

Blog 1 – Access to Justice and the Right to an Effective Remedy

A blog series by Barbara Bolton, Legal Director and Partner

Introduction - A Scottish Human Rights Bill

By the end of June 2024, the Scottish Government (SG) will introduce a Bill to the Scottish Parliament (SP) that will bring a number of international human rights into Scots law for the first time, including economic, social, cultural and environmental rights. We will refer to that Bill as the Scottish Human Rights Bill (SHRB). The SG's commitment is to see that Bill passed by the Scottish Parliament during this parliamentary term, by April 2026. If the Bill is passed it will be the first time international economic, social, cultural and environmental rights have been incorporated into national law within the UK.¹

The launch of the consultation on a proposed SHRB in June 2023 (the Consultation)² came after many years' work by civil society, NGO's, the Scottish Human Rights Commission (SHRC), academics and others. Responding to longstanding calls to incorporate international human rights, the Scottish Government set up the First Minister's Advisory Group on Human Rights Leadership (FMAG) in 2017,³ followed by the National Taskforce for Human Rights Leadership (the Taskforce), in 2019.⁴ The Taskforce produced its report in March 2021⁵ and the SG accepted all 30 of its recommendations, committing to implementing them to the greatest extent possible within the confines of the devolution settlement.⁶

¹ The Scottish Parliament has already passed legislation seeking to incorporate economic, social, cultural and environmental rights into Scots law. It unanimously passed the UNCRC Bill in 2021. However, the UNCRC Bill was prevented from becoming law by the UK Government challenging it as being outwith the devolved competence of the Scottish Parliament in specific ways, which the Supreme Court agreed with. A further section of this blog series will look closely at the impact of the UNCRC decision and the parameters of devolved competence, which is a key consideration in relation to the SHRB. While Wales has already passed legislation that requires public authorities to have regard to the rights contained in the United Nations Convention on the Rights of the Child, a duty to have due regard to rights falls short of incorporating those rights in a way that makes them enforceable, or real, as will be discussed in a further section of this blog series.

² [A Human Rights Bill for Scotland: consultation - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/a-human-rights-bill-for-scotland-consultation/pages/4/)

³ [First Minister's Advisory Group on Human Rights Leadership Home –](https://www.gov.scot/publications/first-minister-advisory-group-on-human-rights-leadership-home/pages/4/) It produced a report with a number of recommendations in December 2018: [First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf \(humanrightsleadership.scot\)](https://www.humanrightsleadership.scot/publications/first-ministers-advisory-group-on-human-rights-leadership-final-report-for-publication/pdf)

⁴ [Human Rights Leadership: national taskforce - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/human-rights-leadership-national-taskforce/pages/4/)

⁵ [National Taskforce for Human Rights: leadership report - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/national-taskforce-for-human-rights-leadership-report/pages/4/)

⁶ As confirmed in the guide to the consultation: <https://www.gov.scot/publications/human-rights-bill-scotland-guide-consultation/> and as noted by the Scottish Government in its submission to the Universal Periodic Review in October 2022: <https://www.gov.scot/publications/universal-periodic-review-2022-scottish-government-position-statement/pages/4/>

JustRight Scotland

Taskforce recommendations on access to justice

The Taskforce, which included the Scottish Government itself, had the benefit of a wide range of extensive expertise, including from those with lived experience, NGO's, academics and practicing lawyers, and it obtained detailed expert advice on a number of areas.⁷

The Taskforce made a number of recommendations regarding access to justice, including:

Recommendation 21: Through engagement with key stakeholders, including those who face additional access to justice barriers, further consider accessible, affordable, timely, and effective remedies and routes to remedy that will be provided for under the framework.

Recommendation 25: Further consider how the framework could provide for the full range of appropriate remedies under international law to be ordered by a court or tribunal when needed, including targeted remedies which could provide for non-repetition of the breach (such as structural interdicts).

