canada.[439] It is instructive to examine the conclusions and recommendations of his report, which relate to the obligations under ICESCR and may be particularly relevant for the UK given certain similarities between the two countries. The report highlighted increasing economic inequality in Canada, with a growing number of people, especially those dependent on social assistance, unable to afford sufficient food and having to rely on food banks and other food aid. The report's recommendations included, among others, the implementation of a rights-based food strategy, setting a level of social security benefits sufficient to promote the enjoyment of the ICESCR right to an adequate standard of living, increasing the level of housing benefits (in recognition of the impact of the high cost of housing) and setting the minimum wage as a living wage.

4.10.1 Factors that influence the risk of destitution

There are several specific UK policies that may, at least partially, be to blame for the increasing risk of destitution for disabled people, including the abolition of the discretionary social fund[440] (by devolution of crisis support to local authorities,[441] and the removal of funding for local welfare provision),[442] delays in deciding eligibility and making benefit payments, unemployment, under-employment, low wages and rising prices.[443] To a certain extent, the risks to disabled people of destitution are mitigated by benefits such as DLA, higher rates of out of work benefits and disability premiums (for example, on tax credits), as well as by measures such as concessionary travel and free parking for disabled people. However, the far-reaching welfare reforms being implemented under the Welfare Reform Act 2012 will reduce the positive impact of some of the above measures – for example, as explained above (Section 3.5.2.3), disabled people with significant mobility impairments who are nevertheless able to walk more than 20 metres may lose the higher rate mobility allowance under PIP, forcing them to fund their own car or pay for taxis to get around.

However, the evidence shows that the extra costs faced by disabled people outweigh the benefit of measures designed to offset them; recent research by Scope indicates that, on average, disabled people face disability-related costs of around £550 per month.[444] Despite specific provision of benefits and services, it remains the case that disabled people are more likely (than non-disabled people) to live in poverty.[445]

In December 2013, the Disability Benefits Consortium, which includes more than 50 national charities whose clients rely on disability benefits, undertook a survey of nearly 4,000 disabled people.[446] The consortium found that disabled people were having to rely on food banks and that

[439] Report of the Special Rapporteur on the right to food, Olivier de Schutter, Mission to Canada. Human Rights Council, Twenty-second session, Agenda item 3: Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, 24 December 2012, A/HRC/22/50/Add.1.
[440] D Gibbons (2013) *Local welfare provision, low-income households, and third sector financial services provision* (Centre for Responsible Credit).
[441] Welfare Reform Act 2012, section 70.
[442] 'Government scraps fund for crisis loans', Inside Housing, 2 January 2014.
[443] Oxfam and Church Action on Poverty (2013) *Walking the Breadline: the scandal of food poverty in 21st century Britain*.
[444] S Bulloch and C Rogers (2014) *Better living, higher standards: improving the lives of disabled people by 2020* (Scope).
[445] Bulloch and Rogers, *Better living, higher standards: improving the lives of disabled people by 2020*; Leonard Cheshire, *Disability Poverty in the UK*.
[446] 'Food banks become lifeline for disabled people as benefit changes hit', Disability Benefits Consortium, 17 December 2013.

the principal reasons were changes to housing benefit (discussed above) and reforms to council tax benefit, which mean many had to pay a proportion of council tax for the first time out of their existing benefit income. The consortium expressed concern that disabled people were already having to turn to food aid even before certain key reforms, such as the replacement of disability living allowance by personal independence payment, had been implemented.

When benefit claims are unsuccessful, or there are administrative errors in deciding or processing claims, disabled people without the support of family or friends are more vulnerable to the risk of destitution:

> **Case study (from the online survey on the We are Spartacus website):**
>
> *…. I will soon be destitute unless a miracle happens. I live alone, am unwell, have no family or friends. My money was stopped in July. I have about £15 left. After that I won't be able to get to food bank. Have said things over and over. Waste of time. There is NO help out there.*

4.10.2 The impact of benefit sanctions

In their report on the Welfare Reform Bill in 2011, the Joint Committee on Human Rights specifically expressed their concern about the impact of benefit sanctions on disabled people, saying:[447]

> *...there is a risk that the conditionality and sanction provisions in the Bill might in some circumstances lead to destitution...*

It is therefore worth investigating the extent to which this concern has been realised over the last couple of years.

