

# Health and Disablement Among Social Security Recipients in the UK: The Role of Digital Communication and Capacity in Assessments and Entitlements\*

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**ABSTRACT** Large numbers of UK citizens with health issues or disabilities currently receive financial support from the social security system by reason of having either a limited capability for work due to a physical or mental problem or a disability that significantly limits their mobility or capacity for self-care. In the UK, where a transformation to 'digital by default' has been a core services policy over the past decade, digital technology plays a hugely important role in the delivery of these and other social security benefits. It features prominently in the ways in which benefit claimants are expected to interact with the administrative authorities, including when they need to notify the authorities of any change in their condition which could be material to their benefit award. Covering both legal and administrative dimensions, this article critically analyses the role and impact of digital technology and digital capacity in the processes for claiming the health-related and disability-related social security benefits, in the assessments of entitlement, and in the notification of changes in circumstances relevant to entitlement.

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## 1. Introduction

The UK has a wide range of social security benefits which aim to provide financial assistance for people with long-term health problems or disabilities. Some of these benefits deliver an enhanced form of out-of-work support while others are intended to help with the additional costs faced by those with care needs or mobility problems arising from physical and/or mental disability, regardless of their employment status. There is also social security support for a family member who provides day-to-day care for a severely disabled person. The relevant benefits are administered by the Department for Work and Pensions (DWP), on behalf of the Secretary of State for Work and Pensions. In the administration of what continues to be a complex benefits framework, with over 10 million health-related or disability-related benefit awards currently in payment (some people being in receipt of more than one benefit),<sup>1</sup> the UK Government has made

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[www.gov.uk/government/statistics/dwp-benefits-statistics-august-2023](http://www.gov.uk/government/statistics/dwp-benefits-statistics-august-2023)); Universal Credit statistics, 29 April 2013 to 12 October 2023 (at [www.gov.uk/government/statistics/universal-credit-statistics-29-april-2013-to-12-october-2023](http://www.gov.uk/government/statistics/universal-credit-statistics-29-april-2013-to-12-october-2023)); DWP, UC Health Caseload (December 2023) (<https://stat-xplore.dwp.gov.uk/webapi/jsf/tableView/tableView.xhtml>); and DWP, Official Statistics: Personal Independence Payment: Official Statistics to October 2023 (DWP, 2023), at [www.gov.uk/government/statistics/personal-independence-payment-official-statistics-to-october-2023](http://www.gov.uk/government/statistics/personal-independence-payment-official-statistics-to-october-2023):~:text=Latest%20figures%20for%20normal%20rules,were%20assessed%20received%20an%20award(all sites accessed 16 March 2024). These figures exclude the new disability payments being phased in in Scotland (see below), where the new Child Disability Payment was being received by an estimated 13,200 children as at 30 June 2022 and the Adult Disability Payment was being received by 55,535 people at the end of April 2023: Social Security Scotland, Child Disability Payment: high level statistics to 30 June 2022, at [www.gov.scot/binaries/content/documents/govscot/publications/statistics/2022/08/child-disability-payment-high-level-statistics-to-30-june-2022/documents/child-disability-payment-high-level-statistics-to-30-june-2022/govscot%3Adocument/Child%2BDisability%2BPayment%2B-%2BPublication%2B-%2BAugust%2B2022.pdf](http://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2022/08/child-disability-payment-high-level-statistics-to-30-june-2022/documents/child-disability-payment-high-level-statistics-to-30-june-2022/child-disability-payment-high-level-statistics-to-30-june-2022/govscot%3Adocument/Child%2BDisability%2BPayment%2B-%2BPublication%2B-%2BAugust%2B2022.pdf) and Adult Disability Payment high level statistics to 30 April 2023, at [www.gov.scot/binaries/content/documents/govscot/publications/statistics/2023/06/adult-disability-payment-high-level-statistics-to-30-april-2023/documents/adult-disability-payment-high-level-statistics-to-30-april-2023/govscot%3Adocument/Adult%2BDisability%2BPayment%2B-%2BPublication%2B-%2BJune%2B2023.pdf](http://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2023/06/adult-disability-payment-high-level-statistics-to-30-april-2023/documents/adult-disability-payment-high-level-statistics-to-30-april-2023/govscot%3Adocument/Adult%2BDisability%2BPayment%2B-%2BPublication%2B-%2BJune%2B2023.pdf).

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<sup>1</sup> The relevant benefits are described below. In Great Britain (therefore excluding Northern Ireland) these are the individual benefit totals (in millions): Personal Independence Payment 3.3m, Employment and Support Allowance 1.6m, Disability Living Allowance 1.3m, Carer's Allowance 1.4m, Attendance Allowance 1.6m and Universal Credit (UC) 6.2m (of which 27% (approx. 1.7m) were claimants with a health or disability-related entitlement): DWP, DWP Benefit Statistics August 2023 (at

uneven progress over the past two decades towards a system that is ‘digital by default’ in terms of its internal operation and claimant and administration interactions.

Digitalisation has, among other things, presented an opportunity for greater administrative efficiency but also, from the claimant’s perspective, for easing the process of claiming benefits and providing a more effective channel through which to report relevant changes in circumstances, such as a marked improvement or decline in health. There is an onus on the claimant to report such changes in order to ensure that an ongoing benefit award continues to be commensurate with their level of need. Unless the DWP is made aware of relevant changes there is a risk that the level of award could be incorrect. If it exceeds the correct entitlement based on the individual circumstances – and particularly if there is an extended period of time before the DWP is made aware of the change – the claimant may accumulate a significant amount of overpayment, which could be subjected to recovery by the Secretary of State.<sup>2</sup> As discussed below, many thousands of notifications of changes in circumstances, including changes in health or disability, are made to the DWP each year. Dealing with them, which may involve making a new decision on a claim, is a very important aspect of benefit administration.

Before examining this issue as it relates to changes in health or disability and the role of digital processes in this context, it is necessary to outline the relevant and health-related and disability-related social security benefits in the UK.

## 2. Entitlement to Social Security Benefits Related to Health or Disability

Within the UK social security system a distinction may be drawn between benefits to support people who have a limited capability for work due to their physical or mental condition, and benefits for people with a disabling condition which gives rise to additional needs by limiting their mobility or the capacity to undertake aspects of daily living without support and care from another person. (But it should be noted that a majority

of people receiving a limited capability for work benefit *also* receive a disability benefit.<sup>3</sup>) There is also a separate allowance paid to carers of severely disabled people. The outline below explains the relevance and methodology of current health and disability assessments and how digital capability in health/disability is reflected in some of the prescribed assessment criteria.

### 2.1 Limited capability for work due to a physical and/or mental condition

What began as an insurance-based sickness benefit under the Beveridge reforms of the late 1940s<sup>4</sup> is now a partly insurance-based (contributory) and partly assistance-based (means-tested) scheme of social security for people whose ability to work is compromised by physical and/or mental ill-health. The main benefit in this field has been Employment and Support Allowance (ESA). When first introduced (in 2008) this benefit was available in two forms: (i) as an insurance benefit (*contributory ESA*), with entitlement not based on a means test but primarily dependent on a record of National Insurance contributions, giving entitlement normally for only the first 365 days of a period of limited capability for work; and (ii) as a means-tested (income related) benefit (*income-related ESA*) for persons with a limited capability for work who had exhausted their entitlement to contributory ESA or who did not have a sufficient contributions record.<sup>5</sup> After further reforms in 2012 and 2013,<sup>6</sup> while contributory ESA remained in place (although is now referred to by the DWP in some contexts as “‘new-style’ ESA”), income-related ESA has been replaced for new claims by Universal

<sup>3</sup> DWP, Health and Disability benefits based on data from 2019 to 2022 (DWP, 2023) at [www.gov.uk/government/statistics/health-and-disability-benefits-based-on-data-from-2019-to-2022/health-and-disability-benefits-based-on-data-from-2019-to-2022](http://www.gov.uk/government/statistics/health-and-disability-benefits-based-on-data-from-2019-to-2022/health-and-disability-benefits-based-on-data-from-2019-to-2022).

<sup>4</sup> See N. Harris, *Beveridge and Beyond: the Shift from Insurance to Means-testing*, in N. Harris et al., *Social Security Law in Context*, Oxford, Oxford University Press, 2000, 87-117.

<sup>5</sup> See N. Harris and S. Rahilly, *Extra Capacity in the Labour Market?: ESA and the Activation of the Sick and Disabled in the UK*, in S. Devetzi and S. Stendahl (eds.), *Too Sick to Work? Social Security Reforms in Europe for Persons with Reduced Earnings Capacity*, Alphen aan den Rijn, Wolters Kluwer, 2011, 43-75.

<sup>6</sup> Principally, the Welfare Reform Act 2012; the Universal Credit Regulations 2013 (SI 2013/376); and the Employment and Support Allowance Regulations 2013 (SI 2013/379).

<sup>2</sup> This will be done under the framework of rules set out in the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988 (SI 1988/664) (as amended).

Credit (UC)<sup>7</sup> for those with a limited capability for work (*limited capability UC*).<sup>8</sup>

### **2.1.1. Assessment of limited capability for work**

For both ESA and limited capability UC, entitlement is normally determined (after an initial period) on the basis of an assessment – a Work Capability Assessment (WCA) – carried out by a healthcare professional. Exceptionally, the DWP may decide a claim simply on the basis of information submitted by the claimant, in particular via the questionnaire form provided by the DWP. This form is available online but has to be signed and sent by ordinary mail to the Department.<sup>9</sup>

Claimants found to have a limited capability for work due to their mental and/or physical problem(s) will be allocated to one of two groups. The first comprises those who also have a limited capability to undertake a ‘work-related activity’ (see below), and thus a more severe degree of incapacity for work. Persons in this category are placed in the ESA ‘support group’ (or the equivalent under limited capability UC), which means they will not have to undertake work-related activities such as attending meetings at a jobcentre or possibly attending training on such matters as basic mathematics as a condition of receiving the benefit. The others will be allocated to the ESA ‘work related activity group’, receiving a lower rate of benefit, and will be expected to undertake some work preparation activities and attend interviews. Currently just over 60 per cent of new ESA claimants are placed in the support group following their initial WCA.<sup>10</sup>

<sup>7</sup> UC not only replaced Income-related ESA but also Income-based Jobseeker’s Allowance and Working Tax Credit. Indeed, UC is now the principal means-tested benefit in the UK for the out-of-work or workers with a low income: see P. Larkin, *Universal Credit, “Positive Citizenship”, and the Working Poor: Squaring the Eternal Circle?*, in *Modern Law Review*, vol. 81, no. 1, 2018, 114-131.