Recommendation 26: As part of the development of the framework, to further explore access to justice, taking into account the views of right-holders, in order to consider how the framework could help provide a more accessible, affordable, timely, and effective judicial route to remedy.

Weakness of Consultation on Access to Justice

The Consultation is particularly weak on access to justice.

For people experiencing breaches of their human rights, it is essential that they are able to effectively challenge that breach and secure an effective remedy, holding those in breach to account. In the absence of that, incorporated rights are illusory; they may appear on paper, but they are not real. They hold out promise, but they do not deliver. A key right under international human rights law is therefore the right to an effective remedy.

Despite accepting all the Taskforce's recommendations over two years ago, including those on access to justice, and although the Scottish Government was part of the Taskforce and so heard and received all of the extensive evidence provided to it, the Consultation document indicates that little to no work has been done to further consider or explore the matters recommended by the Taskforce. This is very disappointing given the central importance of effective remedies and accountability to the success of incorporation.

⁷ [National Taskforce for Human Rights: leadership report - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/) See Annexes B, C and D. See also https://www.law.ox.ac.uk/sites/default/files/migrated/bonavero_report_12021_1.pdf; <https://www.gov.scot/publications/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/>

In relation to Taskforce Recommendations 21, 25 and 26 (above), there are very few proposals in the Consultation. Those limited proposals that are set out are extremely narrow and do not address the considerable barriers to accessing justice that are well known in Scotland, as discussed below.

The SHRB was included in the recently announced 2023/24 Programme for Government,⁸ meaning that a Bill should be introduced by June 2024. While the SG claims that work is ongoing on access to justice, it is difficult to see how they will go from the almost complete absence of proposals in the Consultation, to detailed provisions in a SHRB within months. Moreover, there does not appear to be any time remaining for consultation on such proposals. While we will continue to advocate for the strongest possible provisions on access to justice in the SHRB, it is simply not possible that the SHRB will make all the changes necessary to bring the Scottish civil and administrative justice system into line with the requirements of international human rights law.

It is therefore imperative that the SHRB includes the substantive international human right to an accessible, affordable, timely and effective remedy for breach of the rights contained in the SHRB. It is critically important that this right is included in the overarching framework Bill, in order that the SG and SP can then be pressed to introduce more detailed legislation on specific aspects of access to justice and, if necessary, challenges brought in court. Incorporation of the right to an effective remedy will also ensure a connection to international standards on access to justice, which will continue to evolve and be elaborated upon.⁹

The Consultation recognises that when rights are breached remedies must be accessible, affordable, timely and effective (page 35). However, there is no recognition in the Consultation that this right, and these specific requirements, must be included on the face of the Bill. Given the SG's commitment to incorporating international human rights to the maximum extent possible under devolution, the explicit right to an effective remedy for breach must be included on the face of the bill.

Devolution limits should not prevent the SP from incorporating this right in relation to the rights in the Bill. Scotland has always had a separate legal system, which was protected when Scotland united with England and Wales in 1707, and this did not change through devolution. There are specific reservations which place limitations

⁸ <https://www.gov.scot/publications/programme-government-2023-24/pages/14/> under bills for introduction

⁹ The SHRB is intended to be framework legislation, meaning it should set out the overarching rights framework under which more detailed legislation should be introduced covering specific rights or areas of rights. For the background to the Bill see: <https://www.scottishhumanrights.com/media/2454/shrc-building-a-new-human-rights-framework-for-scotland-key-legal-features.pdf> pages 19-22. A summary version of that document is also available: https://www.scottishhumanrights.com/media/2343/2022_09_14-shrc-hr-bill-legal-framework-executive-summary.pdf The Scottish Human Rights Commission (SHRC) gave an example of this in relation to the right to food, noting that the overarching right to food would be protected in the framework human rights bill, underpinned by more detailed legislation giving effect to that right: <https://www.scottishhumanrights.com/media/1845/good-food-nation-shrc-consultation-response-final-4-april-2019.docx> at page 28-29.

on the SP, such as the requirement that HRA claims be raised within a year, and by those who qualify as “victims” as defined in the HRA, and the EA requirement that claims be raised within 6 months. SP legislation cannot alter these requirements because they are specifically reserved, meaning only the UK Parliament could change these rules. However, aside from specific reservations such as these, the SP can legislate on all aspects of civil and administrative justice in Scotland. Generally, if the SP can incorporate a right within devolved competence, it should be able to incorporate the right to an effective remedy for breach of that right, and make whatever changes are necessary to fulfil that right.

