

# Key concerns of the UK Independent Mechanism following the release of the CRPD Committee's inquiry into the UK under Article 6 of the CRPD Optional Protocol, and the UK Government's response

The Equality and Human Rights Commission (EHRC), the Equality Commission for Northern Ireland (ECNI), the Northern Ireland Human Rights Commission (NIHRC) and the Scottish Human Rights Commission (SHRC) are designated, by Article 33(2), as the UK Independent Mechanism (UKIM) to promote, protect and monitor the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) in the UK.

## 1. Human rights-based law and policy-making

In response to the CRPD Committee's recommendation in its inquiry report<sup>1</sup> that the UK Government ensure 'any intended measure of the welfare reform is rights-based...and does not disproportionately and/or adversely affect the rights of persons with disabilities', the UK Government states that 'the Public Sector Equality Duty (PSED) is aligned with a rights-based approach as it sets a legal duty on public authorities to consider the impact of policies on disabled people'.<sup>2</sup>

However, there is currently no explicit statutory requirement<sup>3</sup> for Ministers to give 'due regard' to the CRPD when developing new policy and law.<sup>4</sup> UKIM does not consider that the UK Government has provided sufficient evidence to demonstrate that it consistently gives due regard to the need to promote the equality of disabled people or their broader human rights, when developing new law and policy. For example, in its most recent submission to the UN Committee on Economic, Social and Cultural Rights (CESCR), the EHRC's analysis concludes that the UK Government did not adequately consider the impact of measures in the Welfare Reform and Work Act on human rights to social security and adequate standard of living, or the impact on people who share a protected characteristic, including disabled people.<sup>5</sup> CESCR accepted the EHRC's recommendations, which were also reflected in a joint letter to the UK Government by the UN Special Rapporteurs on Housing, Disabilities, Poverty and Food in April 2016.<sup>6</sup>

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<sup>1</sup> CRPD Committee (2016) Inquiry concerning the UK carried out by the Committee under article 6 of the Optional Protocol to the Convention, Report, p. 21, available [here](#) [accessed 10 November 2016].

<sup>2</sup> UK Government (2016) Response to the Report by the UN Committee on the Rights of Persons with Disabilities under article 6 of the Optional Protocol to the Convention, p. 26, available [here](#) [accessed 20 November 2016].

<sup>3</sup> Neither a statutory requirement nor a non-statutory commitment. However, note that case law has established there is a need to be aware of CRPD in executive decision-making processes. See *R (on the Application of Bracking and Others) v Secretary of State for Work and Pensions* [2013] EWHC 897 (Admin), *Bracking and others v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, and *R (on the application of Aspinall, Pepper and others) v Secretary of State for Work and Pensions* [2014] EWHC 4134 (Admin).

<sup>4</sup> Approaches that have enhanced the status of the Convention of the Rights of the Child (CRC) in domestic law include UK Government non-binding guidelines to give due consideration to the CRC when developing new policy or legislation. There are mixed results from this non-statutory approach. More effective mechanisms for incorporating the CRC include statutory instruments in Wales and Scotland, which place duties on Ministers. Early evidence suggests that these have made concrete differences to how legislation and policy is developed. See [here](#) [accessed 29 November 2016].

<sup>5</sup> EHRC (April 2016) 'Socio-economic rights in the UK: updated submission to the UN CESCR in advance of the public examination entation of ICESCR', available [here](#) [accessed 29 November 2016].

See also the EHRC's letter to the Secretary for Work and Pensions on the Welfare Reform and Work Bill, 16 September 2015, available [here](#) [accessed 29 November 2016].

<sup>6</sup> Special Rapporteurs' Joint communication to the UK Government on the Welfare Reform and Work Act, Ref: AL GBR 1/2016, 08/04/2016, p. 39, available [here](#) [accessed 29 November 2016].