<sup>8</sup> Claimants of contributory ESA who are in the ‘support group’ (see below) can continue to receive the benefit for longer than 365 days, however: Welfare Reform Act 2007, ss 1A and 1B.

<sup>9</sup> The UC form (form UC50) is available at [www.gov.uk/government/publications/uc50-form-universal-credit-capability-for-work-questionnaire](http://www.gov.uk/government/publications/uc50-form-universal-credit-capability-for-work-questionnaire). For the ESA version (ESA50), see [www.gov.uk/government/publications/capability-for-work-questionnaire](http://www.gov.uk/government/publications/capability-for-work-questionnaire)

<sup>10</sup> DWP, ESA: outcomes of Work Capability Assessments including Mandatory Reconsiderations and Appeals: March 2024, at [www.gov.uk/government/](http://www.gov.uk/government/)

During 2020 and 2021, due to the Covid-19 pandemic, face-to-face WCAs did not take place. Although some have since resumed, the assessment agencies<sup>11</sup> have been operating “a predominantly virtual assessment channel”, with mostly telephone-based interviewing.<sup>12</sup> For example, in the year to March 2023, 66 per cent of WCAs were by telephone, 7 per cent via video, 13 per cent were paper-based and 14 per cent were face to face, repeating a pattern seen over most of the preceding twelve months apart from January 2022, when a Covid-19 wave led to 80 per cent of assessments being via telephone and there were no face to face assessments.<sup>13</sup>

The WCA is not without controversy. In particular, there is concern about the accuracy of the assessments and the mental strain the process causes claimants in general, in both waiting for and then undergoing the health assessment.<sup>14</sup> Evidence suggests that telephone or video health or disability assessment processes are more, rather than less, stressful for some claimants than face-to-face in-person assessment; and there is also a risk that communication barriers can affect the claimant’s direct participation.<sup>15</sup> Consequently, the Work and Pensions Committee of the House of Commons has recommended that claimants be given a choice of mode for the assessment.<sup>16</sup>

The WCA focuses on a range of individual activities, prescribed in regulations,<sup>17</sup>

statistics/esa-outcomes-of-work-capability-assessments-including-mandatory-reconsiderations-and-appeals-march-2024/esa-work-capability-assessments-mandatory-reconsiderations-and-appeals-march-2024.

<sup>11</sup> WCAs are currently carried out under contract to the DWP by Maximus.

<sup>12</sup> Stuart Paterson, Client Executive Partner, Independent Assessment Services (Atos), Oral Evidence to Work and Pensions Committee, 25 May 2022, Q277 and Antony King, Managing Director and Client Partner of Capita Health & Welfare, Capita, Q 285.

<sup>13</sup> Written Answer, House of Commons, 9 March 2023, at <https://questions-statements.parliament.uk/written-questions/detail/2023-03-09/162178>.

<sup>14</sup> See for example, Work and Pensions Committee, *PIP and ESA assessments*, 7<sup>th</sup> Report of Session 2017–2019 (HC 829), London, House of Commons, 2018; and Work and Pensions Committee, *Health assessments for benefits*, Fifth Report of Session 2022–23 (HC 128), London, House of Commons, 2023.

<sup>15</sup> *Ibid.* (2023), par. 41-42.

<sup>16</sup> *Ibid.*

<sup>17</sup> Employment and Support Allowance Regulations 2013 (SI 2013/379) Schedules 2 and 3; Universal Credit Regulations 2013 (SI 2013/376) Schedules 6 and 7; and see also the ESA Regulations 2008 (SI 2008/794) Schedules 2 and 3 for claimants still in receipt of Income-related ESA under transitional arrangements.

spanning 17 functional areas. Examples include “mobilising”, “standing and sitting”, “reaching” and “coping with change”. An inability in relation to any of them must stem from “a specific bodily disease or disablement” or, in the case of mental disability, from a “specific mental illness or disablement”.<sup>18</sup> Each activity is broken down into specific abilities, identified by individual descriptors to which specific numbers of points (either 0, 6, 9 or 15) are attached. A claimant scoring a total of 15 points or more from one or more of the different descriptors is classed as having a limited capability for work (although in exceptional cases someone with less than 15 points can be treated as meeting the requirement, such where facing a substantial health risk if classed as not having a limited capability for work).

In the light of this paper’s focus, it is significant that some of the WCA descriptors relate, or can be related, to digital or information technology (IT) functions. For example, for “standing and sitting”, nine points would be scored for an inability to remain at a work-station (whether standing and/or sitting) for more than 30 minutes before needing to “move away in order to avoid significant discomfort or exhaustion”. Nine points would also be scored, in relation to “manual dexterity”, where the claimant “cannot single-handedly use a suitable keyboard or mouse”, while an inability to press a button (such as on a telephone) with either hand would score 15 points.<sup>19</sup> Some of the descriptors that have a more general application, particularly those related to mental factors such as cognitive capacity (for example, the mental ability to learn how to use a device),<sup>20</sup> may also be relevant to a person’s digital capabilities.

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There has recently been a consultation over proposed changes to some of the activity descriptors: see DWP, *Work Capability Assessment: activities and descriptors* (CP 930), London, DWP, 2023, at [www.gov.uk/government/consultations/work-capability-assessment-activities-and-descriptors/work-capability-assessment-activities-and-descriptors](http://www.gov.uk/government/consultations/work-capability-assessment-activities-and-descriptors/work-capability-assessment-activities-and-descriptors). Some changes are planned as a result: DWP, *Government Response to the Work Capability Assessment: Activities and Descriptors Consultation* (CP 973), London, DWP, 2023.

<sup>18</sup> ESA Regs 2013, reg. 15(5); UC Regs 2013, reg. 39(4); UC Regs 2008, reg. 19(5).

<sup>19</sup> ESA Regs 2008, Sch 2 par. 5(a) and (d); ESA Regs 2013, Sch 2 par. 5(a) and (d); UC Regs 2013, Sch 6 par. 5(a) and (d).

<sup>20</sup> *Ibid.* (all), par. 11 of each of the Schedules, which refers to the activity of ‘learning tasks’.

The reference to a *single-handed* use of a keyboard or mouse was inserted into the regulations in 2012 in order to reflect an intention that the assessment of manual dexterity should focus on simple hand and wrist function. Appeal tribunals had previously been awarding points to claimants on the basis of the standard use of a keyboard requiring two hands.<sup>21</sup> In *DW v Secretary of State for Work and Pensions*, for example, the appellant could not use the shift function on the keyboard while, for example, typing ‘@’ with the other hand. Upper Tribunal Judge May held that it was necessary to take a broad approach rather than merely relying on the fact that the appellant could physically press a keyboard key.<sup>22</sup> Subsequently, in *CL v Secretary of State for Work and Pensions*, Upper Tribunal Judge Mark followed a similar line, noting that “it would plainly be much harder to operate a keyboard with only one hand rather than with two” and that “combinations of three keys, such as control, alt and delete, would seem to be excluded at least on a conventional keyboard”; he said it might be reasonable to conclude that “the claimant could not properly be described as able to use a suitable keyboard using only one hand which would also need to operate the mouse”.<sup>23</sup> However, in *KH v Secretary of State for Work and Pensions*, Judge Mark took a slightly different approach. A claimant with the use of only one hand had been considered able to operate a keyboard with it using standard facilities such as ‘StickyKeys’. While such facilities would not help in situations where it was necessary to use the mouse and a keyboard concurrently, “the fact that some uses were beyond her physical abilities would not mean that she could not use the keyboard or mouse”.<sup>24</sup>

The question of whether the reference to an inability to use a “keyboard or mouse” meant that an ability to use one but not the other would prevent the descriptor from being met was answered in the affirmative in *DG v*

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<sup>21</sup> See DWP, *Explanatory Memorandum to the Employment and Support Allowance (Amendment) Regulations 2012* 2012 No. 3096 (2012) at [www.legislation.gov.uk/ukxi/2012/3096/pdfs/ukxiem\\_20123096\\_en.pdf](http://www.legislation.gov.uk/ukxi/2012/3096/pdfs/ukxiem_20123096_en.pdf).

<sup>22</sup> *DW v Secretary of State for Work and Pensions* (ESA) [2010] UKUT 245 (AAC).

<sup>23</sup> *CL v Secretary of State* (ESA) [2013] UKUT 0434 (AAC), par. [7] and [8].

<sup>24</sup> *KH v Secretary of State* (ESA) [2014] UKUT 0455 (AAC), par. [14].

*Secretary of State for Work and Pensions*.<sup>25</sup> The appellant had broken his left hand, damaging the nerve endings, and had had a pin inserted, leaving the hand weak and without a grip. He could therefore only use one hand. Judge Wright said that the claimant's ability to use a mouse was sufficient to deny him the nine points he had sought. He also concluded that an ability to use a keyboard meant having a simple ability to type out letters, numbers and symbols rather than an ability use it fully, for example typing sentences beginning with a capital letter.<sup>26</sup>

The overall effect of the case law and regulatory amendments is therefore that while inability to use a keyboard or mouse can go a substantial way towards securing entitlement to ESA or limited capability UC, the threshold for such inability has been set at quite a high level and will not be reached if there is a simple, even if limited, functional ability.

### 2.1.2. Assessment of limited capability for work-related activity

A separate set of activities is prescribed for the assessment of a limited capability for work-related activity. Here the assessment is not points-based. To qualify as having this limitation the claimant merely has to satisfy any *one* of the set descriptors (or will qualify if there is a substantial risk to physical or mental health if they were classed as not having this limited capability). One descriptor, for example, refers to an inability to press a button using either hand.<sup>27</sup> Someone with this limitation would satisfy the tests for both limited capability for work (as this inability scores 15 points) and limited capability for work-related activity. They would therefore be placed in the 'support group' category of entitlement.

