



Public Law Project written submissions to the UN Special Rapporteur on Extreme Poverty ahead of his UK Country visit in November 2018

About PLP

The Public Law Project ('PLP') is an independent, national legal charity which aims to improve access to public law remedies for those whose access is restricted by poverty, discrimination or other similar barriers. Within this broad remit PLP has adopted three strategic priorities in our plan for 2017-2022:

- Promoting and safeguarding the Rule of Law during a period of significant constitutional change.
- Working to ensure fair and proper systems for the exercise of public powers and duties, whether by state or private actors.
- Improving practical access to public law remedies.

PLP undertakes research, policy initiatives, casework and training across a range of public law remedies.

Submissions

We are a process focused charity. Whilst much of our work is for poor and marginalised individuals, primarily ensuring and promoting their access to justice, we do not specifically work on poverty issues. Accordingly, these submissions are focused on areas within our expertise that touch upon the matters to be considered by the UN Special Rapporteur as set out in the 'Call for written submissions':

General & Austerity

(1) PLP takes no organisational position on the Government's longstanding austerity policies, although we note the following arising from our recent work:

- a. In our client's case of *RF v Secretary of State for Work and Pensions* [2017] EWHC 3375 (Admin), the High Court did not accept the Government's submissions as to why changes had been made to the thresholds for granting Personal Independence Payments to those with mental health impairments, and found instead that the Government's objective for the changes had been to save money and were *ultra vires*, including because they were unlawfully discriminatory contrary to Article 14 ECHR: "*In my judgment, the 2017 regulations introduced ...criteria ... which were blatantly discriminatory against those with mental health impairments and which cannot be objectively justified. The wish to save nearly £1 billion a year at the*



expense of those with mental health impairments is not a reasonable foundation for passing this measure” [para 59]¹

- b. The Law Society’s recent research indicates that poverty-hit families are being denied legal aid because of the excessively restrictive formula that dictates financial eligibility for civil legal aid. The research found that the financial thresholds for civil legal aid are such that those in need, who cannot otherwise fund access to justice for life-changing events such as eviction or family law matters, are ineligible for legal aid, or required to pay unaffordable contributions, impacting on their right to equality before the law².
- c. In addition to the concerns raised by this research, PLP has grave concerns about the impact of legal aid cuts in recent years on access to justice and equality before the law. These include the removal of important areas of social welfare law, including much of family and immigration, from the scope of legal aid; the introduction of a mandatory telephone gateway for discrimination, education and debt cases, which has acted as a barrier to access to legal aid; and the inadequacy of the ‘Exceptional Case Funding’ scheme which was supposed to act as a ‘safety net’.³

Universal Credit

- (2) PLP has a history of engaging with problems in the provision of benefits to some of the most marginalised in our society. As with all our work we aim to ensure fair systems, promote access to justice and uphold the Rule of Law in decision making around welfare benefits.
- (3) PLP is particularly concerned with benefit sanctioning – which is a feature of many working-age benefits including Universal Credit - and the impact this has on marginalised people, especially those with disabilities. We are concerned that sanctions may be imposed in an unfair or discriminatory way and that benefit claimants often do not have effective access to appropriate and timely remedies when things go wrong.
- (4) We have set out our concerns to date with the system and our findings in our response to the Work and Pensions Committee inquiry⁴ into benefit sanctions.⁵

¹ See judgment at: <https://www.bailii.org/ew/cases/EWHC/Admin/2017/3375.html>

² <http://www.lawsociety.org.uk/policy-campaigns/campaigns/access-to-justice/legal-aid-means-test-report/> See also PLP’s own research briefing on this topic at <https://publiclawproject.org.uk/resources/the-gap-between-the-legal-aid-means-regulations-and-financial-reality/>

³ See our written evidence to the Joint Committee on Human Rights’ inquiry into human rights enforcement available here: <https://publiclawproject.org.uk/resources/written-evidence-public-law-project-joint-committee-human-rights-inquiry-human-rights-attitudes-enforcement/> and other research briefings on the impact of LASPO available on our website.

⁴ A list of all the evidence submitted to the inquiry is available here: <https://www.parliament.uk/business/committees/committees-a-z/commons-select/work-and-pensions-committee/inquiries/parliament-2017/benefit-sanctions-inquiry-17-19/publications/>

⁵ PLP’s submission (ANC0037) is here: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/work-and-pensions-committee/benefit-sanctions/written/83422.pdf>



(5) In brief, the sanctions system as it currently operates (distinguished here from the conditionality system) seems to be unfair in two key respects:

- a. It is a system of imposing a punishment immediately, without adequate opportunity for claimants to provide explanations or objections until after a sanction has already been imposed.⁶
- b. Sanctions are often a disproportionately severe punishment for perceived transgressions.

