

A call for urgent action to reform civil legal aid in Scotland



This briefing sets out what the **problem** is, the **impact** this is having on people in poverty, **why this matters for human rights** protection and realisation, and **calls** on the Scottish Government to act.

Since 1987, Scotland has had a system of legal aid that aims to ensure that people living in poverty and on low incomes can access justice. However, our legal aid system is not working – there is a significant shortage of civil legal aid solicitors, leaving many people unable to access justice and hold the government to account. Despite multiple consultations and Scottish Government commitments, there has been no action towards the radical legal aid reform that is needed.

About civil legal aid in Scotland

Legal aid enables people to get advice, assistance, and representation from a solicitor if they could otherwise not afford it. Legal aid is currently restricted to individuals, excluding groups, NGOs, and charities seeking to pursue cases, placing the onus on individuals to address systemic issues affecting them instead of supporting NGOs to tackle these broader issues.

There are many different legal situations that civil legal aid can help with. For example, when people are facing eviction, applying for asylum, challenging employment discrimination, concerned with investigation into a loved one's death, discrimination related to the impact of a government policy, seeking protective orders following abuse and/or harassment, and many more. Civil legal aid can help cover costs of cases in the Sheriff Court, Court of Session and many Scottish Tribunals.

There are limitations to what civil legal aid can help with. It is only available for representation at most tribunals or for straightforward procedure claims in the sheriff court if the damages that are being sought are more than £3,000 – civil legal aid is not available for very small damages claims.

What are we asking for?

1

We ask the Scottish Government to commit to a consultation on a draft Legal Aid Reform Bill by 2026, committing to it in the 2024-25 Programme for Government.

2

We ask the Scottish Government to amend Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 to broaden the scope of legal aid to include community groups and NGOs as civil legal aid is extended to group cases.

Legal aid can help with solicitors' fees for:

- Preparing a case.
- Negotiating settlements for claims in these proceedings.
- General advice on legal problems.
- Writing letters.
- Getting an advocate's opinion
- Getting a medical report for an accident claim or a benefit appeal
- Representation in a court or tribunal.
- Legal aid is means-tested, taking into account savings, capital, and income. The means test also takes into consideration if someone has dependant relatives or is over the state pension age.
- Anyone can check their eligibility using the advice and assistance estimator on the SLAB website.

Legal aid is overseen by the Scottish Legal Aid Board (SLAB). You can only apply for legal aid through a solicitor - if you can't get a civil legal aid registered solicitor, you can't get legal aid. Solicitors registered for legal aid can be found using the solicitor finder tool available on the SLAB website.

Civil legal aid – problems highlighted by the sector

This briefing provides an in-depth exploration of the issues faced by the sector. For clarity, we have summarised the key endemic problems encountered by civil legal aid practitioners in the following bullet points:

- Most people are unable to find solicitors offering legal aid and are thus forced to represent themselves in court, which is rare, difficult and almost never happens, so more commonly, people will endure the breach of their rights without any remedy. This often means that most rights violations go unaddressed entirely, leaving individuals to live with the situation.
- Finding legal aid solicitors in specialised areas of law is especially challenging, with even greater difficulties for those outside the Central Belt. For example, there are no immigration legal aid solicitors north of Glasgow, and significant shortages exist in solicitors specialising in gender-based violence, human rights and discrimination.
- Solicitors are abandoning civil legal aid, either due to unsustainable income sources to run their business, and/or not being reasonably remunerated for the work they do, leaving clients unable to access legal aid.
- Those who do not qualify for legal aid often cannot afford private solicitors, or the additional cost and risk of taking a claim to court, and must represent themselves or, more often, suffer the breach of their rights without hope of remedy.
- There is a struggle to find firms or organisations offering legal representation for children, raising concerns that children's views are not adequately represented in court proceedings.

A key reason for the lack of legal aid solicitors is that legal aid does not cover the actual cost of the work done, by a considerable margin. JustRight Scotland, which has four law centres doing a range of legal aid work, has advised that legal aid does not pay for a significant amount of essential work on its cases. There are two elements to this. Firstly, the rules about what is chargeable work are very restrictive, ruling out any payment for a wide range of work that must be done. Secondly, for work that is chargeable the rates applied are extremely low, do not pay for the actual time involved and severely undervalue the services being provided. Just Right Scotland has confirmed that without significant funding from other sources they would not be able to do legal aid work. This is particularly so for more unusual or complex cases, including human rights and Equality Act claims. Legal aid does not adequately compensate for legal work, and for most solicitors this makes it impossible to offer legal aid services.

