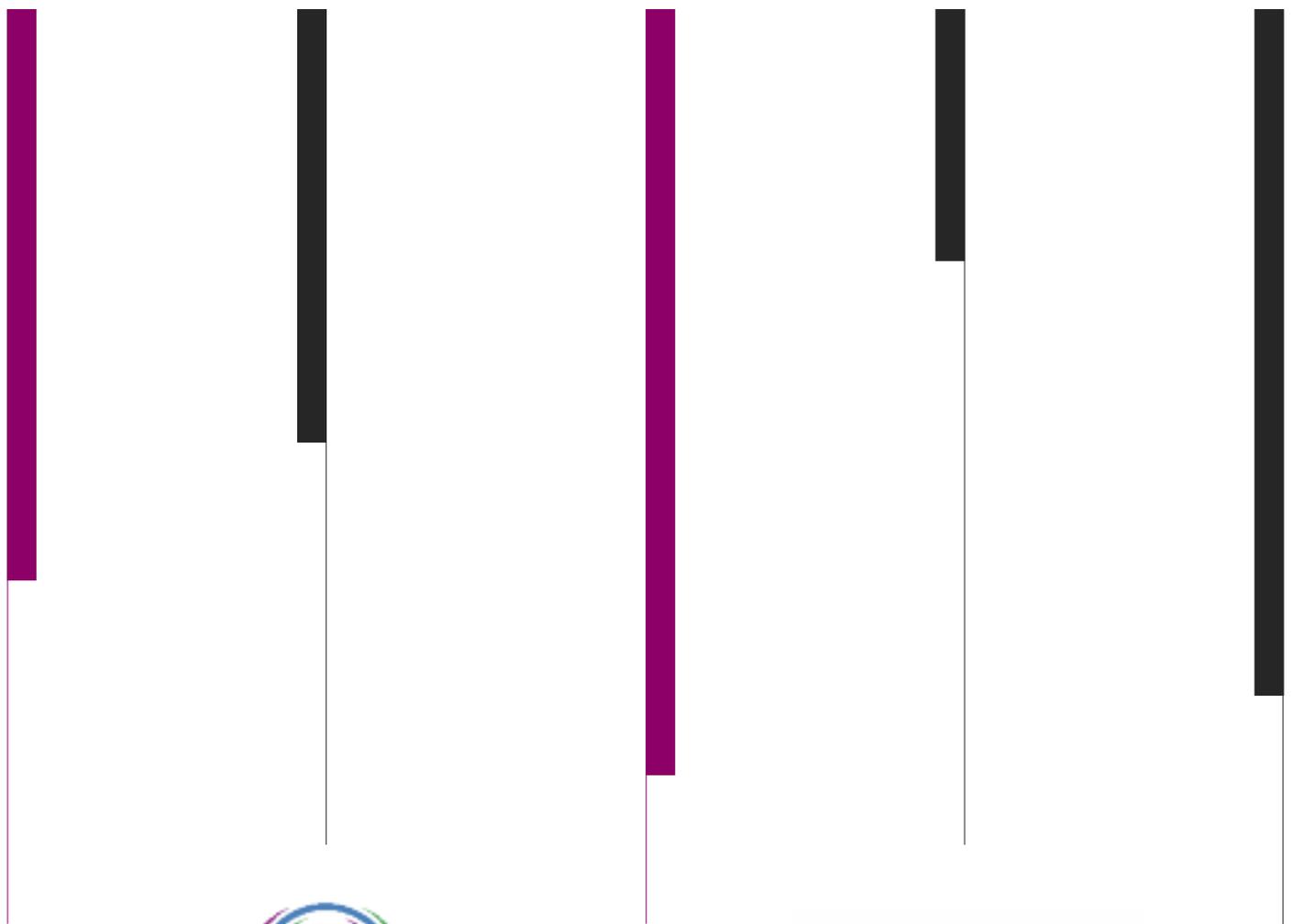

Discussion Paper: Overcoming Barriers to Public Interest Litigation in Scotland



Discussion Paper: Overcoming Barriers to Public Interest Litigation in Scotland

This discussion paper, coordinated and drafted by Mhairi Snowden, Coordinator of Human Rights Consortium Scotland, and Janet Cormack, Legal Policy Coordinator at Clan Childlaw, is the culmination of much discussion and contribution from experts in the NGO and legal sectors. It was made possible by Joseph Rowntree Charitable Trust's funding of the Human Rights Consortium Scotland and The Baring Foundation's funding of Clan Childlaw's project *Children's Rights in Scotland: Using the law and human rights to advance policy*.

**The Baring
Foundation**

Thank you to everyone who contributed their time and expertise in helping shape this paper, and in particular to:

Fiona McPhail (Shelter Scotland),
Mary Church (Friends of the Earth Scotland),
Jennifer Paton (MECOPP),
Naomi McAuliffe (Amnesty International),
Jen Ang (JustRight Scotland),
Sandy Brindley (Rape Crisis Scotland),
Liam Ewing Solicitor Advocate,
Chris McCorkindale (Strathclyde University),
Jacqui Kinghan and Lisa Vanhala (University College London) and
Fiona Jones and Alison Reid (Clan Childlaw).

October 2018

Discussion Paper: Overcoming Barriers to Public Interest Litigation in Scotland

SUMMARY

Court judgments, particularly those of the higher courts, shape how laws are implemented and rights are experienced by all of us every day. Public Interest Litigation (PIL) is the practice of taking a case to court, or intervening in a court case, to advance a widely shared interest, and judgments in PIL cases have been instrumental in progressing rights and making them a reality for society as a whole.

In Scotland, PIL remains relatively rare and it is not often a tool which non-governmental organisations turn to to achieve their objectives. The reasons for this are manifold and an organisation's decision to do so depends on a variety of factors and circumstances. Nevertheless, discussions in the third sector repeatedly point to the same five factors which are hindering greater engagement in strategic legal action today.

