

Access to Justice and Non-Visible Disabilities

A Report by Glasgow Open Justice
& Legal Services Agency
May 2025



LSA Legal Services Agency
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the Right Way

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EXECUTIVE SUMMARY

This report seeks to better understand the experiences of those with non-visible disabilities when trying to access justice in Scotland. It is based on an extensive review of relevant literature as well as analysis of 62 survey responses to a survey designed and distributed by Legal Services Agency (LSA).

It is clear that those with non-visible disabilities, including neurodivergent conditions, face multiple access to justice barriers in obtaining legal advice and navigating the justice process. Disabled people are entitled to support both in terms of better helping them to generally feel empowered in the resolution of their legal problems, as well as by way of reasonable adjustments that might be lawfully required under the Equality Act 2010.

However, support and / or reasonable adjustments are often not offered or implemented in practice, which leads to considerable knock on impacts for individuals including an ability to access advice, effectively participate in proceedings and feelings of disempowerment due to the failure of professionals and institutions to identify and respond to their needs.

This report identifies six key themes in relation to access to justice for those with non-visible disabilities:

- **Empowerment and agency**
- **Communication**
- **Geography and location**
- **Accessibility of support services**
- **Cultural competence of institutions**
- **Professionals and institutions**

It analyses these themes in depth in order to make 12 key recommendations:

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1. Greater clarity around the definition of non-visible disability is needed for legal professionals and across the justice system.
2. Policymakers should address the lack of empirical evidence on the experiences of those with non-visible disabilities, particularly when it comes to their ability to access to legal services and experiences in court.
3. Embedding clear processes for identifying non-visible disabilities at different stages of the justice process will make a critical difference to those experiencing discrimination in the resolution of their legal problems.
4. A single policy or framework across the civil and criminal justice systems for identifying and responding to the needs of those with non-visible disabilities should be implemented.
5. Disability awareness training should be a compulsory part of professional legal education for solicitors in Scotland.
6. Training should include culturally sensitive awareness that is alive to the ways that non-visible disabilities might be considered across different faiths and cultures.
7. Communication challenges can inhibit advice seeking by those with non-visible disabilities and adjustments to communication style should be carefully considered.
8. Continuing training for judges is critical in order to keep pace with best practice developments in the space.
9. The Scottish Courts and Tribunal Service should consider how best to identify those with non-visible disabilities and thereafter the relevant support and reasonable adjustments required.
10. The discrete needs of those with non-visible disabilities should be considered in relation to the location and accessibility of advice agencies and court buildings.
11. It would be beneficial to provide practical information about what to expect when engaging with support services at different stages.
12. Further consideration should be given to the role of intermediaries and advocacy support workers for those with non-visible disabilities.

1. Background

This report focuses on the experiences of access to justice for those who live with non-visible disabilities including neurodivergent conditions. The starting point is to determine who is included in that broad categorisation.

What are non-visible disabilities?

A non-visible disability is a disability or health condition that is not immediately obvious.¹ Because of its non-visibility, it can defy stereotypes of what people might think disabled people look like or how they are expected to behave and communicate. This can make it difficult for people with such disabilities to access what they need. The impact of living with a non-visible disability can be slight or significant in terms of the impact it has on a person's life.

Examples of non-visible disabilities include:

- **Mental health conditions** which have been clinically diagnosed such as bipolar affective disorder
- **Neurodivergent conditions** such as autism
- **Chronic physical conditions** such as colitis or Crohns disease, and muscular skeletal conditions such as osteoporosis

Language and terminology

According to the UK Government's Disabilities Unit, there are different ways of talking about non-visible disabilities. Some people with disabilities that are not obvious prefer the phrase 'non-visible' to 'invisible'. This is because the word 'invisible' can erase the legitimacy of the disability or imply the disability does not exist. 'Hidden' disability can imply a person is hiding their disability on purpose. 'Less-visible' disability does not encompass those whose condition is completely non-visible.

It is important to emphasise that even though a non-visible disability cannot be seen, it does not mean it does not exist. Some 'non-visible' conditions may be visible or obvious sometimes. Also, they can be 'seen' by some people who might have a better understanding of the condition. But they are not usually visible to others.

Non-visible disabilities are named this way because you cannot always easily see the nature of the disability. Some people with non-visible disabilities might use mobility aids, whereas others will not.

Some people with non-visible disabilities might have a 'dynamic disability'. This means that sometimes they might use a mobility aid, but other times they might not need it. Likewise, sometimes they might need to use a priority seat on busy public transport. Other times they may not feel they need to.

¹ UK Government Disability Unit, *Living with Non-Visible Disabilities* (17th December 2020). Available at: <https://disabilityunit.blog.gov.uk/2020/12/17/living-with-non-visible-disabilities/>

The Equality Act's definition and terminology

Section 6 (1) of Great Britain's Equality Act 2010 defines disability in the following terms:

A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a **substantial and long-term** adverse effect on P's ability to carry out normal day-to-day activities.

'A physical or mental impairment'

The use of the term 'impairment' has been criticised for its negative implications and because it aligns the provision of the Act with a medicalised conception of disability discrimination.² Under this medicalised approach discrimination is assumed to occur because of an individual's 'impairment' rather than because of the barriers that arise due to the ableist design and practices of society's structures and institutions including those with responsibility for and involvement in ensuring access to justice.

What do 'substantial' and 'long-term' mean?

'Substantial' is more than minor or trivial, for example, it takes much longer than it usually would to complete a daily task like getting dressed.

'Long-term' means 12 months or more, for example a breathing condition that develops as a result of a lung infection or clinically diagnosed depression that is managed through the use of prescription drugs.

There are specific rules relating to recurring or fluctuating conditions, such as arthritis.³ If the substantial adverse effect on the person's ability to carry out day to day activities ceases temporarily and is likely to recur, then the condition will be treated as continuing and the definition will be satisfied. Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act as long as they meet the meaning of 'long-term'. Recurring or fluctuating conditions might be physical, for example arthritis, or related to a person's mental health, for example schizophrenia and certain types of depression.

A progressive condition is one that gets worse over time. People with progressive conditions can be classed as disabled. Schedule 1 of the Act provides that a person with a progressive condition is to be regarded as having an impairment which has a substantial

² Sarah Fraser Butlin, 'The UN Convention on the Rights of Persons with Disabilities: Does the Equality Act 2010 Measure up to UK International Commitments?' (2011) 40(4) *Industrial Law Journal* 428.

³ HM Government Office for Disabilities, Equality Act 2010: [Guidance on matters to be taken into account in determining questions relating to the definition of disability](#), C5-C6.

adverse effect on his or her ability to carry out normal day-to-day activities before it actually has that effect.

Those diagnosed with HIV infection, cancer or multiple sclerosis will automatically meet the disability definition under the Equality Act 2010 from the day of diagnosis.

Are neurodivergent conditions classified as disabilities?

As long as the definition outlined above is met, a neurodivergent condition such as ADHD (attention deficit hyperactivity disorder), autism, dyslexia and dyspraxia will amount to a disability under the Equality Act 2010, even if the person does not consider themselves to be disabled.

What conditions do not count as a disability?

Certain conditions, where they arise in isolation, and not as a consequence of an impairment that meets the definition of disability, are not regarded as disabilities for the purposes of the Act.⁴ This is the case even if the condition may have an adverse and long-term effect on a person's ability to carry out normal day-to-day activities.

These conditions include addiction to, or dependency on, alcohol, nicotine, or any other substance (other than in consequence of the substance being medically prescribed); certain tendencies such as a tendency to set fires, to steal or to partake in physical or sexual abuse of other persons; exhibitionism and voyeurism.

Does the Act's definition matter or can we be broader?

Circling back to the Equality Act, it is important for the purposes of this research to define whether we are focusing on the Act's definition of disability or thinking more broadly about accessing justice including for those who have health conditions or disabilities that do not meet the definition. The survey data is not limited by whether those who responded met the Act's definition, so why does this matter?

Protection against disability discrimination

Being able to conform to the Equality Act's definition enables the person with a disability to claim certain rights if certain expected standards of behaviour by employers, educational institutions such as schools, colleges and universities, and in the provision of goods and services are not met. Service provision includes public services, such as healthcare, and also covers access to and the provision of legal services.

⁴ HM Government Office for Disabilities, Equality Act 2010: [Guidance on matters to be taken into account in determining questions relating to the definition of disability](#), A12.

Discrimination

Under the Equality Act, people with disabilities are protected against different types of discrimination all of which will be relevant in cases involving non-visible disabilities.

Direct discrimination⁵ is where the individual experiences less favourable treatment compared to someone who is not disabled and the reason for that treatment is because the individual is disabled. Direct discrimination can also occur 'by perception' where the less favourable treatment happens because a person believes another person has a disability even where they do not. Further, where the less favourable treatment happens 'by association', i.e. because a person has an association with someone who is disabled, for example they are related to or provide care for a person with a disability, this can also amount to direct discrimination.

Indirect discrimination⁶ arises where an apparently neutral provision, criterion or practice (PCP) has the effect of putting people with disabilities at a disadvantage compared with those who do not have a disability, and the PCP cannot be justified as being a proportionate means of achieving a legitimate aim.

Discrimination arising from a disability⁷ occurs where the discrimination is because of something that results from a disability, not because of the disability itself. This includes, for example, a change in behaviour because of the medication someone is taking or needing regular rest breaks or toilet breaks. This type of discrimination occurs if someone is treated 'unfavourably' or put at a disadvantage. Unlike direct and indirect discrimination, it does not require a comparison to be made with how other people are treated or would be treated. It does not apply if the person or organisation treating the person unfavourably did not know, and could not reasonably have known, about the disability which might narrow its use in some circumstances involving non-visible disability.

People with disabilities are also protected against harassment⁸ and victimisation.⁹ Harassment is unwanted conduct related to disability which has the purpose or effect of either violating the person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment. Victimisation is where a person victimises another person by subjecting them to a detriment because they have done or are believed to have done a 'protected act', such as bringing proceedings under the Act or giving evidence or information relating to proceedings under the Act.

⁵ Section 13, Equality Act 2010.

⁶ Section 19, Equality Act 2010.

⁷ Section 15, Equality Act 2010.

⁸ Section 26, Equality Act 2010.

⁹ Section 27, Equality Act 2010.

Duty to make reasonable adjustments

A duty to make reasonable adjustments arises where a disabled person is placed at a substantial disadvantage in comparison with persons who are not disabled by a pre-existing 'provision, criterion or practice'.¹⁰ There are three specific situations in which reasonable steps must be taken to avoid this disadvantage: changing the way things are done; changing the built environment; providing auxiliary aids.