Since the introduction of Jobseeker's Allowance (JSA) in 1996, there has been an increasing enthusiasm by governments across the political spectrum for receipt of out of work benefits to be conditional on the claimant fulfilling certain obligations, generally participation in activities relating to seeking or preparing for employment.[448] Governments of both the left and the right have used benefit sanctions – withholding benefit payments, or part payments, for a certain period of time - to reinforce this conditionality. The use of sanctions was extended to those claiming long term sickness benefits when incapacity benefit was replaced by ESA in 2008;[449] the regulations on sanctions for ESA claimants were amended in 2012.[450] In the year ending September 2013, 22,840 sanctions referrals were applied to ESA claimants,[451] but it is important to remember that many disabled people, some of whom will have been wrongly assessed as being fit for work, claim JSA.

In general, if a claimant fails to fulfil an obligation placed on them as a condition of their claim, they can be referred for sanction. Payment of benefit is stopped immediately a referral is made, so even

[447] JCHR, *Legislative Scrutiny: the Welfare Reform Bill*, para 1.45.
[448] Walker and Wiseman (2003), 'Making welfare work: UK activation policies under New Labour' , *International Social Security Review*, vol 56: 1.
[449] Employment and Support Allowance Regulations 2008, SI No. 794.
[450] Employment and Support Allowance (Sanctions) (Amendment) Regulations 2012, SI No. 2756.
[451] Figure derived from, Department for Work and Pensions (2014) *Statistical release: Jobseeker's Allowance and Employment and Support Allowance Sanctions: decisions made to September 2013*.

claimants who are wrongly referred lose benefit immediately; if the referral does not lead to a decision to sanction, or the decision to sanction is overturned at reconsideration or appeal, the claimant receives back-payment of the withheld amount. However, the immediate stopping of benefits may mean claimants struggle to afford food, heating etc before the back payment is received.[452]

In recent months politicians and voluntary sector organisations have expressed considerable concern about the imposition and impact of sanctions, following reports that claimants have been sanctioned for minor or inappropriate reasons. For example, from their experience of advising claimants on a daily basis, the Citizens Advice Bureau in West Dunbartonshire (WDCAB) has concluded that:[453]

> *… conditionality appears to allow JCP to withhold financial support to people, including the most vulnerable and sick people in our society, on the flimsiest of grounds.*

In their report, West Dunbartonshire CAB includes a number of specific case studies of their clients' experience of sanctions, often where claimants have fallen foul of the system because their specific impairment-related needs have not been acknowledged or met by JobCentre Plus. In one example, a JCP adviser was providing a very high level of support to a client with severe dyslexia but the client was referred for sanction by a different adviser who would not accept that the client was unable to apply for jobs without that support. Similar issues have been reported by Citizens Advice Bureaux in Greater Manchester in their report, "Punishing Poverty",[454] on the impact of benefit sanctions.

The Social Security Advisory Committee (SSAC) reviewed the research evidence relating to the use of sanctions in 2012, in the context of the introduction of Universal Credit.[455] The report made specific recommendations for the implementation of conditionality and sanctions, to maximise the positive impact of stimulating behavioural change and minimise the negative impact of sanctions, including acute financial hardship. The SSAC specifically recommended that conditionality and sanctions should be based on the principles of communication, personalisation and fairness, and put particular emphasis on ensuring 'vulnerable' claimants understand what is required of them and are supported to meet their obligations, thus reducing the likelihood that they suffer disproportionately from conditionality and sanctions. However, in its report[456] Greater Manchester CAB pointed out that the experience of their clients indicated that the recommendations made by the SSAC were not being followed. For example, whilst the SSAC recommended that:[457]

> *"unintended consequences of applying a sanction should be monitored and hardship remedies need to be available",*

[452] G Miscampbell (2014) *Smarter Sanctions: Sorting out the system* (Policy Exchange).
[453] West Dunbartonshire CAB, *Unjust and Uncaring: A report on conditionality and benefit sanctions and their impact on clients,* p 31.
[454] Manchester Citizens Advice Bureau (2013) *Punishing Poverty? A review of benefits sanctions and their impacts on clients and claimants.*
[455] Social Security Advisory Committee (2012) *Universal Credit and Conditionality* Occasional Paper No 9.
[456] Manchester CAB, *Punishing Poverty? A review of benefits sanctions and their impacts on clients and claimants.*
[457] SSAC, *Universal Credit and Conditionality* Occasional Paper No 9, para 4.10.