### 2.2. Due to physical or mental disability, a need for assistance with daily living activities or mobility

The UK has been described as "somewhat unusual in its provision for disabled people and the people who care for them compared with other countries", by reason of its provision of entitlement to specific universal

non-contributory cash benefits providing assistance towards the additional economic costs arising from disability and long term health problems, particularly in relation to mobility or personal care for daily living.<sup>28</sup> Despite several key reforms over the past three decades the essential aims and structures of this area of support within the social security system have continued.<sup>29</sup>

#### 2.2.1. The main disability benefits

Currently over six million awards of the main disability benefits are in payment to people in Great Britain.<sup>30</sup> The benefits, none of which is a means-tested benefit or contributory benefit, comprise:

- (1) Personal Independence Payment (PIP) – the principal disability benefit for claimants aged 16 or over and under retirement pension age;
- (2) Disability Living Allowance (DLA) – now available only for under-16 year olds (but some older people continue to receive it under pre-existing awards although will eventually be moved onto PIP); and
- (3) Attendance Allowance (AA) – which is confined to people of retirement age.

Entitlement to AA is based on having a need for "attention" – personal assistance, which can be mental or physical – from another person frequently during the day, or repeatedly at night, in connection with bodily functions. Alternatively, the claimant may need a substantial level of supervision during the day or night from another person in order to avoid being in or causing substantial danger. AA claimants who need any such degree of support by both day *and* night receive the higher of two rates of the allowance; those who need the support only by day *or* at night qualify for a lower rate.<sup>31</sup>

While AA basically only covers care needs, DLA has two separate components, one in respect of care and the other covering mobility. Claimants can qualify for either or both of these components.<sup>32</sup> There are three levels of the care component. The top two are

<sup>25</sup> *DG v Secretary of State for Work and Pensions* (ESA) [2014] UKUT 0100 (AAC).

<sup>26</sup> *Ibid.*, par. [48] and [52]-[54].

<sup>27</sup> See for example ESA Regs 2013, Sch 3 par. 5.

<sup>28</sup> R. Sainsbury, *Disabled people and carers*, in J. Millar and R. Sainsbury (eds.), *Understanding Social Security*, 3<sup>rd</sup> ed., Bristol, Policy Press, 2018, 59-77, 59.

<sup>29</sup> See N. Harris, *Welfare Reform and the Shifting Threshold of Support for Disabled People*, in *Modern Law Review*, vol. 77, no. 6, 2014, 888-927.

<sup>30</sup> See n. 1 above.

<sup>31</sup> Social Security Contributions and Benefits Act 1992, ss 64 and 65.

<sup>32</sup> *Ibid.*, ss 71-73.

equivalent to the AA care levels, but the third is a lower level award for people needing help for a “significant portion of the day” or whose disabilities would prevent them from being able to cook a main meal for one. The mobility component is at two levels: a higher rate for those who are unable or “virtually unable” to walk or who have a prescribed condition (for example, being blind), and a lower rate for people needing guidance and supervision from another person, most of the time, when mobilising outdoors.<sup>33</sup>

PIP similarly has mobility and care (“Daily Living”) components. The Daily Living component has only two rates – a “standard” rate and an “enhanced” rate. Like DLA, PIP has a required period condition: the claimant must, in effect, have had their disability-related limitation for the three months preceding the date of the award and be expected to continue to have it for the next nine months.<sup>34</sup>

Over the past few years there has been a surge in new claims for PIP. They doubled between July 2021 and July 2022, for example, increasing across all age groups and medical conditions.<sup>35</sup> One third of PIP claims relate to a mental health condition.<sup>36</sup> The three most common conditions affecting PIP claimants are currently: psychiatric disorder (38% of claims); musculoskeletal disease (general or regional) (32%); and neurological disease (12%).<sup>37</sup> Reporting the upward trend in claims, Joyce et al speculate that it is likely to be a reflection of worsening health rates, particularly as this growth in claims has coincided with a significant increase in the number of people with health conditions affecting their normal day-to-day activities.<sup>38</sup> However, the current cost of living crisis could well be another factor, driving people to look for additional sources of income.

<sup>33</sup> *Ibid.*, s. 73. In the case of a child, the child must need substantially more such guidance or supervision than children of his or her age who do not have the disability, or children without the disability would not need this guidance or supervision.

<sup>34</sup> Social Security (Personal Independence Regulations 2013 (SI 2013/377), regs 12-15. In the case of DLA, the prescribed periods are three and six months respectively: Social Security Contributions and Benefits Act 1992, s2 72 and 73.

<sup>35</sup> R. Joyce, S.R. Chaudhuri and T. Waters, *The number of new disability benefit claimants has doubled in a year*, London, IFS, 2022.

<sup>36</sup> *Ibid.*

<sup>37</sup> PIP statistics, n. 1. above.

<sup>38</sup> Joyce *et al.* n. 35 above, 9-12.

Furthermore, in the case of mental disability, the reduced stigma and increased openness about mental illness may have made people less reluctant to seek benefit on the basis of mental disablement.

In Scotland, while control of some areas of social security (including ESA and UC (above)) has been reserved to the UK Parliament under a devolution settlement, some social security law making powers have been extended to the Scottish Parliament, most notably in relation to disability benefits.<sup>39</sup> Scotland is using its power to begin replacing DLA (for children), PIP and AA with, respectively, Child Disability Payment (launched in November 2021), Adult Disability Payment (launched in August 2022) and Pension Age Disability Payment (due to launch in 2024),<sup>40</sup> although the aims and basic scope of the existing benefits will, initially at least, be preserved in their replacements.

### 2.2.2. Disability assessments

A feature of PIP that distinguishes it most from AA and DLA is that the assessment of disability-related need is based on a much more detailed set of prescribed criteria or descriptors. The assessment involves the use of a points scoring system – a similar model of assessment to that used for the WCA (above).<sup>41</sup> Also in common with the WCA, the assessments are mostly conducted remotely by telephone or video.<sup>42</sup> In 2022, 75 per cent of PIP assessments were carried out this way.<sup>43</sup>

<sup>39</sup> See M. Simpson, *Social Citizenship in an Age of Welfare Regionalism: The State of the Social Union*, Oxford, Hart, 2022, 80-81.

<sup>40</sup> See the Social Security (Scotland) Act 2018 and the Disability Assistance for Children and Young People (Scotland) Regulations 2021 (SSI 2021/174); Disability Assistance for Working Age People (Scotland) Regulations (SSI 2022/54). See also Disability and Carer Benefits Expert Advisory Group, *Beyond a safe and secure transfer*, Edinburgh, Scottish Government, 2022, at [www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2023/03/disability-carer-benefits-expert-advisory-group-beyond-safe-secure-transfer/documents/disability-carer-benefits-expert-advisory-group-beyond-safe-secure-transfer/disability-carer-benefits-expert-advisory-group-beyond-safe-secure-transfer/govscot%3Adocument/disability-carer-benefits-expert-advisory-group-beyond-safe-secure-transfer.pdf](http://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2023/03/disability-carer-benefits-expert-advisory-group-beyond-safe-secure-transfer/documents/disability-carer-benefits-expert-advisory-group-beyond-safe-secure-transfer/disability-carer-benefits-expert-advisory-group-beyond-safe-secure-transfer/govscot%3Adocument/disability-carer-benefits-expert-advisory-group-beyond-safe-secure-transfer.pdf).

<sup>41</sup> Welfare Reform Act 2012, Part 4 and the Social Security (Personal Independence Regulations 2013 (SI 2013/377)).

<sup>42</sup> PIP assessments are organised regionally and are carried out under contract by Capita and Atos Independent Assessment Services.

<sup>43</sup> <https://questions-statements.parliament.uk/written-questions/detail/2022-11-02/77643>.

Issues arising from remote health and disability assessments were discussed earlier.

Assessments concerning the Daily Living component of PIP are focussed on ordinary personal actions such as taking nutrition, getting dressed/undressed and bathing and are not easily relatable to use of a computer or other digital device. However, a need for assistance via an aid or appliance (beyond glasses or contact lenses) or prompting, in order to read or understand basic or complex information, will score points under the criteria; and an inability to “read or understand signs, symbols or words at all” would, in itself, be sufficient to qualify the claimant for the standard rate of the component.<sup>44</sup> It would not matter if, for example, a PIP claimant with sight or mental processing problems could rely on *verbal* transmission of written text (that is, speaking mode) on a digital device if one of the assessment criteria that are related to “Reading and understanding signs, symbols and words” is satisfied.

At the same time, a claimant with mental health difficulties which include severe social anxiety but who is able to communicate with another person using a digital device could still score points under the assessment, for difficulties with “engaging with other people face to face”,<sup>45</sup> since it is accepted that this refers to being able to “engage socially”.<sup>46</sup> In a case before the Upper Tribunal where this issue arose, Judge Rowley said:

“I am quite unable to see how a claimant’s ability to use a phone to send texts could possibly demonstrate an ability to engage with other people ‘face to face’, not least because one of the requisite criteria of an ability to ‘engage socially’ is an ability to understand body language”.<sup>47</sup>

Similarly, a person who has problems with speech or hearing could qualify for points for inabilities in “communicating verbally” even if they can communicate by digital device.<sup>48</sup> As Judge Gray held in one case where a claimant with such difficulties could communicate using WhatsApp and texting

and could use the internet, “the ability to read and write play no part in an assessment of communicating verbally under [this] activity... Accordingly an ability to use the telephone for text functions is irrelevant, albeit that in practice it may enable effective communication”.<sup>49</sup>

### **2.3. Caring for a severely disabled person**

Another important UK-wide disability-related benefit is Carer’s Allowance, currently being paid to 1.4m people.<sup>50</sup> It is intended to assist people aged 16 or over who provide a substantial amount of care for a very disabled person. The carer’s caring responsibilities will limit their earning potential, but it is not clear whether the allowance is aiming to be an earnings replacement benefit per se or compensation for the extra cost of caring for a person with disabilities.<sup>51</sup> Entitlement<sup>52</sup> is conditional on being “regularly and substantially” engaged in caring for a “severely disabled person”, meaning the provision of not less than 35 hours of care for that person per week.<sup>53</sup> The carer must be neither in full-time education nor gainfully employed (that is, in work paying more than £139 per week<sup>54</sup>). People resident in Scotland who receive the Carer’s Allowance are also entitled to a supplement pending the introduction of a new “Carer’s Assistance” benefit in that jurisdiction.<sup>55</sup>

## **3. Digital Transformation: Social Security in the UK**

### **3.1. A. Digital welfare state**

Turning now to the wider context of welfare state provision in the UK, the use of IT is of course fundamental to the management and delivery of administratively complex service systems such as the social security system. The ‘machine bureaucracies’ that administer social security benefits and

<sup>44</sup> Social Security (Personal Independence Regulations 2013 (SI 2013/377), Schedule 1 par. 8(c).