What is the right to an effective remedy?

The right to an effective remedy for breaches of human rights is a general principle of international human rights law and is expressly set out in most international human rights treaties.¹⁰ The Committee on Economic, Social and Cultural Rights (CESCR) has highlighted that people who experience breaches of for economic, social and cultural rights must have accessible, affordable, timely and effective (AATE) remedies.¹¹ As the Scottish Human Rights Commission (SHRC) set out in a paper for the Taskforce, based on comments by CESCR, the AATE requirements cover:

Accessible – there must be: simple, uncomplicated routes to securing a remedy; widely available and actively promoted information about the existence of the remedy and how to obtain it; avoidance of unduly restrictive time limits; legal advice available for those who need it; flexible rules allowing representative organisations to bring public interest litigation.

Affordable – remedies should be available without any cost, and where costs are unavoidable they should be affordable, with free provision for those who need it. Legal aid should be available for those who need it, to meet costs related to litigation and to cover fees for legal representation.

Timely - remedies should be prompt, without undue delay. Accessible and affordable routes to securing urgent remedies must be available, including interim measures preventing further harm and ensuring basic needs are met pending a final determination.

Effective – there must be: both administrative and judicial routes to remedy; appeal of administrative decisions to courts or tribunals; a range of effective remedies, including restitution, compensation, rehabilitation, satisfaction (e.g. apology) and guarantees of non-repetition; structural remedies, such as

¹⁰ Art 8 UNDHR, ICCPR, ECHR, American Convention on Human Rights, African Charter on Human Rights, CESCR CO's / GC's

¹¹ <https://www.scottishhumanrights.com/media/2163/remedies-for-economic-social-and-cultural-rights.pdf> See also Professor Katie Boyle's papers for the Taskforce: https://www.scottishhumanrights.com/media/1809/models_of_incorporation_escr_vfinal_nov18.pdf ; <https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2021/01/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/documents/aap-paper-katie-boyle---access-to-justice/aap-paper-katie-boyle---access-to-justice/govscot%3Adocument/AAP%2BPaper%2B-%2BNationalTaskforce%2B-%2BKatie%2BBoyle%2B-%2BAccess%2Bto%2BJustice.pdf>

structural interdicts; the possibility of collective or group litigation; effective enforcement of remedies.

Scotland's Civil Justice System – barriers to accessing justice

There are a number of well-known and well-documented barriers to accessing an effective remedy through Scotland's administrative and civil justice system, including:

- lack of information about rights and routes to remedy;
- limited independent advocacy;
- complexity and range of potential routes to remedy (range of institutions, powers, remit and rules);
- lack of integration / connectivity between various routes;
- time; emotional drain; risk/uncertainty;
- scarcity of legal advice and representation;
- very strict/unfair deadlines;
- prohibitive cost (own costs and risk of having to pay other side's);
- limited remedies available;
- barriers for NGO's (cost / standing);
- lack of data (e.g. for strategic public interest litigation).

We know about these barriers from our experience as court solicitors, from our case work at JustRight Scotland, from discussions with colleagues at other human rights organisations and law centres, and from research.¹² The Taskforce, which included the SG, was provided with detailed information about these barriers, from those with lived experience, NGO's, academics and practicing lawyers. Indeed, the SG commissioned the Human Rights Consortium to facilitate a Lived Experience Board, which met from February 2022, and which provided extensive evidence of the barriers to securing a remedy for breach of human rights people already face.¹³ As Professor Katie Boyle has noted, these barriers will be compounded for economic, social and cultural rights.¹⁴

How will those barriers affect people experiencing breach of economic, social or cultural rights?