Failure to make reasonable adjustments where they are required amounts to discrimination.¹¹ What is reasonable will depend on the specific circumstances.¹² In the provision of services, this duty will apply generally to people with disabilities so that service providers are expected to think about and anticipate what adjustments could be needed by users of the service with different types of disability, including support and access requirements. The service provider must think about all potential users with disabilities and not just those who are known to them. The anticipatory nature of this duty means that it will apply to a wide range of non-visible disabilities.

2. Research methodology

The methodology used in this research comprises a combination of an analysis of an online survey conducted by the Legal Services Agency in 2024 and a focused literature review.

The Survey

The survey was designed by the Legal Services Agency and run online between August 2022 and August 2024. It was publicised to potential respondents by members of staff at LSA. Responses were anonymised and respondents were asked to self-declare their disability status, and to choose whether or not to provide information about the nature of their disability and location. The survey consisted of a series of questions¹³ requiring yes/no responses or short text answers which were aimed at uncovering individual experiences of accessing justice defined by the following categories:

- **Seeking and obtaining legal advice:** accessibility and availability, including barriers to access and satisfaction
- **Raising proceedings before a court or tribunal,** including whether represented or not, barriers and satisfaction

¹⁰ Section 20, Equality Act 2010.

¹¹ Section 21, Equality Act 2010.

¹² EHRC Services, Public Functions and Associations: Statutory Code of Practice (EHRC, 2011). Available at: https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf

¹³ For the full list of questions, see Appendix I.

- **Appearing before a court or tribunal**, either as a witness, a party to proceedings or accused in a criminal case, including whether represented or not, barriers and satisfaction

There was a free text section in which respondents were asked to provide any additional comments on the ‘barriers for neurodiverse people and those with hidden disabilities in accessing legal advice and the judicial system in Scotland’.

Responses

The survey elicited 63 responses. This was reduced to a sample size of 62 for the purposes of analysis.¹⁴

Presentation and analysis of the data

The survey responses are summarised in the following tables with explanatory text where appropriate. As outlined above, this report adopts the term ‘non-visible disability’ as an umbrella term for any condition which is not visible including neurodivergent conditions such as autism, ADHD and dyslexia. The survey questions, in contrast, referred to ‘neurodiversity/hidden disability’.

Q: Please provide details of your neurodiversity/hidden disability.

Disability Type	Physical condition	Mental health condition	Learning disability	Neurodivergent condition: Autism/ADHD/dyslexia	Combination	Not specified
62	10	12	1	14	14	11

Table 1: Disability type by response

Nine of those respondents who recorded a combination of different disabilities specified a neurodivergent condition and other health condition.

Geographical location

Location	Central Scotland	Highlands & Islands	Northeast Scotland	Scottish Borders	Outside Scotland	More than one	None given
62	43	6	4	1	2	2	4

Table 2: Geographical location of respondent

Respondents were asked to specify their location in relation to each set of questions (i.e. where they received legal advice, where they raised a complaint before a court of tribunal; where they appeared before a court of tribunal). However, it proved difficult to disaggregate the data in a meaningful way for a variety of reasons. For example, some respondents answered the question on location only in response to the first category of

¹⁴ Respondent 56 was removed as his/her responses were not based on direct lived experience.

questions on legal advice and went on to report that they had never sought legal advice, whereas others recorded the same location in response to each category of question regardless of whether the category was relevant to their answer. For this reason, the breakdown of geographical location in respect of each category was deemed to be unreliable and the data has been pooled to give a single location for each respondent wherever possible.

Q: Have you ever needed to seek legal advice?

Case Type	Nos.	Legal advice obtained	Barriers experienced	Satisfied
Discrimination	10	5	5	1
Family	7	5	5	2
Employment	6	3	3	0
Criminal	5	3	3	0
Housing	3	2	2	0
Health and social care	3	1	3	0
Negligence	2	1	2	0
Financial	2	1	2	1
Domestic abuse	1	0	1	0
Medical	1	0	1	0
Data protection	1	1	1	0
Social security	1	1	1	0
Education	1	0	1	0
Wills	1	1	1	0
Other	4	2	4	0
Total	48	26	35	4

Table 3: Experiences of seeking legal advice

48 respondents in total reported that they had sought legal advice. Respondents were invited to enter the case type (i.e. closed category choices were not offered by tick box). Although this enabled each respondent to self-define the category type, the use of categorisations means that it is difficult to disaggregate the precise case type, for example ‘criminal’ could refer to the respondent seeking legal advice as a suspect or defendant in a criminal case, as a potential witness, or in relation to criminal injury compensation.

Only 26 respondents out of a total of 48 who had sought legal advice reported that they had obtained it. 35 reported that they had faced barriers. The respondents were asked to provide further information about any barriers they faced. These were varied but the most commonly recurring themes were: **communication** e.g. solicitor was not responsive or communicative and/or did not understand autism or ADHD; **difficulties in navigating the system**, e.g. knowing how to find representation and support; **lack of available support** both legal and independent advocacy; **financial cost**.

Only 4 respondents reported being satisfied with the process. For many of those who did not feel satisfied, this was linked to the fact that they were unable to obtain legal advice. For those who did obtain advice, levels of satisfaction were difficult to match specifically with the quality of the advice obtained and/or the wider process due to the limitations of the data.

Q: Have you ever needed to raise proceedings before a court or tribunal?

Case Type	Nos.	Represented	Barriers experienced	Satisfied
Benefits	6	2	5	4
Family	5	5	4	2
Discrimination	5	3	3	1
Criminal	3	2	3	0
Employment	3	0	3	0
Disability	2	0	2	1
Property	2	2	2	1
Education	1	1	1	0
Clinical negligence	1	1	1	0
Complaint against police	1	0	1	0
Domestic abuse	1	0	1	0
Road traffic accident	1	0	1	1
Civil (unspecified)	1	1	1	
Total	32	17	28	10

Table 4: Experiences of raising proceedings

32 respondents in total reported that they had needed to raise proceedings and 17 were represented. Again, the survey design invited respondents to enter the case type. This resulted in some potential overlap in the results presented in Table 4. For example, it is not possible to tell from the responses whether the cases recorded as ‘disability’ refer to a claim of discrimination or disability-related benefits specifically. For those cases categorised as ‘discrimination’, it is not known whether the discrimination arose in the employment context or elsewhere. It is unclear whether the criminal category refers to complaints made to the police or to some other type of activity related to criminal proceedings.

28 out of 32 respondents reported that they had experienced barriers or challenges before, during or after appearing. Again, the responses were diverse, but certain recurring themes did emerge. These included: **communication** e.g. a lack of awareness of how neurodivergent conditions may affect parties’/witnesses’ ability to communicate; **a lack of suitable support** including legal advice and representation; **formality of proceedings** invoked feelings of anxiety/inadequacy/intimidation; **a failure to make reasonable adjustments**.

Only 10 respondents reported feeling satisfied. Several of those respondents who reported not feeling satisfied were still involved in ongoing proceedings.

Q: Have you ever needed to appear before a court or tribunal, either as a witness, a party to proceedings or accused in a criminal case?

Case Type	Nos.	Represented	Barriers experienced	Satisfied
Criminal	22	10	10	9
Family	1	1	1	0
Personal injury	1	1	1	0
Benefits	1	0	0	1
Housing	1	1	1	0
Discrimination	1	0	0	0
Mental health	1	1	1	0
Not known	1	0	0	0
Total	29	14	14	10

Table 5: Experiences of appearing before a court or tribunal

29 respondents in total reported that they had appeared before a court or tribunal and 22 of these responses related to criminal proceedings, although it is not possible to disaggregate in what capacity they had appeared (i.e. witness, party or accused).

14 reported having experienced barriers and, once again, these related to a diversity of factors but there were certain common themes including: a feeling of **not being taken seriously or listened to**; a **lack of adequate support**; a **failure to make reasonable adjustments**.

10 respondents reported being satisfied. Those who were not satisfied, reported feeling that the proceedings had taken too long, that they felt unsupported throughout and that the outcome was either unclear or unsatisfactory.

Key themes

The common themes which emerged from the analysis of the responses to the survey questions were further amalgamated with the free text comments provided by respondents. A word cloud representing these comments is presented in Figure 1 below. A list of 6 key themes was distilled from this data in relation to access to justice barriers experienced by respondents, which were then used as the basis for a focused literature review.

There were:

- Empowerment and agency
- Communication

- Geography and location
- Accessibility of support services
- Cultural competence of institutions
- Professionals and institutions



Figure 1: Word cloud of free text comments

3. Empowerment and Agency

According to the Scottish Human Rights Commission, empowerment means that “everyone should understand their rights and be fully supported to take part in developing policy and practices which affect their lives”.¹⁵ In broad terms, legal empowerment allows individuals to have greater control to ensure that their rights and interests are advanced. Agency refers to the ability to make decisions and exercise individual rights as a result of legal empowerment. Agency is perhaps more implicitly referred to in human rights law, often related to the inherent right of every individual or group to assert themselves, make decisions, and take actions which shape their lives thus emphasising the need to recognise those who have historically been oppressed due to factors like disability.¹⁶ For individuals to be fully integrated into society where they can be fully empowered and exercise their agency, they must have access to justice.

¹⁵ Scottish Human Rights Commission, *A Human Rights Based Approach: An Introduction*. Available at: https://www.scottishhumanrights.com/media/1409/shrc_hrba_leaflet.pdf

¹⁶ Oxford Review Dictionary, ‘Agency in social justice definition and explanation’. Available at: <https://oxford-review.com/the-oxford-review-dei-diversity-equity-and-inclusion-dictionary/>

For those with non-visible disabilities, empowerment and agency are often undermined when they seek access to legal services due to a number of barriers. These include lack of understanding about non-visible disabilities and a related failure to make reasonable adjustments, as well as insufficient legal support. Barriers to access to justice can of course be experienced in relation to all types of disability, however, there can be a disbelief or lack of notice taken over the difficulties faced by those with non-visible disabilities.¹⁷

The data gathered by LSA has highlighted the access to justice barriers which have had negative effects on the empowerment and agency of those with non-visible disabilities. Barriers faced by those with disabilities limit the accessibility of justice systems as well as the ability to contribute to the administration of justice to society. Barriers can come in many forms including inaccessible environments and administrative practices, disbelief in illness or disability, and a lack of understanding of illnesses and disabilities.¹⁸ It is important that barriers are removed to ensure those with disabilities can enjoy equal opportunities to participate in the administration of justice in all capacities.¹⁹

Physical barriers

Many people with non-visible disabilities report unequal opportunities and difficulties accessing services and support they need, which further limits empowerment and agency. Wider research highlights physical access to in-person services as inadequate with the UK Disability Service noting that “of those who had reported having difficult accessing public buildings at least ‘sometimes’, 58% of disabled people who had accessed justice services had experienced some difficulties”.²¹ As explored further below, this highlights the importance of adaptation by legal professionals when providing services and even additional planning is necessary to enable access.²²

Legal representation

Effective legal representation can be the difference between success and failure in legal matters for all those engaging in the legal system. However, where legal professionals are not well-versed in the challenges posed by those with non-visible disabilities, clients may feel disempowered or unable to participate fully in their own cases. The LSA survey data highlights the importance of training of legal professionals to meet the needs of their

¹⁷ Gillian Hendry et al, "I Just Stay in the House So I Don't Need to Explain": Qualitative Investigation of Persons with Invisible Disabilities (2022) 2 *Disabilities* 145, 146.