<sup>45</sup> *Ibid.* par. 9.

<sup>46</sup> See *HA v SSWP (PIP)* [2018] UKUT 56 (AAC), par. [13].

<sup>47</sup> *Ibid.*, at [19].

<sup>48</sup> Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377), Schedule 1 par. 7.

<sup>49</sup> *EG v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 101 (AAC), [65].

<sup>50</sup> See note 1 above.

<sup>51</sup> See Sainsbury n. 28 above, 73-74.

<sup>52</sup> Social Security Contributions and Benefits Act 1992, s.70. A severely disabled person for this purpose is someone for whom AA, middle or higher care DLA care component or standard or enhanced rate PIP Daily Living component is payable: *ibid.* s.70(2).

<sup>53</sup> Social Security (Invalid Care Allowance) Regulations 1976 (SI 1976/409), reg. 4.

<sup>54</sup> *Ibid.*, reg 8. This limit is periodically adjusted.

<sup>55</sup> See the Social Security (Scotland) Act 2018, s. 81.

reach vast numbers of entitlement decisions on claims each year have long favoured the kind of standardised and automated processes for which IT systems are particularly well suited. Increasingly, this role of IT has been integral to the design not only of the processes for administration and data storage but also of the benefits themselves. The majority of areas of social security in the UK are rule-based, with legal rules setting out fairly precise criteria to be employed in determining entitlement in individual cases. IT systems are expected to enable rule-based decisions to be made in a consistent and efficient manner. In the context of social security administration, the efficiency of IT systems has, however, been significantly sub-optimal,<sup>56</sup> at times insufficiently cutting-edge to cope with benefit reforms and the need for a proper linking up of different parts of the very complex social security and welfare machinery. Moreover, automated and algorithmic processes for determining benefit entitlement can lead to unjust outcomes in individual cases,<sup>57</sup> with the risk of a repeated effect on a potential multiplicity of like cases,<sup>58</sup> making them susceptible in either case to irrationality-based public law challenges.<sup>59</sup>

<sup>56</sup> For criticism, see for example, House of Commons Public Accounts Committee, *Underpayments of the State Pension* (HC 654), London, House of Commons, 2022, par. 6-8.

<sup>57</sup> As Hansen et al have found in the context of the Norwegian benefits system, algorithms used in administration of social security may not always fit everyone's situation: H-T. Hansen, K. Lundberg, and L.J. Syltevik, *Digitalization, Street-Level Bureaucracy and Welfare Users' Experience*, in *Social Policy & Administration*, vol. 52, no. 1, 2018, 67-90. Such algorithms can also perpetuate inbuilt social biases and prejudices: see S.M. Appel and C. Coglianese, *Algorithmic Administrative Justice*, in M. Hertogh, R. Kirkham, R. Thomas and J. Tomlinson (eds), *The Oxford Handbook of Administrative Justice*, Oxford, Oxford University Press, 2021, 481, 496.

<sup>58</sup> As Fay Henman says, if algorithms are erroneous, they will be "consistently erroneous" affecting multiple cases: P.W. Fay Henman, *Administrative Justice in a Digital World: Challenges and Solutions*, in M. Hertogh, R. Kirkham, R. Thomas and J. Tomlinson (eds), *The Oxford Handbook of Administrative Justice*, Oxford, Oxford University Press, 2021, 459, 467. See also P. Henman, *Digital technologies and artificial intelligence: A computer science perspective*, in M. Adler (ed.), *A Research Agenda for Social Welfare Law, Policy and Practice*, Edward Elgar, 2022, 265, 269.

<sup>59</sup> J Maxwell, *Judicial Review and the Digital Welfare State in the UK and Australia*, in *Journal of Social Security Law*, vol. 28, no. 2, 2021, 94-109. For legal challenges in the UK, see *Secretary of State for Work and Pensions v Johnson* [2020] EWCA Civ 778 and *R*

The digital welfare state is, nonetheless, firmly established. Its entrenchment spans the administration of benefits – not least with the ongoing development of automated and algorithmic decision-making – but perhaps especially with the outward-facing role of IT in managing communication flow between claimants and the administration<sup>60</sup> and, via inter-active platforms, facilitating public information and guidance.<sup>61</sup> For example, in relation to the State Pension (currently paid from the age of 66, rising to 67 by 2028), the DWP plans that customer interaction should "continue to be shifted to the online channel, reducing workloads for agents by automating processes and enabling citizen straight through processing (no agent intervention) for reporting online change of circumstances", giving rise to "process efficiencies".<sup>62</sup> The point about the reporting of any change of circumstances is important and will be returned to later.

Against a government services policy background of "digital by default",<sup>63</sup> the introduction of Universal Credit as the principal and overarching income maintenance benefit in the UK for both the out-of-work – including those with a long-term incapacity for work due to ill health (as

*(Pantellerisco) v Secretary of State for Work and Pensions* [2021] EWC Civ 1454.

<sup>60</sup> See N. Harris, *Law in a Complex State: Complexity in the Law and Structure of Welfare*, Oxford, Hart, 2013, 70-75.

<sup>61</sup> For example, there is an inter-active online process by which to "Check your State Pension" as well as make pension claim: see Department for Work and Pensions, *Annual Report and Accounts, 2021-22* (HC 193), London, DWP, 2022, 42. Online claiming is also possible for State Pensions Credit, which is a means-tested alternative to and top-up for the State Pension for persons who either do not qualify for the State Pensions (for example, because they have an insufficient record of insurance contributions) or qualify for additional support because their State Pension entitlement is at a very low level.

<sup>62</sup> DWP, *Annual Report and Accounts, 2021-22* (HC 193), London, DWP, 2022, 52.

<sup>63</sup> Cabinet Office Press Release, 'Digital by default proposed for government services', 23 November 2010; Cabinet Office, *Government Digital Strategy*, London, Cabinet Office, 2012; National Audit Office, *Digital Britain 2: Putting users at the heart of government's digital services* (HC 1048) (Session 2012-13), London, NAO, 2013. See also M. Lane Fox, *Directgov2010 and Beyond: Revolution not Evolution*, London, HM Government, 2010, at [www.gov.uk/government/publications/directgov-2010-and-beyond-revolution-not-evolution-a-report-by-martha-lane-fox](http://www.gov.uk/government/publications/directgov-2010-and-beyond-revolution-not-evolution-a-report-by-martha-lane-fox). <http://publications.cabinetoffice.gov.uk/digital/strategy/government-digital-strategy.pdf>.



noted above) – and those in low paid employment, was accompanied by an administrative emphasis on digital usage.<sup>64</sup> The phased introduction of UC over the past decade in place of a range of means-tested benefits and credits has been a complex process, subject to delays. But there has remained a significant focus on online claiming and digital interaction between claimants and the administrative authorities. The Government’s early estimate was that by full implementation of UC 80 per cent of claims would be online.<sup>65</sup>

UC has been described as “the UK’s first ‘digital by design’ benefit”.<sup>66</sup> Recipients of UC will have an online account (or “journal”) which is intended to enable them to “access information about their claim and their... payments, much like the options that online banking services currently offer” and to provide a medium for reporting any significant changes of circumstances affecting them.<sup>67</sup> The online account is intended to be the “primary channel” for claimant–DWP interactions,<sup>68</sup> including exchanges of messages.<sup>69</sup> A leading welfare rights organisation, the Child Poverty Action Group, has however provided evidence that the “informal nature” of this online journal, including “chat” functionality, contributes to the lack of clarity about decisions taken in relation to a claim, making it difficult for the claimant to understand them and use their right to challenge them.<sup>70</sup>

It has also been recognised that notwithstanding the claimed advantages of the online system, such as greater administrative efficiencies, potentially reduced scope for fraud and overpayment, and improved

practical convenience for claimants,<sup>71</sup> there is a need to ensure that people who lack the capacity or resources to utilise digital services receive proper consideration and assistance.<sup>72</sup> Unfortunately, the help service for claimants who lack the necessary skills or resources to negotiate the digital interface is front-loaded, in the sense that it does not assist claimants once they have received their first payment of the benefit.<sup>73</sup> Moreover, there has been a failure to identify, on the system, vulnerable groups who tend to struggle with engagement with such a process, who include claimants with “digital illiteracy or digital access issues”.<sup>74</sup> There is a route to access via face-to-face communication or the telephone, but as Griffiths says, “official policy is to maximise the use of the online journal”.<sup>75</sup>

There is also an electronic route to submitting information for a PIP claim. The “Digital PIP2 Service” was first introduced in 2020 during and because of the Covid-19 pandemic, as a “clear, secure and quick application route... that did not require [claimants] to leave their homes”.<sup>76</sup> The importance of having a digital service for PIP claims and their administration has increased significantly with the marked growth in the number of claims for this benefit, noted above. However, while a full online option for PIP claimants is due to be rolled out by the DWP in 2024 it is currently only at an early stage of development and it is not yet capable of dealing effectively with repeat claims due to the amount of manual intervention that is needed for them.<sup>77</sup>

<sup>71</sup> See Griffiths, n. 64 above.

<sup>72</sup> See Social Security Advisory Committee, *The Implementation of Universal Credit and the Support Needs of Claimants* (Occ Paper no. 10), London, Social Security Advisory Committee, 2013, ch.4. On the difficulties experienced by some claimants, see Human Rights Watch, *Automated Hardship How the Tech-Driven Overhaul of the UK’s Social Security System Worsens Poverty* (Report), 2020, at [www.hrw.org/sites/default/files/media\\_2020/09/uk0920\\_web\\_0.pdf](http://www.hrw.org/sites/default/files/media_2020/09/uk0920_web_0.pdf).