Why is civil legal aid important for human rights?

Ensuring that access to justice is not dependant on your financial means is a crucial human rights principle. Under international human rights law, States must ensure the existence of remedies that are accessible, affordable, timely, and effective. This is known as the AATE framework.

Article 13 of the European Convention on Human Rights (ECHR) requires everyone to have access to effective remedy. European Court of Human Rights jurisprudence has found that a remedy in relation to ECHR rights is only effective if it is available and sufficient, and 'it must be sufficiently certain not only in theory but also in practice'. Article 6(1) of the ECHR guarantees everyone has the right to a fair hearing in the determination of civil rights and obligations or criminal charges. This includes the provision of legal assistance for those who lack sufficient means to afford it, ensuring a fundamental level of 'equality of arms' and upholding the interests of justice, in line with international standards reflected in the UN's International Covenant on Civil and Political Rights.

Increasing access to legal aid, including for public interest litigation, is also necessary to meet access to justice requirements under Article 9(4) of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention), a UN treaty which enshrines our procedural environmental rights.



Civil legal aid is vital to human rights protection because it ensures:

1

Equal Access to Justice

Civil legal aid helps bridge the gap between those who can afford legal representation and those who cannot. It ensures that all individuals, regardless of their financial status, have access to legal resources and representation. This is essential for upholding the principle that justice should not be contingent on one's ability to pay.

2

Protection of Vulnerable Groups

Human rights violations often disproportionately affect vulnerable and marginalised populations. Civil legal aid becomes a lifeline for people from marginalised groups, offering them the means to seek redress when their rights are infringed.

3

Affordable Remedy

Human rights remedies can be intricate legal processes, and the cost of pursuing such remedies without financial assistance can be prohibitive. Civil legal aid ensures that individuals facing human rights abuses can access affordable legal representation, enabling them to navigate complex legal systems and seek appropriate remedies.

4

Promoting Rule of Law

The availability of civil legal aid contributes to the overall strength of the rule of law. It reinforces the principle that legal recourse is available to everyone, fostering a society where human rights are respected and protected through accessible and fair legal mechanisms.

5

A Balanced Legal System

Legal aid helps to maintain a balance of power within the legal system by ensuring that everyone has the ability to present their case in court as strongly as possible. Without civil legal aid, those without financial resources will be unable to pursue justice or defend against injustice, with those who can attempting to represent themselves, leading to a skewed and inequitable administration of justice.



Enhanced human rights law in Scotland requires affordable access to justice

Moreover, civil legal aid provision becomes even more important in Scotland as more of our international rights become part of Scots law and enforceable. The UNCRC (Incorporation) (Scotland) Act 2023 enabled children and young people, for the first time in Scotland, to access remedy through the courts when these rights are violated. The Scottish Government has also committed to introducing a wider human rights bill that will incorporate more of our international human rights treaties directly into Scots law, as well as the right to a healthy environment. This enhanced human rights law in Scotland should enable more people to access remedy and hold government and public bodies to account on protecting and progressively realising these rights. This will only be possible if everyone can access the legal advice, assistance and representation that they need.

It is particularly important to note that the rights to be included in the upcoming human rights bill are rights that are most at risk for those living in poverty. The treaties being incorporated include our economic and social rights - things like the right to food, to adequate housing, to equal access to health services, and to a social security net. Unless our justice system ensures that people living in poverty have access to legal advice and representation, they will not be able to claim these rights in practice. Access to justice for breach of these rights has got to be accessible and affordable for people who are living without savings and on low incomes if this Human Rights Bill is to help drive increased realisation of rights for all in Scotland.

It is very difficult to find a civil legal aid solicitor in Scotland

Getting affordable legal advice and representation in Scotland is very difficult, and this is largely due to the significant scarcity of solicitors registered to take civil legal aid cases. Between 2014-19, solicitors registered for civil legal aid declined by a fifth, and anecdotal evidence suggests that this decline has continued. There were 457 law firms registered for civil legal aid in 2022-23. However, a small number of law firms take most of the cases: 20% of firms delivering civil legal aid dealt with 57% of all civil legal aid grants; 22% of the remaining firms dealt with an average of only two cases.