If someone is living in poverty, does not have adequate housing or food, and their right to health is not being fulfilled, the barriers to securing an effective remedy will be manifold. How does someone in that situation even begin to consider attempting

¹² For example, see https://dspace.stir.ac.uk/retrieve/52a6207c-2284-4c6b-97ce-649ddf9cd749/10-Briefing-The-Access-to-Justice-Journey_18MAY22.pdf

¹³ <https://hrcscotland.org/human-rights-bill-lived-experience-board-reports/>

¹⁴ <https://www.nuffieldfoundation.org/wp-content/uploads/2019/11/Final-report-The-practitioner-perspective-on-access-to-justice-for-social-rights-1.pdf>

to secure a remedy? How would they know their rights are being breached or that they may have a legal remedy? Where do they turn, who can advise and support them, who can offer them representation, what will it cost, and do they have the mental and emotional resources to engage with an intensive, bureaucratic process? And what if the situation is urgent, how do they secure an immediate remedy?

At the moment, they would likely have to work out for themselves that they have a legal right that is being breached, and that they may be able to take action. They may be able to find general information online, if they have access to the internet, but many do not, and the proportion of people who do not will be higher for the people most likely to be affected by breaches of ESC rights.¹⁵ Even if they do, there may be language barriers and/or other accessibility barriers. The information available is also patchy, provided by a range of NGO's and charities, with no one-stop-shop. Navigating that to locate reliable, applicable information and guidance for a particular situation is challenging, and could be impossible for someone experiencing an ESC rights breach.

If they do manage to identify that they may have a legal right and the possibility of a remedy, they then need to find a solicitor to represent them. Legal aid can only be obtained through a registered legal aid solicitor, so if they can't locate a legal aid solicitor, willing and able to take them on as a client, they can't access state funded legal advice. There is a significant and increasing shortage of legal aid solicitors in Scotland, particularly outside the central belt. The Law Society of Scotland noted that the shortage of legal aid solicitors is causing people to be deprived of civil justice and that the legal aid crisis "specifically impacts society's most deprived and vulnerable, perpetuating further disadvantage."¹⁶

If they cannot locate a legal aid solicitor, the only possibility may be to represent themselves, but for most that will not be a real option due to the complexity and inaccessibility of Scotland's civil and administrative justice system.

Consultation proposals

The barriers preventing people from accessing justice were raised and discussed through the Taskforce process, which resulted in a set of recommendations related to access to justice, including recommendations 21, 25 and 26 referred to above. The Consultation states that they want to ensure there are routes to remedy available for when there has been an individual or systemic infringement of people's human rights and that the remedies are accessible, affordable, timely and effective.¹⁷ Yet, the very limited proposals on access to justice would not achieve that.

¹⁵ [https://www.gov.scot/publications/scottish-household-survey-2020-telephone-survey-key-findings/pages/5/#:~:text=93%25%20of%20households%20had%20access, had%20access%20to%20the%20internet](https://www.gov.scot/publications/scottish-household-survey-2020-telephone-survey-key-findings/pages/5/#:~:text=93%25%20of%20households%20had%20access, had%20access%20to%20the%20internet;); <https://www.inspiringscotland.org.uk/wp-content/uploads/2020/06/Digital-Exclusion-in-Scotland-final-full-report-1.pdf>; <https://www.heraldscotland.com/politics/19637801.scotlands-digital-divide-revealed-370-000-go-without-internet-access-pandemic/>

¹⁶ <https://www.lawsco.org.uk/for-the-public/what-a-solicitor-can-do-for-you/legal-aid/>

¹⁷ Consultation, page 10.

However, although the SG accepted all of these recommendations, the Consultation proposals offer very little on this.

