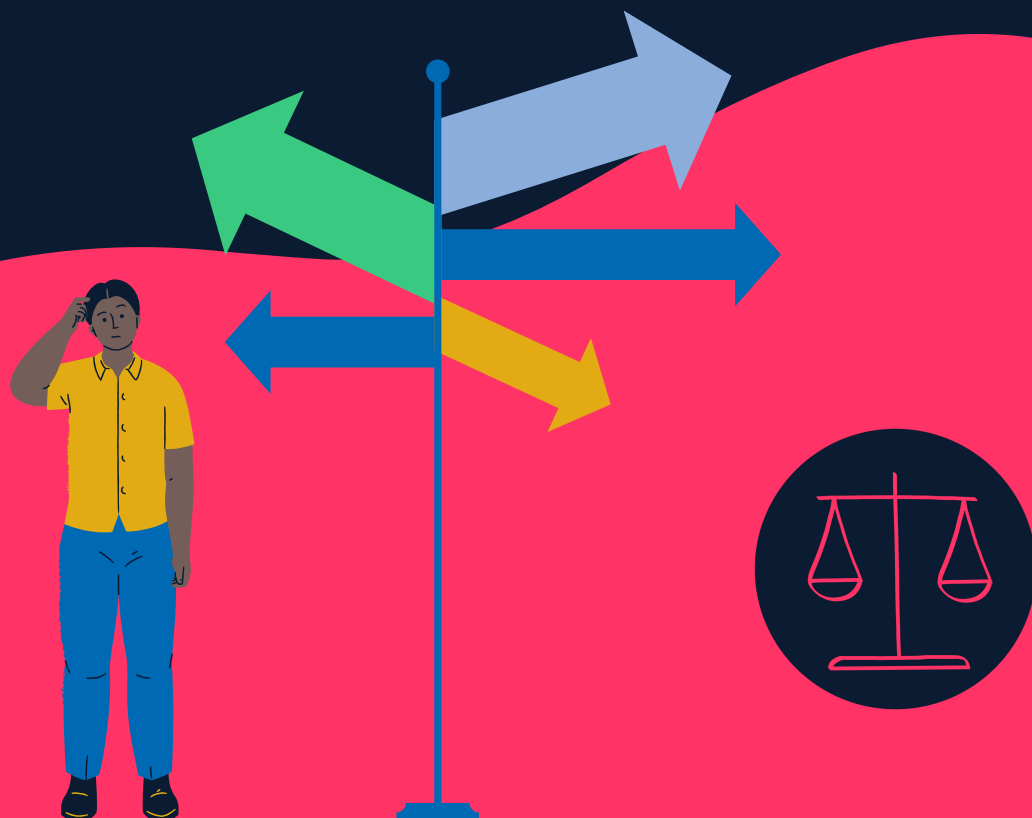


# Access to Justice for Everyone:

How might a new Human Rights legal framework improve access to justice in Scotland today?

*A discussion paper*





# Foreword

The Scottish Government has committed to lay a new Human Rights Bill before the Scottish Parliament during this Parliamentary term and has recently published a consultation paper outlining the approach it plans to take.

But is changing the law enough to ensure people's rights are respected?

Human rights language has become more prominent in Scottish law and policy debates since the Commission was first established. This is a positive development and should be warmly welcomed.

Yet far too many people in Scotland still experience denials of their basic human rights and dignity every day – and lack effective access to the mechanisms and means to challenge them.

From 2023, the Commission is therefore increasing its focus on the lived experience of rights-holders in four 'spotlight' areas. One of these is Access to Justice, not only in relation to abuses of human rights, but more broadly in civil and criminal matters.

This discussion paper is our first contribution to promoting discussion – and action – towards more effective Access to Justice for all in Scotland.

Authored by Professor Katie Boyle, this paper focuses on Access to Justice for



Dr Claire Methven O'Brien  
Commissioner, SHRC

internationally-protected economic, social, cultural and environmental rights. The paper highlights the range of barriers blocking people from challenging or preventing human rights violations.

These include:

- Lack of awareness of rights;
- Lack of legal, financial and emotional resources;
- Complexity of different complaints procedures, and;
- Weak mechanisms to promote system-level learning from past mistakes and violations.

# Access to Justice



Finally, the paper outlines what effective Access to Justice should look like in practice.

This analysis, we believe, can usefully inform debate and reflection about how to strengthen Access to Justice in Scotland more broadly.

The Scottish Government’s Human Rights Bill, for instance, will only advance effective enjoyment of human rights in people’s everyday lives if it also includes measures allowing people to hold public authorities in Scotland to account for rights denials.

Likewise, any new remedy mechanisms the Bill provides for will require targeted action and resources to strengthen rights awareness and widen access to advice and support from civil society, legal professionals, regulators and rights-bodies.

The Commission extends thanks to Professor Boyle for this timely and insightful paper.

We will build on this foundation shortly by publishing our own analysis illustrating the trajectories and challenges faced by real complainants across different access to justice areas – and making constructive recommendations to address the most pressing deficiencies and gaps.

**Claire Methven O'Brien, Commissioner  
Scottish Human Rights Commission**  
September 2023





# Contents

Definitions and key terms	4
Illustration: What are the barriers to accessing justice?	5
Introduction	6
The Access to Justice journey	10
Barrier 1: Awareness of rights and legal processes	12
Barrier 2: Financial, legal and emotional resources	14
Barrier 3: Complexity of the journey	21
Barrier 4: Adequate Processes	25
Barrier 5: Effective Results	29
Barrier 6: Feedback Loop	40
Principles to guide improved access to justice	42
Endnotes	44
Acknowledgements	51



**The Human Rights Bill will only make rights truly justiciable and enforceable if public authorities in Scotland also take action to address the underlying issues and complexity of our current system.**



# Definitions and key terms



<b>Adjudication:</b>	The process of making a formal judgment on a disputed matter.
<b>Incorporation:</b>	Embedding rights into domestic law.
<b>Justiciability:</b>	Subject to decision by a court.
<b>Judicial review:</b>	The judicial route to challenging a decision of a public body, is to raise a case asking the court to review that decision.
<b>Petitioner:</b>	The person(s) seeking judicial review of a decision (called a claimant in England and Wales).
<b>Standing:</b>	Eligibility to bring a case before a court.
<b>Structural interdict:</b>	An order whereby a court instructs coordinated actions to address a systemic violation of ESCE right(s)



# Barriers to accessing justice

An infographic summary

## AWARENESS



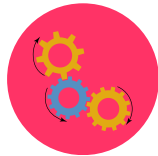
- Do people know what their rights are?
- Do people know what to do when their rights are not respected?
- Are human rights education, campaigns and professional training available?

## JOURNEY COMPLEXITY

- Do people know which is the most appropriate route to justice given their circumstances?
- Are there sustainable models of financing advice services?



## PROCESSES



Are processes:

- Accessible?
- Affordable?
- Timely?
- Fair?

## RESOURCES

- Can people afford to pursue a case?
- Are there prohibitive costs?
- How can legal aid ensure people get what they need?



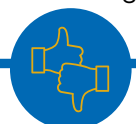
## EFFECTIVE RESULTS

- Are remedies effective in practice for the individual and for society?
- Do remedies ensure non-repetition of the harm?
- Do remedies change poor practice?



## FEEDBACK LOOP

- What kind of feedback loop mechanisms are possible in relation to tribunals, ombudsmen and inspectorates?
- Is there a way to ensure compliance with recommendations?
- Do National Human Rights Institutions have a role to play in improving decision making processes?





# Introduction

In order to make a new human rights framework operate well in practice it is important to reflect on how the framework can be enforced on a day-to-day basis. This discussion paper focuses on the access to justice journey that enables accountability for a violation when something goes wrong – i.e. when there has been a failure to secure a right and a remedy is required to address this failure.

Scotland's proposed new statutory framework will incorporate a number of international human rights into domestic law, including civil, political, economic, social, cultural and environmental rights.

Our domestic legal system already protects a number of civil and political rights under the Scotland Act 1998 and the Human Rights Act 1998 and access to justice is an important dimension of ensuring these rights are enforced. The purpose of this paper is to pay particular attention to accountability and enforcement for economic, social, cultural and environmental rights (ESCER), which will be new to our domestic legal framework.

It can therefore be understood as contributing to the access to justice discussion for all human rights but with a particular emphasis on addressing the accountability gap for violations of ESCER.

The purpose of this paper is also to help those working on access to justice in Scotland enter

into conversation with a common frame of reference, so that the proposed new Human Rights Bill can address some of the gaps and recommendations identified by the National Taskforce on Human Rights Leadership, in particular the following recommendations:

### **Recommendation 20**

The Scottish Government, working with civil society, community-based stakeholders and public authorities should develop effective ways to make sure that people have the information that they need about their rights and easy access to advice on rights.

### **Recommendation 21**

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

### **Recommendation 22**

Further consider specific duties being placed upon front line complaint handling mechanisms and scrutiny bodies in order to enhance access to justice and ensure human rights obligations are given effect by all public authorities.