<sup>73</sup> Griffiths, n.64 above, 7.

<sup>74</sup> National Audit Office, *Universal Credit: Getting to first payment* (HC 376), London, NAO, 2020, par. 3.7.

<sup>75</sup> Griffiths, n. 64 above, 7.

<sup>76</sup> DWP, *Digital PIP2 Service* (staff guide), London, DWP, 2022, 1.

<sup>77</sup> As noted by the DWP in a response to a Freedom of Information request dated 24 November 2022 (posted at [www.whatdotheyknow.com/request/901815/response/2175967/attach/7/Response%2090896%201.pdf?cookie\\_passthrough=1](http://www.whatdotheyknow.com/request/901815/response/2175967/attach/7/Response%2090896%201.pdf?cookie_passthrough=1)) which is reported by the Rightsnet website at <https://www.rightsnet.org.uk/welfare-rights/news/item/dwp-confirms-that-it-is-no-longer-accepting-repeat-pip-claims-through-its-digital-pip2-service>.

<sup>64</sup> For background, see R. Griffiths, *Universal Credit and Automated Decision Making: A Case of the Digital Tail Wagging the Policy Dog?*, in *Social Policy and Society* (advanced online version), 2021, 1.

<sup>65</sup> House of Commons Work and Pensions Committee, *Universal Credit Implementation: Meeting the Needs of Vulnerable Claimants* (HC 576), London, The Stationery Office, 2012, par. 19.

<sup>66</sup> Griffiths n.64 above.

<sup>67</sup> DWP, *Universal Credit: welfare that works* (Cm 7957), London, The Stationery Office, 2010, ch 4 par. 8 and 9.

<sup>68</sup> DWP, *Digital Strategy*, London, DWP, 2012, par. 9.1.

<sup>69</sup> National Audit Office, *Universal Credit: Getting to first payment* (HC 376), London, NAO, 2020, par. 2.17.

<sup>70</sup> Child Poverty Action Group (CPAG), *Computer Says ‘No!’ Stage one: information provision*, London, CPAG, 2019, 7-8, at <https://cpag.org.uk/policy-and-campaigns/computer-says-no-access-justice-and-digitalisation-universal-credit>.

The development of the digital service forms part of the much wider 10 year Health Transformation Programme under which a “single digital platform developed by DWP” is to be established.<sup>78</sup> A joined up approach is planned involving DWP Digital and NHS Digital. DWP Digital, the DWP’s digital development arm, is steering the Department’s digital transformation. NHS Digital (established as the Health and Social Care Information Centre (HSCIC)) operates digital services for the National Health Service (NHS).<sup>79</sup> Unlike DWP Digital, NHS Digital was established by an Act of Parliament.<sup>80</sup> The joined-up approach will include the formation of a “service community”, recognising for example that “People applying for benefits relating to their health may need to interact with a number of different departments including the NHS.”<sup>81</sup> An aim of the integrated service is to bring health/disability assessments for a range of benefits, including PIP, “onto a single, digital system”, enabling medical information relating to the claimant to be shared across departments (provided the claimant has given consent).<sup>82</sup> An online tool based on existing technology operated by NHS Digital is being developed to facilitate the sharing of the claimant’s NHS health information with the DWP.<sup>83</sup> A small-scale implementation of this

policy of establishing an integrated “Health Assessment Service” is already occurring, involving just a few areas, and it is aiming to be “user-friendly”, enabling claimants of multiple health and disability benefits to submit evidence via a single route.<sup>84</sup> It is planned that evidence, including details of the claimant’s health and disability over time, will be able to be presented and maintained in an online Health Input Record and could include input from social care support networks.<sup>85</sup> These developments are ground-breaking and could result in more accurate assessments although success is clearly dependent not only on technical reliability but also on claimants’ capacity for interaction with the system and trust in its security.

### 3.2. Health and disability benefits and the digital divide

While chronic ill-health or disability can affect those of any age, the greatest prevalence is among older people. Consequently, social security benefits that are related to these circumstances are more likely to be received by older citizens. The fact that this age group has tended to experience greater barriers in accessing digital services than younger claimants<sup>86</sup> – an aspect of the ‘digital divide’ – is therefore particularly problematic. This is especially so in view of the UK Government’s commitment towards the increased use of digital interfaces for disability benefits and long-term sickness benefits.<sup>87</sup>

There is evidence that some people with health or disability issues may prefer remote or online access to services.<sup>88</sup> But the digital divide has to be considered. Research has shown how someone with a disability who needs to engage with the social security system but lacks digital access is likely to have a reduced awareness of their entitlements, which in turn would impact on

<sup>78</sup> House of Commons Statement, Mr J Tomlinson, Minister of State for Disabled People, Health and Work, ‘Health Transformation Programme Update’, 9 June 2020. See also Department for Work and Pensions, *Annual Report and Accounts, 2021-22* (HC 193), London, DWP, 2022, 40. For details of how the Programme will facilitate digital communication and interaction with claimants, see NAO, *Transforming health assessments for disability benefits* (HC 1512), London, NAO, 2023, Pt 2.

<sup>79</sup> It is an executive non-departmental public body. See the website <https://digital.nhs.uk/> and see also NHS Digital, *Annual Report and Accounts 2021-22* (HC 795), Leeds, NHS Digital, 2022.

<sup>80</sup> Health and Social Care Act 2012, s.252 and Schedule 18. It has since been brought into NHS England (see the Health and Social Care Information Centre (Transfer of Functions, Abolition and Transitional Provisions) Regulations 2023 (SI 2023/98)). NHS England is the executive body steering the NHS in England.

<sup>81</sup> DWP Digital blog, Developing a health and benefits service community (posted 10 October 2019) at <https://dwpdigital.blog.gov.uk/2019/10/10/developing-a-health-and-benefits-service-community/>.

<sup>82</sup> DWP, *Shaping future support: the health and disability green paper*, London, DWP, 2021, par. 170. See also DWP, *Transforming Support: The Health and Disability White Paper* (CP 807), London, DWP, 2023, par. 120.

<sup>83</sup> DWP, *Transforming Support: The Health and*

*Disability White Paper* (CP 807), London, DWP, 2023, par. 120-121.

<sup>84</sup> See Work and Pensions Committee, *Health assessments for benefits*, Fifth Report of Session 2022–23 (HC 128), London, House of Commons, 2023, par. 11 and 114.

<sup>85</sup> DWP (2023), n. 83 above, par. 123.

<sup>86</sup> National Audit Office, *Progress in making e-services accessible to all - encouraging use by older people*, London, The Stationery Office, 2003.

<sup>87</sup> DWP, *Shaping future support*, n. 82 above, par. 82, 110 and 150-151.

<sup>88</sup> *Ibid.*, par. 150.

the extent to which their needs are met.<sup>89</sup> Claimants are said to be “increasingly expected to access support via a digitalised system, in an environment where face-to-face advice provision and legal assistance has been greatly depleted”, frustrating the efforts of the digitally excluded in seeking assistance<sup>90</sup> or redress.<sup>91</sup> Edmiston et al report that claimants with the most complex needs are the “most disadvantaged” by the withdrawal of such support services and “stand to lose out most from plans for further digitalisation in the benefits system beyond the pandemic”.<sup>92</sup>

A major survey by the UK’s Office for National Statistics, published in 2019, found that overall rates of digital access were increasing among people aged 65 or over, having nearly doubled between 2011–18.<sup>93</sup> For example, the proportion of people age 65–74 in the UK who had used the internet during the previous three months rose from 57.4 to 81.6 per cent (males) and 47.1 to 78.9 per cent (females) over this period.<sup>94</sup> Nevertheless, the over 65s still comprised around 80 per cent of all non-users of the internet (with more female non-users than male non-users).<sup>95</sup> Moreover, in terms of the future, the Office also predicted that although members of this age group were likely to be more digitally engaged than their predecessors, problems could arise:

“For some, health problems as they age could lead to a decline in digital

engagement, particularly if ageing impacts on cognitive ability. Technology may also change again so that the digital skills they have developed through their life will no longer be the skills that are needed.”<sup>96</sup>

The Office considered that technological developments could, however, offset such difficulties, for example through voice-activated internet services and by ensuring that support is available for older people.<sup>97</sup> Nevertheless, recently a blind man brought a successful case in the High Court against the DWP for failing to ensure he had electronic communications which his software could read out, having instead sent him paper letters or PDF email attachments.<sup>98</sup>

Having a degree of digital competence may, in any event, be insufficient to manage a digital interface for claiming benefit. A survey in Northern Ireland found that one reason for not claiming Pension Credit – a means-tested benefit for people of state pension age, distinct from the state pension – was the lack of ability to complete claims online (although other application routes were available, including telephone claims). Moreover, most of those who did claim it, whether online or otherwise, were reliant on help with the process from a family or community member or a social worker.<sup>99</sup> Similarly, there is important evidence from a DWP-commissioned survey of UC claimants, who will be outside the older age group where digital capacity is less prevalent but will include significant numbers of people with vulnerabilities due to health problems – indeed, nearly one in three UC recipients have limited capability for work due to mental or physical ill health or disability.<sup>100</sup> It found that 43 per cent of the claimants needed additional help with registering their online account, 25 per cent were not able to submit their claim

<sup>89</sup> NatCen, *Uses of Health and Disability Benefits* (draft), London, DWP, 2022, 57, published online at <https://committees.parliament.uk/publications/8745/documents/88599/default/>. This draft report was sent to the House of Commons Work and Pensions Committee in January 2022 and was published online by the Committee (using Parliamentary powers following the DWP’s refusal to publish it: see <https://committees.parliament.uk/committee/164/work-and-pensions-committee/news/160255/work-and-pensions-committee-to-use-parliamentary-powers-to-publish-report-after-dwps-refusal/>).

<sup>90</sup> M. Simpson, G. McKeever and C. Fitzpatrick, *Legal protection against destitution in the UK: the case for a right to a subsistence minimum*, in *Modern Law Review* (online), (no vol. no.) 2022, 1–33, 23.