Information about rights

We need much improved access to information about rights and how to secure a remedy for rights breaches. The information should not only be widely available, but actively promoted. Everyone should come into contact with this information, in various ways depending on their life experience.

That should include the education system for those going through it, but it should also include places people visit regularly for day-to-day purposes, such as doctors, chemists, supermarkets, post offices, banks, public transport hubs, libraries and community centres. Unfortunately, the public realm is ever shrinking and public services are considerably and increasingly privatised. That means reaching people where they are is likely to involve reaching agreement with private providers to display information.

However, general information only goes so far. It can be very difficult to apply general information to specific situations. What many people will need is to speak to someone who can assist them.

Independent Advocacy

An independent advocate is usually someone who is not legally qualified, and so is not providing legal advice. They would usually provide support, guidance and information in a range of ways, including by advocating on their behalf, interacting with the public authority or authorities to seek a remedy for the situation, where there appears to be breach of human rights.¹⁸

Having someone who can advocate for or with them, who is not living through the difficult situation themselves, who can give time, energy, knowledge and experience of applying human rights to the situation and engage with public services, including through a complaints procedure, can be invaluable. At the Scottish Just Law Centre we strongly encourage people to seek out the support of an independent advocate wherever possible.¹⁹

However, independent advocacy services are very patchy, with different organisations providing advocacy related to particular subject and/or needs. Provision varies considerably from one area to another and, in our experience, often people are not able to secure any independent advocacy support.

CAS

They may be able to obtain initial advice from the Citizens Advice Service helpline or from visiting one of its offices if they live nearby. One of the great strengths of CAS is

¹⁸ <https://www.siaa.org.uk/what-is-independent-advocacy/>

¹⁹ <https://www.justrightscotland.org.uk/wp-content/uploads/2023/07/26.07.23-Access-to-Justice-in-Scotland-Initial-Action.pdf>

that it has a presence on many high streets across Scotland, and it is often the only places people can physically visit to speak to someone who can provide advice.

However, CAS is limited in the advice it can provide. The availability of legally qualified staff varies from office to office. The specialist topics noted on its website are: universal credit, money advice, defined contribution pensions, NHS complaints and members of the armed forces. For other matters, CAS may be limited to signposting people to other organisations, such as Shelter for housing information.²⁰

The Consultation does not put forward proposals in relation to information, advocacy or general advice about human rights or the rights that will be covered in the Bill. This is disappointing given the discussion of the issues through the Taskforce and evidence from the Lived Experience Leadership Board.

Legal Advice / Legal Representation /SLAB

As discussed above, we are in a legal aid crisis and those most affected include those most likely to suffer breach of their economic, social and cultural rights. The shortage of legal aid solicitors must be addressed by reforming the system to reduce the administrative and bureaucratic burden on solicitors and increase the level of financial recovery for work done, in terms of rates and what is chargeable. In other words, it needs to be made sustainable.

The consultation contains only two sentences on legal aid, noting its importance and noting the SG remains committed to reforming the current system. However, there are no proposals for reform. A legal aid bill was also disappointingly absent from this year's Programme for Government. It therefore seems the Bill will move forward without any measures being taken to address legal advice and representation desserts in Scotland. Without measures to effectively address the lack of affordable legal advice and representation, people will be denied access to justice for breach of rights in this Bill as they are for other rights.

In addition, many people who do not qualify for legal aid are also not wealthy enough to be able to fund an expensive court action, as well as taking on the risk of having to pay the other side's legal costs if they lose. In addition to reforming legal aid, significant improvement could be made to access to justice by introducing new rules protecting those pursuing human rights claims from the possibility of having to pay the other side's costs. This was recently done for personal injury claims, recognising the imbalance between an individual pursuer in a personal injury claim, and the defending company or employer, who will usually be covered by insurers. A similar power imbalance exists for individuals pursuing human rights claims against the state, or government. Detailed consideration ought to be given to the introduction of special rules for human rights claims, to protect people from the risk of having to pay the other side's legal costs.

Court fees should also be waived for those pursuing human rights claims.