As a result, people often have to spend many hours contacting multiple law firms, only to be unable to find a solicitor who is willing and able to take their legal aid case. Anecdotal evidence suggests a significant increase in people being forced to represent themselves in court, or abandon their claim. Many people are unable to even contemplate taking a case to court themselves, due to the inaccessibility and complexity of our court system. People speak about being turned away by solicitors because they have complex cases that are likely to require substantial solicitor time.

Legal aid rates and restrictive rules on what qualifies as chargeable work mean making a living doing civil legal aid work is incredibly challenging even for straightforward matters. For complex cases it is likely impossible. People also speak about experiences of racism and discrimination further exacerbating this problem. For example, the Human Rights Bill Lived Experience Board heard about experience of a Gypsy Traveller contacting multiple law firms only to be turned away due to racism.

It is often particularly difficult for people to find a legal aid solicitor in specialist areas of law, and this is further exacerbated when they live outside of the Central Belt. For example, there are no immigration legal aid solicitors north of Glasgow. There are significant shortages in solicitors specialising in law around gender-based violence.

For example, Shetland Women's Aid emphasises the scarcity of legal aid solicitors, with only one firm on the island taking on civil cases for their client group. Survivors of gender-based violence in Scotland often have to choose between meeting basic needs and pursuing justice, according to experts, because they cannot find a civil legal aid solicitor that can help them.

ERCS has struggled to find any legal aid solicitors in Scotland who will accept environmental (and related planning law) cases on a regular basis, despite a growing demand identified through casework with clients at its advice service.

There are a number of specialist law centres in children's rights, housing, immigration, human rights, anti-trafficking and women's rights – however, all of these are small and with very limited capacity due to patchy funding. All of them are registered for civil legal aid, but all of them are forced to rely on other sources of income to supplement legal aid in order to provide these specialised services. It would likely be impossible to run most of these services without non-legal aid funding, due to low legal aid rates and restrictive rules on what is chargeable work.

Furthermore, there is a very concerning lack of legal aid services in deprived communities. Findings from the Law Society in 2022 revealed stark statistics: 122 out of 139 of the most deprived communities do not have access to any civil legal aid firms, leaving nearly 90,000 individuals without local access to civil legal aid.

Why is there such a shortage of civil legal aid solicitors?

The reasons for this shortage of civil legal aid solicitors are many and complex. Arguably the most significant reason is the low level of fees available to solicitors through legal aid, and the restrictive and rigid limits on what is considered chargeable work, creating a significant disincentive to take legal aid cases, particularly more complex cases. Civil legal aid funding has increased by only 10% since 1999, compared to 55% inflation, dissuading both practicing and upcoming solicitors from taking on cases.

A Parliament Committee heard that:

“A major concern of solicitors is that the current rates of legal aid fees means that it is not sustainable to take on legal aid work. Their view is that since 1999 increases in fees – including the most recent increases announced by the Scottish Government – have not even kept pace with inflation. They argued that further increases were necessary to take account of the long-term underfunding of the system.”

Solicitors have also flagged that cuts to fees introduced in 2011, such as half duty fees and half fees for travel, have impacted on access to justice in rural areas. Legal aid does not cover all of the work involved in taking a case, but only certain aspects of it. The fee structure presents a vivid challenge when translated into practical terms: it means committing an hour of work for a very small nominal sum or receiving no compensation at all for essential tasks like legal research—integral to both novel and routine cases—which can take many hours in complex or novel cases. This reality, drawn from experiences at JustRight Scotland, can vividly illustrate the struggles faced within the legal aid sector

Financial strain, manifested in cash flow issues for legal service providers, hinders their capacity to take on legal aid cases. The current payment system causes cashflow difficulties for legal service providers because the system administers payment following the conclusion of a case. Providers are also unsure of the amount they will recover at the end of the case, as even if SLAB authorises work, it then audits that work and can refuse to pay for anything it decides was unnecessary or took too long.