(6) PLP's areas of concern include:

- a. DWP decision-making as to benefit entitlement and sanctioning is poor. A high proportion of decisions relating to whether a claimant has limited capability for work are overturned by the First-Tier Tribunal.⁷
- b. Claimants are not given sufficient information by the DWP about their Claimant Commitment, and in particular are not given enough information on a consistent basis about easements and the ability for any agreement to be reviewed.⁸
- c. The absence of any warning or 'yellow card' system creates difficulties for claimants who may have trouble understanding why they are considered not to have complied. The absence of such a system underlines the 'sanction first, appeal later' policy, despite the lack of any evidence that such a policy incentivises work or jobseeking.⁹
- d. Before being able to lodge an appeal against an adverse sanction decision, claimants must first go through the 'mandatory reconsideration' (MR) procedure.¹⁰ If claimants are successful in their appeal any money that had been deducted is paid, but claimants are not paid whilst their appeal or MR is ongoing. Additionally, hardship

⁶ See, e.g., M. Adler, 'Benefit Sanctions and the Rule of Law' U.K. Const. L. Blog (23rd Oct 2015) (available at <https://ukconstitutionallaw.org/>)

⁷ HMCTS' statistics published on 14th June 2018 state that in the Social Security and Child Support Chamber, 66% of cases were found in favour of the claimant. The overturn rate varied by benefit type, with PIP having 71%, ESA 70%, Disability Living Allowance 63%, Universal Credit 47% and Jobseekers Allowance having 44% in favour of the claimant. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/716008/tribunal-grc-statistics-q4-201718.pdf

⁸ For example, research conducted by the charity Homeless Link showed that only 39% of agencies surveyed were aware of the 'domestic emergency' easement, which is intended to assist homeless claimants: <https://www.homeless.org.uk/sites/default/files/site-attachments/Sanctions%20and%20easement%20for%20people%20who%20are%20newly%20homeless.pdf>

⁹ See, e.g., Welfare Conditionality Project, 'Final Findings Report', 9th July 2018: www.welfareconditionality.ac.uk

¹⁰ This procedure has been in force for Universal Credit and Personal Independence Payment since April 2013 and for other benefits since October 2013. Mandatory reconsiderations have been criticised for the poor quality of review and the effect on claimants in terms of hardship and subsequent impact on the number of appeals lodged. See, e.g., Mandatory reconsideration: Inadequate by design, UK Administrative Justice Institute, 20th November 2017: <https://ukaji.org/2017/11/20/mandatory-reconsideration-inadequate-by-design/>



payments are not easy to obtain, are recoverable by the DWP, and claimants are not always informed about their availability or how to claim.¹¹

- (7) The evidence so far shows that claimants in receipt of Universal Credit instead of JSA or ESA are more likely to have a sanction imposed.¹² There are a range of factors that may be contributing to this, including but not limited to:
- a. The introduction of 'in-work conditionality', a policy that did not exist under Working Tax Credit;¹³
 - b. The move to an online system (which some claimants struggle with, but which allows for greater monitoring of a claimant's activities); and,
 - c. The DWP's 'explicit consent' policy, which makes it much harder for representatives and advisers to contact the DWP on their clients' behalves.¹⁴ Under 'legacy benefits' the DWP operated an 'implicit consent' policy which made it easier for advisers to make contact.¹⁵ This system remains in place for Universal Credit only for MPs and their caseworkers.¹⁶

New Technologies in the Welfare System

- (8) Officials within the Department for Work and Pensions (DWP) make around 12 million decisions annually. From those refused, some are disputed by claimants. Approximately 300,000 per year are challenged via a system called mandatory reconsideration. Around 150,000 of those refused via mandatory reconsideration go on to lodge a tribunal appeal.
- (9) The DWP introduced mandatory reconsideration to prevent disputes reaching tribunals, on the basis it would speed up the challenge process (and there would be associated efficiency gains). This system turned out to be very quick, yet it has been widely criticised. In particular, there is a concern that mandatory reconsideration is filtering out valid appeals.