<sup>91</sup> P.W. Fay Henman, n. 58 above, 473.

<sup>92</sup> D. Edmiston et al., *Mediating the claim? How “local ecosystems of support” shape the operation and experience of UK social security*, in *Social Policy & Administration*, vol. 56, no. 5, 2022, 775–790, 787.

<sup>93</sup> Office for National Statistics, *Exploring the UK’s digital divide*, London, ONS, 2019), at [www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/articles/exploringtheuksdigitaldivide/2019-03-04](http://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/articles/exploringtheuksdigitaldivide/2019-03-04)

<sup>94</sup> *Ibid.*, 12.

<sup>95</sup> *Ibid.*, 10–13.

<sup>96</sup> *Ibid.*, 13.

<sup>97</sup> *Ibid.*

<sup>98</sup> [www.leighday.co.uk/news/news/2023-news/dwp-in-breach-of-equality-laws-after-failure-to-communicate-acceptably-with-blind-benefits-claimants/](http://www.leighday.co.uk/news/news/2023-news/dwp-in-breach-of-equality-laws-after-failure-to-communicate-acceptably-with-blind-benefits-claimants/)

<sup>99</sup> NISRA (Northern Ireland Statistics and Research Agency), *A Study on Factors that Enable or Constrain Take-Up of Pension Credit*, Belfast, Department for Communities (Northern Ireland), 2022, 11 and 64.

<sup>100</sup> DWP, *Universal Credit Work Capability Assessment*, April 2019 to December 2023 (2024) (at [www.gov.uk/government/statistics/universal-credit-work-capability-assessment-statistics-april-2019-to-december-2023/universal-credit-work-capability-assessment-april-2019-to-december-2023](http://www.gov.uk/government/statistics/universal-credit-work-capability-assessment-statistics-april-2019-to-december-2023/universal-credit-work-capability-assessment-april-2019-to-december-2023)).

online – “predominantly due to difficulties using or accessing computers or the internet” – and 31 per cent needed further help in managing their account.<sup>101</sup> It has also separately been reported that the more vulnerable groups, including those on long term sickness benefit, have had greater difficulty than others in coping with the online approach.<sup>102</sup> Additionally, a survey of child benefit claimants found that digital capability as regards claiming online was lower among those with health problems than for those without them.<sup>103</sup>

So, digital interfaces have a central role in the delivery of social security benefits and in interactions between benefit claimants and administrative operatives. Their use is continually extending across the social security system, including the parts of it providing health-related and disability-related benefits. Yet although some recipients of these benefits may prefer online processes and are content and able to use them, others potentially face the greatest barriers among all benefit claimants to accessing them. This difficulty may have a particularly pronounced effect when it comes to a key legal obligation on these claimants: to report changes in their circumstances.

#### 4. Changes of Circumstances and Underpayment or Overpayment of Benefit

We have seen that entitlement to health or disability benefits is contingent upon an assessment of the claimant’s mobility and/or their capacity to undertake various everyday activities or to self-care. Once an award is in place, any significant change to their condition that would affect an assessment of their needs, and therefore entitlement, ought to be taken into account by the administrative authorities so that an adjustment can be made if appropriate, usually via a “supersession” decision. The guidance to the public on reporting a change of circumstances is lacking in detail, although given their range, it would be difficult to list all of the potentially relevant circumstances precisely. On health and disability, the guidance adopts a very broad

approach, simply advising the reporting of “any changes to your medical condition or disability”.<sup>104</sup> Where an adjustment of benefit should have occurred in response to a relevant change in circumstances, but does not, there could be a resulting overpayment or underpayment.

#### 4.1. The contribution of claimant error to over/underpayment

Overpayments and underpayments of benefit occur on a frequent basis within the UK social security system. Some result from administrative errors by the authorities. But a significant number arise from a failure by a claimant to notify the administrative authorities of a change in their condition or other circumstances. This failure could be due to fraud, which is a criminal offence and occurs when the claimant “dishonestly” fails to report a material change that he or she “knows... affects an entitlement of his to such a benefit or other payment or advantage”.<sup>105</sup> The DWP is seeking to enhance the detection of fraud through the use of algorithms and “digital forensics”.<sup>106</sup> Alternatively, over/underpayment could arise from a “claimant error”, which is considered to have occurred when the claimant “has provided inaccurate or incomplete information, or failed to report a change in their circumstances, but there is no evidence of fraudulent intent on the claimant’s part”.<sup>107</sup> Therefore, it could be the result of the claimant’s ignorance or inadvertent oversight. Indeed, research has shown that claimant ignorance or confusion has led to failures to appreciate the need to

<sup>104</sup> DWP, ‘Benefits: report a change in your circumstances’, at [www.gov.uk/report-benefits-change-circumstances](http://www.gov.uk/report-benefits-change-circumstances).

<sup>105</sup> Social Security Administration Act 1992, ss 111A and 112.

<sup>106</sup> Department for Work and Pensions, *Annual Report and Accounts, 2021-22* (HC 193), London, DWP, 2022, 73 and S. Trendall, “A lack of transparency and accountability” – DWP urged to shed light on fraud algorithm, [publictechnology.net](http://publictechnology.net), 31 October 2022: [www.publictechnology.net/articles/features/lack-transparency-and-accountability-%E2%80%93-dwp-urged-to-shed-light-on-fraud-algorithm](http://www.publictechnology.net/articles/features/lack-transparency-and-accountability-%E2%80%93-dwp-urged-to-shed-light-on-fraud-algorithm) (accessed 5 December 2022).

<sup>107</sup> DWP, Fraud and error in the benefit system Financial Year Ending (FYE) 2023 (May 2023) statistics, at [www.gov.uk/government/statistics/fraud-and-error-in-the-e-benefit-system-financial-year-2022-to-2023-estimates/fraud-and-error-in-the-benefit-system-financial-year-ending-fye-2023#:~:text=Overpayments,The%20total%20rate%20of%20benefit%20expenditure%20overpaid%20in%20FYE%202023,was%20the%20highest%20recorded%20level](http://www.gov.uk/government/statistics/fraud-and-error-in-the-e-benefit-system-financial-year-2022-to-2023-estimates/fraud-and-error-in-the-benefit-system-financial-year-ending-fye-2023#:~:text=Overpayments,The%20total%20rate%20of%20benefit%20expenditure%20overpaid%20in%20FYE%202023,was%20the%20highest%20recorded%20level).

<sup>101</sup> IFF Research, *Universal Credit Full Service Survey* (Research Report 958), London, DWP, 2018, par. 1.3.1.

<sup>102</sup> N Timmins, *Universal Credit: From disaster to recovery?* London, Institute for Government, 2016, 60.

<sup>103</sup> N Mitchell and L Adams, *Digital Child Benefit Customer Survey*, London, Her Majesty’s Revenue and Customs (HMRC), 2022, par. 7.12.

report changes or the kinds of changes that matter for this purpose.<sup>108</sup> Fimister, for example, found that 40 per cent of benefit claimants lacked knowledge about the requirements on reporting changes.<sup>109</sup>

If an overpayment of benefit occurs due to a claimant’s failure to disclose to the appropriate office a “material fact”, meaning some fact potentially having a bearing on entitlement under a benefit award,<sup>110</sup> any overpaid benefit will be recoverable from the claimant.<sup>111</sup> The recovery is usually made via deductions from monthly payments.<sup>112</sup> Recent estimated annual overpayment and underpayment rates and their cause are set out in Table 1. The rates shown represent the total proportion of benefit that was either not paid when there was entitlement to it (underpayment) or was wrongly paid due to fraud or error (overpayment), as a proportion of actual total benefit expenditure.

Overpayments		Underpayments	
Fraud	2.7%		-
Claimant error	0.6%	Claimant error	0.9%
Official error	0.3%	Official error	0.5%
Total overpaid	3.6%	Total underpaid	1.4%

**Table 1: Estimated Overpayment and Underpayment Rates for Social Security Benefits in Great Britain, Year to April 2023<sup>113</sup>**

It is significant that in the case of one benefit, AA, the chief cause of underpayment in 2022 was when the claimant’s disability had “deteriorated and/or their care needs have increased enough to change the rate they are eligible for, but they do not inform the Department and are therefore paid at the lower rate rather than higher rate (of the benefit)”.<sup>114</sup>

<sup>108</sup> See G. Fimister, *Reporting changes in circumstances: factors affecting the behaviours of benefit claimants*, DWP Research Report No. 544, London, DWP, 2009; A. Irvine, J. Davidson and R. Sainsbury, *Reporting Changes in Circumstances: Tackling Error in the Benefits System*, DWP Research Report No. 497, London, DWP, 2008; M. Boath and H. Wilkinson, *Achieving good reporting of changes in circumstances*, DWP Research Report No. 457, Leeds, Corporate Document Services, 2007.

<sup>109</sup> *Ibid.*

<sup>110</sup> See Social Security Commissioner’s Decision R(IS)9/06.

<sup>111</sup> Social Security Administration Act 1992, s.71.

<sup>112</sup> See R. Griffiths and R. Cain, *Universal Credit, deductions and “sexually transmitted” debt* in *Journal of Social Welfare and Family Law* (advanced online publication), 2022, 1-24, at 7-8.

<sup>113</sup> DWP (2023), n. 107 above.

<sup>114</sup> *Ibid.* The reference to ‘higher rate’ refers to the fact

Indeed, almost all of the AA underpayments arose from claimant error rather than official error. They totalled £200 million in the year ending 2022.<sup>115</sup>

Underpayments of PIP totalled £900 million in 2023 of which £840 million was due to claimant error; and the DWP reports that *all* of these claimant error underpayments resulted from “errors where the claimant’s condition had got worse and they failed to inform the department”.<sup>116</sup>

These figures underline the significance of changes of circumstances (particularly concerning health) in relation to benefit awards and the importance of ensuring effective communication of them.