### **Recommendation 23**

Explicitly allow for bodies with "sufficient



interest" to bring proceedings on behalf of claimants.

### **Recommendation 24**

Include in the framework an approach to standard of review of the reasonableness of a measure that takes into account international human rights law standards and comparative best practices.

### **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.

### **Recommendation 26**

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



## Defining 'Access to Justice'

'Access to justice' is a term that can mean different things depending on the circumstances. At times this can be problematic, as people may be thinking of different meanings of the phrase when discussing the area. For example, sometimes lawyers will use the term remedies when discussing legal processes such as judicial review or tribunal adjudication and sometimes they will be specifically referring to the court order or relief that follows. In international human rights law, remedies can also be understood as the outcome of a legal process, i.e. the remedy can be framed as the end result or the solution:

In the first sense, remedies are the processes by which arguable claims of human rights violations are heard and decided, whether by courts, administrative agencies, or other competent bodies. The second notion of remedies refers to the outcome of the proceedings, the relief afforded the successful claimant. [1]

As these terms can be conflated it means conversations around access to justice can become confused.

There is no set definition for 'access to justice'. Some people may think of access to justice in a narrow legal sense and may consider issues like standing (eligibility to bring a case before a court), legal aid, access to advice and representation to be paramount (i.e. effective equal access to legal processes). Some think of access to justice in a broader sense reflecting



## Access to Justice



on the means and mechanisms through which people can enjoy their rights in an everyday setting (i.e. immediate rights realisation).

Some people may think of access to justice as preventative measures to stop violations happening in the first place, or embedding good practice in decision-making processes. Others frame access to justice as a journey that kick starts when a person experiences a violation of a right and ends with an outcome that addresses that violation in an effective and comprehensive way (i.e. access to adequate legal processes that result in effective legal remedies). It is the latter of these conceptualisations that this briefing is based on. This approach reflects international human rights law.

As part of its international obligations, the UK is required to provide access to an effective remedy if there is a failure to meet economic, social, cultural [2] and environmental [3] rights (ESCER) obligations. The briefing adopts a definition of access to justice using this international human rights law lens – i.e. the state must enable access to effective legal processes and enable effective substantive outcomes of those processes.

International law requires that remedies are “accessible, affordable, timely and effective” [4] as well as “appropriate, fair, equitable, timely and not prohibitively expensive” [5]. Both process and outcome are relevant in considering if a remedy is ‘effective’. [6]

The right to an effective remedy under international law includes both:  
(a) equal and effective access to justice; and

(b) adequate, effective, and prompt reparation for harm suffered [7].

The concept of reparations forms an important component of the ‘outcome’ dimension of the right to an effective remedy. All victims of ESCER violations are entitled to expect adequate reparation, which may take the form of restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition [8].

Further clarification suggests that the right to an effective remedy does not depend “on a certain favourable outcome for the applicant” [9] but “to be effective, a remedy must be capable of directly providing redress for the impugned situation” [10]. In other words, enabling effective remedies means providing access to effective processes that are capable of achieving effective and adequate outcomes (the definition of what constitutes an effective remedy in practice is discussed further below).

## Routes to Remedy: Non-judicial and judicial mechanisms

The Committee on Economic, Social and Cultural Rights has indicated that any person or group victim of a violation should have “access to effective judicial or other appropriate remedies” [11].

This brings us to an important point of clarification. Access to justice may be achieved through both judicial and non-judicial routes to remedy for violations of ESCER.

## Access to Justice



A key component of this framing is that at all times there should be a right to an effective judicial remedy – i.e. whilst administrative mechanisms may be the first port of call and may enable an effective remedy, judicial oversight should remain available and a judicial remedy be made available where necessary. [12]

Judicial routes to remedy are considered a prerequisite for the domestic protection of ESCER [13]. The availability of a judicial remedy for a violation of ESCER remains an indispensable requirement of international human rights law, particularly if other mechanisms fall short. The United Nations Committee on Economic, Social and Cultural Rights explains that “whenever a right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary” [14]. Judicial remedies may be better understood as a means of last resort, however, they are indispensable to the access to justice framework.

Non-judicial routes to remedy may include administrative law mechanisms that are designed to hear complaints without the need for legal representation or a court. It may be possible that the right to an effective remedy is achieved without the need to resort to court, [15] so long as those administrative mechanisms uphold international human rights norms and a judicial remedy remains available as a last resort. For example, the role and remit of ombuds, tribunals, regulators and inspectorates, as well as internal complaints mechanisms and alternative dispute resolution should be adapted to include ESCER

compliance and this must include interrogating ESCER as rigorously as civil and political rights [16]. As discussed in more detail below, non-judicial mechanisms can create an extremely complex justice framework. If the remit and procedure of the non-judicial mechanism can be adapted to provide accessible, affordable, timely and effective remedies, including appropriate reparations for ESCER, a judicial remedy may not be necessary. If it is not possible to adapt the remit and procedure of a non-judicial mechanism to comply with international human rights law, then it may further delay and exacerbate the access to justice journey, inevitably becoming another barrier to justice. All routes to remedy should be evaluated in this context.

This paper examines the potential barriers to accessing justice, taking the reader on a journey through various routes to remedy, asking them to reflect on whether the process and the potential outcome can be deemed ‘effective’. This framing can be thought of as ‘the access to justice journey’.

**The Committee on Economic, Social and Cultural Rights has indicated that any person or group victim of a violation should have “access to effective judicial or other appropriate remedies.”**



# The access to justice journey



Historically access to justice has been understood in a narrow sense, relating to the most fundamental barriers people face in having a chance to access a legal process, such as access to advice, access to legal representation, access to legal aid and issues around standing. Whilst overcoming these barriers is absolutely key to enabling people to access justice, this research also revealed a need for us to take a step back and view a much broader picture.

A way of explaining the gap between the narrow and broad understanding of access to justice is to think of the journey as crossing a large mountain range. In order to reach the first summit, those at the start of the journey must contend with the immediate barriers

they face. On the journey, the initial barriers are the only ones that are visible. However, once the first peak is reached, more peaks come into view and further barriers appear. This briefing explains how to broaden our conception of access to justice beyond the initial barriers, towards a definition of access to justice that results in an effective remedy for a violation of ESCER.

Adopting this broader view, the first barrier identified relates to 'legal consciousness,' or an awareness of rights. In other words, how can anyone claim their rights if they do not know that the rights exist? The second barrier is awareness of the legal processes to vindicate rights, without which people do not know where to turn. The third is about having access

## Access to Justice



to the appropriate financial, legal and emotional resources to vindicate your rights. The fourth relates to the complexity of the system; without appropriate resources people cannot navigate the complexity of the various routes to justice. The fifth barrier relates to the availability of an effective remedy; without adjusting our understanding of remedies and reparations we risk overlooking the important components that can make a remedy effective in practice, including both individual and collective remedies. Finally, the sixth barrier relates to the failure to prevent repetitive cases; the system should be able to prevent violations from recurring by ensuring a feedback loop into decision making to help with guarantees of non-repetition. Each is discussed in turn.





# Awareness of rights and legal processes



## Barrier 1

People need to know about their rights and the processes available to claim those rights before the access to justice journey can begin. Information, knowledge and awareness raising is a fundamental building block of a justice system that will enable genuine and meaningful participation and something that international human rights law recognises as a key enabler of access to justice.

One of the key areas where access to justice can be enhanced is through raising awareness, education, capacity building and empowerment to create a sense of ownership around rights. This will require a great deal of commitment and resources to help foster and cultivate a human rights culture in Scotland that is genuinely inclusive, informed and participative.

Human rights education, awareness raising, training of professionals and dissemination of information about human rights monitoring processes all form part of the obligations on states under international law [18]. For example, the UN Human Rights Committee has recommended that the UK introduce new

awareness raising campaigns aimed at promoting respect for human rights and tolerance for diversity [19]. Scotland has the devolved power to implement and observe this obligation across all areas of devolved governance.

In addition people need to be equipped with the tools and resources to enforce their rights, besides information people need to be able to access advice about their rights and the law (discussed below).



So, for example, when we went into Leith and we chatted to people about their right to housing and they were like ‘right to housing? What are you talking about?’ You know ‘what do you mean we’ve got a right to housing?!’ They didn’t know that was there and they thought that it was all about lawyers taking human rights cases. So the narrative about human rights wasn’t built - you know, wasn’t very clear, that this could be in practice, for people.  
Civil society leader [17]








# Key Questions


## to enable access to justice

### Awareness of rights and legal processes

 How can we ensure people know about their rights?

 What type of education programmes about rights should exist? How can education programmes be rolled out across different sectors and settings?

 How can information be made accessible, including addressing digital and language barriers, as well as addressing the needs of specific groups?

 Is it possible to co-locate services, so that people can access information and advice in places they already attend, like GP practices, schools, places of work, libraries, food banks etc?