Manchester CAB made the following points in their report:[458]

> *"...lack of money meant many respondents were unable to afford regular meals, with consequences for their health, particularly where there were pre-existing health conditions. Exacerbating physical health problems seems to be a perverse and presumably unintended effect of sanctions, given that the intention is to promote job search and employment. Other consequences, presumably also unintended, were severe anxiety and depression, and financial demands and stress on the wider family."*

and quoted this statement from one of their clients:[459]

> *"I can't work, I take 23 pills a day and I'm also diabetic, yet the group they put me on was for work? They have no right to take money away just like that. Totally unfair, I've lost half a stone as I can't buy enough food to eat and as a diabetic I'm supposed to eat 5 small meals a day. No chance. As I don't, I'm open to foot infection, eyesight problems, coma or death or amputation. I'm worried sick. Also stress brings on a relapse of [my] other condition."*

Manchester CAB also expressed concern about the lack of personalisation in the conditionality process and sanction decisions, explaining that Jobcentre Plus were imposing obligations that were impossible or difficult for their clients to meet, due to their health conditions or impairments. For example one client reported:[460]

> *I am epileptic and can't apply for certain jobs that's why I am limited, I apply for 5-10 jobs that I can do, but it's not enough.*

This lack of personalisation of approach also extended to a failure to take account of the impact of sanctions on claimants with particular impairments, for example:[461]

> *Stopped disabled wife's money as well. Had to survive on £8.77 army pension for 18 weeks could not attend job centre appointment as live in a village with no bus service and can't drive due to epilepsy and not owning a car. There isn't a post office phone box or internet where I live and they have closed the only jobcentre in the county of Rutland, leaving us to travel 30 odd miles into a neighbouring county for appointments.*

The Public Accounts Committee recently highlighted the fact that the effectiveness of JobCentre Plus offices is measured in terms of the number of people who stop claiming benefits, rather than the number who achieve sustainable employment.[462] In its summary, the Committee said:[463]

> *The focus on how many people stop claiming benefits... raises the risk that jobcentres may unfairly apply sanctions to encourage claimants off the register. Citizens Advice has seen a*

[458] Manchester CAB, *Punishing Poverty? A review of benefits sanctions and their impacts on clients and claimants*, p 23.
[459] Manchester CAB, *Punishing Poverty? A review of benefits sanctions and their impacts on clients and claimants*, p 19.
[460] Manchester CAB, *Punishing Poverty? A review of benefits sanctions and their impacts on clients and claimants*, p 19.
[461] Manchester CAB, *Punishing Poverty? A review of benefits sanctions and their impacts on clients and claimants*, p 20.
[462] Public Accounts Committee (2013) *Department for Work and Pensions: Responding to change in Jobcentres,* 5th report 2013-14.
[463] PAC, *DWP: Responding to change in Jobcentres,* Summary, p 3.

> *sharp rise in enquiries from people needing advice about sanctions applied by their jobcentres, particularly from vulnerable claimants.*

Whilst the imposition of benefit sanctions, intended to enforce conditionality (but frequently, it seems, imposed without adequate reason), has the potential to cause hardship and the risk of destitution for any claimant, both common sense and the examples quoted above suggest strongly that this likelihood is increased for claimants with additional health or impairment-related difficulties. In terms of ICESCR and UNCRPD, sanctions may threaten the enjoyment by disabled people of the right to social security, social protection and, in many cases, the right to an adequate standard of living.

In its recent report on the use of sanctions,[464] the Work and Pensions Select Committee highlighted a number of issues with regard to applying sanctions to ESA claimants in the WRAG and to disabled people claiming JSA. In relation to JSA claimants, the Committee expressed concern that the newly-introduced Claimant Commitment, an agreement between JobCentre Plus and the claimant that sets out what is expected of the claimant, was not being sufficiently differentiated to take account of the impact of claimants' impairments or health conditions. This was leading to claimants being sanctioned for failing to meet requirements set out in their Claimant Commitment that they were unable to meet.

The Committee noted that the vast majority of sanctions imposed on ESA claimants in the WRAG related to failure to participate in work-related activity.[465] However, as explained above, there is a general failure by JobCentre Plus and Work Programme providers to tailor work-related activity to take account of claimants' impairments or health conditions.[466] Despite internal DWP guidance setting out safeguards to protect ESA claimants from inappropriate conditionality, this can lead to ESA claimants in the WRAG being referred for sanction due to failing to participate in work related activity.

