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**Executive Summary**

# Access to Justice for Everyone

# Making It Work

**September 2023**

# Access To Justice: How might a new Human Rights legal framework improve access to justice in Scotland today?

# Executive Summary

What is this discussion paper about?

Under international human rights law, everyone has the right to equal treatment and a solution when things go wrong - that is access to justice.

In short, routes to justice should be accessible to all and justice should benefit all. Where things have gone wrong, lessons should be learned and changes should be made.

Our new paper, authored by Professor Katie Boyle, highlights that right now in Scotland, many people are confused about their human rights and where to turn when they need help. Too often, systems do not make wholescale changes when breaches of human rights occur, meaning that many people in different parts of the country experience the same or similar problems time and time again.

This paper explores the issues around access to justice as they are experienced in Scotland today. It is designed to provide an assessment of the current landscape and barriers, and to provide those with an interest in access to justice – whether that be those advocating for change or those working as duty bearers and regulators - with a framework to assess how fit for purpose current routes to justice are in human rights terms.

Scotland is proud to be a rights respecting country. The Scottish Government is consulting on a new Human Rights Bill for Scotland, to be laid before the Scottish Parliament in 2024.

The independent research we have commissioned explores how rights are truly being experienced in Scotland today through the lens of Economic Social and Cultural Rights.

This short paper presents a summary of the report findings and considers what this may mean for those working in the field of access to justice, and the development of the new access to justice mechanisms via the forthcoming Human Rights Bill.

The [full research report](https://www.scottishhumanrights.com/media/2496/access-to-justice-for-everyone-a-discussion-paper.pdf) can be downloaded on our website at www.scottishhumanrights.com/publications.

How people experience access to justice

Often, when we talk about access to justice, people think of the criminal and civil court system, solicitors, judges and juries. Current evidence shows that challenges with access to legal aid, backlogs in the court system, and ready access to specialist legal advice is making the legal system difficult to access for many people in Scotland.

Whilst these are of course fundamental pillars of the justice system in Scotland, the types of issues and experiences around access to justice in human rights terms are much broader. Other examples of access to justice issues could be:

* A complaint to a local authority that social care staff are not available to support an elderly person living alone with personal care, even though it is agreed that this should be in place.
* A complaint to the Scottish Public Services Obudsman that the local authority failed to investigate properly.
* Whistleblowers in the NHS.
* Tenants in social housing who are experiencing problems with black mould in their home.
* Taking an issue to an independent advice service, like Citizens Advice Scotland or Enquire.
* Survivors of historial child abuse seeking recognition of what happened to them.
* Family members of a person who has died in custody; it could be a person in custody who has a complaint.
* A person who needs help to understand their rights and what is happening to them if they are detained in hospital under the Mental Health Act.

Far too often, individuals do not have access to the information they require, the emotional resilience nor energy to pursue a complaint, access to help or independent advocacy, the financial resources, the time, or the advice they require to effectively pursue justice.

The routes to accessing justice in Scotland are therefore complex, not equally available to all, and not accessible to all.

Strengthening human rights in Scotland

The Scottish Government has committed to bring UN human rights treaties into Scots law in the current Parliamentary term. This will mean a range of new protections for everyone, from housing to health, food, social care and education.

The new laws should ensure that public authorities take these human rights seriously, and provide tools for the people of Scotland and its institutions to hold them accountable when things go wrong. To do this, the legislation must be amibitious in scope and unafraid to introduce stronger accountability measures, as well as the mechanisms and resources for people to access these.

Shaping a clear, well-defined pathway to access to justice – and making it easy to navigate – is at the heart of this. This discussion paper is the second in a series of papers from the Commission in 2023-24 which includes a look at the lived experience of rights holders in Scotland in accessing justice.

The Commission and access to justice

The Commission has already considered the experiences which have led to the proliferation of calls for new public bodies to uphold their human rights. It is clear that there is an accountability gap between how human rights are envisaged in policy, and how they are experienced by people in their day to day lives. The cumulative and persistent impact of this has led to many groups of people in Scotland calling for change. The Commission’s 2023 paper “[At a Crossroads: what next for the Human Rights system in Scotland](https://www.scottishhumanrights.com/media/2456/crossroads_what-next-for-human-rights-protection-in-scotland-shrc-june-2023.pdf)” explores this further.

The Commission is clear that it would welcome further powers to play a stronger role in the access to justice system, particularly to assist in achieving systemic change through (non-HDMI) greater monitoring and scrutiny, more usable powers of inquiry, and the power to raise legal proceedings in its own name.