¹⁸ Disability Rights UK and Chronic Illness Inclusion, *Removing societal barriers for disabled people with energy limiting conditions* (December 2021) 13. Available at: <https://chronicillnessinclusion.org.uk/wp-content/uploads/2021/12/DRUK-CII-survey-report-Nov-2021.pdf>

¹⁹ Stephanie Ortoleva, 'Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System' (2010) 17(2) *ILSA Journal of International and Comparative Law* 287.

clients with non-visible disabilities. Some survey respondents noted that legal professionals made “assumptions” when dealing with their legal processes and had little understanding of neurodiversity. Others stated that they were “not included” and “not kept informed” making their understanding of their legal processes even more difficult to grasp.

Legal advice and representation is most effective where there are clear pathways to getting the right legal support. For those with neurodivergent conditions, there may be a preference for certainty, routine and rules-based systems. However, respondents to the LSA survey felt there was a lack of information in “knowing who you are dealing with”, the lack of familiarity with the court process was overwhelming and not knowing which sector of legal practice to approach when seeking support for their legal issues caused anxiety. One respondent also stated that “it is extremely difficult to know which branch of law one should seek advice/information.” Previous studies have highlighted that it is good practice for legal service providers to make adjustments including producing information in accessible formats for clients.²⁰ It is clear that further work is needed to ensure information about different pathways to advice and representation are clearly conveyed in practice.

Lack of understanding and awareness surrounding disabilities

According to the 2021 National Disability Survey, a lack of understanding and stigma from others creates consistent barriers in the lives of people with non-visible disabilities.²¹ This theme has been reflected in a number of other reports where participants noted that the lack of understanding of their conditions had adverse impacts.²² Notably, there is a lack of empirical evidence on the experiences of those with non-visible disabilities, particularly when it comes to their access to legal services.²³ This lack of research, and the related relatively poor understanding of the experiences of people in this group, may be a factor in the lack of awareness on what constitutes a disability under the Equality Act. Those with non-visible disabilities are often disbelieved and struggle with comments such as “you don’t look disabled”²⁴ and even with the feeling that they are an imposter should they identify as disabled.²⁵

²⁰ Paul Swift et al, *What happens when people with learning disabilities need advice about the law?* (Norah Fry Research Centre, 2013) 3. Available at:

<https://www.legalservicesconsumerpanel.org.uk/ourwork/vulnerableconsumers/Legal%20Advice%20Learning%20Disabilities%20Final%20Report.pdf>

²¹ Rebecca Kelly and Natasha Mutebi, *Invisible disabilities in education and employment* (UK Parliament Research Briefing, 2023). Available at: <https://researchbriefings.files.parliament.uk/documents/POST-PN-0689/POST-PN-0689.pdf>

²² n 19, 12-13.

²³ n 5, 5.

²⁴ See, ITV and Scope, *Invisible Disabilities: Lisa Doyle*. Available at: <https://www.itv.com/disability/>

²⁵ n 19, 10.

The LSA data has shown a similar experience of stigmatisation and disbelief where they have felt they were “mocked” in legal proceedings, or felt they did not have their vulnerabilities taken into consideration when speaking in front of a court. One participant in the LSA survey noted that “it can be intimidating to have to seek legal advice or deal with the courts for any person, (but) for someone with (neurodiversity) it can be terrifying.” These types of experiences may negatively affect an individual’s identity and self-esteem which may lead to a negative impact on their empowerment and agency²⁶ Training programmes could increase awareness of these less-recognised disabilities, and challenge misconceptions of non-visible disabilities.²⁷

Reasonable adjustments

When those with non-visible disabilities are accessing legal services, reasonable adjustments may be required to ensure individuals can better engage in legal processes with the effect of reinforcing their own agency.²⁸ Reasonable adjustments may include providing more time for an individual to process information and alternative communication methods.

However, responses to the LSA Survey have shown that even where adjustments are made, effective communication is often a barrier faced by those with non-visible disabilities as one respondent stated: “I did receive assistance for a tribunal appearance but found it very difficult to communicate my position to them.” In this case, the respondent also noted that those involved had “little to no experience” of dealing with their non-visible disability and another respondent found it difficult to request adjustments feeling their solicitor was uncomfortable and unknowledgeable on how to support this process emphasising the importance of communication and adequate training in ensuring reasonable adjustments are tailored to each client.²⁹

Exercising choice

Choice is often taken out of the hands of those with non-visible disabilities as a result of the reliance on others for accessing legal services. Those with non-visible disabilities are more likely to rely on others, such as carers and family members, when accessing legal services and obtaining the support they need compared to the rest of the general public. A study by the Norah Fry Research Centre highlighted that very few people initiated contact with legal services themselves and where vulnerable groups are typically lacking

²⁶ n 22, 5.

²⁷ Jim Kyle et al, *Legal Choices – Silent Process: Engaging legal services when you do not hear* (Deaf Studies Trust, 2012) 12. Available at:

https://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/Legal%20Choixes%20Silent%20Process%20.pdf

²⁸ The Law Society of England and Wales, *Meeting the needs of vulnerable clients* (Law Society, November 2022). Available at: <https://www.lawsociety.org.uk/topics/client-care/meeting-the-needs-of-vulnerable-clients>

²⁹ Ibid.

knowledge of their rights, they are less likely to take action or seek advice when faced with a civil justice issue.³⁰

In similar studies, participants often mention family members as being their first port of call for advice.³¹ This might suggest that empowerment and agency is often passed onto others when those with non-visible disabilities access legal services. The Law Society of England and Wales has asserted that carers can play a valuable role in supporting vulnerable people to access legal services and to make relevant decisions for themselves.³²

Limitations to exercising choice may also arise in this context where interpreters are necessary for access to legal services. Family members are often heavily relied upon for interpretation in the case of sign language for example, but even with the involvement of professional interpreters, legal professionals may be more inclined to interact with the interpreter or family member to negotiate thus removing the client from the decision making process. Attempts to exercise choice could therefore be affected by the tendency to interact in a way that excludes the client.³¹ Identifying and providing reasonable adjustments to create diverse opportunities to exercise choice will make a meaningful difference to the accessibility of the law and legal services for those with non-visible disabilities.

Proposals for change

The first step to empowerment and agency for those with non-visible disabilities is to ensure clarification of the conditions that might be considered within the term, as well as those conditions which fall under the Equality Act 2010, in order to generally promote better understanding and awareness. This will also help to identify who will qualify for reasonable adjustments. It is also imperative that data collection is promoted in order to gain a clearer picture of the experiences of those with non-visible disability, and that empirical evidence be used to inform what reasonable adjustments might be most appropriate with respect to different non-visible disabilities in practice. Finally, education and training will help legal professionals and other frontline workers in the justice system to consider how to identify and provide adjustments that help those with non-visible disabilities to exercise choice and thus better participate in the resolution of their legal issues.

4. Communication

³⁰ n 21, 11.

³¹ n 28, 20.

³² n 29.

Those with non-visible disabilities are susceptible to challenges related to communication. For example, most neurodivergent conditions increase the likelihood of communication issues, including for example: social communication challenges (autism); difficulty concentrating, impulsiveness, difficulty following instruction and organisational sequencing (ADHD); challenges in reading, spelling, sequencing and processing information (dyslexia); challenges in turning thoughts into written language (dysgraphia).³³ It is common for those with neurodivergent conditions to find ways to cope with these challenges in day-to-day life, which might include ‘masking’ strategies to make the condition less obvious to others. It can be extremely tiring and difficult to ‘mask’ when communicating, especially for those also experiencing complex or traumatic legal issues associated with increased likelihood of stress and anxiety.

Communication support needs have been identified in relation to a number of other non-visible conditions including complex trauma, dementia, mental illness, learning disabilities, acquired brain injury and foetal alcohol spectrum disorder.³⁴ Recognising a communication support need is not straightforward and involves understanding both verbal and non-verbal signs. Non-verbal signs might include being confused or unable to follow a conversation, a lack of awareness or difficulty ‘keeping up with the pace of events or understanding the consequences of what is happening’ and attention wandering.³⁵

Problems associated with communication

Stigma and misunderstanding related to communication may adversely impact the accessibility of services and / or court processes. For example, autistic people can be misunderstood as aggressive or lacking in empathy. George et al’s research in the family justice context conversely found that autistic people have and value relationships and that they have considerable amounts of empathy, although it might be expressed in ways that differ from those who are neurotypical.³⁶

As discussed above in relation to empowerment and agency, survey respondents reported that professionals generally had a poor understanding of non-visible disability. This aligns with wider research commissioned by LSA on disabled people’s access to justice, which provides an important glimpse into the multi-faceted problem of communication. In that study, an overwhelming majority of respondents felt that their

³³ Family Justice Council, *Guidance on Neurodiversity in the Family Justice System for Practitioners* (January 202). Available at: <https://www.judiciary.uk/wp-content/uploads/2025/01/Family-Justice-Council-Guidance-on-Neurodiversity-in-the-Family-Justice-System-for-Practitioners.pdf>

³⁴ Supporting Offenders with Learning Disabilities (SOLD) Network, *A Practice Guide for Defence Solicitors in Scotland* (December 2020) 15. Available at: <https://soldnetwork.org.uk/wp-content/uploads/Practice-Guide-Defence-Solicitors-SOLD.pdf>

³⁵ Ibid, 19.

³⁶ Rob George et al, “Our Normal is Different”: Autistic Adults’ Experience of the Family Court (2020) 42(2) *Journal of Social Welfare and Family Law* 204-220.

disability was not understood by legal professionals meaning that appropriate adjustments could not be put in place. This lack of understanding is also evident in legal service provision, as respondents also noted their struggle to find solicitors who would take on their case. Where participants did find legal assistance, many encountered problems of such scale that put them off seeking legal advice in the future.

Communication challenges can lead to myriad problems that inhibit advice seeking behaviours. For example, one LSA survey respondent represented himself at trial due to the prohibitive cost of representation, however, he experienced “almost unbearable anxiety” which he said “put [him] off reporting crimes.” It is noted that in the criminal justice context (which relates to LSA’s work in criminal injuries compensation) those with hidden disabilities may experience barriers during the trial process in a number of ways. For example, it is particularly challenging to give evidence, either as a witness or a defendant, which can have an impact on reliability and persuasiveness.