**UKIM urges the UK and devolved governments to enhance the status of the CRPD in domestic law, including a domestic mechanism for scrutiny of policy and legislation to ensure compliance with the CRPD.**

## **2. Cumulative impact assessment of social security reforms**

The inquiry found that disabled people have been disproportionately affected by social security reforms, and that the impact of the reduction of social security benefits has resulted in a struggle for many disabled people to maintain an adequate standard of living. The inquiry report therefore recommends that the UK conducts a human rights-based cumulative impact assessment of the social security reforms since 2010.<sup>7</sup>

In its response, the UK Government states that: ‘Since 2010 the UK Government has published cumulative analysis of the impacts of its tax, welfare and public spending policies on households’ while noting that this ‘analysis is not broken down into sub-groups such as disabled people due to significant modelling limitations’.<sup>8</sup>

UKIM reiterates the view, expressed in its evidence to the inquiry team, that such cumulative impact assessments are both feasible and practicable, as a study commissioned by the EHRC has shown.<sup>9</sup> Cumulative impact assessments would build on the UK Government and devolved administrations’ statutory equality duties,<sup>10</sup> which provide a clear impetus for comprehensive data collection and ongoing monitoring of the impact of public policies on all groups protected by equality legislation, with appropriate mitigation where those impacts are disproportionate.

The importance of assessing the cumulative impact of tax and spending decisions on disabled people has also been underlined by the UK Parliament’s Social Security Advisory Committee.<sup>11</sup> In addition, following its examination of the UK earlier this

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<sup>7</sup> CRPD Committee (2016) Inquiry concerning the UK carried out by the Committee under article 6 of the Optional Protocol to the Convention, Report, p. 21, available [here](#) [accessed 10 November 2016].

<sup>8</sup> UK Government (2016) Response to the Report by the UN Committee on the Rights of Persons with Disabilities under article 6 of the Optional Protocol to the Convention, p. 25, available [here](#) [accessed 20 November 2016].

<sup>9</sup> Reed, H. and Portes, J. (2014), ‘Cumulative Impact Assessment: A Research Report by Landman Economics and NIESR for the Equality and Human Rights Commission’, available [here](#) [accessed 30 November 2016].

<sup>10</sup> The Public Sector Equality Duty in s149 of the Equality Act 2010 is applicable to public bodies in England, Scotland and Wales. The Statutory Duties under s75 of the Northern Ireland Act 1998 are applicable to Northern Ireland.

<sup>11</sup> Social Security Advisory Committee (April 2014), ‘The Cumulative Impact of Welfare Reform: a commentary, A study by the Social Security Advisory Committee’, Occasional Paper No.12, p. 27 available [here](#) [accessed 30 November 2016].

year, the CESCR raised serious concerns about the disproportionate, adverse impact of austerity measures on the rights of disadvantaged and marginalized individuals and groups. CESCR also noted that ‘the State party has not undertaken a comprehensive assessment of the cumulative impact of such measures...in a way that is recognised by civil society and national independent monitoring mechanisms’, and urged the UK to ‘conduct a comprehensive assessment of the cumulative impact’ of changes, including the impact on disabled people.’<sup>12</sup>

**UKIM therefore calls upon the UK Government to urgently carry out a cumulative impact assessment of all social security reforms since 2010, in relation to the effect upon disabled people.**

### **3. Non-retrogression and protecting core elements of rights**

The inquiry recommends that the UK Government makes sure that ‘any intended legislation and/or policy measure respects the core elements of the rights analysed in the present report’.<sup>13</sup>

While the UK Government’s response states that its ‘legislation and policies support the core elements of rights’,<sup>14</sup> UKIM considers that it is not possible to ascertain this in the absence of a human rights-based cumulative impact assessment. In addition, the UK Government has not justified the retrogressive measures in its reforms since 2010 with reference to the criteria established by the UN CESCR.<sup>15</sup> Namely, measures that could reduce the enjoyment of socio-economic rights should be temporary; necessary and proportionate; non-discriminatory; not disproportionately affect the rights of disadvantaged individuals and groups; and ensure a minimum core level of human rights protection. As set out in a recent joint letter from the UN Special Rapporteurs on poverty, housing, disability and food,<sup>16</sup> it is not clear whether the UK Government has satisfied these criteria in its social security reforms.