# Financial, legal and emotional resources



## Barrier 2

People need legal and financial resources to support them on their journey to finding a remedy for a legal problem. However, this paper also demonstrates the need for additional resources over and above purely legal ones, including emotional resilience, stamina, time, strength and overcoming a legitimate fear of retribution.

### Financial Resources



People face potential hurdles in financing a legal case and the emotional burden of applying for funding. The criteria for civil legal aid in Scotland include a number of tests including a means test, a capital test, and a consideration of the merits, as to whether it is reasonable to fund advice and assistance by way of representation. A change in 2011 increased the limits for an applicant's disposable income to £25,000, meaning that 70-75% of adults in Scotland meet the criteria to receive some legal aid.

The Scottish Legal Aid system works on an inclusive basis that is demand led [20], rather than the prescriptive approach adopted in England and Wales under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 [21]. This approach means there is a wider scope of issues that can be funded – a key strength of the Scottish system. Nonetheless, there has been a decrease in overall legal aid funding in Scotland (16% over the last 3 years) and this has inadvertently created potential barriers through the increasing likelihood of advice deserts, both geographically and in the sufficiency of the numbers of solicitors providing a particular service within a specialist field of law [22].

The reluctance of private providers to engage in these fields may be a result of the complexity and unsustainability of this work as a field of private practice, and the related bureaucracy. Private firms cannot afford to take on legal aid civil work because the legal aid available will not cover the total costs of advice and representation needed on a case, meaning not every hour worked is paid.



Respondents to a Scottish Government consultation on legal aid reform highlighted concerns that housing, debt, employment, domestic abuse, immigration and asylum were areas currently poorly served by private providers, meaning an overreliance on already stretched third sector organisations. They also highlighted gaps in funding that exists across these areas, for example in relation to reasonable adjustments for people with disabilities, or in responding to mental health issues that can intersect with all of the above [23].

Likewise, prohibitive costs, such as court fees, the cost to gather evidence including expert reports, the costs of the legal team and the potential cost of the respondent's expenses (if the case is lost) can render some routes to justice unaffordable [25]. In environmental cases there is a possibility of applying for a Protective Expense Order that can limit the amount owed by the petitioner if they lose the case. However, even PEOs are not sufficient to meet Aarhus Convention requirements to guarantee access to an affordable remedy [26]. Routes that are not affordable fall short of the criteria to meet the definition of an effective remedy.

## Legal advice and representation

People access advice in different ways and advice services can be thought of as constituting different tiers. People tend to access front-line advice services in the first instance including welfare advisors, advice centres & advocacy services, and their case may thereafter be escalated to requiring specialist advice and/or representation from lawyers and even advocates. Sometimes advice will be required at only one of these tiers or it may be required across all of them.

There are various barriers faced in accessing appropriate advice. First, there may be insufficient funding for one or more of the tiers (see above). Second, even if one tier is engaged it may not be obvious or easy to access advice in another tier – this could be because welfare advisors for example, are not aware that legal advice might enable access to a legal remedy (the legal awareness barrier) or it could be because there are not enough lawyers specialising in a particular area of



**You don't have many, if any, legal aid high street firms, or legal aid firms, doing housing and only housing. Because it is not... um, it's not sustainable. So I think that, that, in and of itself is a human rights issue. Solicitor [24]**





## Access to Justice



.housing/ immigration/ mental health/ social security law etc. In other words, the lack of appropriate funding in areas of social welfare law means that there are not enough lawyers specialising in these areas of expertise creating 'advice deserts':



"So, if it's about services that can provide advice and help people challenge and have their rights enforced, I'm worried. I say that I mean from the perspective - I obviously look at it through the lens of like legal advice. And that's not to say all these cases most housing issues and homeless issues ... will be dealt with without a solicitor. But at the end of the day, in the context of homelessness, for example, it's judicial review that's the remedy. Where you would need a solicitor. And in many of these eviction cases it is court proceedings.

"We're overly reliant - not 'overly reliant', we are dependent on charities and you know, Citizens Advice Bureaus and all of these organisations are doing everything that they possibly can. We have to ask ourselves - why is there not a body of social security lawyers there to tease out what are really complex areas of law. Social security - like immigration law - changes all of the time." Solicitor [27]

Those people who access appropriate legal advice and representation do better than those who do not. That is the case, even for access to justice avenues where lawyers are not a requirement of the process, such as ombudsman or tribunal services. Lack of legal advice and representation exacerbates the power imbalance between the individual and the state. An unrepresented litigant on one side, facing a legal team on the other, raises an 'equality of arms' issue.

Likewise, without access to appropriate early advice people may not know about the different routes to remedy available to them (discussed further below in relation to the complexity of the system).



"We sometimes forget, or there's sometimes a perception that these are eviction cases that are just about non-payment of rent and all that is required is negotiation of repayment arrangements, when these are actually legal proceedings with lawyers acting for the landlords and rarely lawyers acting for the tenants. So the statistics on people who are accessing lawyers to represent them, are, you know, are stark. Yet when you have a lawyer in who is looking at the paperwork and who is identifying whether things are done properly, i.e. when equality of arms are there, it makes a stark difference to somebody, as I say, keeping their house or not. Or at least, how their case is dealt with." Solicitor [28]





## Emotional Resources

Very few cases make it all the way to accessing a formal legal process and even fewer secure a remedy at the end of the journey. Research demonstrates that to reach that stage takes an immense emotional toll on the individual person, with additional stress and the burden of fighting the case piling on top of the impact of the breach that lead to the complaint. For example, those in housing stress, facing financial difficulties, contending with mental or physical disabilities, facing precarious immigration status or other complex intersectional problems, may already have depleted physical and mental resilience to address the violation they face before contending with a legal dispute.

There are many hurdles to overcome to secure the legal and financial resources to challenge a violation, neither of which are guaranteed. Emotional resources can be depleted in seeking to access basic legal and financial resources such as legal aid, before a legal challenge even begins.

In addition, there can be fear of potential retribution for pursuing a case, something that in practice can manifest as subtle or explicit worsening of circumstances for the person complaining. Empirical research confirms that this fear can manifest in reality, creating a significant and often invisible barrier for access to justice. A practitioner in the Nuffield study emphasised that fear of consequences when

defending yourself in the face of rights violations was not entirely misplaced. They expressed dismay that they could not:



**“Give people assurances that like, nothing bad will happen if they complain because sometimes things do happen when people complain and they're the ones that deal with it, I don't deal with it. I dealt with one example that I always think about, of a woman, during the evictions, like after SERCO had made the evictions and we were working with a lot of lawyers to get people represented in court. Anyway, I had this woman who...the court had placed an interim interdict...the interim interdict says that they can't move you until the SERCO, the Ali case had been decided...she called us saying 'SERCO have said that they're going to come and evict me today' so I called SERCO and was like 'are you aware that there's an interim interdict on this property and you will be breaking the law if you... (cont)**



**...move her?!" And they didn't know! And they were like 'oh thank you for telling us!' 'she won't be moved". But then there's this kind of like system in place where if somebody doesn't move when - either when they come to evict you or they come to move you to a different property, it's called a 'Failure to Travel', so if you refuse to get in the van and go, they issue a Failure to Travel message to the Home Office and then your asylum support stops. So, even though they would have been breaking the law if they had moved her, they still issued the Failure to Move notice, so then her asylum support stopped."**

**Case worker NGO [29]**

In order for access to justice to function people should be able to participate in the system and in the decisions that impact them. The role of advocacy services can play an indispensable role in supporting and ensuring genuine participation and informed decision making. Likewise, the support of legal advice and representation can help alleviate some of the emotional burden of fighting a case because an expert is there to help navigate the process and the law. These resources can help address some of the power imbalances when navigating complex access to justice routes (discussed below).

## Clustered and systemic injustice: placing a burden on the individual and clogging up the justice system



The legal justice system often siloes issues into stand-alone legal problems, whereas violations of ESCE rights are more likely to be 'clustered,' where a person faces many intersecting violations engaging with different rights, reflecting the fact that rights are indivisible and interdependent [30]. In addition, ESCE rights violations often impact multiple people at the same time. They are often systemic in nature and relate to a structural problem that is impacting many people. However, the legal system leans towards relying on individuals to challenge the system.

This means that the system can get clogged up with individual cases rather than dealing with a systemic violation holistically. Likewise, without the power of a collective challenge, this can place an unfair burden on an individual:



**"There's definitely a role for individuals trying to get recourse... (cont)**



**...as well. What there isn't is a strong enough structure in place to be able to enable to do that easily without breaking them down mentally, physically, emotionally.**

**You know, if you're already marginalised and then you've got to fight the system which is completely stacked against you - you know what? You really don't have a lot of (hope) for success unless you've got resilience coming out your pores."**

**Consultant & Activist [31]**

Standing requires to be sufficiently broad to enable individual, public interest and collective litigation. The taskforce recommends that the persons or organisations with “sufficient interest” should be able to bring cases [32]. This is a broader approach to standing than the ‘victimhood’ test for cases engaging with ECHR rights [33]. For this to work in practice a similar approach should be reflected in rules around legal aid so that the lack of legal aid funding for public interest litigation or multi-group actions does not act as an inadvertent barrier (collective actions are discussed further below).