One EHRC study highlighted the lack of effective participation among neurodiverse defendants.³⁷ Not only does verbal communication impact upon the general understanding of court proceedings, but non-verbal communication can have an adverse impact on the support offered to defendants. The Commission’s report highlighted that the environments defendants find themselves in are experienced as hostile and clinical and are not designed to support people’s needs.³⁸

A key issue identified generally in the literature is the lack of data collection on the characteristics of those in the justice system (both civil and criminal) in Scotland and elsewhere. For example, the EHRC found no evidence to suggest that public authorities have collected information regarding the characteristics of defendants or the provisions that could be implemented to support them.³⁹ In fact, information about an individual’s support needs is generally not passed on from one agency to another, exacerbating the experience of access to justice barriers related to communication in practice.

It has been noted that legal professionals largely rely on their clients themselves to communicate the barriers they may face. However, many will not do so due to feelings of embarrassment and shame associated with disclosing their disability and/or neurological condition. In the consultation commentary on the Learning Disabilities, Autism and Neurodivergence (LDAN) Bill, the Scottish Government recommended that gaps in monitoring and analysis of disability data be addressed; and new systems be

³⁷ EHRC, *Inclusive justice: a system designed for all* (EHRC, 2020). Available at: https://www.equalityhumanrights.com/sites/default/files/ehrc_inclusive_justice_a_system_designed_for_all_june_2020.pdf

³⁸ Ibid, 12.

³⁹ Ibid, 13.

created to ensure information is collected and shared across health, social work and justice agencies as appropriate.⁴⁰

Proposals for change

The EHRC also identified a stark discrepancy between the provisions offered in England and Scotland.⁴¹ The establishment of the NHS Liaison and Diversion Service in England has been met with positive reaction by stakeholders. The service involves the presence of medical practitioners in police stations and criminal courts to screen those in custody for conditions and to assess their communication needs. However, in Scotland, the accused is relied upon to disclose impairments, with the Appropriate Adult Scheme placing a duty onto police officers to assess whether the accused has difficulties in communication and understanding. The SOLD network in Scotland has created a guide for support staff, including a specific guide for criminal defence solicitors,⁴² to better support those with communication needs in the criminal justice system. Broadly, there might be legal aid available for those with support needs in either the criminal or civil justice system, however, this appears limited in practice and should be made widely available to those who are eligible.

One survey respondent highlights the extent of communication problems in practice, observing “no one wants to listen to me. It’s like I am invisible”, with another reporting that “they dont [sic] explain things properly. They just assume you understand.” It is therefore critically important that adequate communication support by way of a registered intermediary, advocacy worker or crisis navigator be established in Scotland. Examples of communication adjustments have also been identified in recent guidance on neurodiversity in the family justice system in England and Wales. These adjustments could similarly be made in the Scottish context and include:

- Contact by email, rather than phone call.
- Written material being presented in a different format, avoiding black writing on a white background. People may have their preferred tint for background, such as pale green. ‘Aktiv Grotesk’ or similar font may help.
- Avoiding the use of abstract or metaphorical language and double negatives.
- Using shorter sentences or questions.
- Formulating questions in a way that considers any tendency to answer questions in a very literal or overly short way.

⁴⁰ Scottish Government, Learning Disabilities, Autism and Neurodivergence Bill: Consultation (21st December 2023). Available at: <https://www.gov.scot/publications/learning-disabilities-autism-neurodivergence-bill-consultation/pages/23/>

⁴¹ n 38, 26-27.

⁴² n 35.

- Allowing more time to consider information and answer questions.
- Allowing more time for instructions to be taken and advice given.
- Building in strategies to check the person is understanding and whether the communication adjustments need to be amended.
- Detailed advanced planning of examination in chief or cross examination to ensure that the communication needs of the witness are met during oral evidence.⁴³

The Commission also recommends that legal professionals be provided with guidance and training to enable them to recognise non-visible disabilities, their impact and how adjustments can be made. This echoes the Scottish Government's commentary in relation to the LDAN Bill where training at the professional stage of legal education is recommended in order to create change in the approach taken by lawyers in the future.

5. Geography and Location

Geography and physical location are often overlooked as significant barriers for individuals with non-visible disabilities. These barriers may, and often do, limit the ability of people with non-visible disabilities to access legal services on an equal basis as those without non-visible disabilities. As with empowerment and communication, geographic barriers are frequently underestimated in large part due to limited and/or a lack of understanding surrounding non-visible disabilities, including their scope and reasonable adjustments needed.

Research generally indicates that barriers fall into two inter-related areas: the burdensome requirement to travel long distances to access legal services or courts; and inaccessible buildings that people may be required to use (and often wait in for long periods of time). For those with non-visible disabilities, which includes a multitude of conditions including but not limited to multiple sclerosis and mental health conditions such as anxiety, the result of these barriers can be related to either or both mental and physical ill-health. Indeed, a frequently overlooked aspect of the design of buildings relates to how those with mental health and psychological conditions may be impacted by certain designs. For example, respondents to the LSA survey noted, in particular, the adverse impact of crowded and narrow spaces.

Distance

Survey respondents raised the issue of having to travel long distances to be able to access legal services. This is primarily due to the fact that legal services may be overly

⁴³ n 34, 21.

concentrated in urban areas, particularly in the Central Belt region. This overconcentration of legal services in certain geographical areas affects people with and without non-visible disabilities who do not live in those areas as it can impose burdensome (and sometimes expensive) travel requirements to be able to access advice. For example, the Scottish Legal Aid Board found that “there is evidence that rural dwellers have difficulties in accessing a range of other physical services; and that lack of public transport is a key reason for this”.⁴⁴

The impact of extensive travel on people with non-visible disabilities can be disproportionate in part because of “the inaccessibility of much of Scotland’s public transportation system.”⁴⁵ Moreover, whilst targeted research in this area remains limited there is some recognition that this impact is likely to be most significant for individuals living in the most remote areas, such as in the Highlands and Islands, as they may be unable to travel to the court every day, further exacerbating the issue.⁴⁶

One survey respondent, for example, mentioned the “lack of local solicitors” as a significant barrier they faced when seeking legal representation, whilst another noted “having to go to Glasgow” to meet their solicitor. This may deter potential claimants from seeking legal representation and/or discourage and deter people with non-visible disabilities from seeing out a legal claim. This was reflected by one respondent who stated that their experience (including a lack of support) led them to feel like they “need[ed] to give up” as it had an “impact on [their] health”.

Physical location

Physical location barriers primarily take the form of accessibility related problems within the buildings that house legal services, for example, regarding layout and building design. Issues around accessibility can have a profound impact as they can inhibit the ability of a client to meet and converse with their solicitor; not least because confidential and trauma-informed spaces are needed to promote safety and effective communication. One survey respondent described the difficulty they faced in accessing their solicitor’s office, which was located “up a stair” with “no lift” available. Additionally, another respondent raised concerns about “lack of access to offices with metal ramps at an acute angle,” indicating that physical accessibility and the physical conditions of buildings continues to be a pressing barrier faced by people with non-visible disabilities as well as for those with visible disabilities.

⁴⁴ Scottish Legal Aid Board, *Rural Access to Civil Legal Services: Literature Review* (SLAB, 2020). Available at: <https://www.slab.org.uk/app/uploads/2020/11/Rural-access-to-legal-services-Literature-Review.pdf>

⁴⁵ Capability Scotland, *Shaping Scotland’s Court Service: A Public Consultation for Proposals for a Court Structure for the Future* (Capability Scotland, 2020).

⁴⁶ Ibid.

Other challenges for those with non-visible disability include crowded spaces contributing to anxiety as well as a lack of space that may make it difficult (and in some cases impossible) for those that use mobility aides, such as a wheelchair. This specific issue was noted by one respondent to the LSA survey who raised the issue of "limited space in offices," which made it difficult for them to navigate the space.

Finally, court room buildings themselves may also be inaccessible for a number of groups, including but not limited to people with non-visible disabilities. A UK-wide study by the law firm Bolt Burdon Kemp studied 444 courthouses in Scotland, England, and Wales (England and Wales were measured separately in this study) and found that overall, only 2% of UK courthouses were fully accessible.⁴⁷ In particular, the study found that only 8% of courthouses in Scotland were fully accessible to wheelchair users compared to 15% in England and 29% in Wales.⁴⁸ Moreover, whilst the study found that 69% of courthouses in Scotland offered hearing loops and accepted assistance dogs this was likewise the lowest figure for the three nations with 77% of courthouses in England doing so and 82% of courthouses in Wales.⁴⁹ These findings are of concern and importance as without these accommodations and facilities courthouses in Scotland cannot be considered to be fully accessible, which will have detrimental impacts on the ability of people with non-visible disabilities to participate and go to court.

Proposals for change

Barriers related to geography and location exist due to a wide-range of complex and sometimes interwoven factors that may require a variety of solutions. Addressing these barriers will often require a multi-faceted approach and solutions should not be considered in isolation. First, legal service providers should be aware of the variety of needs that individuals with non-visible disabilities may have and ensure that their services are able to make necessary accommodations. This could include ensuring that office spaces are designed to be accessible to all individuals, such as by installing lifts in buildings with stairs or adjusting ramps to safer, less steep angles. It is acknowledged that this may require careful consideration of planning permission regulations and laws related health and safety. Alternatively, accessible meeting spaces in locations near to a solicitor's office or offering home visits where possible and appropriate might be considered.

It is important to consider the discrete needs of those with neurodivergent conditions. Accessible spaces should limit unpredictable noise, for example by restricting time spent in open plan offices, and thought should be given to mitigation strategies for reducing

⁴⁷ Bolt Burdon Kemp, *Only 2% of Britain's Civil and Criminal Courthouses are accessible* (2020). Available at: <https://www.boltburdonkemp.co.uk/our-insights/campaigns/only-2-percent-british-courthouses-fully-accessible/>

⁴⁸ Ibid.