**When existing measures have reduced rights protections for disabled people, UKIM calls upon the UK Government and Northern Ireland Executive to**

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<sup>12</sup> CESCR (2016), ‘Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland’, paras 18-19, available [here](#) [accessed 30 November 2016].

<sup>13</sup> CRPD Committee (2016) Inquiry concerning the UK carried out by the Committee under article 6 of the Optional Protocol to the Convention, Report, p. 21, available [here](#) [accessed 10 November 2016].

<sup>14</sup> UK Government (2016) Response to the Report by the UN Committee on the Rights of Persons with Disabilities under article 6 of the Optional Protocol to the Convention, p. 26, available [here](#) [accessed 20 November 2016].

<sup>15</sup> CESCR, General Comment No. 19: the right to social security (Article 9), para 9, available [here](#).

<sup>16</sup> Special Rapporteurs’ Joint communication to the UK Government on the Welfare Reform and Work Act, Ref: AL GBR 1/2016, 08/04/2016, p. 39, available [here](#).

**address the CESC criteria for non-retrogression, putting in place any mitigating measures required.**

**If future impact assessments or monitoring exercises project a disproportionate impact on disabled people, UKIM calls upon the UK and devolved governments to address the CESC criteria for non-retrogression, putting in place any mitigating measures required.**

#### **4. Independent Living Fund closure**

UKIM shares the inquiry team's concerns about the closure of the Independent Living Fund (ILF) on 30 June 2015, whereby continued support of ILF users was devolved to local authorities (LAs) in England and the devolved administrations.<sup>17</sup>

In particular, the ILF's closure could force some disabled people in England into residential care, as LAs may not be able to cover independent living costs.<sup>18 19</sup> The monetary transfer to LAs is not ring-fenced,<sup>20</sup> and there is no mechanism to monitor how LAs in England are supporting independent living.

In Northern Ireland the ILF is administered by the Independent Living Fund Scotland<sup>21</sup> but restricted to existing users leading to its eventual de facto closure, with no clear indication of future arrangements.<sup>22</sup>

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<sup>17</sup> Department for Work and Pensions (2014) 'Future of the Independent Living Fund', available [here](#) [accessed 30 November 2016]. In Scotland, the Scottish Government supports users through the Scottish Independent Living Fund and provides support to existing and new users. In Wales, the Welsh Independent Living Fund or Grant will run until March 2017 and support previous ILF recipients. By 31 March 2019 all current ILF recipients will have their care and support needs met through normal social care provision. See [here](#) [accessed: 29 November 2016]. See also [here](#) [accessed 30 November 2016].

<sup>18</sup> The EHRC has intervened in two Judicial Review cases about the Independent Living Fund: *Stuart Bracking, Paris L'amour, Gabriel Pepper, Anne Pridmore, John Aspinall (by his mother and Litigation Friend Evonne Taylforth) (claimants) v SS for Work & Pensions (defendant) and Equality and Human Rights Commission (Intervener) High Court (Administrative Court), and Pepper and Aspinall v Secretary of State for Work and Pensions*.

<sup>19</sup> Research in London revealed considerable inconsistency in how ILF recipients have been treated. Some local councils have maintained pre-ILF closure support levels, others have made "substantial cuts indicative of a systematic approach of 'levelling down' packages". It suggests the national picture is similar, and concludes that this is a clear step back in terms of independent living for disabled people, available [here](#) [accessed 30 November 2016].

<sup>20</sup> Evidence from local authorities on transition arrangements indicated that most had not ring-fenced ILF funding and some were not planning to do so, see [here](#) [accessed 30 November 2016].