¹¹ See, e.g., Homeless Watch's report '[A High Cost to Pay](https://www.homeless.org.uk/sites/default/files/site-attachments/A%20High%20Cost%20to%20Pay%20Sept%202013.pdf)', September 2013:

<https://www.homeless.org.uk/sites/default/files/site-attachments/A%20High%20Cost%20to%20Pay%20Sept%202013.pdf>

¹² DWP statistics published on 14th August 2018 state that in May 2018, the percentage of UC claimants with a drop in payment due to a sanction was 2.8%, compared with 0.3% for JSA claimants in December 2017:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/733642/benefit-sanctions-statistics-to-april-2018.pdf

¹³ Regulations 87, 88 and 90, Universal Credit Regulations 2013.

¹⁴ See DWP Guidance: Universal Credit consent and disclosure of information, published 5th March 2018: <https://www.gov.uk/government/publications/universal-credit-detailed-information-for-claimants/universal-credit-consent-and-disclosure-of-information>

¹⁵ See DWP Guidance: Working with representatives, last updated 12th August 2015: <https://www.gov.uk/government/publications/working-with-representatives-guidance-for-dwp-staff>

¹⁶ Universal Credit: Written statement - HCWS528, 13th March 2017: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2017-03-13/HCWS528/>



- (10) There is little clarity on which aspects, if any, of the processes within DWP—whether initial decision-making or mandatory reconsideration—are, or will be, increasingly reliant on digital technologies (there are, for example, reports on the use of AI to tackle benefit fraud). There are, however, widely-discussed concerns about both the use of algorithms and other technologies in these processes and it is hoped that the DWP, if it were to adopt them, would provide both notice of and consultation on any proposed changes.
- (11) As regards independent tribunal appeals, the Ministry of Justice (MoJ) and HM Courts and Tribunals Service (HMCTS) are implementing a wide-ranging court reform and digitalisation programme across the justice system. Moving tribunal appeals online is central to this agenda. These reforms will be initially developed and piloted in social security tribunals and work has already begun in that respect—the pilot begins later this year. The aim is for social security appeals to be dealt with through a range of methods, including ‘continuous on-line hearings.’ The overarching strategy is to increase access to justice while making large savings in terms of efficiency.
- (12) While digitalisation reforms may yield certain benefits, there are also multiple areas of concern with moving tribunal appeals online. Such concerns are more pronounced when it is considered that the changes are being made in the context of fiscal austerity and in areas where court users are more likely to be digitally excluded. Though we do not seek to be comprehensive, the key issues we see in this area can be summarised as follows:
- a. Not all tribunals users will want to use online pathways and some will be unable. The MoJ is developing assisted digital programmes, but we are yet to see if these services will function properly and if appropriate benchmarks have been used to design them;
 - b. Whether tribunal users can opt out of online hearings or if some will be forced to use the online process will be critical. So too will be the way in which it is determined if any case is suitable for online adjudication;
 - c. The procedural fairness in online tribunals will be key, both in terms of actual process and perceived legitimacy;
 - d. Consistently, empirical research has shown that process affects tribunal decisions substantially. A key issue will be the extent to which online processes may affect the outcome of appeals, and the amount of overall successful appeals;
 - e. The debate around online appeals seems to be premised largely on the basis that the process will not heavily involve legal representatives. There are questions therefore around what role lawyers and representatives can play, and how online procedures and outcomes differ depending on their presence or absence; and
 - f. In respect of the planned efficiencies of online tribunals, there are at least two large risks. The first is that the system becomes overloaded and processes are weakened without further investment. The second is that, in order to make savings, some users are forced to use online hearings when they would rather not.



(13) How these concerns play out in practice is yet to be seen. PLP has worked with JUSTICE¹⁷ to explore concerns around digital exclusion and online justice more generally and support the recommendations from their recent report on this issue¹⁸. There is a clear deficit in the amount of evidence available at present on the effects of the digitalisation on welfare and justice systems. Detailed data must be made available so that the effect of the new technologies in the justice system can be measured and access to justice promoted.¹⁹

Brexit

(14) PLP takes no position on the UK's decision to leave the European Union. This section of our submissions focuses on the loss of rights protections under the European Union (Withdrawal) Act 2018 and the proposed post-Brexit settlement scheme for EU citizens in the UK.

European Union (Withdrawal) Act

(15) The main piece of Brexit legislation passed so far is the European Union (Withdrawal) Act ('The Act'). The effect of the Act is to retain the majority of EU law and convert it into domestic law on 'exit day'.²⁰ The Act contains extensive powers for Government Ministers to amend retained EU law through the use of delegated powers²¹ and it is yet to be seen to what extent the Government will use those powers to make significant changes to retained EU law with the potential for impact on those living in poverty.