In a recent report relating to the implementation of Universal Credit, the Social Security Advisory Committee said:[467]

> *SSAC, amongst others, has raised concerns about the increased use of sanctions, not because we believe that they are necessarily ineffective, but because we do not know for certain that they are effective, at least in terms of getting people into good quality jobs. We believe that the sanctions regime needs to be tested.*

The Committee recommended that DWP:[468]

> [conduct] *an urgent review of the operation of the sanctions regime ensuring that existing rules are thoroughly evaluated and greater* ***testing with incentives rather than penalties is explored.***

[464] Work and Pensions Select Committee (2015) *Benefit sanctions policy beyond the Oakley Review,* Fifth Report of Session 2014-15.
[465] D Webster (2015) *Briefing: The DWP's JSA/ESA sanctions statistics release, 13 May 2015*, Child Poverty Action Group, 28 May 2015.
[466] Hale, *Fulfilling Potential?*
[467] Social Security Advisory Committee (2015), *Universal Credit: priorities for action*, Occasional Paper No. 15, July 2015, p14.
[468] SSAC, *Universal Credit: priorities for action*, p29.

4.10.3 Conclusion and recommendations

There are a number of factors that increase the risk of disabled people becoming destitute, which reflect a failure to comply with the minimum core obligations under ICESCR and UNCRPD and to guarantee their rights to social security, social protection and an adequate standard of living. These factors include problems with the timely payment of the correct benefits, the monetary level of benefits, pay levels in the labour market and the increasing cost of many essential commodities such as food and heating. Most of these issues also affect non-disabled people, but disabled people are generally less able to find ways to avoid the consequences, for example by working, heating their homes less or moving to a less expensive home. Such benefits that exist to help offset these extra costs are insufficient and, for some disabled people, are affected by the far-reaching welfare reforms currently being implemented.

Given the broad range of reasons behind the inability of individuals and families to meet their basic needs, it is challenging to formulate recommendations that will ensure compliance with the UK's minimum core obligations[469] and avoid impermissible retrogression in respect of the rights to an adequate standard of living, social security and social protection.

However, appropriate recommendations include refocusing the ethos and performance management of DWP and JobCentre Plus so that their primary responsibility is to ensure claimants are able to support themselves and their families – by being supported to enjoy their rights to work, to social security and to an adequate standard of living under ICESCR Articles 6, 7, 9 and 11 and UNCRPD Articles 27 and 28.

The Government should implement the following recommendations in relation to conditionality and sanctions. These recommendations are based on those made by the Social Security Advisory Committee in 2012:[470]

- **Communication – ensure full information about expectations and the circumstances in which sanctions may be applied are properly explained and understood by the claimant. This must include taking account of the claimant's specific communication needs, such as alternative formats or for communication in writing rather than by phone.**
- **Personalisation – conditions attached to benefit payment should be tailored to the needs and abilities of the claimant. Support should be provided to encourage and facilitate compliance, with sanctions used only as a last resort.**
- **Fairness – when sanctions are needed, they should be proportionate and reasonable. Unintended consequences should be monitored and support should always be available in cases of hardship. The claimant should be encouraged and enabled to avoid further sanction.**
- **Evaluation – the impact of conditionality and sanctions on disabled people should be carefully evaluated, with evaluation continuing so that the long term impacts on individuals and families can be properly understood.**

[469] See explanation provided in Section 2.3.6.
[470] Social Security Advisory Committee Occasional Paper No. 9: Universal Credit and Conditionality, 2012

4.11 Conclusion

Employment and social security policies implemented by current and recent Governments have entailed significant expenditure on frequent assessments, multiple appeals and a failing Work Programme. However, there is no evidence that such policies are framed to fulfil the obligations under ICESCR and UNCRPD, which require States Parties to make concrete progress towards realising disabled people's economic, social and cultural rights to the maximum extent of their available resources.

Current policies fail to appreciate the nature and breadth of 'real world' factors that affect disabled people's ability to secure and maintain sustainable employment. Evidence of hardship reported by voluntary sector organisations and other service providers shows retrogression in relation to disabled people's rights to social security and social protection (ICESCR Article 9 and UNCRPD Article 28) and, for some, the right to an adequate standard of living (ICESCR Article 11 and UNCRPD Article 28). In addition, the failure to implement effective employment strategies, based on proven methods that provide effective support to both disabled people and employers, is also leading to retrogression in relation to disabled people's right to work (ICESCR Article 6 and UNCRPD Article 27). **There is a clear need to refocus policy and expenditure towards evidence-based approaches that progressively realise the rights of disabled people to work, social protection, social security and an adequate standard of living.**