## Key Questions to enable access to justice

### Financial, legal and emotional resources

- How can we ensure people in Scotland can afford to pursue a legal case when a human rights violation of ESCER occurs?
- Are there prohibitive costs associated with taking formal legal action when a violation of ESCER occurs? Can these be removed?
- How can legal aid provision ensure that people receive the specialist legal aid, advice, assistance and representation they need?
- How can legal aid and legal representation better respond to both the systemic and clustered nature of violations of ESCER?
- What other funding models might help improve access to advice and representation, including for example, state funded advice services and salaried lawyers that operate without the bureaucracy of individual legal aid applications?
- How can people be better supported in terms of the emotional barriers in accessing justice? How can issues regarding the fear and realisation (when people are punished for pursuing a complaint) of retribution be addressed? Would collective justice mechanisms help alleviate the emotional distress? If not, what further steps could be adopted?
- Should legal aid fund public interest litigation or collective cases to alleviate the burden on the individual taking on the system?



# Complexity of the journey



## Barrier 3

The complexity of the different pathways, or routes to access justice, presents as an additional barrier. The complexity of the system makes it incredibly difficult to navigate without appropriate advice and choosing one pathway over another may inadvertently impact on your chances of securing an effective remedy. The reliance on non-judicial administrative routes to justice is something that can lead to an effective remedy, however, the system must be calibrated in such a way as to ensure that regardless of the route taken there is a realistic prospect of such a remedy, otherwise that particular pathway can become redundant, constituting an additional barrier.

Often times people indicate a preference to resolve their dispute through a non-judicial route to justice. This could be for example, through an internal complaints process or a form of alternative dispute resolution, such as mediation. In addition, under the new proposed statutory framework in Scotland it is envisaged that inspectorates and regulators should play a key role in embedding a human rights culture across decision-making and act as an “everyday accountability” mechanism [34]. Other formal legal processes exist via tribunals and ombudsmen. Whilst there are many positives to encouraging resolution

through a variety of alternative routes, there are also potential setbacks due to the complexity of the pathways available, and the danger that people can get ‘stuck’ in ‘administrative mud’ or lose the option of formal court action due to the passage of time.

As discussed above, international human rights law encourages non-judicial administrative routes to remedy, although the court must be available as a means of last resort. However, non-judicial routes to remedy must be equally guided by international human rights norms, meaning they must meet the same standards and criteria in order to deliver an effective remedy.

The UN Special Rapporteur on Housing makes the case that compared to formal court processes, non-judicial routes to remedy can be “culturally and socially less threatening, more timely and more cost-effective, and they can enjoy greater social legitimacy and trust among rights claimants” [35]. They might also facilitate approaches which can be more participatory with better representation of rights holders on adjudicative bodies and greater integration of rights-empowerment strategies and human rights education at the

## Access to Justice



local level [36]. When guided by human rights norms, non-judicial mechanisms have the capacity to deliver accessible justice to individuals and communities sometimes in ways that formal judicial mechanisms struggle to achieve [37].

What is not always clear is what is the best route to justice for an individual in their particular circumstances and how they can reach a satisfactory and timely remedy. As a general rule, it would be expected that internal complaints procedures are exhausted before a formal judicial route can be raised. It may be either a legal requirement or simply more appropriate to seek a remedy via an internal complaints mechanism, a tribunal, the ombudsman or another complaint process in the first instance, although this is not always the case. However, the longer and more drawn out the various legal processes, the more ineffective that route to justice can become, as it will struggle to meet the adequacy metrics of a timely and affordable process.

These routes to justice can create a complex web that is difficult to navigate, and for most people, impossible without advice. There is a significant gap in the existing system, as navigating the complexity of legal avenues is not something for which advice, legal aid or representation is generally available. Indeed, many of the non-judicial routes to justice are designed to avoid the need for legal advice or representation. However, research demonstrates that, regardless of the route, front-line general advice and specialist legal advice is still required in order to help people

navigate a complex system.

Likewise, some people may choose to pursue a non-judicial route to remedy, for example via an ombudsman, without realising their entitlement to raise a court case is on a countdown clock [38]. For example, while there is a 12-month time limit for pursuing a



Above: access to justice will be better secured if the system facilitates partnerships and collaborative working

claim with the Scottish Public Service Ombudsman (SPSO), there is only three months to raise judicial review proceedings in court. Therefore, pursuing the SPSO route, court renders the latter unavailable as a route to remedy [39]. The only way to effectively protect your right to raise a court action from becoming time-barred in Scotland is to start that court action and then ask the court to pause it (sist) while you pursue other routes to remedy. Most people will of course be unaware of that. People need advice to help make informed decisions about the best routes and best potential remedy for their

## Access to Justice



particular circumstances.

Advice services are stretched and face the continuing threat of funding cuts [40], and so it becomes less and less likely that people on the ground get the help they need to navigate the complexity of the access to justice journey. The complexity of the system requires to be revisited to streamline avenues in a way that ensures access to effective remedies regardless of the route. Likewise, the system requires to be properly supported through a well-funded, comprehensive and diverse advice sector, ensuring there is appropriate breadth and availability of expertise and both general and specialist advice.





# Key Questions

## to enable access to justice

### Complexity of the journey

- How can we ensure people in Scotland know which is the most appropriate route to accessing justice for their particular circumstances?
- How can we ensure sustainable model of financing advice services?
- How can we ensure that the clock stops on routes to judicial remedy whilst pursuing alternative routes to justice? In other words, prevent people from being time-barred from accessing an effective remedy whilst they navigate a complex journey?





# Adequate processes



## Barrier 4

Regardless of the process, human rights should guide the journey and the end result. This means that whether an individual relies on a complaints mechanism, a tribunal, ombudsman, court or other alternative route, human rights standards should guide the process and outcome. In international human rights law, processes must be accessible, timely and affordable. Likewise, the outcomes of those processes, i.e. the remedies awarded, should be adequate, effective and appropriate in practice, ensure non-repetition and help change poor practice if the issue is systemic [41].

In addition to these metrics, and in order to ensure transformative incorporation of international human rights law, further reflection on how adjudicators (whether it be complaints handlers, ombudsmen or judges) understand and apply human rights law should be considered. When introducing a new suite of rights, adjudicators will need clear instructions, guidance and help in order to understand how to apply international human rights law using the appropriate tools and sources. This can be achieved by ensuring substantive standards are included on the face of the proposed Human Rights Bill as well as an interpretative clause that requires reference

to international human rights standards and relevant comparative law in the interpretation of rights. Likewise, the Bill should clarify how accountability operates when public functions or services are delegated to non-state private actors.

It also requires appropriate implementation measures such as education and training on international human rights law to support adjudicators, as well as clear rules on how to apply the legal framework in different settings.





## Key Questions to enable access to justice

### Adequate processes

- How can we ensure that the way compliance with ESCER standards on adequacy of remedy is assessed is based on standards set in international human rights law?
- What guidance should be provided to adjudicators to help support them in deciding ESCER cases?
- How can the system ensure that the delegation of public services and functions to non-state private actors is accommodated to ensure accountability for violations of ESCER?





# Substantive fairness and intensity of review in judicial review proceedings

Typically, the judicial route to challenging a decision of a public body is to raise a case asking the court to review that decision. This process is called 'judicial review'.

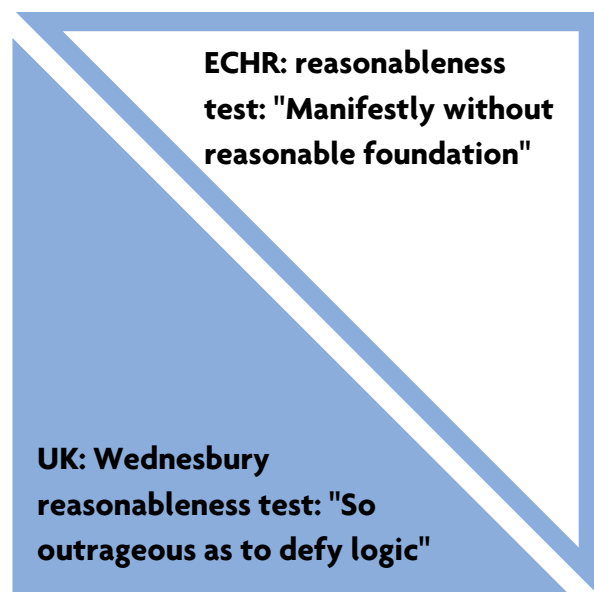
Depending on the grounds of review, illegality (unlawfulness), irrationality (unreasonableness) and procedural impropriety (unfairness), the court can employ a different intensity of review including assessing the reasonableness, proportionality, and procedural fairness of the decision [42]. Each of the types of review can vary in intensity. Likewise, sometimes various forms of review can be used at the same time, including both procedural and substantive aspects.