⁴⁹ Ibid.

noise. Visual noise can also be challenging, for example, “high contrast stripes and geometric patterns can create acute sensory overload particularly for people with visual sensitivities, epilepsy, or migraine sufferers.”⁵⁰ Other accessible design proposals include easy entrance and exit spaces, creating welcoming sanitary facilities and recalibrating environments to give sensory control.⁵¹ As one specialist designer suggests, “these private spaces may contain moveable furniture, adjustable blinds, lighting, sound, and temperature controls into the overall design to give the user full sensory control of their environment.”⁵²

Another potential solution to the issue of geographical distance is the increased use of technology to facilitate communication between legal professionals and clients. The use of video conferencing and video calls may help to bridge the gap for those who cannot easily travel to meet with solicitors or attend court hearings. However, this solution is not fail-proof, with the EHRC noting that video hearings are not always suitable for people who might need support with communication.⁵³ Moreover, when considering videoconferencing as a solution for clients who may live in remote areas, the Scottish Legal Aid Board has observed that there “is also evidence that rural dwellers have poorer access to digital services; with poor connectivity (e.g. connection speeds to broadband, mobile data coverage).”⁵⁴ Mulcahy and Tsalapatanis have cautioned the widespread use of video conferencing (particularly for courts) due to the fact that “there is still much work to be done in developing evidence-based policies and practices about video hearings in cases involving the most marginalised and disadvantaged” particularly as it relates to “digital poverty”.⁵⁵ Video conferencing should therefore be viewed as a complement to, rather than a replacement for, face-to-face meetings.

Finally, addressing these barriers requires an acknowledgment that non-visible disabilities encompass a wide range of conditions, each of which may require different accommodations. For example, individuals with conditions such as multiple sclerosis may find long-distance travel physically exhausting, whilst those with anxiety disorders and other mental health conditions may experience additional stress when required to navigate urban environments or be in small office spaces. To better support these individuals, legal service providers must remain flexible and responsive to their specific needs, ensuring that people can access justice without facing unnecessary obstacles.

⁵⁰ Jason Slocombe, *How to design space to better meet the needs of neurodivergent groups*. Available at: <https://hdsunflower.com/au/insights/post/design-accessible-spaces>

⁵¹ Ibid.

⁵² Ibid.

⁵³ n 38, 16.

⁵⁴ n 45.

⁵⁵ Linda Mulcahy and Anna Tsalapatanis, ‘Exclusion in the interests of inclusion: who should stay offline in the emerging world of online justice?’ (2022) 44(4) *Journal of Social Welfare and Family Law* 455–476.

6. Accessibility of Support Services

The need for support services

Being involved in a legal dispute or navigating the court system can be a daunting experience. It may involve complex legal language and financial constraints, and often the reason for the dispute is personal or emotionally distressing. For individuals with non-visible disabilities, it can be particularly difficult to handle this distress, understand where to start or how to raise a legal claim.⁵⁶ Support services operate, therefore, as a “gateway” to justice.⁵⁷ When effective, they offer both practical and emotional guidance to individuals who seek to access civil justice. This support can include:

- i. Explaining the clients’ legal rights
- ii. Examining the facts of the case, and the likely chance of success
- iii. Accompanying individuals to certain meetings/hearings
- iv. Signposting to relevant legal services and professionals
- v. Offering assistance for administrative tasks
- vi. Offering information on available legal aid and the likely cost of disputes.

Across Scotland there is a range of relevant support services including carers organisations, disability charities and support networks. Effective support services are essential in ensuring justice for all, particularly for those with non-visible disabilities who face additional barriers when seeking legal help. Without a clear understanding of their rights and remedies, individuals cannot effectively advocate for themselves or participate fully in society.⁵⁸ Free access to legal information and advice, as well as specialist support for reasonable adjustment application is the starting point for accessing justice.

According to Article 5 of the UN Convention on the Rights of Persons with Disabilities, “all people are equal before the law” and are entitled without any discrimination to the “equal protection and equal benefit of the law”. As discussed above, recent data suggests that very few people with learning disabilities initiate contact with legal services themselves. It is through support services, or through a family member in which legal assistance is sought.⁵⁹ Therefore, if there is limited support services provided and funded by the government, this can significantly impair an individual’s right to justice and access to the courts.

⁵⁶ Julinda Beqiraj et al, *Access to Justice for persons with disabilities: From international principles to Practice* (Bingham Centre for the Rule of Law, October, 2017).

⁵⁷ n 21.

⁵⁸ Scottish Government, Minister for Social Care, Mental Wellbeing and Sport, ‘Learning Disabilities, Autism and Neurodivergence Bill: Consultation’ (21 December 2023).

⁵⁹ n 21.

Those seeking advice on behalf of someone with a non-visible disability tend to access helplines and forums provided by disability charities, carers' organisations and support groups.⁶⁰ Without access to these support services, people with non-visible disabilities, and their carers, are less likely to understand what particular provisions or remedies were available to specifically support them. With respect to reasonable adjustments, concerns have been raised that many people providing support services see them as a form of kindness or favouritism, rather than as a legal duty and a fundamental human right.⁶¹ Furthermore, lack of compliance with accessibility requirements within support services can result from a lack of training and education should ensure that reasonable adjustments are made for all forms of non-visible disabilities in compliance with the anticipatory duty under the Equality Act 2010. It is only once this level of accessibility is achieved, that there can be true access to justice.

What makes a support service accessible?

Several adjustments have been identified as being helpful in order to make a support services accessible¹¹.

- The service has various available methods of communication, including in person, online and over the phone appointments.
- There is a flexible booking system for appointments, and accommodations are made for lateness.
- Provision of auxiliary aids including assistance dogs.
- Provision of intermediaries and supportive adults during meeting.
- Access to information for family members and support workers, with the consent of the individual.
- Compliance with digital accessibility, including providing alternative text for images, using high colour contrast within websites, and displaying texts in small chunks and clear language.⁶²
- Offering forms in large print, guidance in audio or easy-format reads.
- Support services which are offered locally.
- Provision of short breaks, and a clear structure to meetings.

However, as discussed above, a significant impediment to justice identified in the survey was a lack of clear pathways available to getting “the right support”. Some respondents described the process as “extremely daunting” and said “the support is not obvious”. Another respondent noted that autism charities were not knowledgeable about the way

⁶⁰ Ibid.

⁶¹ Scottish Civil Society Shadow Report, *Nothing about us without us! United Nations Convention on the Rights of Disabled People* (March 2022).

⁶² Roberta Beattie, *What is the Social Model of Disability and how can you use it to improve digital accessibility?* (Digital Culture Network, 2021). Available at: <https://digitalculturenetwork.org.uk/knowledge/what-is-the-social-model-of-disability-and-how-can-you-use-it-to-improve-digital-accessibility/>

in which lawyers might provide support. Data suggests that people with long term visible and non-visible disabilities are more likely to need help dealing with legal issues than the general population,⁶³ but are less likely to know their rights or seek advice or support.⁶⁴ It was also reported by respondents that where the initial step of accessing support and information is challenging, many legal cases are abandoned.

Financial barriers

Informal support services are underfunded, understaffed and undertrained. This has a significant impact for those with non-visible disabilities and the resources available to them. The Law Society of Scotland has reported that the number of legal aid cases providing early advice dropped from nearly a million in 2009/10 to just 130,000 in 2021/22. For people with non-visible disabilities, this has created a two-tier justice system.⁶⁵ Without early advice, this compounds the problems which certain individuals with non-visible disabilities face in day-to-day life. It means that they are unable to discuss their case, or understand their rights, and increases the likelihood that they will choose not to bring the claim or resolve the dispute in another way.

Furthermore, individuals volunteering at NGOs and frontline organisations providing support find that they are ill-equipped to provide specialist legal advice in areas which disproportionately impact those with a disability. This includes areas such as community care, welfare rights and discrimination.

Proposals for change

In order for support services to provide adequate support to people with non-visible disabilities, it is critical that there is sufficient public funding for service delivery. It would be an important step to reinvest in legal aid funding, particularly in civil matters, which disproportionately affect disabled people, in order to better promote the early resolution of legal issues and prevent problem escalation. As discussed elsewhere in this report, funding should be also made available for improved training.

The Scottish Government could also take a more proactive approach to ensure that individuals with non-visible disabilities understand their rights and how to access the court system. There should be opportunities for individuals, as well as their carers, family members, and support networks, to self-enrol for legal information. This could include the development of an online service that consolidates local support services, explains

⁶³ n 21.

⁶⁴ Denvir et al, 'Informed Citizens? Knowledge of Rights and the resolution for civil justice problems' (2012) 41(3) *Journal of Social Policy* 591-694.

⁶⁵ Amnesty International, *Cuts that Hurt: The Impact of Legal Aid Cuts in England on access to Justice* (London, 2016)

how to access them, and outlines funding options for civil action. A significant barrier for those seeking to access a support service is lack of clarity surrounding what the law and a legal agency can do. Expanding the reach of support services should help to address this concern, likewise with fostering collaboration between advocacy services / frontline service provision and legal support services.

For those with neurodivergent conditions, it would also be beneficial to provide practical information about what to expect when engaging with support services. This could include details such as the typical duration of initial meetings and information about public transport options. Moreover, it is essential for all support services to offer a way for individuals to communicate their specific reasonable adjustment requirements and other accommodations that could assist them, prior to first meeting.

To enhance the accessibility of support services, the legal system must align its procedures with everyday realities by formally recognising and empowering family carers as key facilitators in the justice process. Legal support services should establish clear protocols that allow family members and carers to participate meaningfully—such as attending meetings and hearings, assisting with documentation, and providing emotional or practical support—while ensuring that the primary decision-making authority and agency of the individual concerned are preserved. This could involve structured guidelines for carers’ involvement, and a designated role that clarifies the limits and responsibilities of their support.

7. Cultural Competence

The intersection of disability, culture and cultural competence

While there is no universally agreed definition of cultural competence, the most widely cited one comes from Cross et al. who define this concept as ‘a set of congruent behaviours, attitudes, and policies that come together in a system, agency, or among professionals to facilitate effective work in cross-cultural situations’.⁶⁶ The greatest development and use of the concept of cultural competence has come from the healthcare and social sectors. Nevertheless, it is highly relevant to the legal sector as well. Adams highlights the role that clients’ cultural background can play in how they interpret the legal issue at hand, how they interact with their lawyer, and how they see the legal system.⁶⁷ Hence, people working in the provision of legal services require cultural competence. This sentiment was also reflected by a respondent to the LSA

⁶⁶ Terry Cross et al, *Towards a Culturally Competent System of Care: A Monograph on Effective Service for Minority Children who are Severely Emotionally Disturbed* (CASSP, 1989).

⁶⁷ Travis Adams, ‘Cultural Competency: A Necessary Skill for the 21st Century Attorney’ (2012) 4 *The William Mitchell Law Review* 2-22.

survey on barriers to accessing the justice system, stating that “cultural competence and faith communities are very important dynamics”.