The goal of this paper is to explore these barriers and contribute to discussion in Scotland around how we can begin to overcome them.

The barriers identified in this paper are:

- 1. Poor access to information about court cases**
- 2. Limitations to who can take a case to court ('standing' issues)**
- 3. Short time-limits for taking cases**
- 4. Inhibitive costs and financial risk**
- 5. Limited culture of using PIL**

This paper suggests actions which, if taken by the relevant actors – including national or local policy-makers, the legal sector, NGO leaders, and third sector funders – could enable more organisations to engage in legal proceedings in the interest of the people they represent and ultimately increase use of PIL, an essential element of protecting rights and keeping decision-makers in check in any democratic society.

Discussion Paper: Overcoming Barriers to Public Interest Litigation in Scotland

It is 20 years since the passage of the Human Rights Act 1998 and the Scotland Act 1998 which made the European Convention on Human Rights directly enforceable in Scottish courts, and since the 1998 Aarhus Convention which established the right to access to justice in environmental matters. However, despite these 20 years, it remains unusual for individuals and organisations to take public interest legal challenges in Scotland to strengthen and advance our human and environmental rights.

Public Interest Litigation (PIL) is a core element of any democratic society based on the rule of law which aims to recognise and protect human rights. It is an essential tool in keeping public decision-making in check, in guaranteeing that human and environmental rights are protected and embedded in our society, and in providing access to justice to those whose voice might otherwise not be heard.

Convinced of the benefits of greater strategic use of the law by public interest groups in Scotland, this paper highlights what we consider to be some of the barriers that are hampering PIL. It also suggests actions that could be explored to better enable litigation in the public interest in Scotland.

The recommendations are not for one group or profession or job-title – rather they are aimed at a wide range of people. These include national and local policy-makers, the legal sector, non-governmental organisation (NGO) leaders, and third sector funders.

We do not claim to have all the answers or the full picture, but by bringing together our experience of PIL in Scotland with a view to making it work better for advancing rights, we hope that this is a helpful contribution to debate and policy making.

What is Public Interest Litigation?

Litigation in the public interest is litigation that goes beyond the interests of one individual. Also known as impact, test or strategic litigation, public interest cases are brought in the knowledge that the court's decision is likely to impact a much broader swathe of society. These may be cases which raise issues that are of significant interest to many individuals or communities, or which affect a smaller number of people to a significant extent, or which seek to protect interests that are of legitimate concern to everyone, such as the natural environment.

Public interest litigation can be brought by individuals, often with the backing and support of NGOs, or in some circumstances be brought directly by interest groups, NGOs or national human rights institutions or other bodies themselves.

Strategic cases can be pursued in a variety of areas of law and forums. Decisions of government and public authorities can be challenged via judicial review, rights issues can be raised in our civil and criminal courts, cases can be brought before specialist tribunals or Children's Hearings and resolution can be sought through European and international rights enforcement mechanisms.

Organisations and individuals may also make public interest interventions, that is, assist the court as a third party to a case by making written and/or oral submissions which raise particular issues of public interest, and in doing so can potentially make a significant contribution to how the court views the case before it¹.

Public Interest Litigation in Scotland

It is difficult to get a clear picture of PIL cases that have been taken in Scotland as not all cases are reported, some are settled before getting to court, and there is a paucity of research in this area thus far. However, what we do know is:

- There were 343 judicial reviews initiated in Scotland in 2016-17²; this per capita is **far fewer than in England and Wales³ and Northern Ireland⁴**. The vast majority of judicial reviews in Scotland were related to immigration (262 in 2016-17), and it is notable that there has been a significant increase in housing judicial reviews in Scotland (from 5 disposed in 2008/09 to 17 disposed in 2016/17).
- The Human Rights Act 1998 has had a significant impact on Scots law and in Scottish courts,⁵ but its potential to be used by NGOs to drive change has not yet been fully exploited. It remains unusual for organisations to support

individuals to seek judicial review on human rights grounds, or to intervene in judicial review proceedings to raise arguments relating to breaches of convention rights, though high-profile cases demonstrate the impact a human rights-based intervention can have.⁶

- Law centres in Scotland take cases on behalf of clients that are of strategic importance, such as Clan Childlaw's cases relating to children's rights, Govan Law Centre's cases relating to education law and the eviction of asylum seekers, Shelter Scotland's cases on housing and homelessness, Legal Services Agency's cases on mental health and housing, and JustRight Scotland's work in the areas of refugee children's rights and women's rights.
- **Very few NGOs in Scotland have any experience of, or take a strategic approach to, using litigation** to achieve social change. A notable exception to this is in the environmental sector where Friends of the Earth Scotland, RSPB Scotland and the John Muir Trust have all been involved in court cases.⁷ In recent years the Humanist Society Scotland, the Christian Institute and SPUC Scotland have all brought own-name judicial reviews in Scotland. Some organisations in Scotland who are UK-wide such as the Child Poverty Action Group, Shelter, the Open Rights Group or Amnesty International have significant experience of using litigation in courts in England and Wales, and in the Supreme Court.
- **Anecdotal evidence and information-sharing around NGO involvement in court cases confirms that NGO use of PIL is more embedded within the strategic approaches of NGOs based elsewhere in the UK.**
- **Public interest interventions are rare in Scottish courts** today and whilst on average 30%-40% of UK Supreme Court cases have interventions, Scots interveners make up a tiny proportion of these.
- Recent years have however seen **a small increase in public interest interventions by third sector organisations.** JUSTICE, Rape Crisis

Scotland, Alcohol Focus Scotland, Clan Childlaw and Friends of the Earth Scotland have all intervened in judicial reviews in their respective policy areas.

