

Response of the Scottish Human Rights Commission to the Scottish Government's Consultation on Legal Aid Reform

October 2026

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About the SHRC

The Scottish Human Rights Commission ("SHRC") is a public body created by the Scottish Commission for Human Rights Act 2006.

We are an independent, expert body that works with and for the people of Scotland; we monitor, listen, speak up for all of our rights and respond when things go wrong.

The SHRC is also part of the international human rights system. It is accredited by the United Nations as its trusted organisation to provide impartial evidence on the enjoyment of human rights in Scotland.

The SHRC is independent of Government. We are accountable to the people of Scotland via the Scottish Parliament.

Introduction

We welcome the Scottish Government's commitment to bring forward a new Legal Aid (Scotland) Bill in the first year of the Programme for Government.

The SHRC previously responded to the Equality, Human Rights and Civil Justice ("EHRCJ") Committee's call for views in Session 6 on civil legal advice and assistance. Our response is available here - [SHRC's response to EHRCJ Committee](#). That response set out the applicable human rights framework relevant to civil legal aid and the importance of civil legal aid in accessing justice for human rights issues. It also highlighted what the SHRC considers to be the current strengths and challenges facing civil legal aid.

The EHRCJ Committee's report concluded that there is an urgent need for action to improve the delivery of civil legal assistance and in turn improve access to justice. It stated that it was highly unsatisfactory that legislation to reform the system was not introduced in the last Parliamentary session.

The SHRC does not directly engage in legal aid work and has not undertaken further research into the successes or challenges of specific funding models. Therefore, we are not well placed to comment on specific means of funding or delivery of civil legal aid from the perspective of operational effectiveness. For that reason, the SHRC's response to this consultation is limited to questions 3 and 16, as well as an additional comment on UNCRC compliance. However, we invite the Scottish Government to have regard to the SHRC's earlier response to the EHRCJ Committee's review when developing the legislation. We will closely scrutinise the legislative proposals that emerge from this consultation process to ensure that they meet the relevant human

rights standards and, in turn, serve to effectively improve access to justice for everyone in Scotland.

In summary, the SHRC believes that the design and implementation of a reformed civil legal aid system should be expressly guided by the principles of effective remedy, non-discrimination and the best interests of the child. These are fundamental to ensuring that the system respects, protects and fulfils human rights.

The SHRC also welcomes, in principle, the expansion of legal aid from individuals to include organisations in order to better facilitate public interest litigation and therefore access to justice. In pursuit of the same purpose, the SHRC also suggests that the Scottish Government should consider whether there are pre-existing mechanisms, such as Protective Expenses Orders, which could be improved. Moreover, we consider that funding is only one piece of the access to justice landscape, and action to address the other barriers which exist to effective public interest litigation should also be prioritised.

Question 3: What principles, if any, should inform the purpose and objectives?

A human rights-based approach to legal aid reform should expressly recognise and be underpinned by three established human rights principles, summarised as follows:

1. Effective remedy.

Access to justice and to effective remedies are essential for the protection, promotion and fulfilment of human rights. For rights to have meaning, effective remedies must be available in response to violations of those rights. Part of what makes a remedy effective is that it is available in practice and not just in theory. Excessive costs, complexity and delay can operate to make the right illusory. Civil legal aid should be accessible, affordable and timely.

2. Non-discrimination.

Civil legal aid should be available without discrimination. The fundamental principle of non-discrimination must guide the design and implementation of the reformed civil legal aid system to ensure that

barriers to accessing legal aid are identified and removed. This may require that special protection and assistance is granted to vulnerable people.

3. Best interests of the child.

The best interests of the child must be a primary consideration in all decisions about legal aid which concern a specific child, group of children or children in general. This should also guide the design and implementation of the reformed civil legal aid system. The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 ("UNCRC Act") has made this a requirement under the domestic law of Scotland.