However, in this paper, the Commission takes a deeper look at the complexity of the system at an individual level, and provides a framework for a human rights based approach to the design and deliivery of access to justice processes. We asked leading expert Professor Katie Boyle, Professor of Human Rights and Social Justice at the University of Strathclyde, to author this paper, offering both an investigation into the challenges people in Scotland face on access to justice and suggested solutions.

The report focuses on experience of access to justice in relation to people’s economic, social, cultural and environmental rights but it is relevant for all human rights. It identifies six key themes for action:

* Improving people’s awareness of their human rights;
* Understanding the financial, legal and emotional resources involved in accessing justice;
* Simplifying the access to justice process;
* Making sure all the different ways of making a complaint are accessbile, timely and affordable;
* Ensuring that responses to human rights complaints are effective, both for individual people and to help organisations improve how they work;
* Feeding lessons learned back into the system, to create meaningful change.

# Barriers to access to justice

An infographic summary

We know that many people in Scotland face the same obstacles when human rights are breached and they want to seek justice. Trying to overcome these barriers puts most people off, before their journey ever gets fully started.



Complaints: how to take a human rights based approach

Beyond an exploration of the issues faced, this paper provides useful reflective questions that both those advocating for change and duty bearers who have a role in the access to justice journey can use to take a human rights based approach to their work.

# Designing an access to justice system

A human rights based approach

The following key questions are designed to help duty bearers and regulators to build a human rights based approach to access to justice. They will also help those who are advocating for change to assess current practice and where things need to change. They are centred around the themes of Access, Participation and Deliberation, Fairness, and Access to Effective Remedy.

Access

* + Has there been sufficient awareness raising about rights as well as legal and alternative processes?
	+ Do people have the necessary emotional and financial resources to enable them to access justice.
	+ Is there sufficient advice and representation available?
	+ Is standing sufficiently broad?
	+ Is access to justice affordable?
	+ Is civil legal aid sufficient to support ESCE litigation?
	+ Accessibility for group or multi-party actions?
	+ Public interest litigation facilitated?

Participation and deliberation

* + Are those impacted able to meaningfully participate?
	+ What role can advocacy play in supporting litigants? How can advocacy be better enabled?
	+ Do processes listen to the voices of those impacted and included them in decisions and remedies?
	+ Does a digital divide or language barrieres prohibit participation?
	+ Is public interest litigation facilated?
	+ Are multi-party actions facilitated?
	+ Are collective responses facilitated when deadling with systemic issues?
	+ How can adjudicators best engage in dialogue between institutions?
	+ Are adjudicators able to work in dialogue with other institutions, sometimes in a deferential way, and sometimes in a more interventionist way?
	+ Are adjudicators able to listen to other domestic and international stakeholders such as ombudsmen, international courts and UN Committees, as well as rights holders themselves?

Fairness

* + What grounds and intensity of review is used?
	+ Reasonableness and proportionality tests should align with international and comparitive best practice.
	+ Is it appropriate to move beyond procedural review and enforce substantive standards? How can this be achieved?
	+ Adjudicators should use international human rights law (including UN treaties, treaty body decisions, General Comments and recommedations), as well as comparitive law when interpreting rights.
	+ Can adjudicators enforce the minimum core obligation? How can courts move beyond Article 3 ECHR in enforcing substantive standards? Is dignity an appropriate threshold?

Access to effective remedy

* + What would remedies look like under a new statutory framework? What does an effective remedy mean in Scotland for a violation of an ESCE right?
	+ Can courts deploy different remedies to address different aspects of the violation?
	+ Are the remedies appropriate and are they effective?
	+ Are they procedural or substantive in nature?
	+ Are remedies deferential where appropriate and outcome oriented where appropriate?
	+ Are remedies participative and are there sufficient monitoring mechanisms to ensure compliance?
	+ Are structural remedies used where appropriate when dealing with systemic issues?
	+ Do remedies deal with the issue at hand, as well as a change of practice to ensure others do not face the same violation?

More detail on this approach can be found in the [full paper](https://www.scottishhumanrights.com/media/2496/access-to-justice-for-everyone-a-discussion-paper.pdf) which is published on our website at www.scottishhumanrights.com/publications.

# Next steps

Over the coming months, as part of our continuing Access to Justice project, the Commission will be using this framework and applying these questions in our own assessment of whether Scotland is meeting its obligations in two focus areas: prisons and social care. Our findings will be published later in 2023.

If you would like to know more about this work or have any views on the access to justice system in Scotland today, please contact us at hello@scottishhumanrights.com.

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