In relation to ESCE rights it is particularly important to be aware of the difference between different types of review. For example, the reasonableness test in UK [43] and ECHR [44] jurisprudence is not the same reasonableness test used to assess ESCE rights in international human rights law. Recently the Supreme Court, relying on the SC case [45], stated that intensity of review on the grounds of irrationality (unreasonableness) should be restricted in cases concerning economic and social policy, meaning such cases are not open

"to challenge on the grounds of irrationality short of the extremes of bad faith, improper motive or manifest absurdity" [46]. This is an extremely high threshold and would not be appropriate for assessing compliance with ESCE rights under the new statutory framework. The taskforce recommendations suggest adopting a standard of review that takes into account international human rights law standards and comparative best practice (including expanded reasonableness tests) [47].

In Scotland, adjudicators in both administrative and judicial proceedings should therefore be provided with clear instructions on intensity of review to ensure an enhanced form of the reasonableness test is used to assess ESCER compliance. This test has been described as "proportionality-inflected reasonableness" and is in keeping with human rights adjudication internationally and comparatively. [48].

### What do we mean by a narrow reasonableness test?





## What is meant by an expanded reasonableness test?

### Proportionality-inflated reasonableness test in international human rights law

Whether the steps were taken in a reasonable timeframe

The extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights

Whether policies have prioritised grave situations or situations of risk

Whether discretion was exercised in a non-discriminatory and non-arbitrary manner

Whether state party adopts options that least restricts Covenant rights

Whether resource allocation is in accordance with international human rights standards

Whether the precarious situation of disadvantaged and marginalised individuals or groups has been addressed

Whether decision making is transparent and participatory

## Key Questions to enable access to justice



The new human rights framework will require enhanced intensity of review in cases engaging with economic and social policy. How can the new statutory framework ensure that adjudicators, judges and decision makers are deploying enhanced forms of reasonableness and proportionality in line with international human rights law?



What kind of training and support is required to ensure the roll-out of appropriate intensity of review?



How can enhanced reasonableness be placed on a statutory footing?



# Effective results



## Barrier 5

A flexible approach to remedies recognises that what is appropriate in the particular circumstances can differ from case to case. The Taskforce Recommendations recognised that there requires to be a multitude or a constellation of remedies available, including the possibility of using structural remedies to address systemic issues [50].

The effectiveness of a remedy will necessarily depend on the appropriateness of the reparations ordered in a specific case [51]. In this sense, the right to an effective remedy necessarily entails the right to reparation [52]. Specific situations require different forms of reparations, as some might be more appropriate under certain circumstances than others. Appropriate reparations can come in the forms of: a) restitution; b) compensation; c) rehabilitation; d) satisfaction; and e) guarantees of non-repetition [53].

### Restitution

Wherever it is possible, the state must restore the victim to the original situation before the human rights violation occurred. Restitution includes, as appropriate: enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property, among

others. It is important to mention, however, that in many situations relating to ESCE rights, restitution might not be an appropriate solution as the victim may not have had access to the rights in question in the first instance [54].

### Compensation

Compensation should be provided for any financially assessable or determinable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting violations of international human rights law such as:

- Physical or mental harm;
- Lost opportunities, including: employment, education and social benefits;
- Material damages and loss of earnings, including loss of earning potential;
- Moral damage;
- Costs for legal or expert assistance, medicine and medical services, and psychological and social services [55].

There is a tendency under the current human rights framework to consider that a response to violations of human rights is through issuing damages [56]. Whilst compensation is an important response to ensure access to an



effective remedy, it is not the only means, nor is it always a necessary component of an effective remedy in international human rights law.

For example in the case of Rosario Gómez-Limón Pardo, the UN Committee on Economic, Social and Cultural Rights held that there was no need to issue financial compensation in response to the violation of the right to adequate housing<sup>[57]</sup> Instead, the Committee held that Ms Gómez-Limón Pardo be provided with suitable housing following an unlawful eviction order and that her legal expenses be covered <sup>[58]</sup>.

In addition, the Committee instructed Spain (the state party) to undertake domestic reform to ensure others were able to access an effective domestic remedy for unlawful evictions in order to ensure cessation of the violation. Spain was required to report what

steps were taken within six months of the judgment, meaning the Committee took on a supervisory role post-judgment <sup>[59]</sup>.

### Rehabilitation

Rehabilitation should include medical and psychological care as well as legal and social services that might be necessary to repair the human rights violation caused <sup>[60]</sup>.

### Satisfaction

Measures of satisfaction should include, where applicable, any or all of the following:

- Effective measures aimed at the cessation of continuing violations;
- Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's



**“You could get compensation, but another part of [an] effective remedy is restitution [...] to the extent possible, you should be restored to the position that you were in had that rights violation not happened to you, but compensation won't necessarily do that, so you might need educational, counselling, health measures - various other things to be put in place...to some people, a finding of liability is important - so a finding of fault and then comes with that the apology. And then [...] human rights law has stuff to say about what an apology should be as well.” Solicitor <sup>[49]</sup>**





- relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
- An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
- Public apology, including acknowledgement of the facts and acceptance of responsibility;
- Judicial and administrative sanctions against persons liable for the violations;
- Commemorations and tributes to the victims;
- Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational materials at all levels [61].

### Guarantees of non-repetition

This form of reparation is intended to ensure that current violations are not perpetuated over time. Such guarantees are intended to respond to structural situations, that require measures that go beyond the sole victim of the case in question. When implemented, they prevent further human rights violations and ensure that others do not require to access the judicial system to ensure their rights. In general, guarantees of non-repetition should include, where applicable, any or all of:

- Reviewing, reforming, or striking down laws contributing to or allowing human rights violations;

- Requiring policies to be reviewed or changed in order to comply with human rights standards;
- Requiring appropriate authorities to create new policies in order to satisfy human rights obligations and prevent future harm [62]

### A multitude of remedies in International Human Rights Law

In international law, effective remedies can include, amongst other things:

Restitution, compensation, rehabilitation, satisfaction, effective measures to ensure cessation of the violation and guarantees of non-repetition, public apologies, public and administrative sanctions for wrongdoing, instructing that human rights education be undertaken, ensuring a transparent and accurate account of the violation, reviewing or disapplying compatible laws or policies, use of delayed remedies to facilitate compliance, including rights holders as participants in development of remedies and supervising compliance post-judgement.





# Key Questions

## to enable access to justice

### Effective results



How can the new statutory framework take into account the constellation/multitude of remedies, flexibility in using them and deploying an aggregate of remedies where appropriate?



What should guide the court or adjudication body as to the most appropriate remedy or remedies in the circumstances?





## Enabling collective access to justice

ESCER often engage with a violation that is systemic in nature meaning that we need to find new ways of facilitating collective complaints and collective remedies. International human rights law stipulates that states should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate [63].

There are three distinct approaches to facilitating a collective or structural response to systemic problems: (1) relying on an individual taking a test case; (2) relying on a representative person or body to raise a public interest case; (3) challenging a systemic issue through collective action (also known as multi-party group proceedings or class actions).

In Scotland, the system is currently over-reliant on the first of these approaches and uses a ‘test and sist’ system where all affected cases are suspended whilst a lead case is heard [64]. The research suggests this can exacerbate access to justice issues for those impacted and that public interest litigation and collective cases are required to help alleviate the individual burden of a test case and the potential adverse impact on those cases that are suspended. By way of example, a number of cases were sisted whilst awaiting the outcome of the *Ali v Serco* case arguing that it was unlawful for Serco to evict people without first obtaining a court order, contravening Scots housing law as well as

human rights law [65]. This meant that those sisted cases were prevented from proceeding, even although they may have brought a new dimension to the legal arguments (the Saeedi case [66] was a judicial review and the Ali case an ordinary action – the former of which would have allowed for wider arguments regarding human rights and equality law obligations).



**"...the Ali case being the leading case, and our case, the Saeedi case being sisted, we were never really able to ventilate those particular arguments.**

**It remains a source of frustration because a lot of hard work had gone into that, giving evidence." Solicitor [67]**

This is a gap in the existing system. For example, there is a lack of legal aid to support public interest litigation. Regulation 15 Civil Legal Aid (Scotland) Regulations 2002 places limitations on a person making a claim for legal aid when there may be another person who

## Access to Justice



has a joint interest. There is no clear financial or legal support in places to enable collective responses to injustice. Whilst the Group Proceedings (Scotland) Act 2018 facilitates a form of collective class action, the Act is based on a compensation model for private law disputes that does not reflect the complex financial or legal needs of different groups who may face systemic violations of ESCER.

# Key Questions to enable access to justice

- Do the rules around standing and legal aid require to be adapted to reflect this policy objective?[i]
- Is standing sufficiently broad? Do legal aid rules reflect the policy objective of enabling strategic litigation so that organisations can bring cases or by enabling collective multi-group proceedings?
- Collective routes to litigation require consideration of the different needs of marginalised groups (such as children, ethnic minorities, disabled persons etc). How can the system enhance collective litigation in a way that responds to the diverse needs of different interest groups?
- What other mechanisms might help support collective complaints or collective advocacy movements?