#### 4.2. The obligation to report changes of circumstances

##### 4.2.1. The nature of the claimant’s duty

The claimant has an obligation, set out in regulations, to notify the Secretary of State (in reality this means the DWP) of “any change of circumstances” which the claimant “might reasonably be expected to know might affect” either the continuance of entitlement to benefit, the amount of benefit or the payment of benefit, and to do so “as soon as reasonably practicable after the change occurs”.<sup>117</sup> The duty applies even if the award was made for a fixed period. Many awards of PIP, for example, are fixed term, on the assumption that there could be changes in the claimant’s disabling condition and therefore their needs beyond the set period. Just over three-quarters of PIP recipients are on fixed period awards of

that the claimant receives the lower rate of benefit, paid to those with lesser care needs, rather than the higher rate paid to those with more significant needs. Comparable information on AA is not available for 2023.

<sup>115</sup> DWP, *Fraud and error in the benefit system Financial Year Ending (FYE) 2022 (May 2022) statistics*, at [www.gov.uk/government/statistics/fraud-and-error-in-the-e-benefit-system-financial-year-2021-to-2022-estimates/fraud-and-error-in-the-benefit-system-financial-year-ending-fye-2022](http://www.gov.uk/government/statistics/fraud-and-error-in-the-e-benefit-system-financial-year-2021-to-2022-estimates/fraud-and-error-in-the-benefit-system-financial-year-ending-fye-2022)

<sup>116</sup> DWP (2023) n. 107 above.

<sup>117</sup> The Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968) (the 1987 Regulations), reg.32(1B) and the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (SI 2013/380) (the 2013 Regulations), reg.38(4). Note that this is distinct from separate duties to provide information or evidence required by the DWP in connection with a claim; in that context the reasonableness in relation to the claimant’s knowledge is irrelevant.

two years or less.<sup>118</sup> Nevertheless, any change prior to the expiry of the fixed period needs to be reported. For long-standing or indefinite awards there is no scheduled (re-)assessment until a “light touch” assessment after 10 years,<sup>119</sup> so self-reporting any change in the interim will be particularly important.

In addition to this duty to notify a change of circumstances there is a more general duty to provide “in such manner and at such times as the Secretary of State may determine such information or evidence as the Secretary of State may require in connection with payment of the benefit claimed or awarded”.<sup>120</sup> However, this duty and the change of circumstances duty are considered to be linked,<sup>121</sup> in the sense that the duty to provide any relevant information to the Department is an ongoing one during the continuance of the award.

Case law makes clear that a claimant is not necessarily expected to report undramatic changes in health or disability that have occurred over a prolonged period.<sup>122</sup> An award could have started many years ago and it has been held judicially that it would not be reasonable to expect the claimant to remember their precise condition far in the past and be able to make a comparison between then and the present. Instead, they need only to compare their present and their earlier condition over a “reasonable time frame”, a period sufficient “to show overall a sustained improvement or deterioration, taking account of any usual variation”.<sup>123</sup>

It has also been held that the instructions in the official notes sent by the DWP to benefit recipients have a bearing on whether a claimant should realise the need to report a change, although what it is reasonable for the claimant to know in any individual case might

hinge on their mental state and other relevant factors.<sup>124</sup> In one case the notes had stated:

“We need to know if anything you told us changes about how your illness or disability affects you. Please tell us if things get easier or more difficult for you. And tell us if you need more or less help.”<sup>125</sup>

It seems probable that any person who has received such notes and has benefited from a hip operation in the way the claimant in this particular case had done, by experiencing an improvement in walking ability, would be expected to know that they should report the change. Furthermore, it has since been held by the Court of Appeal, in *B v Secretary of State for Work and Pensions*, that an overpayment of benefit resulting from a failure to disclose a material fact of which the claimant was aware (in this case, that the claimant’s children had been taken into local authority care) is recoverable by the authorities even if the claimant did not actually appreciate that reporting of it was necessary.<sup>126</sup> The test of whether it is “reasonable” to know that the change might affect one’s entitlement to benefit, in other words whether the change is a material fact, was considered an objective rather than a subjective one.<sup>127</sup>

This approach was subsequently held by the European Court of Human Rights to be consistent with the European Convention on Human Rights, in *B v United Kingdom*, which involved the same claimant. The complaint was of discrimination contrary to Article 14 read with Article 1 of the First Protocol, arguing that claimants who could not reasonably be expected to report a material fact because of being *unaware of that fact* were treated differently to claimants who could not reasonably be expected to report the fact because they were *unaware of the requirement to report* it. Were the two groups of claimants in an analogous situation, on the basis that neither of them could reasonably be expected to report the relevant fact and they were equally blameless for not doing so? The Court decided that they were *not* analogous situations. The situation where someone was not aware of a fact was “qualitatively of a different nature” to where someone was

<sup>118</sup> See PIP statistics cited in n.1. above. The law requires PIP awards to be fixed term unless that is considered “inappropriate”: Welfare Reform Act 2012 s.88.

<sup>119</sup> See DWP, The Personal Independence Payment (PIP) toolkit, at [www.gov.uk/guidance/the-personal-independence-payment-pip-toolkit](http://www.gov.uk/guidance/the-personal-independence-payment-pip-toolkit).

<sup>120</sup> 1987 Regulations above, reg. 32(1A). See also the 2013 Regulations, reg. 38(3).

<sup>121</sup> Commissioner’s Decision *CDLA/2328/2006*, a decision of a Social Security and Child Support Commissioner. The functions of the Commissioners, to hear appeals from decisions of first-tier tribunals, was transferred to a new Upper Tribunal in 2008 under the Tribunals, Courts and Enforcement Act 2007.

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*, par. 24.

<sup>124</sup> *Ibid.*, par. 28.

<sup>125</sup> *Ibid.*, noted at par. 18.

<sup>126</sup> *B v Secretary of State for Work and Pensions* [2005] EWCA Civ 929.

<sup>127</sup> *Ibid.*, par. [40].

“aware of a fact but... not aware of its materiality”: the latter but not the former depended on “difficult questions of cognitive capacity and moral sensitivity which vary from person to person”<sup>128</sup>

The claimant’s alternative argument in *B v United Kingdom* was that because she was incapable of understanding that she should report a material fact to the Department she should have been treated differently from someone who had such a capability. However, the Court said that the difference in treatment was in pursuit of a legitimate aim, “namely that of ensuring the smooth operation of the welfare system and the facilitation of the recovery of overpaid benefits”, and was “objectively and reasonably justified”, since requiring decision-makers to assess the claimant’s understanding or mental capacity for this purpose would hinder recovery of overpaid benefit and reduce public resources.<sup>129</sup> The treatment was also considered proportional in that it was accepted that public authorities have the right to correct errors in the award of benefits provided an excessive burden is not placed on the individual (here the mitigation was that repayment was by monthly instalments) and the claimant had not requested a waiver of the recovery of the overpaid benefit on the basis that such recovery would be detrimental to the claimant’s health or welfare.<sup>130</sup>

So, the requirement to report a change of circumstances, such as a material change in a medical condition or disability, is likely to be treated strictly. If digital access can improve the claimant’s ability to fulfil this requirement it would be particularly beneficial. Alternative means of reporting would need to be permitted, however, since otherwise there might be grounds for an Article 14 claim on the basis that those lacking mental or physical capacity for online engagement are unjustifiably disadvantaged compared with others. Leaving this aside, the fall in the reporting of changes of circumstance during the Covid-19 pandemic, in the case of PIP,<sup>131</sup> for which digital usage is still nowhere near

normative, demonstrates why digital communication can make a difference to claimant engagement with the benefit system for such purposes.

#### **4.2.2. Using digital technology to report changes successfully**

Social security law permits the communication of information or evidence relating to a change of circumstances to be undertaken by the claimant electronically provided various conditions are met.<sup>132</sup> Essentially, this form of communication must have been officially approved and comprise online communication using the official route. Where the approved method is not used, the information provided will be treated as not having been submitted.<sup>133</sup> Using an unapproved method (for example, a simple email) might, therefore, result in the information not being classed as officially received and disclosed to the DWP, leading to a potential overpayment of benefit which could be recoverable from the claimant. The online facility is particularly relevant to UC claims, as described earlier, and the lack of progress in making this route more widely open across different benefits (for example, contributory ESA recipients must report changes via the telephone or postal services<sup>134</sup>) is regrettable.

A problem that has emerged in relation to UC is that third parties who are supporting claimants do not have direct access to the UC online journal which, as noted earlier, is intended to be the principal channel of communication for reporting changes of circumstances as well as for other interactions. Someone representing an ill or vulnerable claimant might therefore be hampered in their efforts to keep the Department informed of relevant matters. The National Audit Office has recommended allowing claimants’ supporters access to a version of the journal to enable them to “view appropriate shared information and communicate with the Department”<sup>135</sup>.

<sup>128</sup> *B v the United Kingdom* (Appl. No. 36571/06) [2012] ECHR 255, par. [57].

<sup>129</sup> *Ibid.*, par. [59] and [62].

<sup>130</sup> *Ibid.*, par. [60]-[61].

<sup>131</sup> DWP, Official Statistics: Personal Independence Payment: Official Statistics to April 2022 (published 2022), at [www.gov.uk/government/statistics/personal-independence-payment-statistics-to-april-2022/personal-independence-payment-official-statistics-to-april-2022](http://www.gov.uk/government/statistics/personal-independence-payment-statistics-to-april-2022/personal-independence-payment-official-statistics-to-april-2022).

<sup>132</sup> 1987 Regulations, reg.32ZA and Schedule 9ZC; 2013 Regulations, Schedule 2.

<sup>133</sup> See the 1987 Regulations, Schedule 2 par. 2; and the 2013 Regulations, Schedule 2 par. 2.

<sup>134</sup> As advised by the DWP in its detailed guidance for claimants at [www.gov.uk/guidance/new-style-employment-and-support-allowance-detailed-guide](http://www.gov.uk/guidance/new-style-employment-and-support-allowance-detailed-guide).