(16) However, the Act provides that the European Union Charter of Fundamental Rights ('the Charter') will not form part of domestic law after exit day²² but seeks to preserve fundamental rights and principles which exist irrespective of the Charter.²³ Many of the rights in the Charter are also protected in the European Convention on Human Rights ('ECHR') and therefore (for the most part²⁴) are already part of domestic law through the Human Rights Act 1998 ('HRA'). Some other fundamental rights protected by the Charter are protected by the common law or by existing statutory provisions.

(17) It is welcome that there are provisions in the Act that prevent Ministers from using their new powers to amend, repeal, or revoke the HRA or any subordinate legislation made under it.²⁵ However, there are fundamental rights protected by EU law which are not protected to the same extent by the ECHR or by existing domestic law. For example, the High Court of England and Wales has held that Article 8 of the EU Charter, which

¹⁷ An all-party law reform and human rights organisation working to strengthen the justice system in the UK <https://justice.org.uk/>

¹⁸ <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2018/06/Preventing-Digital-Exclusion-from-Online-Justice.pdf>

¹⁹ For further information see our research paper published here:

<https://publiclawproject.org.uk/resources/the-digitalisation-of-tribunals-what-we-know-and-what-we-need-to-know/>

²⁰ Defined as 11pm on 29 March 2019: s20(2).

²¹ Sections 8 and 9 in particular.

²² Section 5(4)

²³ Section 5(5)

²⁴ The HRA does not incorporate all of the rights protected by the ECHR. In particular, the right to an effective remedy for breach of Convention rights in Article 13, ECHR is not incorporated.

²⁵ Section 8(7)(f)



concerns data protection, “clearly goes further, is more specific, and has no counterpart in the ECHR”.²⁶

- (18) The Charter has been used to challenge the indiscriminate bulk collection of personal data by the government, and to demand that the government protect the personal data it does collect.²⁷ It has been used by women to fight discriminatory insurance company rules that unfairly charged them more than men.²⁸ It is the source of the “right to be forgotten” – that is, a person’s right to require that internet search engines do not spread false or hurtful information about them with impunity.²⁹
- (19) Another example is the right to an effective remedy in Article 47 of the Charter. The right to an effective remedy is protected by Article 13 ECHR but that right is not incorporated by the HRA.
- (20) It is unclear what the status of these rights will be after exit day. Fundamental rights are also general principles of EU law which will form part of retained EU law (to the extent recognised before exit day), but it will not be possible to rely on them to enforce individual rights.³⁰

Settled Status

- (21) The government has committed to securing EU citizens’ rights after Brexit through a settlement scheme called “Settled Status”. Settled status is a form of Indefinite Leave to Remain (ILR). The government published its Statement of Intent (Sol) on 21st June 2018 and presented a Statement of Changes to the Immigration Rules (IR) on July 20th 2018. The IR provided for a limited pilot that launched on August 28th 2018. The pilot is for EU citizens who are students or employees at universities in Liverpool or employed by a list of NHS trusts in the North-West of England. The full list of universities and NHS trusts is set out in the IR.
- (22) PLP produced a briefing for the All Party Parliamentary Group (APPG) on Gypsy, Roma and Traveller (GRT) Rights in response to the Sol setting out the key issues with the proposals.³¹ The key concerns are: that children aged 16 and 17 are required to pay the same fees as adults; that the process is entirely online and there is a risk of digital exclusion; there is excessive discretion for caseworkers built into the IR; the suitability/criminality criteria do not comply with the Draft Withdrawal Agreement with the EU and Roma who fail to exercise their treaty rights (for example through homelessness) could be rejected on the basis of suitability; the proof of identity requirements are onerous; and it will be difficult for Roma, with nomadic labour and housing arrangements, to evidence continuous residence.

²⁶ *David Davis and others v Secretary of State for the Home Department* [2015] EWHC 2092 (Admin), paragraph 80.

²⁷ *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* (2014) C-293/12

²⁸ *Association Belge des Consommateurs Tests v Conseil des Ministres* (2011) C-236/09

²⁹ *Google Spain SL v. Agencia Española de Protección de Datos* (2014) C-131/12

³⁰ Schedule 1, paragraph 3; subject to limited savings for cases brought within 3 years of exit day and relating to things which occurred before exit day: EU (Withdrawal) Act 2018, Sch 8, para 39(5).

³¹ <https://publiclawproject.org.uk/wp-content/uploads/2018/07/Briefing-note-on-EU-Settlement-Scheme.docx>



Public Law Project

Publication

We are content for these submissions to be published on the website of the Special Rapporteur.