## Enabling collective access to justice

- How can the proposed new framework via the Human Rights Bill be adjusted to ensure that public interest litigation and collective multi-party group proceedings are available and affordable?





# Enabling collective access to justice: infographic

**ESC rights often engage with a violation that is systemic in nature, meaning that we need to find new ways of hearing collective complaints and providing structural remedies (meaning facilitating more of options B and C below).**

**Option A:**

Relying on an individual to challenge the system is a very difficult burden for one person to take on in the hope of changing the situation for many.



**Option B:**

Relying on a representative person or body can help by facilitating public interest litigation on behalf of a group.



**Option C:**

Many people grouping together to challenge a systemic issue collectively meaning no one person carries the burden.





### Routes to collective structural remedies?

Language around the use of structural remedies for systemic issues draws on different framings of individual v collective [69]/systemic [70]/structural relief [71]; specific v general measures [72]; and simple v complex remedies [73].

Structural orders cover the broad field of remedial responses that include a (complex) aggregate of remedies (including interim, delayed, declaratory and mandatory orders) offering both individual and systemic/structural relief involving both individual or collective cases where there may be multiple defendants and the court may perform a supervisory role post-judgment.

Structural orders are one tool of many and so should be viewed within the context of a range or multitude of remedies across a spectrum (deferential to interventionist). The more flexible the remedial framework is the better placed the adjudicator will be to respond appropriately to ensure the remedy deployed is effective and appropriate in the particular circumstances and according to international human rights law.

Structural orders are used across the globe under both national, regional and international legal systems. The European Court of Human Rights for example now uses a pilot system to

deal with systemic cases [74]. The central idea behind this procedure is to ensure applicants obtain redress more speedily if an effective remedy is established in national law to address a systemic issue [75]. This allows the court to deal with its heavy case-load and limited resources by ensuring repetitive cases and those cases that are urgent or raise questions of wider public importance can be adjudicated holistically and more speedily where the structural remedy addresses the systemic issue [76].

Other regional human rights systems adopt a similar approach. For example, the Inter-American Court of Human Rights seeks to ensure structural responses as a matter of course through guarantees of non-repetition. In the case of the Xákmok Kásek Indigenous Community in Paraguay, the court issued a structural order to address the vulnerable situation of those who had been unable to take possession of their ancestral land and who were in the meantime left without access to adequate food, medicine and sanitation [77].

The court ordered the return of the Xákmok Kásek Community's land, instructed a public act of acknowledgement of the wrongdoing by the state and instructed the state to amend the domestic law to create an effective system for indigenous peoples to reclaim ancestral lands at the domestic level. Further, the court undertook to supervise compliance with judgment [78]. This approach is also evident as part of international complaints mechanisms.



Similar approaches to preventing future violations from occurring have been the subject of cases before the UN Human Rights Committee (on access to medical care) [79], the UN Committee on the Elimination of Discrimination Against Women (on domestic violence) [80] as well as the UN Committee on Economic, Social and Cultural Rights (on eviction orders) [81].

Comparative constitutional jurisprudence demonstrates that structural orders are used when dealing with systemic violations of ESCER. For example, cases in India [82], South Africa [83], Kenya [84], Colombia [85], the US [86] and Canada [87] have used structural remedies to address systemic violations.

For example, in 2018 the Colombian Constitutional Court issued a structural remedy on the right to a healthy environment and the protection of future generations (Article 79). The court ordered the government to undertake a participative process to develop an ‘intergenerational pact for the life of the Colombian Amazon’ (PIVAC) to reverse the damage caused by deforestation of the Amazon. The tutela device and the operation of structural remedies such as this are embedded in participative and deliberative processes that seek to include those impacted by the decision.

In this case, the court required coordination with the actors of the National Environmental System and the participation of the applicants (25 children and young people), the affected

communities and interested population in general, to formulate a short, medium, and long term action plan to counteract the deforestation rate in the Amazon, tackling climate change and engaging directly with protecting the rights to water, air and health [88].

The benefits of this approach to ESCER are far-reaching:

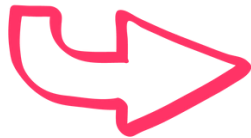
[t]he effects includes—in addition to governmental action specifically mandated by the court—the reframing of socioeconomic issues as human rights problems, the strengthening of state institutional capacities to deal with such problems, the forming of advocacy coalitions to participate in the implementation process, and the promoting of public deliberation and a collective search for solutions on the complex distributional issues underlying structural cases on [ESCER]’ [89].

One of the necessary components of a structural remedy is the role played by civil society as part of a participative and deliberative process where the court listens to evidence on the particular systemic issue and is open to issuing remedies that address the issue, compel the duty bearer to act, supervise compliance and include those impacted in the post-judgment decision making and compliance processes.

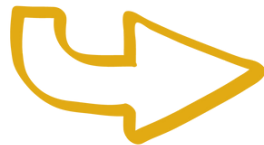


# What are structural remedies?

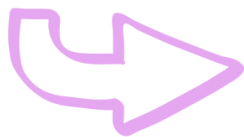
An infographic summary



**Affect a large number of people who allege a systemic violation of their rights;**



**Implicate one or multiple respondents found to be responsible for pervasive public policy failures that contribute to such rights violations;**



**Involve structural edits, i.e. Enforcement orders whereby courts instruct multiple actors to take coordinated actions to protect the entire affected population through an aggregate of remedies;**



**Facilitate participative approaches to remedies that include the affected population in the design of the remedies deployed;**



**Aim to ensure cessation of the violation through guarantees of non-repetition.**



In Scotland, the legal terminology for a structural order is a 'structural interdict'. It means issuing a remedy that seeks to address a systemic issue by instructing one or many duty bearers to cease the violation and ensure access to effective remedies for those impacted. The remedies available to the Scottish judiciary already enable wide-reaching responses to violations of human rights [90]. In this sense, the existing remedies could be combined as an aggregate of remedies in some cases in order to deploy a structural interdict. In other words, the existing system is well placed for development in this area. One of the key benefits of a structural interdict is to ensure accountability in a system where different duty bearers may seek to deflect obligations onto other actors. The structural interdict can facilitate a cross-institutional response to ensure it is clear who is responsible for what in response to a systemic violation.

The structural interdict can operate as a response to a systemic problem identified in either an individual case that identifies a wider systemic problem, in relation to a public interest case raised on behalf of a group by a key stakeholder or representative body, or in response to multi-party group proceedings where several litigants are facing the same systemic issue.

There is more scope for exploring the possibilities that multi-party actions or group cases can provide in terms of dealing with systemic ESCER violations in Scotland. Experience from other countries indicates that

courts must adapt procedures to deal with systemic ESCER violations by facilitating access to a collective procedure with multiple stakeholders, multiple defendants and through the deployment of structural remedies [91]. Responding to this need in the deployment of effective remedies was also recommended by the First Minister's Advisory Group and National Taskforce [92].

## Key Questions to enable access to justice

- What support and guidance is required to help adjudicators develop structural remedies when engaging with systemic issues?
- Could systemic issues be identified early on and grouped together to issue a structural response? How might this happen in practice?
- What bodies should play a role in helping to identify systemic cases and how could the system respond to this in a structural way without relying on the 'test and sist' approach?





# Feedback loop



## Barrier 6

Regardless of the route to justice pursued, effective remedies should ensure an iterative process whereby the end of the access to justice journey feeds back into law, policy and decision-making processes as a matter of course.

This is particularly important where it becomes clear that there is a flaw in the system that requires to be addressed. In other words, ideally there requires to be feedback mechanisms that help enable longer term change for systemic issues and guarantees of non-repetition.

When a court case is determined, this sets a precedent for future cases and changes decision-making processes or the impacted legislation as a result. However, other non-judicial mechanisms do not provide a feedback mechanism as a matter of course. For example, at tribunal level if there is a repeated pattern of poor decision-making, or a repeated flaw in the decision-making process, rather than have a flow of repetitive individual cases, how can the system ensure that case outcomes are fed back into the decision making system to improve decision-making processes and hence prevent the problem occurring? In other words, how does the duty-bearer or staff from

such a body learn of the mistake and receive support to change?

Likewise, if systemic issues are identified by regulators, ombudsmen or inspectorates what kind of feedback mechanism should exist to ensure the issue is addressed earlier on in decision-making processes? Is there a role for the national human rights institutions to facilitate this feedback loop?

For example, under the statutory remit of the SPSO, the ombudsman has the power to alert the Scottish Parliament to a serious systemic issue (such as a lack of learning from complaints, or a recurrent theme or trend in complaints upheld by the SPSO) [93]. The SPSO has not used this power to date. Is this mechanism sufficient to prevent systemic issues recurring? Are there ways through which the systemic issues that arise in SPSO complaints could be grouped together earlier and facilitate more robust feedback mechanisms or enforcement orders to prevent recurring breaches?

Responding to these gaps in access to justice may require revisiting the statutory remit of these bodies to help support and enable a more comprehensive and structural response that seeks to streamline and prevent future violations of ESCER.