Principle 1 - effective remedy

The first principle reflects Article 13 of the European Convention on Human Rights ("ECHR"), which provides that everyone whose rights and freedoms have been violated shall have an effective remedy before a national authority. Article 13 is principally incorporated in UK domestic law via section 7 of the Human Rights Act 1998 ("HRA"). Article 13 ECHR is closely related to the requirements of a fair trial set out in Article 6 ECHR. Article 6(1) ECHR can in certain circumstances compel the state to provide for the assistance of a lawyer, as explained in more detail in the [SHRC's response to the EHRCJ Committee](#). The European Court of Human Rights has stated:¹

"As a rule, the fundamental criterion of fairness, including the equality of arms, is a constituent element of an effective remedy. A remedy cannot be considered effective unless the minimum conditions enabling an applicant to challenge a decision that restricts his or her rights under the Convention are provided".

This is also reflective of Article 4 of the United Nations Convention on the Rights of the Child ("UNCRC"), which is now a directly enforceable obligation in the Scots legal system as a result of the UNCRC Act. Article 4 UNCRC requires a State to take all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the UNCRC. To this end, the Committee on the Rights of the Child - the body tasked with overseeing the implementation of the UNCRC by States - has stated:²

"For rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties. Children's special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights. So States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include the provision of child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance. Where rights are found to have been breached, there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39."

The right to an effective remedy is therefore a requirement of both the ECHR and the UNCRC. The Scottish Government has an opportunity through this reform to ensure that its approach to civil legal aid realises these rights in practice.

Principle 2 - non-discrimination

This is reflective of Article 14 ECHR and Article 2 UNCRC. The fundamental nature of the principle was explained by the House of Lords in Carson:³

"In the field of human rights, discrimination is regarded as particularly objectionable because it disregards fundamental notions of human dignity and equality before the law".

The Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law include non-discrimination as a general principle.⁴ These guidelines provide guidance for states seeking to reform their legal aid schemes in order to provide better access to justice, particularly to the most vulnerable. We therefore recommend that the Scottish Government has regard these guidelines when developing the new legislation.

Principle 3 - best interests of the child

This principle is rooted in Article 3(1) UNCRC, read together with the Committee on the Rights of the Child's General Comment No. 14 (2013) on the right of the child to have their best interests taken as a primary consideration. Article 3 is a legal obligation which is now directly enforceable through the Scottish courts where the

Scottish Ministers and the Scottish Legal Aid Board are exercising a relevant function, as defined by section 6 of the UNCRC Act.

The SHRC nonetheless considers that Article 3(1) UNCRC should be expressly recognised as a principle in the reformed system of civil legal aid given its role as a general principle of the UNCRC, as well as the recommendation from the Committee on the Rights of the Child in its 2023 Concluding Observations to the UK that the UK ensure all children have access to "legal support and representation in addition to remedies, including by removing barriers faced by children in disadvantaged situations and expanding the types of support provided under the legal aid budget".⁵ Express recognition of this in the civil legal aid system should facilitate a better understanding of the legal obligation placed on Scottish public authorities by the UNCRC Act and ensure that this is at the forefront of all relevant decision-making.

The SHRC also recommends that the Scottish Government has close regard to the Committee on the Rights of the Child's General Comment No. 27 on children's right to access to justice and to an effective remedy when developing and implementing the reformed system. This was formally adopted by the Committee on the Rights of the Child in September 2026 and is an authoritative statement on a matter which is currently at the forefront of the Committee's considerations.

Question 16: Do you consider that the scope of legal aid in Scotland should continue to be focused primarily on individuals, or are there circumstances in which non-natural persons should be eligible for support?

Extending legal aid to non-natural persons in certain circumstances has the potential to have a significant positive impact on the ability of civil society organisations to pursue human rights litigation in the public interest. On this basis, the SHRC would be supportive of this in principle.

