

**Legal Aid Reform in Scotland**

The Human Rights Consortium Scotland is Scotland’s civil society network to promote and protect human rights. We work to enable a strong collective civil society voice on human rights and to facilitate civil society organisations to have the understanding and information that they need to embed human rights in all of their work.

We welcome this consultation on improvements to the legal aid system in Scotland. We particularly welcome the Scottish Government’s commitment to retaining the wide scope of legal aid availability, recognising ‘that a functioning legal aid service is an important element in ensuring access to justice in guaranteeing rights under the European Convention on Human Rights[[1]](#footnote-1)’.

Due to limited capacity, this response is only related to one of the consultation questions. However many of the questions and issues raised within this consultation are of significant concern to civil society as they work with and empower people to hold the government and public bodies to account for the protection of their basic human rights. We note that there were few third sector bodies engaged in the Rethinking Legal Aid[[2]](#footnote-2) – if the same is true of this consultation we suggest that there would be significant benefit in working with third sector networks such as the Consortium to engage better with the third sector around changes to legal aid.

We further highlight that legal aid is only one aspect of a whole system of costs and help with costs that can hinder or enable access to justice. For example, court fees, a lack of clarity around Protective Expenses Orders and very limited application of Qualified One Way Costs Shifting are all significant barriers to justice relating to resourcing – we would greatly welcome the Scottish Government’s attention to these barriers also.

**Would you support the availability of funding to those with a common interest in legal proceedings, such as Fatal Accident Inquiries?**

Yes

Public Interest Litigation is an essential part of a society based on the rule of law, including protection of human rights through judicial review of legislation.[[3]](#footnote-3) Litigation that raises issues of public interest can be taken by an individual but there is an important role for PIL taken by groups, by representatives of groups or by NGOs with significant interest and expertise in the issue at hand. This is for several reasons. Such group or NGO proceedings mean that the burden of engagement in the court system does not fall on one person, particularly when this person is very often a disadvantaged or excluded person. Often systemic rights abuses cannot be raised in court because the infringement is remedied for each individual, thereby nullifying their individual reason to take a case even whilst it remains a problem for many. Sometimes the issue may be relatively small for each person but is significant due to the number of people affected. The issue could be one that is recognised to be in the public interest by campaigners or NGOs engaged everyday in, and with expertise in, policy making and empowering those seldom heard. As Prof Tom Mullen has noted:

*‘The essential point is that public interest litigation is necessary in order to guarantee respect for the rule of law by executive government. Relying soley on persons who litigate to advance their own interests will not achieve that aim.’[[4]](#footnote-4)*

Rethinking Legal Aid recommended that legal aid should be available for group or multi-party actions. This was further raised during the passing of the Civil Litigation (Expenses and Group Proceedings) Act 2018 when group proceedings were introduced as a possibility in the Court of Session. The Stage One report states:

*‘The Committee welcomes the Scottish Government’s commitment to amend the legal aid rules to enable legal aid to be available for group proceedings’*.[[5]](#footnote-5)

Recognising that ‘there is little point in opening doors to the courts if litigants cannot afford to come’[[6]](#footnote-6) we recommend that the Scottish Government makes legal aid available for group proceedings. We suggest that there is no access to justice rationale for restricting legal aid for group proceedings only to FAIs – it should be available to all group proceedings.

We also recommend that in doing so, the Government recognises the crucial role of NGOs as representatives of the interests of many in PIL. As outlined in ‘Overcoming Barriers to Public Interest Litigation in Scotland’, uncertainty over costs and a prohibitively expensive legal system were frequently highlighted as major barriers to NGOs playing their full, proper and vital role in PIL - this is to the detriment of the rule of law and of human rights in Scotland. In extending legal aid to group proceedings, it should include legal aid to charities taking cases in the public interest.

Making legal aid available to NGOs to take public interest cases also reflects current legal understanding of who has standing to take a case. Furthermore, we highlight that, as recommended by the First Minister’s Advisory Group on Human Rights Leadership[[7]](#footnote-7) and by the Scottish Government consultation on Incorporating the UNCRC into Scots law, if a new statutory framework for human rights in Scotland extends this broader definition of ‘sufficient interest’ standing to human rights law for the first time, then it both makes sense and is essential that the legal aid system reflects this change also.

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*September 2019*

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1. Consultation p5 [↑](#footnote-ref-1)
2. Evans, M, Rethinking Legal Aid: An independent strategic review, 2018 [↑](#footnote-ref-2)
3. Lautenbach; Rhona K M Smith, ‘Towards the Rule of Law’s Human Rights Requirements in Commonwealth States: Selected Observations, 2012 [↑](#footnote-ref-3)
4. Mullen, T (2015) Public Interest Litigation in Scotland, Juridical Review, 2015 p365 [↑](#footnote-ref-4)
5. Scottish Parliament Justice Committee: Stage 1 Report on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill, 24th Report, 2017 (Session 5) [↑](#footnote-ref-5)
6. Toohey J, Address to Australian National Environment Law Association 1989 [↑](#footnote-ref-6)
7. Recommendations for a new human rights framework to improve people’s lives, 2018 [↑](#footnote-ref-7)