- **The Scottish Human Rights Commission** (SHRC) has a specific statutory power to intervene in civil proceedings where the issue is relevant to the Commission's duty to promote human rights and raises a matter of public interest.⁸ It has made a number of amicus curiae (friend of the court) interventions to the European Court of Human Rights, but **has not yet intervened in proceedings before the Scottish Courts.**
- The **Equality and Human Rights Commission** (EHRC) has statutory powers to support individuals taking legal action to invoke their rights, to intervene in cases and to bring judicial review cases in their own name.⁹ It has intervened in several cases.¹⁰ It has not as yet brought a judicial review to court in Scotland, though has achieved change through the threat of judicial review.¹¹

There is some evidence of the beginnings of culture change towards greater strategic use of the law in Scotland, e.g. Human Rights Consortium Scotland's work on strategic litigation, including a new online toolkit for NGOs funded by the Equality and Human Rights Commission,¹² the Children's Rights Strategic Litigation Group coordinated by Clan Childlaw, the Housing and Equality Act Legal Strategy Group chaired by Shelter Scotland launched in March 2018, the setting up of new organisations like JustRight Scotland and the Scottish Women's Rights Centre with a specific focus on strategic PIL, and the development of a strategic litigation approach by the Children and Young People's Commissioner Scotland.

However, it is clear that PIL in Scotland remains relatively rare and is not usually a core element of NGO strategy. It is also clear that this does not mean that there are no human rights issues or abuses in

Scotland – indeed, far from it. We know that many aspects of rights affecting people's everyday lives would greatly benefit from being addressed in court to bring strategic change for the better.

The barriers to PIL in Scotland we have identified and our recommendations for starting to address them fall under five headings:

1. **Access to case information**
2. **Standing: rules on who can participate in legal action**
3. **Time limits**
4. **Cost**
5. **Culture**

1.

ACCESS TO CASE INFORMATION

Compared to other jurisdictions, fully accessible public information about court proceedings and decisions in Scotland is lacking, with implications for access to justice and the rule of law. Where the public and organisations that represent their interests perceive the law as inaccessible, they are unlikely to engage in using the law to further their rights and objectives.

Access to information about forthcoming court cases

Court rolls are published on the Scottish Courts and Tribunal Service (SCTS) website but contain only very limited information, and no indication as to the subject matter of the case. As a result, it is next to impossible for interested members of the public or organisations interested in PIL to follow proceedings. An organisation considering taking a public interest case cannot know if other similar cases have already been lodged, and an organisation which may be in a position to assist the court by intervening in a case may simply not know about it.

Word of mouth, perhaps from one of the parties to the case or a lawyer, remains the only effective method in Scotland of hearing about a case in

time to intervene. Some very limited information is available on the ‘Walling copies’, i.e. the hard-copy first page of petitions lodged at the Court of Session, but in most cases insufficient information is available to know where an intervention might be useful.

The Supreme Court website holds much better information about cases. The website includes a monthly list of decisions on appeals, and details of current cases are published in advance, although it should be noted that here too cases can be included in the list of current cases too late to have any realistic prospect of intervening.

Recommendation:

– Consideration should be given to how to improve public information on upcoming and current cases. For example, key words describing the subject matter and hearing dates of upcoming cases could be published in good time, in a data protection compliant manner, on the Scottish Courts and Tribunals Service website.

Access to information about past cases

Many court decisions that would be of interest to NGOs and the public are not published in

Scotland, making it difficult to have a full picture of how the courts are deciding cases or how legislation is being applied in practice. Whether or not decisions are published depends on the court and whether the sheriff or judge considers they should be published. According to the SCTS website, ‘Generally, only decisions which involve a matter of principle, a particular point of general public importance or are delivered after a substantial hearing of evidence, will be contained in a written Opinion’.¹³

In contrast, written opinions of the Court of Session and the High Court of Justiciary are published unless there are exceptional circumstances requiring restriction of publication, and the decisions of the UK Supreme Court, the European Court of Justice and the European Court of Human Rights are always published. Where there has been a third party intervention, this is usually indicated in the judgment.

The parties in a case are often a key source of information about a case. Whilst there is a current gap in information for the third sector around strategic public interest cases, NGOs that are involved in PIL, the EHRC, the SHRC, the legal sector, advice sector and third sector network bodies could all play greater roles in raising awareness of cases and interventions that can bring social change. As well as being important for hastening positive change on the specific issues within each case, such wider communication of cases (e.g. via networks, newsletters, web alerts and social media) would also help to encourage more PIL in Scotland.

Recommendations:

- Explore publishing more court judgments to give a fuller picture of how rights are being applied by our courts in practice.
- Leaders in NGOs, NGO networks, NGO funders, the legal sector, the SHRC and EHRC should consider how more information about strategic cases and their implications can be shared across civil society.

Intervener’s right of access to court papers

Court of Session rules on interventions inhibit interveners in preparing their submissions because of the lack of provision entitling interveners to receive court papers. Instead, interveners are left to rely on the other parties’ goodwill to share their submissions in order to help them shape their own arguments, and, crucially, to ensure they are meeting the requirement that they add something new to the proceedings (as established by *Re E (A Child) (Northern Ireland)* [2008] UKJL 66, paragraphs 2-3). Anecdotal evidence suggests parties can delay or propose restrictive conditions on the sharing of submissions which further inhibits potential interveners.

Recommendation:

- **The Court of Session Rules on interventions in judicial reviews should be amended to give interveners the right to receive court papers.**

2.

STANDING: RULES ON WHO CAN PARTICIPATE IN LEGAL ACTION

‘Standing’ in legal proceedings, in other words who can bring a legal challenge, is central to all public interest litigation. Aspects of current rules on standing are hampering the expansion of PIL in Scotland because they restrict organisations themselves being party to the case rather than an, often vulnerable, individual.

Standing to petition for judicial review

To petition for judicial review, the applicant must demonstrate sufficient interest in the subject matter of the application, and the application must have a real prospect of success. The ‘sufficient interest’ test, now in statute,¹⁴ was established by the Supreme Court in the AXA case in 2011¹⁵, in a departure from the former, narrower, ‘title and interest’. The new test allows for more public interest litigation in recognition of the essential function of the courts in preserving the rule of law.