# Key Questions

## to enable access to justice

### Feedback loop

- What kind of feedback loop mechanisms are possible in relation to tribunals, ombudsmen, regulators and inspectorates?
- Are there ways of ensuring compliance or enforcement with recommendations of these bodies that would help close the feedback loop and prevent future violations?
- Do National Human Rights Institutions have a role to play in identifying systemic issues and providing a feedback mechanism to improve decision-making processes?





# Principles of adjudication to guide improved access to justice

## 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 representation and advice 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 better be enabled?
- Do processes listen to the voices of those impacted and include them in decision-making around remedies?
- Does digital divide/language barriers prohibit participation?
- Are multi-party actions facilitated?
- Are collective responses facilitated when dealing 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 differential way and sometimes in a more interventionist way?
- Are adjudicators able to listen to domestic and international stakeholders such as ombudsmen, international courts and UN committees as well as rightsholders themselves?
- Is public interest litigation facilitated?



# Principles of adjudication to guide improved access to justice

## Fairness

- Reasonableness and proportionality tests should align with international and comparative best practice. What grounds and intensity of review is used?
- 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 treaty body decisions, General Comments and recommendations) as well as comparative 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?
- What grounds and intensity of review is used?

## 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 differential where appropriate and outcome orientated where appropriate?
- Are remedies participative and are there sufficient monitoring mechanisms ensure compliance?
- Are structural remedies used where appropriate when dealing with systemic issues?
- Do remedies deal with the issue at hand as well as change of practice to ensure others do not face the same violation?



# Endnotes

- [1] Dina Shelton, Remedies in International Human Rights Law (OUP 1999) at 7
- [2] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24; The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, (1998) 20 Human Rights Quarterly, 691, para.23.
- [3] 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 UNTS 447, 38 ILM 517 (1999) Article 9(4)
- [4] CESCR General Comment 9, para. 9.
- [5] Aarhus Convention, Article 9(4)
- [6] See the jurisprudence under Article 13 ECHR and Article 47 EU Charter of Fundamental Rights both of which recognise the right to an effective remedy, and both of which constitute definitions that consider both the process and the outcome in considerations as to whether the remedy is “effective”. Guide on Article 13 of the European Convention on Human Rights Right to an effective remedy Updated on 31 August 2021, available at [https://www.echr.coe.int/Documents/Guide\\_Art\\_13\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_13_ENG.pdf)
- [7] United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law ,UN General Assembly Resolution: resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147
- [8] The Maastricht Guidelines para.25
- [9] The Council of Europe Guidelines on Article 13 (right to an effective remedy) para.50
- [10] The Council of Europe Guidelines on Article 13 (right to an effective remedy) para.57
- [11] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, para.59; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11, para.55
- [12] The Committee speaks about the importance of judicial oversight in the case of forced evictions in I.D.G v. Spain (Communication No. 2/2014) [17.06.2015] para.12.3
- [13] For a comprehensive discussion on issues of justiciability and enforcement of economic, social and cultural rights see Katie Boyle, Models of Incorporation and Justiciability for Economic, Social and Cultural Rights (SHRC 2018) available at [https://www.scottishhumanrights.com/media/1809/models\\_of\\_incorporation\\_escr\\_vfinal\\_nov18.pdf](https://www.scottishhumanrights.com/media/1809/models_of_incorporation_escr_vfinal_nov18.pdf)



[14] General Comment 9 para.9

[15] General Comment No 9, para.9; UN Basic Principles para.12

[16] The Maastricht Guidelines suggest such bodies must interrogate ESCER as rigorously as civil and political rights, para.25

[17] During the course of the Nuffield Foundation funded research project we spoke with 26 practitioners from across the UK. All research participant quotes in this briefing are sourced from our Scottish practitioner participants discussing barriers in access to justice for social rights. All research participant's identities have been anonymised.

[18] See the concluding observations under the following treaty monitoring processes:

CRC/C/GBR/CO/5 (CRC, 2016) Committee on the Rights of the Child, para.49;

CERD/C/GBR/CO/21-23 (CERD, 2016) Committee on the Elimination of Racial Discrimination para.50; E/C.12/GBR/CO/6 (CESCR, 2016) Committee on Economic, Social and Cultural Rights,

para.72; CCPR/C/GBR/CO/7 (CCPR, 2015) Human Rights Committee, para10(b)

[19] CCPR/C/GBR/CO/7 (CCPR, 2015) Human Rights Committee, para10(b)

[20] 2019-2020 SLAB Annual Report and Accounts, (SLAB 2020),

<https://www.slab.org.uk/app/uploads/2020/11/2019-20-SLAB-Annual-Report-and-Accounts.pdf>

[21] Prior to LASPO scope for civil legal aid came with a list of exceptions. LASPO changed the approach & provides a prescribed list (Schedule 1) and all else is excluded, including debt, welfare benefits, employment, education, most housing disputes, private family law, non-asylum immigration. Exceptional Case Funding covers ECHR & retained EU, and so excludes ESCER. ESCER are therefore largely excluded from legal aid provision in England and Wales.

[22] Scottish Government Consultation, Legal Aid Reform Consultation Analysis, (Scottish Government 2020), available at <https://www.gov.scot/publications/legal-aid-reform-scotland-consultation-response/pages/4/>

[23] Ibid

[24] During the course of the Nuffield Foundation funded research project we spoke with 26 practitioners from across the UK. All research participant quotes in this briefing are sourced from our Scottish practitioner participants discussing barriers in access to justice for social rights. All research participant's identities have been anonymised.

[25] The UN Committee on Economic, Social and Cultural Rights stipulates that access to justice must be affordable, General Comment 9 para.9 and and the Aarhus Convention stipulates that access to justice must not be prohibitively expensive in relation to environmental rights, Aarhus Convention, Article 9(4)

[26] Economic and Social Council, Economic Commission for Europe Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters Seventh session Geneva, 18 – 20 October 2021 Item 7 (b) of the provisional agenda Procedures and mechanisms facilitating the implementation of the Convention: compliance mechanism Report of the Compliance Committee on compliance by the United Kingdom of Great Britain and Northern Ireland – Part I, ECE/MP.PP/2021/XX para.90



[27] During the course of the Nuffield Foundation funded research project we spoke with 26 practitioners from across the UK. All research participant quotes in this briefing are sourced from our Scottish practitioner participants discussing barriers in access to justice for social rights. All research participant's identities have been anonymised.

[28] During the course of the Nuffield Foundation funded research project we spoke with 26 practitioners from across the UK. All research participant quotes in this briefing are sourced from our Scottish practitioner participants discussing barriers in access to justice for social rights. All research participant's identities have been anonymised.

[29] During the course of the Nuffield Foundation funded research project we spoke with 26 practitioners from across the UK. All research participant quotes in this briefing are sourced from our Scottish practitioner participants discussing barriers in access to justice for social rights. All research participant's identities have been anonymised.

[30] Luke Clements, Clustered Injustice and the Level Green (Legal Action Group 2020)

[31] During the course of the Nuffield Foundation funded research project we spoke with 26 practitioners from across the UK. All research participant quotes in this briefing are sourced from our Scottish practitioner participants discussing barriers in access to justice for social rights. All research participant's identities have been anonymised.

[32] Recommendation 23, National Taskforce for Human Rights Leadership Report, 12 March 2021 available at: <https://www.gov.scot/publications/national-taskforce-human-rights-leadership-report/>

[33] Section 100 of the Scotland Act 1998 and section 7 of the Human Rights Act requires the applicant to be a victim in terms of Article 34 ECHR.

[34] "Effective practical implementation of human rights and of the Act also lies within the everyday accountability space where human rights standards should be monitored and upheld by a range of bodies including inspectorates, regulators, complaint handlers and adjudicators".... Access to court and a judicial remedy are indispensable safeguards. However, they are a last resort when the everyday accountability space has not worked. Priority needs to be given to the practical implementation of the Act through policy and practice and to this "first resort" of everyday accountability from inspectorates, regulators, complaints handlers and adjudicators. First Minister's Advisory Group for Human Rights Leadership (Edinburgh, 2018) available here: <https://humanrightsladership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf> p.40

[35] UN Special Rapporteur, Access to justice for the right to housing Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to nondiscrimination in this context, 15 January 2019, A/HRC/40/61 para.65

[36] *ibid*



[37] Informal Justices Systems: Charting a Course for Human-Rights Based Engagement (New York, United Nations Development Programme, United Nations Children’s Fund and UN-Women), p. 11

[38] A time limit of 3 months applies in relation to judicial review proceedings, a 12 month time limit applies in complaints made to the SPSO, there are different rules around prescription for reparation claims (5 years) and other statutory rules may apply to other times of statutory appeal procedures.