Complexity / Inaccessibility

The Scottish administrative and civil justice system is a highly complex landscape of regulators, ombuds, tribunals and courts, each with their own particular remits,

²⁰ <https://www.citizensadvice.org.uk/scotland/about-us/get-advice-s/>

deadlines, procedural rules, and powers. Even selecting an entry point can be incredibly challenging for someone experiencing a breach of rights, particularly for those who does not have an independent advocate or legal representation. Should they complain to the public authority? How accessible is that? Will that involve the public authority reviewing itself? How likely is that to lead to a resolution? What proportion of claims concerning rights breaches currently lead to a satisfactory outcome? How long will it take?

From our casework, we are aware of many clients who have attempted to resolve things through a public authority's complaints procedure, who did not secure a meaningful resolution and who therefore had to pursue a legal remedy with our assistance. There will be many more who could not do so, as they did not have the time or emotional resources it takes to pursue a complaint, and/or because they couldn't find a legal aid solicitor with capacity. It is also our experience that public authorities can be highly defensive when asked to reconsider their actions, rather than viewing a complaint as an opportunity to reflect and resolve situations without the need for court action. Asking the same entity that breached your rights to find itself wanting and require itself to take the action it refused to take, it inherently an uphill struggle.

We are also aware that the complaint process can take months, often longer than the three month period within which a Judicial Review must be raised (as discussed below). The complaints process is not joined up with the court or tribunal system, and so time spent trying to resolve things in that more informal could mean they are too late to raise it in court if it is not resolved.

While the general proposal to try to improve the public authority complaints process is positive, the Consultation does not contain any meaningful proposals for reform of the public authority complaint process. Has consideration been given to changes in process and practice, drawing on good examples that may exist in other jurisdictions, that could improve the current situation, where people are asking the decision-maker to review its own work? The Consultation refers only to the SG having had discussions with the Scottish Public Services Ombudsman ("SPSO")²¹ about updating its model complaints handling procedures. While the SPSO is an important stakeholder, it is important that the SG look beyond the existing system for examples of good practice and potential reforms that could be introduced.

As well as drawing up the standard complaint process for public authorities, the SPSO is also the final stage for those complaints. Someone experiencing a breach of their rights can only go to the SPSO if they've completed the public authority complaint procedure, and then only in relation to matters raised in the initial complaint which the SPSO agrees to consider, and they must go to the SPSO within 12 months of the event complained of. The SPSO currently has a 4 month wait period for a complaint to be allocated to a complaint reviewer. It can then take many months to obtain an outcome, by which time it will be long past the three month deadline for raising a Judicial Review.

²¹ [We are Scotland's Ombudsman | SPSO](#)

Perhaps most importantly, the SPSO can only issue recommendations. It cannot issue binding, enforceable decisions. If a public authority fails to comply with a recommendation the SPSO's only power is to make a report to the Scottish Parliament. In the 21 years since it was set up, the SPSO has never done so. For the SPSO, this is a positive. It notes on its website that it has never had to make a report to the Scottish Parliament because public bodies usually comply with its recommendations and it follows up to rigorously check with them that they have done so.²² However, we are not aware of any independent study reviewing the effectiveness of the SPSO's complaints handling process, in terms of remedying failures. What we can say is that many of our clients, current and former, have attempted to resolve public authority failures through the SPSO and have been left frustrated by the process; by the length of time it takes, the narrow approach taken and, most importantly, by the failure to provide a real remedy.