The expectation following AXA that there would be a significant increase in organisations lodging judicial review petitions in Scotland has not yet come to pass. Among the reasons for this may be uncertainty around what constitutes ‘sufficient interest’ and the factors that will be taken into account by the Court of Session in deciding

whether the test is met.¹⁶ In the Christian Institute case, the Inner House remarked that “[t]he United Kingdom Supreme Court has thus made it abundantly clear that a very broad approach should be taken to the issue of standing. However, there is a limit defined by “sufficient interest”. This, in turn, means that the person must be directly affected by the matter; which means that the petitioner must have a “reasonable concern” or be able to express such a concern “genuinely” on the part of a section of the public which he seeks to represent.”¹⁷

Recommendation:

- Ways of adding clarity to the test of ‘sufficient interest’ should be explored.
- Taking the Aarhus Convention as a marker for the scope of the right of access to justice, ‘sufficient interest’ should be interpreted broadly.

Standing in human rights cases

Only a victim of an alleged violation of the European Convention on Human Rights can challenge it before the UK courts and the Strasbourg court. This is a requirement of section 7 of the Human Rights Act 1998 and Article 34 of the Convention itself and has been

interpreted to mean that the complainant must have been directly affected in some way.¹⁸

In some narrow circumstances NGOs may be successful in persuading the courts that they meet the test. The Strasbourg court has permitted an NGO to represent a person affected by the complaint who could not represent themselves due to the person being deceased.¹⁹ In *Open Door and Dublin Well Woman v Ireland*,²⁰ the Strasbourg court accepted that the victim status was met by individual women challenging an injunction because they belonged to a class of women which risked being directly prejudiced by it, even though in the circumstances they were not affected by it.

However, in most circumstances an organisation is not the victim and, even if it would like to be able to take proceedings under the Human Rights Act 1998 in its own name to save a vulnerable client from having to do so, it cannot. In practice, therefore, the victim test has been a significant barrier to organisations taking ECHR challenges. For example, the Humanist Society Scotland's judicial review on religious observance in schools was permitted to proceed on other grounds, but not on ECHR grounds because it was not a victim.

The one organisation that has statutory standing to bring an ECHR challenge without being a victim is the EHRC. Its own-name judicial review power where there is a human rights or equality issue at stake is an important cornerstone of human rights public interest litigation in the UK. The EHRC's mandate is in non-devolved areas but can act in devolved areas with the permission of SHRC. It is regrettable that the SHRC only has intervention powers, and does not have an equivalent power to launch legal proceedings on human rights grounds.

Human rights protection in Scotland would be fundamentally advanced by incorporating international human rights treaties into Scots law,

as is currently under serious consideration as the Scottish Government seek to prevent any loss in human rights protection that may arise as a result of leaving the European Union. Not only would the scope of judicial rights protection be widened beyond the civil and political rights protected by the ECHR to cover economic and social rights, environmental rights, etc. but incorporation also presents an opportunity to develop law and policy on standing to allow organisations acting in the public interest to take human rights cases.

Recommendations:

- **Review the legal enforcement powers of the Scottish Human Rights Commission to enable it to take human rights cases in its own name and ensure that it is adequately resourced to be able to do so.**
- **PIL, and specifically clarity on 'standing', should be embedded in any new laws and policy recommendations around the ECHR and incorporating international human rights treaties into Scots law.**

Standing to intervene as a third party

Any Scottish court can allow a public interest intervention. However to date, the only courts with written rules governing interventions in Scottish cases are the Court of Session (for judicial review proceedings only (Chapter 58)), the UK Supreme Court (Rule 26), the European Court of Human Rights and the Court of Justice of the European Union. Specific rules govern interventions by court by the SHRC and the EHRC in the Court of Session and sheriff court.²¹

We welcome that the Scottish Civil Justice Council's Access to Justice committee is currently considering the rules on public interest interventions (PIIs): at its meeting April 2018 it *"broadly supported the extension of PIIs to other types of cases, and in particular the idea that competency of an application to intervene should be determined by the issue in question and not the*

type of case". However "*it was conscious that changes in this regard may have wide ranging implications*".²² For the sake of transparency and consistency and to encourage more public interest interventions, rules on interventions should be introduced for procedures beyond judicial review and across other courts and tribunals.

Anyone can apply to intervene in judicial review proceedings before the Court of Session, unless they are specified as a person who should be served with the petition or are directly affected by any issue raised in the petition (Rule 58.17). The Court of Session may only allow an intervention if: the case raises a matter of public interest; the issue the intervener wishes to address raises a matter of public interest; it is likely to assist the court; and the intervention will not unduly delay or otherwise prejudice the rights of the parties, including their potential liability for expenses (Rule 58.19(4)). We note that the Court of Session has taken a more restrictive approach to allowing interventions than the UK Supreme Court. Given that interventions often introduce new or important issues to a case that can considerably change the court's perspective, it might be considered that enabling more interventions in the Court of Session would minimise the risk of decisions being overturned at the Supreme Court, and bring more consistency across courts.

In addition to written interventions, the Court of Session may also in *exceptional circumstances* allow an oral intervention (Rule 58.20). Considering the importance of an oral intervention for highlighting issues at the hearing and responding to any questions from the court, this seems unnecessarily restrictive, particularly given that oral interventions are more commonplace before the Supreme Court.

Current rules also mean that an intervener before the Outer House has to re-apply if it wishes to intervene before the Inner House where the judgment is appealed. However, in some cases it

may be sufficient for the appeal court to be able to refer to the intervention at the earlier instance, thereby avoiding the expense and time inherent in a second intervention. Ways to enable the appeal court to benefit from a first instance written intervention should be explored.