<sup>135</sup> National Audit Office (NAO), *Rolling Out Universal Credit* (HC 1123) (Session 2017-2019), London, NAO, 2018, par. 19. The NAO is an agency tasked with

The benefits to the claimant of electronic communication via digital channels for reporting a change of circumstances include the relative certainty, provided the system works properly, that the DWP will receive the relevant information and be able to act upon it where appropriate. In any event, it should also provide a probative electronic footprint relating to the sending or uploading of the information. There is, however, a question over whether it may also potentially avoid the difficulty faced by some claimants in ensuring that the information is correctly channelled to the relevant DWP office or section. For example, a claimant receiving more than one social security benefit may assume (not necessarily correctly) that a communication to just *one* of the offices handling the different awards may satisfy the obligation to notify a change of circumstances. The law, however, requires the change of circumstances notification relevant to an individual benefit to be given to the “appropriate office” (in writing or, unless specifically required to be given in writing, by telephone).<sup>136</sup>

This issue was highlighted in an inquiry by the House of Commons Work and Pensions Committee into overpayment of Carer’s Allowance paid (as noted above) to people who provide substantial care for another person who receives disability benefit. In its report, the Committee noted that the DWP, in an annual reminder to recipients, states that their Carer’s Allowance entitlement “could be affected” if there is a change in their circumstances. The reminder also provides an internet link for reporting any such change to the relevant administrative office, the “CA Unit”. However, the Committee criticises the Department for not also making clear to recipients that changes of circumstances *must* be reported *directly* to the Unit “even if claimants have reported the changes to other DWP departments who may need to be informed”.<sup>137</sup> A claimant would be wrong to assume that the different offices or sections are all joined up administratively, particularly through an IT system, so that informing one part of the system might be sufficient. This has long been an aspect of the complexity of

providing arms-length scrutiny of government economic efficiency in service provision.

<sup>136</sup> See, for example, the 2013 Regulations, reg.38(5).

<sup>137</sup> House of Commons Work and Pensions Committee, *Overpayments of Carer’s Allowance* (Session 2017-19) (HC 1772), London, House of Commons, 2019.

the social security system that claimants find particularly problematic.<sup>138</sup> It has been exacerbated by the only partial linking of different agencies’ computer systems.<sup>139</sup> Although the replacement of six separate benefits by UC has led to a more unified system than previously existed, the migration of claimants from the benefits that are being replaced has been a greatly protracted one and is still not complete.

The problem of failing to report changes to the “appropriate office” was highlighted in an important case in 2005: *Hinchy v Secretary of State for Social Security*.<sup>140</sup> The claimant received a disability premium in her social assistance benefit (Income Support). Her entitlement to this premium was triggered by her receipt of the DLA care component at the middle rate. When her DLA award ended, payment of her disability premium should therefore also have stopped. However, the premium wrongly continued in payment, because the Income Support office was unaware the DLA award had ended. A total of £3,500 in disability premium was overpaid and the Secretary of State sought to recover it.<sup>141</sup> The claimant appealed, but the first-tier tribunal rejected her claim to have conveyed the information by telephone, since there was no record of her call. The tribunal also considered it clear from the notice printed in her Income Support order book that it was important for her to notify the appropriate office of relevant changes. The tribunal concluded that it was reasonable to expect her to have read the instructions. Also, the case law confirmed that she was under an

<sup>138</sup> House of Commons Work and Pensions Committee, *Benefits Simplification, Vol.1* (HC 463-I), London, The Stationery Office, 2007, par. 10.

<sup>139</sup> NAO, *Department for Work and Pensions: Dealing with the Complexity of the Benefits System*, London, NAO, 2005, par. 2.24. The problematic situation described by Henman and Adler over 20 years ago, of a frequent absence of an automatic flow of information between different benefit administrations (P. Herman and M. Adler, *Information technology and transformation in social security policy and administration: A review*, in *International Social Security Review*, 54, No. 4, 2001 23-49, 30), has still not been fully redressed. For a recent example, see *WS v Secretary of State for Work and Pensions* [2023] UKUT 81 (AAC) (DWP and HMRC were linked by a RTI (real time information) feed but this did not mean that a claimant’s reported change of circumstances was known to both).

<sup>140</sup> [2005] UKHL 16.

<sup>141</sup> Under the Social Security Administration Act 1971, s 71(1).



obligation to provide any relevant information to the appropriate office.

The case progressed to the Court of Appeal, which concluded that the information relating to the ending of the DLA award did *not* need to be communicated to the Income Support office as the fact was already known to the DLA officials and it was reasonable for the claimant to believe that other benefit officials would be aware of it. When the case was subsequently heard in the House of Lords, one of the judges, Lord Scott, in effect blamed the DWP for not ensuring that the instructions in the order book were clear about having to inform a specific office about the ending of the DLA award.<sup>142</sup> However, the other four judges took a hard line. Lord Hoffmann said that there was an onus on the claimant to report changes appropriately and the relevant official could not be deemed to know something that was actually unknown to them.<sup>143</sup> Although Baroness Hale expressed doubts about the clarity of the order book's instructions in informing the claimant of her obligations,<sup>144</sup> the question of whether claimant ought reasonably to have known that she was obliged to report the termination of her DLA award was a matter to be left to the first-tier tribunal's judgment.<sup>145</sup>

The *Hinchy* case therefore reinforced the burden on claimants in trying to manage with the complexities of the social security system, while it also highlighted the system's disparateness and lack of cohesion, factors which have in fact made the employment of joined-up digital processes both more necessary but at the same time more difficult.<sup>146</sup>

In addition to a disjunction between different computer systems, there is also the problem where individual systems do not

work efficiently. In one case<sup>147</sup> the claimant had informed the Department by telephone of a change of circumstances and was informed that the system was "down" and they would contact her again, which did not happen. As her benefit was not adjusted, she was overpaid a significant sum, a total of £11,000. The DWP argued that she had a continuing obligation to disclose her circumstances, with the implication that she should have persisted with informing them until the adjustment to her benefit was made. However, Upper Tribunal Judge Wikeley held that the claimant had met her disclosure obligation when she telephoned with the information. Claimants of most social security benefits in the UK, including disability benefits, are advised by the DWP to telephone in details of changes of circumstances, the exception being UC claimants, who as noted above will normally be expected to use their online account.<sup>148</sup> However, the danger that the information may not be recorded will normally make the online route seem much safer and more reliable from a claimant's perspective.

## 5. Conclusion

In the light of the large numbers of UK citizens currently eligible for and receiving sickness or disability benefits (nearly half of the total recipients across these categories are receiving both types<sup>149</sup>) it is not surprising that the Government's ongoing digitalisation programme for social security is having an increasingly marked impact on these particularly disadvantaged and vulnerable claimants. Interaction by digital means between the administrative authorities and claimants is a particular feature of this new emphasis within social security administration. There is an expectation by the policy makers that the normative status of digital communication for claims and the management of awards, including decisions and adjustments, will become firmly entrenched within this area of social security as it is in the context of mainstream out-of-work benefits. However, it is important that account is taken of the Work and Pensions Committee's recent warning in relation to health and disability benefits that "digital does

<sup>142</sup> [2005] UKHL 16 at par. 46 (Lord Scott of Foscote).

<sup>143</sup> *Ibid.* at par. 32 (Lord Hoffmann). This situation may be contrasted with that in a Commissioner's case (*CIS/1887/2002*) in which the claimant's Income Support was overpaid because his payments were not adjusted to take account of his simultaneous award of Incapacity Benefit but it was held that the administrative office for Income Support was the same office as the one that handled Incapacity Benefit and should therefore have known about the latter award.

<sup>144</sup> *Hinchy* n. 142 above, par. 57.

<sup>145</sup> *Ibid.* at par. 58.

<sup>146</sup> See for example the comments by the chair of the Committee in Social Security Advisory Committee, *Seventeenth Report, 2004*, Leeds, Corporate Document Services, 2004, foreword.

<sup>147</sup> *CIS/3529/2008* [2009] UKUT 52 (UT).

<sup>148</sup> See the statement at [www.gov.uk/report-benefits-change-circumstances](http://www.gov.uk/report-benefits-change-circumstances).

<sup>149</sup> DWP (2023) n. 82 above, par. 139.

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not work for everyone” and its recommendation that “alongside the digital platform” there need to be “alternative formats and channels... easily available to those who need them”.<sup>150</sup> Digital will nevertheless be the default and given this expectation it is ironic that mental or physical problems that affect a person’s digital capacity may, as we have seen, be relevant factors in the assessment of their entitlement to the health-related and disability-related benefits. This is unlikely to change even if the Work Capability Assessment is reformed or replaced, as is expected to occur, following the publication of proposals by the Government in March and November 2023.<sup>151</sup>

One of the most important aspects of the two-way information flow by digital means between the provider and the recipient of benefit relates to the obligation on the latter to report to the former any change of personal circumstances relating to health and disability insofar as it relates to and affects their physical or mental capacity for work or to self-care or mobilise. The strictness of the rules is underlined by the case law. As we have seen, this is a problematic issue since failures to report such changes can result in underpayment of benefit or to an accumulation of overpaid benefit that will need to be repaid by the claimant, with the attendant risk of hardship. It is important that any barriers to the correct reporting of changes, which is not always a straightforward matter for claimants, are

minimised. To this end, further measures and support will be needed to bridge digital the divide which clearly disadvantages some disabled and long-term sick claimants disproportionately.

<sup>150</sup> See Work and Pensions Committee, *Health assessments for benefits*, Fifth Report of Session 2022–23 (HC 128, London, House of Commons, 2023, par. 61.

<sup>151</sup> DWP (2023) n.82 above, Chapter 4 and *Government Response to the Work Capability Assessment: Activities and Descriptors Consultation* (CP 973), London, DWP, 2023. Those receiving a disability benefit would qualify for UC limited capability (to be renamed “UC health element”) without the need for a separate health (WCA) assessment, whereas those not receiving a disability benefit would not undergo a WCA either but would in effect be assessed under the PIP criteria but will also be subjected to a new “personalised health conditionality approach”. Much more detail (and new legislation) relating to the proposals will be needed, but if approved the reform would be rolled out from 2026/27. For analysis of potential impact, see Resolution Foundation (RF), *Reassessing the Work Capability Assessment* (RF, 2023), at [www.resolutionfoundation.org/publications/reassessing-the-work-capability-assessment/](http://www.resolutionfoundation.org/publications/reassessing-the-work-capability-assessment/). See also S R Chaudhuri and T Waters, *The effects of reforms to the Work Capability Assessment for incapacity benefits*, London, Institute for Fiscal Studies, 2023.