One of the few proposals in the Consultation related to access to justice is to add human rights to the remit of the SPSO. This would mean the SPSO could consider rights in the Bill as part of any complaint, whether raised by the complainant or not.²³ While access to a free and relatively easy process is essential, the remedy provided by administrative mechanisms must also be effective. While the SPSO's view is that it should no more than powers of recommendation in order to retain constructive working relationships with local authorities, what is the view of rights holders? Careful consideration should be given to the SPSO's very limited powers and the effectiveness of its recommendations before deciding that simply adding human rights to its remit will provide an effective administrative route to remedy for breaches of the rights contained in the SHRB.²⁴

Administrative remedies must also be reviewable. Currently there is no link between the SPSO and the court and tribunal system. On the one hand this provides flexibility to the individual, which is positive, as they shouldn't be required to complete an informal administrative process before being able to raise a claim in court. On the other hand, the lack of connectivity means the SPSO's recommendations are not reviewable, and if that process does not result in an effective remedy, the individual has to begin all over again, by raising a court action. However, by then it will be too late to raise one of the most common forms of human rights claim Judicial Review. There needs to be connectivity between the various processes to ensure that the burden on the person experiencing the rights breach is reduced, and that they are not put at risk of being barred from another part of the overall system. If they raise a

²² <https://www.spsso.org.uk/about-us>; <https://www.spsso.org.uk/faq-page#t44n11881>

²³ A Human Rights Bill for Scotland: Consultation, June 2023, page 39:

<https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2023/06/human-rights-bill-scotland-consultation/documents/human-rights-bill-scotland-consultation-june/human-rights-bill-scotland-consultation-june/govscot%3Adocument/human-rights-bill-scotland-consultation-june.pdf>

²⁴ See e.g. <https://eprints.gla.ac.uk/206016/9/206016.pdf>; https://www.researchgate.net/profile/Chris-Gill-2/publication/267029082_The_Evolving_Role_of_the_Ombudsman_A_Conceptual_and_Constitutional_Analysis_of_the_Scottish_Solution_to_Administrative_Justice/links/5442140f0cf2a6a049a5cce4/The-Evolving-Role-of-the-Ombudsman-A-Conceptual-and-Constitutional-Analysis-of-the-Scottish-Solution-to-Administrative-Justice.pdf

claim, in whichever part of the system, that ought to be adequate. The system should be sufficiently joined up so that the claim can be sent to another area of the system without having to start again (by what's called remittal), and all timebar clocks should stop running when that initial claim is raised.

The Consultation states that further consideration is being given to how pursuing a complaint with the SPSO could interact with court routes to remedy, such as judicial review. Any such proposals should be put out for consultation.

The Consultation also notes that scrutiny bodies play an important role in upholding human rights and driving culture change, and again suggests that human rights be expressly added to their mandates. However, if significant reliance is being placed on scrutiny bodies, we should have confidence that the inspectorates and regulators we have cover all areas of public life. There is no suggestion that any mapping exercise has been done to identify gaps in the scrutiny body landscape. From our experience, we are aware that the remit of the inspectorates can be unclear, and in practice they can apply a more restrictive approach to the types of matters they will review than their website might indicate. They also apply time limits, with some only considering things that happened in the past 6 months. If we are relying on them to provide play an important role, we should be clear as to what each covers (in practice as well as on paper).

Going to Court

The Consultation does not have a lot to say on judicial remedies, focusing instead on administrative routes to remedy. While it is very important that people have free, highly accessible routes to securing an effective remedy, it is equally as important that they are able to pursue a judicial remedy.

With significant improvement in administrative routes to remedy, the need to pursue a remedy in court would reduce in many cases. However, we cannot assume that we will have accessible, affordable, timely and effective administrative remedies.

Significant reform is required to achieve that. Even then, there will always be a need for judicial remedies, and so a requirement that those judicial remedies are also accessible, affordable, timely and effective.

Time Limits

There is no discussion of time limits for court claims under the new SHRB. Claims under the Human Rights Act (HRA) must be brought within a year, and this Bill should at least mirror that. However, we should not assume that the HRA position is the right one. In the UNCRC Bill we saw the Scottish Parliament mirror the one-year time limit in the HRA, but also agree that any period prior to a person turning 18 should be disregarded, and so young people have a year from the date on which they turn 18 to bring a claim.²⁵ It could also adopt a more flexible approach for claims under this Bill. The one year limit in the HRA is very short compared to Scotland's general approach to civil claims. People have three years to raise personal injury claims in court, and five years to raise breach of contract claims. One year is a very short period of time, particularly where breaches of rights may have placed someone

²⁵ <https://www.parliament.scot/-/media/files/legislation/bills/current-bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill/stage-3/bill-as-passed.pdf> , Section 7(7)

in a highly precarious situation, rendering them unable to engage with a judicial process, and/or have caused trauma.