Recommendations:

- **Rules on interventions should be introduced for procedures beyond judicial review and for other courts.**
- **Court of Session rules on public interest interventions should be amended to allow oral submissions if the court considers this would assist it rather than only in 'exceptional circumstances'.**
- **Explore how an intervention made at first instance can assist an appeal court without the intervener necessarily having to follow the procedure anew.**

3.

TIME LIMITS

The legal time limit for making a claim or appealing a decision varies depending on area of law, but often presents difficulties for public interest litigants. Intervening is equally subject to time pressures, meaning that organisations need to be in a position to act quickly.

Following changes brought in under the Courts Reform (Scotland) Act 2014, judicial review, the most common procedure used for public interest litigation, is subject to a 3-month time limit, i.e. a challenge must be brought within 3 months of the decision, act or omission subject to challenge. This short deadline means that it is very difficult for organisations, communities or individuals who wish to challenge a public decision to obtain a legal opinion, organise legal action and raise funds or obtain legal aid in time.

The Court of Session does have discretion to permit an application to be made beyond the 3-month period if it is satisfied that is equitable having regard to all the circumstances.²³ Since the 3 month time limit was introduced in September 2015, some examples of the Court exercising that discretion have been reported.²⁴

Cases under the Human Rights Act 1998 which are not judicial review proceedings must be lodged within one year of a challenged public decision or failure to act, though again the court can allow an application outside the one-year time limit if they think it is fair to do so. Discrimination claims under the Equality Act 2010 are usually subject to a six-month time limit, with discretion for courts to consider a claim brought outside the six-month period if they consider that it is fair to do so.

Recommendation:

– Explore ways to ensure that time-limits are not an undue barrier to public interest litigation, such as raising awareness of the time limits amongst potential litigants, monitoring how the court’s discretion to permit an application for judicial review beyond the 3-month period is exercised, and explore extending the time limit for judicial review in public interest cases.

4.

COST

The principle of access to justice means that the cost of accessing the courts should not be prohibitive for individuals and organisations acting in the public interest. The Aarhus Convention established that central to the principal of access to justice in environmental matters is the premise that proceedings²⁵ should not be prohibitively expensive; clearly this principle can be applied to all public interest litigation. Yet cost and financial risk are probably the greatest hindrances to more public interest litigation in Scotland.

In circumstances where legal aid is available to an individual taking a legal challenge, the costs incurred will largely be met by the Scottish Legal Aid Board. However in all other cases, costs include:

- court fees and the costs of preparing and printing documents for the court
- potentially, full or partial liability for the other parties' expenses, depending on whether expenses are capped by the court
- fees for legal advice and representation from a solicitor and advocate
- the internal resource required for an organisation to take a case will depend on the nature of the case, but may include research, victim support, liaison with legal representatives, communications and policy work.

To reduce cost as a barrier to PIL in Scotland, there are a number of measures and funding models which could be explored.

Court fees

The fundamental importance of court fees that are affordable to everyone in ensuring meaningful access to the courts and thus to access to justice and the rule of law generally was recently recalled by the Supreme Court in its landmark decision in the UNISON case.²⁶ Court fees are payable when submitting applications to a court and lodging documents at different stages of the court procedure. Fee exemptions apply under certain prescribed circumstances, for example for recipients of legal aid for the matter in court. However there is no particular exemption to court fees for community groups or charities or where the case is in the public interest.

The Court of Session has the discretion to waive fees for third party interveners but in practice tends not to do so. In contrast, it is usual practice in the Supreme Court to waive or reduce the fee for charities and not-for-profit organisations seeking to intervene in the public interest.

The potential financial burden of court fees is increasing. Court fees have risen significantly in

recent years as a result of the Scottish Government's policy of full cost recovery²⁷, with the result that they may be simply unaffordable for not-for-profit organisations. For example, a hearing before the Inner Court is now charged at £512 per half hour, meaning a full day before the appeal court could cost close to £5,000. Indeed, the Faculty of Advocates has warned the Scottish Government that full cost recovery in the courts may be illegal in terms of hindering access to justice.²⁸

Recommendation:

– Consider introducing a presumption that court fees will be waived for registered charities and not-for-profit organisations and community groups in public interest cases, including interventions.

Liability for other parties' expenses

Any party entering court proceedings must weigh up the risk of liability for the expenses of the other party in the event that the case is unsuccessful. For NGOs or individuals taking a case without legal aid, this can have a considerable chilling effect on engagement in PIL.

'Protective Expenses Orders' (PEOs) – pre-emptive court orders determining whether expenses are to be paid prior to them being incurred – are a very important vehicle for resolving this concern and enabling confidence in proceeding with a public interest case.²⁹ However, we have found that for several reasons the current system of PEOs do not provide this certainty:

- There is a lack of clarity around court decision-making on awarding a PEO. Courts have the discretion to award a PEO under common law but there are no court rules beyond environmental cases. In addition, there is no readily available information about PEO decisions and their rationale. As a result, those considering court proceedings in public interest litigation have no certainty or even indication about whether a PEO will be awarded or not

until the process has begun and significant costs have been incurred.

- Chapter 58A of the Rules of the Court of Session containing the rules on PEOs in environmental appeals and judicial reviews was introduced in response to EC infraction proceedings regarding non-compliance with the Public Participation Directive 2003/35/EC. However, even with these rules, the cost of applying for a PEO can in itself be prohibitively expensive, and a clear written application procedure is lacking, leading to confusion and uncertainty.
- There is also debate as to what is 'prohibitively expensive' in environmental cases. The current cap of £5,000 is still prohibitively expensive for some litigants, especially when added to their own costs if they lose their case, and the £30,000 'cross cap' (the limit on the respondent's liability for the petitioner's expenses where the petitioner is successful) is unrealistic for a complex judicial review.
- While public interest interveners at the Court of Session can seek a PEO under common law so that each party pays their own costs resulting from the intervention, there is a risk it may not be granted, and the cost and time of this additional proceeding makes what should be a straightforward and affordable process overly burdensome. Indeed, Court of Session rules expressly allow the court to impose conditions on an intervention, including liability for any additional expenses incurred by the parties as a result of the intervention, which can have a chilling effect on potential interveners. This contrasts with Supreme Court rules which state that orders for costs will not normally be made either in favour of or against interveners³⁰ but such orders may be made if the Court considers it just to do so (in particular if an intervener has in substance acted as the sole or principal appellant or respondent).³¹

Recommendations:

– Introduce a presumption that PEOs will be awarded in public interest cases.