Public interest litigation is an essential component of a society based on the rule of law. It enables systemic issues that affect the broader community to be addressed. While legal challenges that raise issues of public interest can be brought by individuals, this places a significant burden on individuals which goes beyond the requirement for financial support. The SHRC, as Scotland's National Human Rights Institution ("NHRI"), has an important role to play in protecting and advancing human rights through strategic, public interest litigation where our powers enable us to do

so. At present this can be achieved through intervention and own name litigation under the UNCRC Act. However, there is also an important role for public interest litigation to be undertaken by other organisations such as charities and non-governmental organisations. These organisations often possess valuable insights and expertise in relation to the specific challenges faced by vulnerable and marginalised communities. Where legal challenges are brought by these organisations, it means that the significant burden associated with pursuing legal proceedings does not fall on one individual, particularly where this person is very often already vulnerable and marginalised. The benefits of public interest litigation being conducted by such organisations are well-documented, such as in the SHRC's "Access to Justice for Everyone" discussion paper.⁶ As set out in our response to question 3, the Committee on the Rights of the Child has also highlighted that children can face specific difficulties in pursuing legal proceedings.

As the SHRC has reported to the European Network of National Human Rights Institutions (ENNHRI) as part of ENNHRI's 2026 Rule of Law and Human Rights report,⁷ the SHRC has observed that practical restrictions on resources and engagement are having a direct impact on the sustainability of open civic space in Scotland. Therefore, a move to support civil society to uphold rights in this way would be a welcome signal of support for the critical role that a healthy civil society plays in a healthy democracy.

There are recent developments in human rights law in Scotland which are reflective of the role that organisations can and should play in public interest litigation. Importantly, the UNCRC Act does not replicate the "victim test" in sections 7(3) and 7(7) of the HRA. This should create more opportunities for proceedings to be brought under the UNCRC Act by organisations in the public interest.

The "victim test" in the HRA does mean that opportunities for civil society organisations to bring proceedings under the HRA are more limited, and this is compounded by the fact that the SHRC does not have the power to bring proceedings under the HRA.⁸ However, opportunities for organisations to raise public interest litigation under the HRA do still exist in certain circumstances. We also consider it relevant to note that in 2024 the European Court of Human Rights expanded the understanding of who may qualify under Article 34 ECHR to bring a claim.⁹ The effect of the judgment is that "associations" in cases concerning climate change can now bring claims before the European Court of Human Rights where certain conditions are met. The Grand Chamber reflected that this development underscored the evolution of civil society's role in addressing the risks of climate change.¹⁰

Moreover, it is also important to note that raising proceedings under the UNCRC Act or the HRA is not the only means by which human rights issues can be challenged in the Scottish courts. For instance, challenges can also be based on common law fundamental rights following the approach adopted by the Supreme Court in *Osborn*¹¹, or challenges can be brought under other domestic legislation which is designed to give effect to human rights, such as the Equality Act 2010 and the Housing (Scotland) Act 1987. Therefore, the SHRC suggests that a broad conceptualisation of human rights challenges should be adopted when considering the context in which public interest litigation can arise.

The unanimous passage of the UNCRC Act by the Scottish Parliament, together with the commitment by the Scottish Government to adopt the same approach to standing in the forthcoming Human Rights Bill, sends a powerful signal that public interest litigation is encouraged in Scotland. However, this is just one piece of the puzzle. The SHRC is aware that funding can be a significant barrier to civil society organisations bringing proceedings in their own name to challenge systemic human rights issues, despite the improvements to the position on standing introduced by the UNCRC Act. This is particularly so in relation to the risk of having to pay the other side's expenses if the action is unsuccessful. The SHRC notes that duty bearers will generally be an emanation of the state, meaning that there is often an inherent power dynamic in play. While duty bearers may also face financial constraints, legal aid plays an important role in redressing the imbalance and ensuring that the state does not have an unfair advantage.

However, while the SHRC is supportive of this proposal in principle, we do not take a view from the perspective of operational effectiveness. The Scottish Government should therefore carefully consider the positions of civil society organisations as to whether and, if so, how this proposal would work in practice. We also suggest that the Scottish Government should consider whether pre-existing mechanisms such as Protective Expenses Orders could be improved for the same purpose.