The issue of disability intersects with culture in two ways. First, culture can be analysed as a factor influencing how disability is seen, comprehended and reacted to by an individual, a community or society.⁶⁸ Secondly, disability can be conceptualised as one type of culture in its own requiring cultural competency.⁶⁹ Explaining the importance of cultural competence in legal environments, Pay highlights how a client’s cultural background informs how they perceive health and disability, which in turn influences how they perceive and are perceived by the legal system.⁷⁰ For instance, she refers to an example where ‘a client claiming disability benefits is perceived by legal clinic staff to be “non-compliant” or without a serious mental health problem’ because she has refused her family doctor’s referral to a psychiatrist. However, the clinic staff did not have an awareness of the ‘extreme stigma associated with mental health treatment in the client’s culture’.⁷¹

Therefore, cultural competency at the intersection of culture and disability is necessary for lawyers and advisers to best support their clients, and to understand and respond to their specific concerns. Here, Pay elucidates the cultural grounding of conceptions of health and attitudes toward the legal system, which ‘may determine and limit what information is provided by a client to her lawyer and also what types of legal actions might be seen by the client to be useful or not’.⁷² For instance, if a person accessing the justice system has a stigmatised view of mental illness, she ‘may not feel comfortable testifying about or even acknowledging this in support of her claim for disability benefits. Similarly, her description of symptoms of such an illness might not make sense to a lawyer or a decision-maker if they are not aware that mental health disabilities may be manifested in physical ways (described as somatization) in some cultures’. Finally, Pay highlights the importance of a lawyer’s awareness of their client’s attitude and connection to ‘traditional health practices’, as these might be helpful. Legal advocates may also find it useful to ‘supplement other medical evidence regarding treatment in support of a disability claim’.⁷³

Lack of awareness and training

⁶⁸ RIDM - Rapid Interactive Disability Management Ltd., ‘The Importance of Cultural Competence In Disability Assessments’. Available at: <https://ridm.net/faqs-independent-medical-evaluations-ime/the-importance-of-cultural-competence-in-disability-assessments/>

⁶⁹ Rosemarie Garland-Thomson and Lisa Lezzoni, ‘Disability Cultural Competence for all as a Model’ (2021) 21 *The American Journal of Bioethics* 26.

⁷⁰ Cynthia Pay, ‘Teaching Cultural Competency in Legal Clinics’ (2014) 23 *Journal of Law and Social Policy* 188.

⁷¹ Ibid 192.

⁷² Ibid 204.

⁷³ Ibid.

A first key barrier identified by the literature at the intersection of disability and culture is the lack of knowledge of service providers, which can include courts, tribunals, legal aid organisations and social service providers. This exacerbates negative effects, particularly for people with non-visible disabilities, as due to insufficient knowledge, their conditions may be overlooked or dismissed by people working in this sector. Analysing the experience of people with disabilities in the judicial process in Indonesia, Wahyudi and Kasiyati identify a lack of knowledge by law enforcement officials as a key issue, stating they have difficulties ‘to accept cases and follow up on the process of examining cases because the testimony of witnesses as persons with disabilities is considered incompetent and is considered insufficient evidence. In addition, sufficiently evidenced cases require a long legal process because the police have never handled a case of a person with a disability who faces the law’.⁷⁴

Similarly, Human Rights First, in the US context, lamented a lack of training for immigration judges on ‘identifying mental disabilities and communication with people with mental disabilities’.⁷⁵ This system results in the denial of accommodations and safeguards for ‘Immigrants with cognitive, neurological, and mental health disabilities [...] with some found not credible and denied protection due to failures by immigration judges to recognize the impacts of disabilities on memory and testimony or to take into account medical records submitted to the court’.⁷⁶ Analysing the situation of service provision to migrants and asylum seekers, the European Association of Service Providers for Persons with Disabilities (EASPD) highlighted: ‘In recent years, the limited numbers of staff at the centres to conduct these assessments, people's symptoms, especially the more ‘invisible’ (mental, sensory or psychosocial disabilities), are often missed’.⁷⁷

Lack of culturally sensitive support

Furthermore, the EASPD identified a ‘lack of provision of culturally sensitive support’ for asylum seekers with disabilities.⁷⁸ Similarly, O’Hara has argued that persons and families at the intersection of disability and ethnic minorities experience a ‘double-jeopardy’, being exposed to both ‘racial discrimination and culturally inappropriate forms of care and service provision’.⁷⁹ For example, in the absence of appropriate language support and interpretation, the conditions of people with non-visible disabilities are more likely to be missed: ‘We think and feel in our first language, and using

⁷⁴ Abdullah Tri Wahyudi and Siti Kasivati, *Reasonable Accommodations on the Legal Aid to Person with Disabilities in the Judicial Process* (Atlantis Press, 2022) 140.

⁷⁵ Human Rights First, *You Suffer A Lot: Immigrants with Disabilities face Barriers in the Immigration Court* (Human Rights First, 2023) 32.

⁷⁶ Ibid 5.

⁷⁷ European Association of Service Providers with Persons with Disabilities, *Refugees and Migrants with Disabilities: Ensuring Access to Quality Support* (EASPD, 2020) 3-4.

⁷⁸ Ibid.

⁷⁹ Jean O’Hara, Learning Disabilities and Ethnicity: Achieving Cultural Competence (2003) 9 *Advances in Psychiatric Treatment* 166.

a second language can block thoughts and emotions. Bilingual patients can appear less psychotic when interviewed in their second language rather than their first language, as well as remaining protected from anxiety and hidden meanings and feelings.⁸⁰ Relatedly, non-visible psychological conditions of clients from ethnic minorities may be overlooked by the medical system, because they are more likely to ‘present to their GP with somatic symptoms’.⁸¹

Faith-based discrimination

In the LSA survey, a respondent living with memory and concentration loss indicated they faced barriers in accessing the justice system connected to their religious background. Further, of their experience having to appear in front of a court as a witness, a party to proceedings or accused in a criminal case they perceived having faced barriers as well, lamenting “Fundamental dishonesty and abuse of power by police officers”. The respondent was not satisfied with the outcome of the case, declaring: “[Procurator Fiscal] can also hate you for having a faith, fighting spirit”.

Proposals for change

Several recommendations have been identified in the literature to assist clients at the intersection of disability and cultural/faith background in accessing the services they need. As with the other themes in this report, staff training has been identified as a key need to ensure quality services for clients with non-visible disabilities from different cultural backgrounds. More specifically, EASPD recommend the establishment of ‘personalised tools (designed and depending on the disability that the individual possesses) and the linguistic and psychosocial background of the individual migrant’ and the creation of ‘Specialised focal points for persons with disabilities at the registration and identification centres’.⁸² Similarly, in the US context, Human Rights First recommended that immigration judges receive training on non-visible disabilities such as mental and cognitive disabilities, including:

- Identifying people with mental and cognitive disabilities, communicating, and understanding how mental health challenges may impact a person’s ability to present their case and work with their attorney.
- Traumatic Brain Injuries (TBIs), their prevalence among people who appear in immigration court and in particular people seeking asylum who may have sustained TBIs due to the persecution they suffered, and the impact of TBIs on memory and cognition.

⁸⁰ Ibid 170.

⁸¹ Ibid 169.

⁸² n 78.

- Credibility assessments where an individual has mental or cognitive disabilities, including how to approach credibility determinations where a person has PTSD, TBI, and other disabilities and not to draw adverse inferences regarding inconsistencies or memory gaps where a person has memory loss associated with disability.⁸³

Culturally sensitive services, for example involving partners with the same cultural background (as in, for example, the Austrian BEAM project) can also play an important role in effecting change. The EASPD highlights the need for ‘cultural interpreters’ or ‘parent guides’ to help clients and their families with (non-visible) disabilities to receive culturally sensitive support. These would serve to ‘help understand the social system, help the family complete the necessary paperwork, and organise needs assessments. The vital role that these cultural interpreters would have is to inform the person with disabilities or, in some cases, their families about resources that are available to them’.⁸⁴

Similarly, Wahyudi and Kasiyati recommend the incorporation of disability assistants in the legal aid system to enhance disabled peoples’ access to justice:

Provision of disability assistants; Disability assistants play a role in fighting for their rights when facing legal cases, bridging the interests of persons with disabilities, and intermediary communication with law enforcement officials. The requirements for disability assistance are to understand the needs and barriers of persons with disabilities, facilitate persons with disabilities during the judicial process, associate and interact well with persons with disabilities who are accompanied, and obtain approval from persons with disabilities or their families.⁸⁵

In this context, the literature also highlights a need for increased cooperation between those offering support to migrants and clients with different cultural backgrounds and organisations that support disabled people to enable more specialised and sensitive support. For instance, the EASPD recommended: ‘More partnerships with NGOs and Funding. The Commission promotes partnerships between migration authorities for asylum/migration procedures to service providers for persons with disabilities. These partnerships would help provide service to refugees with disabilities and ensure the inclusion of migrants within the larger society and achieve independent living. These partnerships could be instrumental in creating a program specifically designed to address the rights and needs of asylum seekers, refugees and migrants with disabilities.’⁸⁶

⁸³ n 76, 10-11.

⁸⁴ n 78.

⁸⁵ n 75, 142.

⁸⁶ n 78, 13.

Wahyudi and Kasiyati highlight the importance of translators to aid clients with disabilities in accessing the justice system, stating: ‘Communication with persons with disabilities is not easy to do...Translation requires being good at getting along, interacting, communicating well and effectively and obtaining the consent of persons with disabilities or their families.’⁸⁷ Finally, to aid the client’s recovery process, faith-based support should be included: ‘Spiritual reinforcement. Legal aid providers provide spiritual reinforcement to persons with disabilities facing the law by referring to clergy according to their respective religions and beliefs.’⁸⁸

8. Professions and Institutions

This section brings together themes discussed throughout this report. It is clear that the justice system and the professionals working within it should work to ensure the effective participation of its users. In order to ensure effective participation, the justice system must ensure disabled court users’ engagement at all stages of the process: the pre-trial stages, which includes the identification of needs, implementing support, and gaining legal representation; and the court proceedings itself.

Broadly, there are five areas in which the justice system requires improvement: the lack of specific guidance or framework; the lack of compulsory training for lawyers and members of the judiciary; the lack of understanding towards individuals with non-visible disabilities within the court system; the complicated legal language that prevents court users from understanding court proceedings; and the difficulties with gaining legal representation.

The lack of specific guidance or framework

There is no single policy or protocol in place to guide frameworks across civil and criminal justice systems in Scotland. Consequently, there is not enough training to produce sufficient awareness about the nature and extent of vulnerability of parties among the judiciary.

It is worth noting that perhaps the most pertinent legislation relevant to court users with non-visible disabilities are those that provide special measures in court, and often these are only discussed in criminal cases and for witnesses more broadly, not necessarily in relation to the defendant himself or herself. Most of these measures are enshrined in the Vulnerable Witnesses (Scotland) Act 2019, which has been amended over the years since its first introduction in the Criminal Procedure (Scotland) Act 1995.

⁸⁷ n 75,142.

⁸⁸ Ibid, 145.