- Extend court rules on PEOs beyond environmental justice.
- Introduce a clear, affordable and accessible written application process.
- Routinely publish PEO decisions.
- Consider lowering the cap of £5,000 liability for the other party’s costs, and increasing the £30,000 cross cap in environmental cases.
- Explore extending to other areas the system of ‘qualified one-way cost shifting’ introduced by the Civil Litigation Funding & Group Proceedings Act 2018.³²
- Expressly provide for PEOs in court rules on public interest interventions, in line with Supreme Court rules so that orders for expenses will not normally be made either in favour of or against interveners.

Funding legal advice and representation

Even if a PEO is granted and court fees waived, the costs of legal advice and representation from a solicitor and advocate can be too much for NGOs, individuals and communities. Whilst many legal professionals dedicate time to pro bono work, and help can be sought from the Faculty of Advocates’ Free Legal Services Unit, funding support for NGOs for legal advice in Scotland is very limited.

Generally where the organisation is a party, it will not be able to apply for legal aid for PIL. Current civil legal aid rules also do not allow joint legal aid thereby excluding communities from this support.³³

Several developments in Scotland and elsewhere are relevant to considerations about how to decrease the cost burden and uncertainty for NGOs in PIL:

- The recent Independent Review of Legal Aid in Scotland recommended that there should be a strategic litigation forum with a range of interested parties to identify and prioritise publicly-funded group actions. This recommendation is welcome, and we suggest that this could go further to consider other ways in which legal aid could assist PIL.

- Group civil law actions were recently introduced in the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 and the impact of these for PIL should be explored, as should the extension of group actions to other areas.
- Models in other jurisdictions deserve exploration in Scotland. For example, the Public Interest Litigation Support (PILS) project in Northern Ireland provides a valuable membership model. The project provides: support for NGOs and lawyers before, during and after litigation; a pro bono register to provide legal opinions and representation at courts and tribunals; and a litigation fund to help members with the costs involved in bringing public interest cases, in particular by providing an indemnity to pay the other party’s costs if the case is lost.
- In England and Wales, collaboration among private law firms to fund PIL is highly organised, and in-house contributions are regularly made by pro bono departments, e.g. to help facilitate third party interventions. The Strategic Legal Fund for Vulnerable Young Migrants, administered by the Immigration Law Practitioners Association, is a good example of a dedicated funding stream in a particular area.
- Crowdfunding has been increasingly used as a means of funding PIL in Scotland as elsewhere in the UK, usually via the website crowdjustice.com. Whilst evidently of significant potential for public interest litigants, caution too is being advised by researchers into its use and emerging implications.³⁴

Recommendation:

- Explore models of funding Public Interest Litigation in Scotland, including legal aid for charities taking public interest cases, allowing group actions and joint applications for legal aid by communities, developing private sector funding, and third sector funders developing their funding streams for NGOs to engage in PIL.

5.

CULTURE

Scotland has had to date a limited culture of public interest litigation among NGOs, community and interest groups, statutory bodies such as the SHRC and the EHRC, and the legal profession. The more PIL is a feature of the Scottish legal system, and the more it is initiated by organisations, the more others will be encouraged to follow suit.

Building the capacity of public interest organisations to use the law

We know that many NGOs in Scotland lack awareness and understanding of how litigation can be used to hasten social change. Whilst they are very used to using other methods such as consultation responses, research, the media, meetings and briefings etc. to campaign and highlight the need for change, few organisations have any background in using legal arguments or the courts.

However, alongside action to tackle the other barriers outlined in this paper, more can be done to encourage NGOs in Scotland to be aware of PIL as an effective tool for change, and to have the resource, knowledge and understanding that they need to make use of this tool. Indeed *‘using the law can lead to policy and material victories in the*

courts that might have been impossible to achieve in any other way.’³⁵

There are various ways that organisations can contribute to PIL, without being party to a case. Getting a case to court is often a collaborative effort and vital work organisations do include informing rights-holders of their rights so they are able to identify breaches, identifying where a legal remedy may be available, recognising systemic issues or potential test cases, research and evidence gathering, referring on a case, providing support to an individual who is bringing a case, providing a witness statement or affidavit to a party to a case, and contributing financially.

The EHRC is well placed to assist NGOs interested in PIL. Sharing its expertise with other organisations, and highlighting particular cases to NGOs for potential interventions, can help to build their capacity, knowledge and understanding. The EHRC also has an important role to play in highlighting the potential benefits of PIL for social change. This also increases the likelihood of those organisations referring rights breaches to the EHRC for legal action where appropriate.

It is vital that NGOs which have been involved in PIL share their experience and achievements³⁶.

NGO networks and their funders could usefully consider how to encourage such peer support around PIL, and how to facilitate support, training and information resources around particular aspects of effective PIL, such as managing publicity and communications and ensuring ‘legacy’ changes to legislation, policy and practice take place following a favourable judgment.

Many NGOs in Scotland receive funding from local or national government or from other public sector bodies. NGOs often express concern that engagement in PIL carries too great a risk to their reputation with their public sector funders, and might actually indirectly threaten their future existence and financial stability. Particularly in a country as small as Scotland, there can be the perception that pushing to achieve social change through the courts is too unwelcome. Whilst we recognise that this perception may well be just that – a perception and not a reality – nonetheless this concern needs to be recognised and addressed if PIL is to be increased for the good of human rights in Scotland.