If three years has long been considered appropriate in Scotland for people bringing personal injury claims, should those who have experienced breaches of their fundamental rights not be giving at least that same period of time before being barred from pursuing a judicial remedy?

The one-year time limit in the HRA is softened to a degree by provision for courts to exercise their discretion and allow a claim later if it considers it equitable to do so. This was also mirrored in the UNCRC Bill.²⁶ However, that leaves victims of human rights breaches with little certainty, as it depends on the discretion of the court. They face the burden of meeting yet another strict legal test, having to present evidence justifying the delay and funding that procedure, before it is even confirmed that they can bring forward their claim. The discretionary possibility that claims may be allowed after one year does not adequately address the harshness of the one year limitation. A discretion does not confer a right. Given that the state is generally the defender in human rights claims, and will generally have retained relevant records for at least three years, it is hard to see significant prejudice to the state of having to defend human rights claims related to events that occurred within the previous three years.

Most HRA claims are raised through Judicial Review (JR). The one year limit in the HRA and UNCRC Bill are qualified, in that any stricter time limit will apply. Since Scotland followed the approach taken in England & Wales, introducing a three month time limit for seeking permission to raise a Judicial Review, HRA claims through JR must be raised within three months of the breach.²⁷ Three months is an exceptionally short period for anyone to raise a court action, but it is particularly burdensome for anyone who: does not already know they may have a legal remedy; does not already have a solicitor; requires legal aid; is experiencing the adverse impact of the breach of their rights.

We know from our own casework that three months is an unreasonable deadline, with many clients having exceeded that by the time they find their way to us. Real consideration should be given to whether the three-month time limit should remain. Such a restrictive limitation on accessing justice should have a very strong justification. It is not clear that adequate consideration was given to this at the time of the introduction of these new rules. Prior to the introduction of the three month limit Scotland had no specific limit on the time for bringing a JR. A claim could be brought at any time subject to the defender's right to challenge the claim as too late, based on rules related to the fairness of the process. If events had occurred decades prior, witnesses were deceased and documents destroyed, there may have been an argument that it would have been unfair to put the claims to the defender. To go from

²⁶ Section 7(10).

²⁷ Section 27A of the Court of Session Act 1988 was introduced by the Court Reform (Scotland) Act 2014, following the Scottish Civil Courts Review (the Gill Review) and provides that a JR application must be made "before the end of the period of three months beginning with the date on which the grounds giving rise to the application first arise."

that to a three month time limit was a dramatic change.

Strict statutory interpretation compounds the unfairness - a claim is time-barred three months after the *first day* of the breach, *even if the breach of human rights is continuing*. Can it be right that someone denied their liberty in breach of their rights loses the possibility of accessing justice through judicial review because the breach has been occurring for more than three months? If this is not urgently reformed, someone denied adequate housing, food or the right to a healthy environment will similarly be barred from pursuing a remedy through judicial review even although their rights continue to be breached. The discretionary power of judges to allow claims 'late' if they consider it equitable to do so is inadequate, as a discretionary power does not confer a right.

Similarly, the three month rule has been interpreted to mean the three months runs from the date of the decision, even if you are unaware of that decision. If a decision is made and recorded in a letter, but that letter is not sent or does not reach you for more than three months, you have already lost the possibility of JR. None of this sits well with long established principles of Scots law related to time bar, but the introduction of that legislative provision along with strict statutory interpretation has meant this is where things currently stand.

***This is a work in progress and more content will be added on a rolling basis. Additional sections will be added to this blog.**