[39] McCue v. Glasgow City Council [2020] CSIH 51

[40] Martin Williams, “U-turn: Closure-threatened Glasgow Citizens Advice centres set to get vital funding...but” The Herald 17 September 2020, available at

<https://www.heraldscotland.com/news/18726063.u-turn-closure-threatened-glasgow-citizens-advice-centres-set-get-vital-funding/>

[41] For a discussion on adequate and effective remedies in international human rights law see Scottish Human Rights Commission, Adequate and Effective Remedies for Economic, Social and Cultural Rights Background briefing paper for the National Taskforce on Human Rights Leadership (December 2020) available at <https://www.scottishhumanrights.com/media/2163/remedies-for-economic-social-and-cultural-rights.pdf>

[42] Council of Civil Service Unions v Minister for the Civil Service (The GCHQ case) [1985] AC 374, [1985] ICR 14

[43] Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223

[44] James v United Kingdom (1986) 8 EHRR 123; Stec v United Kingdom (2006) 43 EHRR 47; Carson v United Kingdom (2010) 51 EHRR 13

[45] R (SC) v Secretary of State for Work and Pensions [2021] UKSC 26, [2021] 3 WLR 428

[46] R (Pantellerisco and others) v SSWP [2021] EWCA Civ 1454 para.58 referring to Lord Reed in SC [ibid] who cites Lord Bridge in R v Secretary of State for the Environment, ex p Hammersmith and Fulham London Borough Council [1991] 1 AC 521

[47] National Taskforce Recommendation 24

[48] Sandra Liebenberg, ‘Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol’ (2020) 42(1) Human Rights Quarterly, 48-84, p.72

[49] During the course of the Nuffield Foundation funded research project we spoke with 26 practitioners from across the UK. All research participant quotes in this briefing are sourced from our Scottish practitioner participants discussing barriers in access to justice for social rights. All research participant’s identities have been anonymised.

[50] National Taskforce Recommendation 25

[51] The following paragraphs are discussed as part of the SHRC paper on adequate and effective remedies: Scottish Human Rights Commission, Adequate and Effective Remedies for Economic, Social and Cultural Rights Background briefing paper for the National Taskforce on Human Rights Leadership (December 2020)





[52] UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para.16

[53] UN Basic Principles and Guidelines paragraph 18. The UN Committee on Economic, Social and Cultural Rights has considered that these forms of reparations are appropriate within the context of the covenant rights. See for example UN Committee on Economic, Social and Cultural Rights, General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 2 May 2016, para.64

[54] UN Basic Principles and Guidelines para.19

[55] Ibid para.20

[56] This is not surprising given the current ECHR incorporation model. Also evident in Part 1 Success Fee Arrangements Civil Litigation (Expenses and Group Proceedings) Act 2018

[57] Rosario Gómez-Limón Pardo v. Spain (Communication No. 52/2018) [05.03.2020] para.13

[58] Ibid para.13

[59] Ibid para.14

[60] UN Basic Principles and Guidelines para.21

[61] UN Basic Principles and Guidelines para.22

[62] UN Basic Principles and Guidelines para.23

[63] UN Basic Principles and Guidelines para.13

[64] For a discussion on this see Katie Boyle, Models of Incorporation and Justiciability for Economic, Social and Cultural Rights (SHRC 2018)

[65] Ali v Serco [2019] CSOH 34; Ali v Serco [2019] CSIH 54

[66] A separate legal case sisted pending the outcome of Ali v Serco (ibid). The Saeedi case was settled out of court in the intervening period, as Mr Saeedi was granted leave to remain.

[67] During the course of the Nuffield Foundation funded research project we spoke with 26 practitioners from across the UK. All research participant quotes in this briefing are sourced from our Scottish practitioner participants discussing barriers in access to justice for social rights. All research participant's identities have been anonymised.

[68] National Taskforce Policy Objective 23

[69] Also in relation to class action, multi-party proceedings and group proceedings

[70] Systemic and structural can be used interchangeably in the literature and in practice. Roach formulates systemic remedies as constituting complex aggregate of remedies where courts perform a supervisory role in the case of repetitive and continued violations, Kent Roach, Remedies for Human Rights Violations, A Two-Track Approach to Supra-national and national Law (CUP 2021). Elsewhere, terminology referencing structural remedies is used interchangeably in practice and in the literature. For example, the South African Constitutional Court and Kenyan Constitutional Court have issued 'structural remedies' which are framed in similar terms. See for example Mahlangu and Another v Minister of Labour and Others [2020] ZACC 24, Equal Education and Others v Minister of Basic Education and Others (22588/2020) [2020] ZAGPPHC 306 and Mitu-Bell Welfare Society v. Kenya Airports Authority, SC Petition 3 of 2018



[71] *ibid*

[72] Roach on pathologies of remedies, *Remedies for Human Rights Violations* (CUP 2021), at 77

[73] *ibid*

[74] Rule 61 of the Rules of Court. For an explanation see Janneke Gerards, 'Abstract and Concrete Reasonableness Review by the European Court of Human Rights', (2020) 1(2) *European Convention on Human Rights Law Review* 218-247

[75] European Court of Human Rights, Pilot Judgment Procedure, Information Note Issued by the Registrar, available at

[https://www.echr.coe.int/Documents/Pilot\\_judgment\\_procedure\\_ENG.pdf](https://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf), para.6

[76] *Ibid*

[77] Inter-American Court Of Human Rights, Case Of The Xákmok Kásek Indigenous Community V. Paraguay, Judgment Of August 24, 2010 (Merits, Reparations, And Costs), para.2

[78] *Ibid*

[79] Toussaint v Canada, United Nations Human Rights Committee, CCPR/C/123/D/2348/2014, 7 August 2018. See also Mbongo Akwanga v Cameroon, Merits, UN Doc CCPR/C/101/D/1813/2008, IHRL 172 (UNHRC 2011), 22nd March 2011: para.14 – state required to prevent such violations from occurring in the future

[80] X and Y v. Georgia, Communication No. 24/2009; U.N. Doc. CEDAW/C/61/D/24/2009 para.11(b)(ii)

[81] Communication submitted by: Rosario Gómez-Limón Pardo

[82] In Re: Problems And Miseries Of Migrant Labourers, No. 6 of 2020 (Supreme Court of India, June 29, 2021)

[83] Equal Education and Others v Minister of Basic Education and Others (22588/2020) [2020] ZAGPPHC 306; [2020] 4 All SA 102 (GP); 2021 (1) SA 198 (GP) (17 July 2020)

<http://www.saflii.org/za/cases/ZAGPPHC/2020/306.html>

[84] Available at <https://katibainstitute.org/wp-content/uploads/2021/01/Petition-3.2018-MituBell.pdf> For a discussion on this recent case see Victoria Miyandazi, 'Setting the Record Straight on Socio-Economic Rights Adjudication: Kenya Supreme Court's Judgment in the Mitu-Bell Case', (Oxford Human Rights Hub, 1 February 2021) available at <http://ohrh.law.ox.ac.uk/setting-the-record-straight-on-socio-economic-rights-adjudication-kenya-supreme-courts-judgment-in-the-mitu-bell-case/>

[85] Manuel José Cepeda Espinosa and David Landau, *Colombian Constitutional Law: Leading Cases* (OUP 2017) see chapter 6 on social rights

[86] Katharine Young, 'A typology of economic and social rights adjudication: Exploring the catalytic function of judicial review', (2010) 8(3) *International Journal of Constitutional Law* 385

[87] Kent Roach, *Constitutional Remedies in Canada*, (2nd ed. Canada Law Book, 2013)



[88] TC4360-2018; No: 11001-22-03-000-2018-00319-01 (Approved in session on April 4th, 2018) Bogotá, D.C., (5th April 2018) For a discussion on the case see here: <https://www.dejusticia.org/en/climate-change-and-future-generations-lawsuit-in-colombia-key-excerpts-from-the-supreme-courts-decision/>

[89] César Rodríguez-Garavito 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America', (2011) 89 Texas Law Review 1669-1698 at 1676

[90] Remedies available to the judiciary include reduction, declarator, suspension and interdict, specific performance or specific implement, liberation, interim orders, damages.

[91] César Rodríguez-Garavito and Diana Rodríguez-Franco, Radical Deprivation on Trial, the Impact of Judicial Activism on Socioeconomic Rights in the Global South (CUP 2015) and David Landau, 'The Reality of Social Rights Enforcement', (2012) 53 Harvard International Law Journal 189

[92] First Minister's Advisory Group Recommendations, p.35; National Taskforce Recommendation 25

[93] Under s16 or 17 of the Scottish Public Services Ombudsman Act 2002. See SPSO Support and Intervention Policy, available at [https://www.spsso.org.uk/sites/spsso/files/communications\\_material/leaflets\\_buj/SupportandInterventionPolicy.pdf](https://www.spsso.org.uk/sites/spsso/files/communications_material/leaflets_buj/SupportandInterventionPolicy.pdf)

[94] The Nuffield Foundation is an endowed charitable trust that aims to improve social wellbeing in the widest sense. It funds research and innovation in education and social policy and also works to build capacity in education, science and social science research. More information is available at [www.nuffieldfoundation.org](http://www.nuffieldfoundation.org)



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