Steps could therefore be taken to mitigate this concern and so encourage organisations to engage in PIL as a tool to achieve their policy aims. For example, express support and recognition of the legitimate engagement in PIL by NGOs from government and funders would go some way to reassuring organisations that they do not risk losing funding as a result of legal challenges.

Recommendations:

- **Facilitate learning from organisations, including the EHRC, who use PIL and consider ways to provide information resources, training and support to NGOs around effective use of PIL.**
- **Encourage grant and public funders to assure organisations that involvement in PIL is legitimate and welcome.**

Expanding the in-house legal resource of NGOs and supporting not-for-profit law practice models

It remains unusual for solicitors to sit within NGOs in Scotland. Where this does happen, there are a range of models used. These include the use of in-house solicitors or legal officers which allows NGOs to benefit from in-house access to legal expertise, and not-for-profit legal practice models such as the law centre model, used by the Legal Services Agency, Shelter Scotland, Govan Law Centre and others including Clan Childlaw and JustRight Scotland.

Recommendations:

- **Support NGOs as they consider building their legal capacity, and potential new sector specific law centres.**
- **Explore secondments for legal professionals in the third sector to support legal resource in NGOs and increase mutual understanding and collaboration.**
- **Explore how the Law Society of Scotland could better support developing legal capacity in NGOs.**

Strengthening links between the NGO and legal sectors

To successfully pursue PIL, organisations and lawyers must work together, yet in Scotland there are relatively weak links between NGOs and the legal profession. There is a mutual benefit in getting to know each other and who is working on what: for example, organisations can seek legal advice from lawyers working on their subject area and can ask solicitors and advocates to look out for cases of strategic importance, whereas lawyers can approach relevant NGOs for example for expert evidence, research or a witness statement. Initiatives in Scotland to bring the voluntary sector and legal community together to further PIL include:

- Clan Childlaw coordinates a Children’s Rights Strategic Litigation Group, established in 2012,

which promotes and facilitates strategic litigation to progress children's rights. Clan Childlaw has also held a number of events bringing together practitioners in children's rights in the two sectors.

- Human Rights Consortium Scotland have held pilot legal-NGO networking events around strategic litigation, funded by the Equality and Human Rights Commission, aiming to provide informal space where individuals from both sectors can discuss PIL and potential strategic cases.
- MECOPP's Self-Directed Support Legal Rights Project (The 3 R's Project) aims to build the capacity of third sector organisations which provide support to individuals who are entitled to self-directed support under the Social Care (Self-directed Support) (Scotland) Act 2013. The project also aims to develop links between the legal profession and the third sector, and does this in a number of ways including by organising internships for law students and inviting legal professionals to deliver training to the third sector.
- JustRight Scotland builds social justice collaborations with third sector organisations, offering expert legal advice on targeted issues through direct legal representation in strategic PIL cases, legal outreach, training, policy and research. For example, the Scottish Women's Rights Centre (a collaboration with Rape Crisis Scotland and Strathclyde University Law Clinic) works to combat gender-based violence in Scotland.³⁷
- The Housing and Equality Act Legal Strategy Group, chaired by Shelter Scotland, brings together legal and NGO housing experts.
- RebLaw Scotland was launched at Glasgow University in 2017 bringing together law students interested in legal activism and organisations active in using the law for change.
- University law clinics sit between and work with the two sectors and there is further opportunity for them to work with the two sectors to contribute to PIL in Scotland.

However we know that networking and knowledge and information sharing between the legal and NGO sectors is far greater in other UK jurisdictions³⁸ and that there are practical ways that these connections could be vastly strengthened in Scotland.

Recommendations:

- **Leaders in both the voluntary and the legal sectors should consider how to increase their links, cooperation and networking to strengthen PIL in Scotland.**
- **Teach PIL to all law students and explore cooperation between university law clinics and NGOs.**
- **Explore introducing a project similar to Northern Ireland's PILS Project in Scotland.**

Looking forward: What's next for Public Interest Litigation in Scotland?

Public Interest Litigation in Scotland is hampered by some very practical, cultural and resource-related barriers. This paper seeks to contribute to discussion in Scotland around how we can progress rights through the courts by making helpful suggestions about how to begin to overcome these barriers. We encourage those working in law, policy or strategy in this area to make full use of this paper to instigate further discussion and exploration, with a determination to remove these significant barriers. The hope and expectation is that, as these barriers are addressed, more Public Interest Litigation will be both possible and likely, which will in turn lead to more attention being paid to this area.

Most importantly, the enabling of more strategic cases in Scottish courts will bring vital social change, protect the rule of law, widen access to justice and empower individuals and communities across Scotland.