In civil cases, legislation or guidance relating to vulnerable parties or witnesses is even more scarce. These provisions exist in theory, with judges having the inherent power to order special measures for a vulnerable witness. Legislation related to the judicial process appears to be codified in piecemeal legislation and not within a single framework, making the process more confusing for legal representatives and court users. For example, the Education (Additional Support for Learning) (Scotland) Act 2004, which imposes a duty to allow advocates to make representations on an individual's request; the Adult Support and Protection (Scotland) Act 2007, which imposes a duty on a local authority to consider the importance of providing advocacy; and section 4 of the Social Security (Scotland) Act 2018, (which states that Scottish Ministers are under the duty to have regard to the importance of communicating in an inclusive way. The Scottish Parliament is currently debating the Victims, Witnesses, and Justice Reform Bill, which recognises the requests to improve the existing legislation in relation to civil courts and to embed trauma-informed approaches across the criminal justice system. However, most significantly, there is no current set method to elicit information about non-visible disabilities and so this will generally depend on the willingness and ability of the judge presiding over the case to draw attention to it through paperwork or during the hearing.

No compulsory training for legal professionals or members of the judiciary

Solicitors and advocates in Scotland should be guided by professional principles in order to identify and meet the needs of disabled clients. The Law Society of Scotland has provided guidance for identifying vulnerable clients and setting out best practice approaches, especially with a view to supporting the exercise of legal capacity.⁸⁹

A protocol was developed between the Crown Office and Procurator Fiscal Service, the Scottish Courts and Tribunals Service, Victim Support Scotland and Police Scotland in 2023 and provides helpful guidance on the approach that should be taken with vulnerable witnesses.⁹⁰ The guidance provided to barristers and judges in England and Wales is instructive. For example, there is useful guidance in two sources, the Equal Treatment Bench Book (ETBB) and the Advocates Gateway Toolkits. The former gives detailed guidance covering physical and mental disabilities of parties, while the latter aims to support the early identification of vulnerability in witnesses and the making of reasonable adjustments, especially on questioning them. The Toolkits in particular cover a great deal of good practice when interacting with disabled conduct, including:

⁸⁹ Law Society of Scotland, Vulnerable Clients Guidance. Available at: <https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-b/rule-b1/guidance/b1-5-vulnerable-clients-guidance/#:~:text=Solicitors%20should%20as%20far%20as,carry%20through%20valid%20juridical%20acts.>

⁹⁰ COPFS and others, *Working Together for Victims and Witnesses: Protocol Between COPFS, SCTS, Police Scotland and Victim Support Scotland* (COPFS, June 2021).

- Toolkit 5: Planning to question someone with ‘hidden’ disabilities: specific language impairment, dyslexia, dyspraxia, dyscalculia, and AD(H)
- Toolkit 10: Identifying vulnerability in witnesses and parties and making adjustments
- Toolkit 12: General principles when questioning witnesses and defendants with mental disorder.⁹¹

The Advocates Gateway has particularly been highlighted as a useful resource by professionals in Scotland. It is also noted that a comprehensive Scottish Equal Treatment Benchbook has been published by the Judicial Institute for Scotland.⁹²

Further resources provided in Scotland include a disability toolkit developed in 2021 by the Scottish Children’s Reporter Administration, targeted at use by practitioners that allows for the identification of additional needs in the children’s hearing system.⁹³

However, despite the guidance, there is no compulsory training on disability and adjustments for solicitors and barristers. In Scotland, solicitors are required to undertake 20 hours of Continuing Professional Development per year. However, continuing professional training includes a range of activities and the content of the training is self-selected. There is therefore no guarantee that legal professionals receive any training in relation to adjustments for disabled clients.

The training for members of the judiciary is similarly scant. The Judicial Institute of Scotland provides training for Judges, Sheriffs and Justices of the Peace, but this training mostly pertains to optional modules in relation to diversity awareness and equal treatment. The research suggests that the system remains dependent on the ability of an individual judge to recognise that a disability may create an issue that needs to be addressed, without appropriate training, this might not be possible.

Lack of understanding of non-visible disabilities from the justice system

As a direct result of the lack of training (as covered in the previous section), there are barriers in communicating clients’ disabilities and needs to the court, especially for those with non-visible disabilities. Courts often rely on legal representatives to disclose any disabilities and related reasonable adjustments to the court. However, solicitors tend to perceive their priority in relation to identification to be more narrowly focused on

⁹¹ The Advocate’s Gateway, *The Advocate’s Gateway Toolkits*. Available at: <https://www.theadvocatesgateway.org/toolkits-1-1-1>

⁹² Judicial Institute for Scotland, *Equal Treatment Bench Book* (2019). Available at: https://www.judiciary.scot/docs/librariesprovider3/judiciarydocuments/judicial-institute-publications/equal-treatment-bench-book.pdf?sfvrsn=3aa746ad_4

⁹³ Scottish Children’s Reporter Administration, *Development and Piloting of a Children’s Disability Toolkit* (SCRA, 2021). Available at: <https://www.scra.gov.uk/wp-content/uploads/2021/09/SCRA-Disability-Toolkit-Report-2021.pdf>

the court user's capacity to instruct them and to the cases themselves. This means that solicitors only consider disclosure if it affects the court users' capacity to give instructions or impacts the court proceedings in some way. Moreover, some legal representatives may neglect to tell their clients in advance whether their condition will be raised in court so that court users may not expect their condition to be disclosed to the courtroom, causing them unnecessary distress and to feel 'small', 'stupid', and 'thick'.⁹⁴

The lack of training among members of the judiciary also means that judges lack experience in dealing with disabilities and making adjustments. This is particularly important since the lack of statutory or procedural framework means that the burden often falls on the judge to recognise that an issue may arise with regards to the court user's disability. Even if a disability is identified, lack of training often means that court staff, legal representatives and judges do not understand what reasonable adjustments should be made or how to make them. This aligns with LSA survey responses, for example one respondent expressed that being non-verbal meant that they "can't talk" not that that "lack understanding".

There is also a risk that members of the judiciary may feel that people with non-visible disabilities such as mental health conditions and learning disabilities would not be regarded as reliable witnesses, or that impairments are excuses for offending behaviour.⁹⁵ There is therefore a general lack of empathy that seems to perpetuate the effects of non-visible disabilities and severely affect individuals' performance in court. A respondent to the LSA survey reported experiencing a "panic attack during the tribunal" and feeling "mocked by the judge"; another expressed that being "tearful, mix your words up, anxious or forget things" made them look like "the village idiot"; and one reported being unable to "provide a quick summary", "shaking with anxiousness" and becoming more upset when asked "yes, but what are you asking for?".

Difficulties in identification and disclosure of non-visible disabilities

Neither the civil or criminal justice systems were designed to identify disabilities. There seems to be a perception among court staff and judges that the court's responsibility is to ensure that any special needs are met, but not to identify such needs. This is particularly pertinent in civil cases, in which there is a lack of awareness regarding whether it is the responsibility of court staff, legal representatives, or court users to identify and/or to disclose an impairment.

⁹⁴ Rosie McLeod et al, *Court experience of adults with mental health conditions, learning disabilities and limited mental capacity (Report 3: At court)* (Ministry of Justice Research Series 10/10, 2010), 28.

⁹⁵ Equality and Human Rights Commission, *Inclusive justice: a system designed for all* (2020), 35

It is assumed that legal representatives are most likely to make an identification. However, solicitors tend not to consider this a priority and so only disclose such impairments if they believe it would impact the court user's behaviour in court.⁹⁶ Moreover, court users are often unaware that they can apply for reasonable adjustments to be made in civil and family courts. Civil courts in England and Wales have attempted to make this information more widely known by providing leaflets advising users to talk to the staff if they had any special requirements. However, this has proved weak and ineffective, since many of the court users who have non-visible disabilities might have insufficient reading proficiency to understand the written material unassisted; and research has shown that, even if they do understand, they mostly assume that the question relates to physical disability and not to mental health conditions.⁹⁷ Consequently, applications for reasonable adjustments appear to be very rare, with few legal practitioners aware of the possibility. Disabilities or vulnerabilities are often not identified until the day of the court appearance.

As discussed above, due to the lack of a specific framework or procedure for identifying disability or vulnerability, the duty is usually on the judge to make accommodations for special needs. However, research has shown that court staff, magistrates and the judiciary often do not put much effort into identifying potential vulnerabilities in disabled court users. One survey respondent reported that their mental health condition was disclosed in writing but was "not explained in court" and they were therefore "not considered to be a vulnerable witness" when they considered that they should have been.

Another widely held view is that it is the police's responsibility to identify any disabilities and/or vulnerabilities. It is said that in cases where social services and other public agencies have high involvement, judges are more likely to assume that any special needs and vulnerabilities would have been identified prior to the court appearance. However, the reality is that the police often do not communicate this information to the courts, and members of the judiciary often do not feel the need to make any inquiries on the day of the hearing.⁹⁸ Respondents reported that this impacted their "performance" in court and their ability to "control the outcome".

The courts also seem to depend on court users to disclose any non-visible disabilities. This is problematic because they often are reluctant to do so for a variety of reasons, including the lack of privacy, a fear that they could get a punitive outcome, feelings of embarrassment, shame, or insecurity, and a risk of stigmatisation. The majority of court

⁹⁶ n 95, 34.

⁹⁷ Scottish Government, 'Victims, Witnesses, and Justice Reform (Scotland) Bill: factsheet' (2023). Available at: <https://www.gov.scot/publications/victims-witnesses-and-justice-reform-bill-factsheet/pages/special-measures-civil-cases/>

⁹⁸ n 38, 24

users in the civil justice system are reluctant to disclose any non-visible disabilities, as they are fearful or reprisal and vulnerable to intimidation. In particular, organisations supporting tenants of social housing have long complained of the difficulty in persuading witnesses to attend court in relation to anti-social behaviour due to fear of reprisal.⁹⁹ Moreover, even if special needs are identified, information about the necessary adjustments to be made are often not shared effectively across the system. For example, information collected by police or the NHS is often not passed on to the court due to confidentiality issues and the requirement to stay in line with data protection legislation. As a result, the system lacks any framework to take account of the identification of non-visible disabilities in a systemic way and, as a result, reasonable adjustments are frequently not made and individuals' needs unmet.