<sup>21</sup> Written statement, Health Minister Simon Hamilton MLA (19 May 2015): 'New arrangements for the future support of Independent Living Fund users In Northern Ireland', available [here](#) [accessed 30 November 2016].

<sup>22</sup> Welfare Weekly (20 May 2015): 'Northern Ireland Independent Living Fund To Be Administered In Scotland', available [here](#) [accessed 30 November 2016].

UKIM welcomes the UK Government's stated commitment in its response to the inquiry to 'researching the impact of the ILF closure', expected to reach completion 'by the end of this year'.<sup>23</sup> However, we note that urgent steps are needed to ensure compliance with Article 19 of the CRPD.

**Where it has delegated responsibility for independent living funding to LAs in England, UKIM calls on the UK Government to:**

- **provide sufficient independent living funding to each LA to meet the needs of disabled people in their area**
- **provide guidance to LAs to clarify what they must do to meet the minimum requirements of Article 19, and provide examples of best practice, and**
- **put in place a monitoring mechanism so that each LA reports on independent living funding and activities, enabling the State to assure itself that it is complying with Article 19.**

**In light of the closure of the ILF to new applicants in Northern Ireland, we recommend that the UK Government and Northern Ireland Executive urgently review how the health and social care needs of disabled people no longer eligible for funding are being met.**

## **5. Access to justice**

UKIM welcomes the recommendation that the UK ensure access to justice for disabled people seeking redress and reparation for the violation of rights covered by the inquiry report.<sup>24</sup> We note with concern that the UK Government's response does not acknowledge the adverse impacts on disabled people.

The EHRC has outlined evidence and analysis of the impact of a range of changes on disabled people's rights to access justice, including the reduction in scope of legal aid and the introduction of a mandatory telephone gateway service in England and Wales, as well as the introduction of employment tribunal fees in Britain.<sup>25</sup> These

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<sup>23</sup> UK Government (2016) Response to the Report by the UN Committee on the Rights of Persons with Disabilities under article 6 of the Optional Protocol to the Convention, p. 13, available [here](#) [accessed 20 November 2016].

<sup>24</sup> CRPD Committee (2016) Inquiry concerning the UK carried out by the Committee under article 6 of the Optional Protocol to the Convention, Report, p. 21, available [here](#) [accessed 10 November 2016].

<sup>25</sup> EHRC (2015), 'Equality, human rights and access to civil law justice: a literature review', available [here](#) [accessed 30 November 2016]. Note that the literature review highlighted a number of shortcomings in the Ministry of Justice's 2014 review of the telephone gateway service, see pp 62-64. Recent research has also highlighted evidence of impact on disabled people. See: Amnesty

concerns have been shared by every treaty body that has examined the UK's human rights record since 2012.<sup>26</sup>

**In relation to England and Wales, UKIM urges the UK Government to:**

- **Review the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 on access to justice and other CRPD rights for disabled people. It should ensure the review includes the commissioning of independent research on the impacts of legal aid reforms on disabled people, and take concrete steps to mitigate any adverse impacts identified.**
- **Further review the operation of the telephone gateway service with regard to its accessibility and effectiveness for disabled people, and mitigate any adverse impacts identified.**

**In light of the introduction of Tribunal fees in Great Britain, UKIM calls on the UK Government to publish the findings of its post-implementation review of Employment Tribunal fees, and address any disproportionate impacts on disabled people.**

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International (2016), 'Cuts that hurt: the impact of legal aid cuts in England on access to justice', available [here](#) [accessed 30 November 2016].

<sup>26</sup> Including Committee on the Elimination Discrimination Against Women; the Human Rights Committee; the Committee on Economic, Social and Cultural Rights; the Committee on the Rights of the Child; and the Committee on the Elimination of Racial Discrimination, see [here](#) [accessed 30 November 2016].