Footnotes

- 1 See JUSTICE & Freshfields Bruckhaus Deringer LLP publication ‘To Assist the Court: Third Party Interventions in the Public Interest’ (<https://justice.org.uk/assist-court-third-party-interventions-public-interest>).
- 2 Civil Justice Statistics in Scotland 2016-2017 (1 April 2016-31 March 2017): <https://beta.gov.scot/publications/civil-justice-statistics-scotland-2016-17/pages/40/>.
- 3 4,200 applications in 2017 (Civil Justice Statistics Quarterly, England and Wales).
- 4 351 applications for leave to apply for Judicial Review in 2015 (Northern Ireland Courts and Tribunals Service Judicial Statistics 2015).
- 5 For an overview of the impact of the Human Rights Act 1998 in Scotland, see the Scottish Human Rights Commission’s Written Evidence to the Joint Committee on Human Rights Inquiry: 20 years of the Human Rights Act 1998, September 2018.
- 6 E.g. the intervention by Rape Crisis Scotland in *WF* [2016] CSOH 27 where the Court of Session found access to medical or otherwise sensitive records represented a significant breach of a complainer’s article 8 right to privacy and overturned a decision of Scottish Ministers to refuse legal aid to a complainer to enable her to oppose the recovery of her medical records; the intervention by JUSTICE in *Cadder v HMA* [2010] UKSC 43 where the Supreme Court found the refusal by police to allow a suspect access to a solicitor before questioning was incompatible with article 6; the intervention by Clan Childlaw in *Christian Institute & others v Lord Advocate* [2016] UKSC 51 where the Supreme Court found information-sharing in the named person scheme breached article 8 privacy rights.
- 7 E.g. *Friends of the Earth Scotland* intervened in *Ineos Upstream Ltd and another v Lord Advocate* [2018] CSOH66, the first intervention to raise environmental matters in the Court of Session, and before the Supreme Court in *AXA General Insurance Ltd and others v the Lord Advocate and others* [2011] UKSC 108, arguing that the then test of standing, Title and Interest, was overly restrictive and contravened the Aarhus Convention. RSPB Scotland recently challenged via judicial review plans for offshore wind turbines in the Firths of Forth and Tay (*RSPB v Scottish Ministers* [2016] CSOH 103 [2017] CSIH 31) and *The John Muir Trust* brought judicial review proceedings in relation to windfarm development at *Stronelairg* [2015] CSOH 163, [2016] CSIH 61.
- 8 Section 14 of the Scottish Commission for Human Rights Act 2006.
- 9 Section 30 of the Equality Act 2006 sets out the EHRC’s powers.
- 10 Details of EHRC interventions can be found at: <https://www.equalityhumanrights.com/en/legal-casework/legal-cases/legal-interventions>.
- 11 E.g. <https://www.equalityhumanrights.com/en/legal-work-scotland/legal-work-scotland/scottish-legal-articles/human-rights-children-kinship-care>.
- 12 ‘Making change happen: A step-by-step guide to strategic litigation in equality and human rights for NGOs in Scotland’ <http://www.litigatingforchange.scot/>.
- 13 <https://www.scotcourts.gov.uk/search-judgments/about-judgments>.
- 14 Section 27B of the Court of Session Act 1988 as amended by the Courts Reform (Scotland) Act 2014.
- 15 *AXA General Insurance Limited and others v The Lord Advocate* [2011] UKSC 46.
- 16 For further discussion of the Court of Session’s approach see Chris McCorkindale & Paul Scott (2015) Public Interest Judicial Review in Cross-Border Perspective, *King’s Law Journal*, 26:3, 412-439, and Tom Mullen, Public interest litigation in Scotland. *Juridical Review*, 2015, pp. 363-383.
- 17 *The Christian Institute & others v The Scottish Ministers* [2015] CSIH 64, paragraph 40.
- 18 *Klass v Germany* 1988 2 EHRR.
- 19 *Centre for Legal Resources v Romania*, Application no. 47848/08.
- 20 14234/88 [1992] ECHR 68.
- 21 Rules of the Court of Session, Chapters 94 and 95; Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 No.1956 (S.223), Schedule 1, Chapters 13A and 13B.
- 22 Draft minutes, 23 April 2018 available at <http://www.scottishciviljusticecouncil.gov.uk/>.
- 23 Section 27A of the Court of Session Act 1988, as amended by section 89 of the Courts Reform (Scotland) Act 2014.
- 24 See e.g. *Wightman v Advocate General* 2018 SLT 356; *INEOS Upstream Ltd v Scottish Ministers* [2018] CSOH 15.
- 25 I.e. all costs arising from proceedings – see *R Edwards v Environment Agency* C-260/11 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CJ0260> .
- 26 *R (Unison) v Lord Chancellor* [2017] UKSC 51.
- 27 *The Court Fees (Miscellaneous Amendments) (Scotland) Order 2016* (SSI 2016/332). Court fees are listed on <https://www.scotcourts.gov.uk/taking-action/court-fees>.
- 28 Response by the Faculty of Advocates to the Scottish Government Consultation on Scottish Court Fees, October 2016.
- 29 For an analysis of PEOs in Scotland, see ‘Protective Expenses Orders and public interest litigation’, Tom Mullen, *Edinburgh Law Review* 19(1):36-65, January 2015.
- 30 Rule 58.19(5) of the Court of Session Rules.
- 31 Rule 46(3) of the Supreme Court Rules 2009.
- 32 Under the Act, persons who successfully defend a personal injury damages claim will not be able to recover their costs except in certain circumstances.
- 33 Section 15 of the Civil Legal Aid (Scotland) Regulations 2002.
- 34 Tomlinson, Joe, *Crowdfunding and Public Interest Judicial Review: A Risky New Resource for Law Reform* (January 21, 2018). Available at SSRN: <https://ssrn.com/abstract=3106355> or <http://dx.doi.org/10.2139/ssrn.3106355> .
- 35 *The Baring Foundation: Working Paper No. 3 on Better Use of the Law by the Voluntary Sector: Successful Use of Strategic Litigation by the Voluntary Sector on Issues Related to Discrimination and Disadvantage: Key Cases from the UK*, Dr Lisa Vanhalla (<https://baringfoundation.org.uk/wp-content/uploads/2017/01/WorkingPaper3.pdf>).
- 36 e.g. *Clan Childlaw* publishes strategic litigation resources, including its written interventions on its website www.clanchildlaw.org
- 37 *JustRight Scotland* solicitors at the Scottish Women’s Rights Centre recently won a landmark legal case in which civil compensation was recovered in a rape case, in which the earlier criminal prosecution had resulted in a “not proven” verdict. See further, Press Release on *AR v Stephen Daniel Coxen*: <http://justrightscotland.org.uk/2018/10/press-release-ar-v-stephen-daniel-coxen/>
- 38 Interesting examples in England and Wales include projects run by the Public Law Project, e.g. <https://lankellychase.org.uk/project-summary/public-law-project/>.