In any event, the potential extension of legal aid to civil society organisations is not a panacea to all of the barriers which exist to effective public interest litigation in Scotland. The SHRC suggests that the Scottish Government should also prioritise action to address the other barriers which exist, such as the availability of structural remedies, which is considered as part of the SHRC's "Access to Justice" discussion paper.¹² We also note that expansion of the SHRC's statutory mandate, as has been recommended by the Global Alliance of National Human Rights Institutions and the UN Office of the High Commissioner for Human Rights, would be another important step towards facilitating public interest litigation in Scotland.¹³

As Scotland's NHRI, the SHRC may also want to engage further with the Scottish Government as work on this proposal develops to ensure that the potential impact on Scotland's wider human rights litigation landscape is fully taken into account. We look forward to being kept updated by the Scottish Government and would expect the Scottish Government to be open to further analysis from the SHRC where provided.

Additional comments

The SHRC wishes to take this opportunity to highlight recent developments regarding representation of children in cases brought under the UNCRC Act. Article 12 UNCRC requires that children must be given an opportunity to express their views and for those views to be given due weight in accordance with their age and maturity. The SHRC is aware of at least two cases where the Court of Session has appointed a curator ad litem for the purpose of ensuring that the proceedings themselves are compliant with Article 12.¹⁴ The SHRC does not currently have a firm view as to whether this should be the preferred approach to achieve Article 12 compliance, but we highlight this here as we believe that this is an issue to which the Scottish Government should give active consideration. The SHRC suggests that the Scottish Government should consider whether any other changes to the civil legal aid system, as well as the justice system more broadly, are needed to best ensure compliance with Article 12 UNCRC. The SHRC and other stakeholders should be involved in that work from an early stage.

Finally, the SHRC notes the intention to determine other important matters, such as the types of cases for which legal aid may be available, through a combination of Ministerial policy and secondary legislation, rather than by inclusion in the new Bill. To this end, the SHRC stresses the importance of all reforms being made via an instrument or function which is in scope of the accountability mechanisms in the UNCRC Act. This also includes the Bill itself which should not make changes by way of amendments to out of scope legislation. Such an approach will maximise the ability of UNCRC incorporation to protect children's rights in Scotland, as well as ensure consistency and transparency in the extent of protection.

Endnotes

¹ Judgment of the European Court of Human Rights, [Csüllög v Hungary](#) (application no. 30042/08)

² General Comment No. 5 (2003) on general measures of implementation of the Convention on the Rights of the Child states, [24].

³ [R \(Carson\) v Secretary of State for Work and Pensions](#) [2005] UKHL 37, [49].

⁴ European Committee on Legal Co-operation, [Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and effectiveness of legal aid schemes in the areas of civil and administrative law](#)

⁵ [17.b].

⁶ SHRC and Professor Katie Boyle, [Access to Justice for Everyone: How might a new Human Rights legal framework improve access to justice in Scotland today? A discussion paper](#).

⁷ The ENNHRI 2026 Rule of Law report and the SHRC's Scotland report can both be viewed at [European Network of National Human Rights Institutions - ENNHRI](#).

⁸ [Letter to the EHRCJ Committee regarding its Legacy Report](#), 6 March 2026; [Letter to the First Minister regarding discussions on further powers for Scotland](#), 7 September 2026.

⁹ Judgment of the Grand Chamber of the European Court of Human Rights, [Verein Klimaseniorinnen Schweiz and Others v Switzerland](#) (application no. 53600/20).

¹⁰ Ibid, [602], [614], [622].

¹¹ [Osborn and others v The Parole Board](#) [2013] UKSC 61.

¹² SHRC and Professor Katie Boyle, [Access to Justice for Everyone: How might a new Human Rights legal framework improve access to justice in Scotland today? A discussion paper](#), pages 29-39.

¹³ Global Alliance of National Human Rights Institutions, Report and Recommendations of the 47th Session of the Sub-Committee on Accreditation, April 2026, available at the [NHRI Accreditation Database Archive - GANHRI](#).

¹⁴ In [X, Principal Reporter](#) [2026] CSOH 15 the court appointed an interested party as curator ad litem in order to ensure compliance with Article 12 UNCRC. Then in [Scottish Ministers for an order under section 46 of the Court of Session Act 1988 and for interdict and interdict ad interim](#) [\[2026\] CSOH 82](#), the court appointed a curator ad litem to report to the court on the views of the children to ensure compliance with Article 12 UNCRC.