Additionally, recruitment challenges, especially in attracting and retaining young lawyers, contribute to the profession's workforce shortages. Tony Lenehen of the Faculty of Advocates told a Parliament Committee that recruiting and retaining solicitors was an increasing problem, stating that ‘people are leaving simply because more attractive pastures are being created around them’. Furthermore, the exceedingly low fee rates, coupled with the substantial amount of non-chargeable work and administrative tasks associated with legal aid applications, constrain civil legal aid firms from offering competitive salaries and favourable employment terms.

The Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 , introduced group civil proceedings. Furthermore, the UNCRC Act and the upcoming Human Rights Bill broaden ‘standing’ to anyone with sufficient interest, opening the way for NGOs to take strategic cases to court to advance human rights. However, there is a paradox in the context of legal aid.

Presently, only individuals can apply for legal aid, leaving court action unaffordable for many groups and charities, including communities grappling with environmental challenges. Consultations and responses to legal aid reforms have consistently highlighted the imperative of extending support to group cases, including ‘Rethinking Legal Aid’ that recommended that legal aid should be available for group or multi-party actions. The existing legal aid system falls short in providing accessible and affordable justice, particularly for those confronting environmental issues collectively. This necessitates comprehensive reforms to align the legal aid structure with the collective nature of group cases and ensure a more just and equitable legal support system.

Scottish Government commitments

The Scottish Government has undertaken several significant consultations and policy developments related to civil legal aid. In the consultations in (2020) Legal Aid Reform and the (2018) Independent Review of Legal Aid, there has been resounding support for user-centric approaches, recognition of the necessity for reform, and recommendations for strengthening the legal aid framework from across legal and policy sectors.

The Scottish Government’s (2022) Vision for Justice in Scotland outlines a comprehensive 10-year vision for the justice sector as a whole and again, this includes legal aid reform. The commitments around legal aid reform include regulatory changes, maintaining the current scope, simplifying processes, supporting a diverse delivery model, fair fee structures, investment in technology, and establishing effective oversight. It sets out that public consultation and engagement with stakeholders are key components of these reform efforts. The Vision for Justice commits the Scottish Government to such legal aid reform in 2023-26.

This commitment was also reflected in the Programme for Government 2018 that stated:

“We will engage with both legal professionals and victim support organisations to review the Legal Aid system, and will introduce a Legal Aid Reform Bill in this Parliament, ensuring that the system is flexible, easy to access and meets the needs of those who use it.”

However, despite these multiple consultations and commitments, the civil legal aid system in Scotland remains largely unchanged. The Parliament’s Justice Committee considered legal aid within its 2022 report on Scottish justice sector reforms and found that ‘the pace of progress needs to accelerate markedly. (The Committee’s remit is criminal legal aid but the report acknowledges that many of the issues raised equally apply to civil legal aid).

The Committee stated that:

“Our view is that progress in reforming legal aid has not been fast enough. We believe that a priority this parliamentary session should be to accelerate the rate of progress. We are concerned that prolonged further engagement and reviews might unnecessarily delay progress and simply defer the point at which decisions regarding the future arrangements for legal aid need to be taken. Instead the focus should be on solutions being brought forward to address the key concerns identified in our roundtable. These concerns are well-known and, in some cases, long-standing. If further consultation is required, this should take place as quickly as possible.”

However, the Programme for Government published in September 2023 included no mention of legal aid. The Scottish Government’s Delivery Plan for the Vision for Justice published in November 2023, also included no firm plans for legal aid reform. Instead it merely says that the Scottish Government will “engage with key stakeholders to inform and shape future legislative proposals” with no timescale specified other than “ongoing”.

It is time for action on legal aid system reform.

Too many people, particularly those living in poverty, in rural areas and experiencing serious violations of their human rights, can simply not access justice because it is unaffordable. Scotland has a system that is meant to address this - our legal aid system - but it is not working. There are simply not enough civil legal aid solicitors, and in the right places or with the right specialisms. Civil justice in Scotland is therefore unaffordable for many. Despite Government promises of reform, our legal aid system is crumbling, leaving people in poverty without access to justice.

We call on the Scottish Government to urgently reform the legal aid system, setting out actions that they will take in the Programme for Government 2024. The current situation is a crisis that demands immediate attention and substantial investment to build a legal aid system that truly enables access to human rights justice for everyone.

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