Court users' difficulties understanding the court system

The use of complex legal language and terminology can prevent people with non-visible disabilities from understanding court proceedings. For example, in criminal proceedings, they may not understand what they have been charged with, and may understand only some or none of what the judge said during their hearing. For some important information can be difficult to retain, as having a cognitive impairment, mental health condition or neuro-diverse condition may cause short attention span, extreme anxiety, and memory loss.¹⁰⁰ If judges and legal representatives lacked awareness of mental health issues, neurodivergent conditions or learning disabilities, court users may experience a sense of exclusion from the proceedings, which research suggests may be more acute in civil and family cases.¹⁰¹ One of the key issues in relation to this is that the limited contact between court users, legal representatives, and the courts in civil cases can mean that legal practitioners are often not aware of court users' conditions until the day of the hearing.¹⁰²

The switch to video hearings over the course of the pandemic worsened the situation for some court users with mental health conditions. Research findings on the Mental Health Tribunal's pandemic response have shown that, in comparison with in-person hearings, patients could experience a lack of mental connection to video or telephone hearings, meaning that the process did not seem real. The advantages of body language and non-

⁹⁹ Civil Justice Council, *Vulnerable Witnesses and Parties Within Civil Proceedings: Current Position and Recommendations for Change* (CJC, 2019) 8.

¹⁰⁰ n 38, 3.

¹⁰¹ Scottish Government, *Vulnerable Witnesses Act – section 9: report* (2023) 10. Available at: <https://www.gov.scot/publications/report-respect-section-9-vulnerable-witnesses-act/pages/4/>

¹⁰² n 98: 41.

verbal cues were also lost, meaning that tribunal members were unable to ‘read the room’.¹⁰³

Civil cases often also rely on written communication prior to a hearing. Court users with mental health conditions, learning disabilities and limited mental capacity may experience difficulties understanding the paperwork, particularly if it contains legal jargon, and would benefit more from face-to-face meetings where legal representatives could explain the court process more appropriately.¹⁰⁴

Court users’ difficulties accessing legal representation

There are two separate issues regarding court users’ difficulties in accessing independent advocacy or legal representation if they have non-visible disabilities. The first is a knowledge issue, with individuals often not knowing what their rights are; and second, the legal services and support available to them not being sufficient to meet the high demand.

In civil cases, guidance in finding and choosing appropriate legal representation is essential, and such guidance will mainly come from social workers, charities or informal networks. Neurodivergent individuals and people with learning disabilities may not know they have legal rights or may not know how to access them.¹⁰⁵ The Scottish Mental Health Law Review found that only around 5% of people who have the right to independent advocacy actually access it.¹⁰⁶ As a result, some individuals may struggle to access legal advice and representation and to be heard.

There is a clear disparity between the supply and demand of lawyers who specialise in working with vulnerable court users. As a result, those who specialise in such work are often inundated with referrals from voluntary sector support organisations as well as from the Office of Public Protection (Office of Public Guardian in Scotland), and report feeling unable to meet the demand.¹⁰⁷ This may explain why several respondents to the survey reported that the legal services agency they contacted failed to “return messages or calls” and, as a result, they felt unheard. Notably, specialist solicitors report no experience of their client group contacting them independently, presumably because their specialism is spread by word of mouth and so does not necessarily reach this group of court users themselves. A common theme in terms of accessing legal services

¹⁰³ Rachel Ormston et al, Civil justice system – pandemic response: research findings’ (Scottish Government, 2023). Available at: <https://www.gov.scot/publications/civil-justice-systems-pandemic-response/pages/1/>

¹⁰⁴ n 95: 17.

¹⁰⁵ Scottish Government, ‘Learning Disabilities, Autism and Neurodivergence Bill: Consultation’ (2023), 48

¹⁰⁶ Scottish Mental Health Law Review: Final Report (2022), 136. Available at: <https://webarchive.nrscotland.gov.uk/20230327160310/https://cms.mentalhealthlawreview.scot/wp-content/uploads/2022/09/SMHLR-FINAL-Report-.pdf>

¹⁰⁷ n 95, 23.

appears to relate to referrals or recommendations to solicitors who lack capacity to provide advice and representation. Another key problem in this area is the time it takes to take instructions and provide advice to disabled people, which is often not adequately accounted for in legal aid rates.

Court users with non-visible disabilities often rely on advocacy and voluntary organisations for advice as to legal representation. However, even such networks have difficulty finding solicitors, with one survey respondent reporting that “[n]obody was doing civil legal aid cases”. Even if representation is found, individuals with non-visible disabilities often have difficulties explaining their case during meetings leaving them feeling misunderstood or unsupported. A respondent reported feeling that their solicitor had “worked against [their] interests and tried to sabotage the progression of [their] case”.

Fear of the costs of legal services is also a barrier to access to justice. A respondent to the survey stated that, due to lack of understanding of the process, they were not aware that “legal aid wouldn’t cover the fees and had so much to pay monthly for years.” Where legal aid solicitors act on cases attracting a fixed fee, it can be difficult to find adequate time to spend with clients with non-visible disabilities. Of note is also the fact that the fees payable to the Office of the Public Guardian were increased from 1 November 2024.¹⁰⁸

Proposals for Change

In light of the above discussion, it is suggested that training and awareness raising about non-visible disability should be implemented in Scotland. Likewise, specific training of judges and other court staff is needed to ensure that people with non-visible disabilities are responded to and that their needs are met. It is worth noting that the Sunflower Scheme, which allows people with non-visible disabilities to be identified by a badge or lanyard should they wish, has been implemented by the court service in England and Wales. On the whole, ensuring that there is adequate legal aid resource to take account of the additional time needed to support clients with non-visible disabilities could make a considerable difference in practice.

9. Recommendations

To achieve access to justice for those with non-visible disabilities in practice, we make the following recommendations relevant to the themes identified in this report:

¹⁰⁸ Office of the Public Guardian (Scotland) News: Fees payable to the Public Guardian to increase from 1 November 2020’ (3rd October 2024).

1. **Greater clarity around the definition of non-visible disability is needed for legal professionals and across the justice system:** this will help to promote a better understanding of the support needs and reasonable adjustments required for those with non-visible disabilities.
2. **Policymakers should address the lack of empirical evidence on the experiences of those with non-visible disabilities, particularly when it comes to their ability to access to legal services and experiences in court:** it is critical that data with respect to different conditions is collected in order to determine the discrete needs of those non-visible disabilities, the way different types of disability might interrelate and to gain a better understanding of the reasonable adjustments which work well (or not) in practice.
3. **Embedding clear processes for identifying non-visible disabilities at different stages of the justice process will make a critical difference to those experiencing discrimination in the resolution of their legal problems:** it is important that uninformed assumptions are not made about non-visible disability. Clear processes are needed to ensure fairness and consistency in how conditions might be identified and what adjustments are suitable whether obtaining early advice and / or legal representation in the courts and tribunals.
4. **A single policy or framework across the civil and criminal justice systems for identifying and responding to the needs of those with non-visible disabilities should be implemented:** the Scottish Courts and Tribunal Service, together with other relevant civil and criminal justice agencies, should consider drafting a single high level policy to guide decision making on how to respond to non-visible disability.
5. **Disability awareness training should be a compulsory part of professional legal education for solicitors in Scotland:** this will help to create change at all levels of the justice system. Training should include knowledge and awareness of both visible and non-visible disability and should include: detailed guidance on how to adjust communication style; different models of advice giving; generally advocating for clients; best practice for engaging with third parties such as translators, advocates and carers; and identifying and making reasonable adjustments at different stages of the justice process. Such training will also complement the development of trauma-informed lawyering approaches in future.
6. **Training should include culturally sensitive awareness that is alive to the ways that non-visible disabilities might be considered across different faiths and cultures:** training on the ways in which faith and culture intersect with non-visible

disability should be carefully researched. It should promote collaboration with relevant civil society organisation and consider referral pathways.

- 7. Communication challenges can inhibit advice seeking by those with non-visible disabilities and adjustments to communication style should be carefully considered:** advice agencies and legal professionals should provide information in a variety of ways and think carefully about support needs, particularly for those with neurodivergent conditions, in order to make legal advice accessible in practice. Clear processes to check what support needs there are at early stages of advice giving, as well as ensuring others in the justice system who may need to be notified throughout the process are kept informed as necessary and where consent is given, is important.
- 8. Continuing training for judges is critical in order to keep pace with best practice developments in the space:** it is critical that judges have access to ongoing training and support in relation to responding to the needs of those with non-visible disabilities in the courts and tribunals. This might include developing understanding and awareness of the ways in which non-visible disability might intersect with other protected characteristics.
- 9. The Scottish Courts and Tribunal Service should consider how best to identify those with non-visible disabilities and thereafter the relevant support and reasonable adjustments required:** facilitating choice and ensuring there is time available for needs to be met, or adjustments made, is key. It is important not to assume that others in the justice process (i.e. before a case reaches court) might have identified and responded to relevant non-visible disabilities. Consideration might be given to the formal implementation of the Sunflower Scheme.
- 10. The discrete needs of those with non-visible disabilities should be considered in relation to the location and accessibility of advice agencies and court buildings:** this include both physical accessibility (location of courts, access ramps, lifts) as well as accessible spaces for those with neurodivergent conditions, for example, visual noise, private rooms, moveable furniture and sensory control (such as adjustable lighting and sound).
- 11. It would be beneficial to provide practical information about what to expect when engaging with support services at different stages:** it is critically important that clear pathways to advice are provided, which give clarity as to each step in the process and fully explain potential possible outcomes, especially for those with neurodivergent conditions. Training for legal professionals and other professionals in the justice system must include how best to clarify process and manage expectations in different ways.

12. Further consideration should be given to the role of intermediaries and advocacy support workers for those with non-visible disabilities: expanding resource to better embed the use of such advocates across different stages of the justice process will better facilitate client agency and empowerment.

Appendix I

Access to Justice for Neurodiverse People and People with Hidden Disabilities – LSA Survey Questions

1. Do you see yourself as neurodiverse or as having a hidden disability?
2. If you feel comfortable to tell us, please tell us more about your neurodiversity or your hidden disability.
3. Have you ever need to get legal advice? This could be from a lawyer, solicitor or an organisation like a law centre, or Citizens Advice Bureau.
4. What town or city was this in?
5. What area of law was it about?
6. Did you find someone to give you advice?
7. Was there anything that made it difficult to get legal advice?
8. If you answered 'yes' above tell us more about what made it difficult.
9. Were you happy with the outcome – the way things turned out?
10. Please tell us more about this.
11. Have you ever needed to take someone to court or tribunal?
12. What town or city was it in?
13. What area of law was it about?
14. Were you represented by a lawyer?
15. Was there anything that made it difficult before, during or after you were in court?
16. If you answered 'yes' please tell us more about what made it difficult.
17. Were you happy with the way things turned out?
18. Please tell us more.
19. Have you ever needed to go to a court or tribunal in a criminal case?
20. What town or city was this in?
21. What area of law was involved?
22. Were you represented by a lawyer?
23. Was there anything that made it difficult for you before, during or after being in court?
24. Please tell us more.
25. Were you happy with the way things turned out?
26. Please tell us more.
27. Is there anything else you would like to tell us about what makes it difficult for neurodiverse people and people with hidden disabilities to get legal advice and access to justice in Scotland?

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