

PE1766/C

Scottish Government submission of 26 February 2020.

This response recognises that although the petition refers to legal aid the Committee expressed an interest in a broader question about private prosecutions.

LEGAL AID

The Scottish Government is committed to reforming the legal aid system in Scotland. There has not been a root and branch review of legal aid legislation for Scotland since the current Act (the Legal Aid (Scotland) Act 1986) was introduced. In recognition of this, and the ambition that Scotland should continue to have a world leading legal aid system, an independent strategic review was commissioned.

In taking forward supported recommendations from the review the Scottish Government committed to a full public consultation, to assist with the development of appropriate legal aid reforms. This consultation ran between 27 June and 19 September 2019. The responses have been analysed and the Scottish Government response to, and analysis of, the consultation will be published shortly.

Notwithstanding, respondents supported many aspects of the change agenda set out in the consultation document, with some respondents, for example, favouring greater use of grants or contracts to facilitate exclusive funding arrangements for particular groups, such as women affected by domestic abuse, people with disabilities, care experienced children, and those with mental health issues.

Consideration was also given to eligibility as part of the legal aid reform process. Legal aid allows individuals on low and moderate incomes to access legal advice and representation services. Currently a person's financial circumstances will usually determine if they are eligible to receive legally aided services, and if legal aid will be available with or without payment of a financial contribution towards the cost of these services. The current financial limits are laid down in legislation. To secure that the current wide scope of legal aid is sustainable, the Scottish Government has followed a policy that those who can afford to pay towards the cost of legal aid services should do so. Responses to the consultation have indicated that fairness is a key concern in respect of any reform for eligibility.

The Scottish Government will work with key stakeholders representing the above groups when considering implementation of changes to the legal aid framework in Scotland.

LEGAL AID FOR PRIVATE PROSECUTIONS

There are at least two, and may be three potential stages to the process of seeking a private prosecution, as well as any actual private prosecution itself. The first is the initial phase in which a person might seek legal advice about the possible basis to pursue a private prosecution. Under the Legal Aid (Scotland) Act 1986 funding is available – subject to a means test – for advice and assistance (A&A) from a solicitor;

that is, advice on the application of Scots law to particular circumstances which have arisen in relation to the person seeking the advice and as to any steps which they might appropriately take, and assistance in taking such steps. A&A would, in principle, be available for the stages prior to the formal commencement of a private prosecution.

The second stage is to seek the Lord Advocate's consent to bring a private prosecution, which is initiated by means of a Bill for Criminal Letters. As the SPICe briefing points out, while it is obligatory to take this step, the Lord Advocate's permission is not absolutely necessary. If it is not granted, an application may then be made directly to the High Court to pass the Bill, or to direct that the Lord Advocate concurs. This would be the third stage. Only if the High Court were to agree to pass the Bill, with or without the Lord Advocate's concurrence, would the private prosecution actually proceed.

The Scottish Legal Aid Board (SLAB) does not have the legislative powers to provide legal aid for representation at any stage in private prosecutions since the 1986 Act provides only for criminal legal aid for accused persons.

However, the 1986 Act provides Scottish Ministers with the power to direct SLAB to make payment from the Legal Aid Fund available in respect of legal advice and representation for procedures or issues not specified in the Act (commonly referred to as making a 'determination'). Requests to Scottish Ministers to make a determination are not uncommon. In general, the basis of consideration that informs advice on whether to grant legal aid focusses on whether any ECHR rights are engaged in the situation presented.

PRIVATE PROSECUTIONS

The Scottish Government believes that the system of public prosecution in Scotland works well, and we have no plans to adjust the current process by which private prosecution can be initiated.

The Opinion of the Court delivered by Lady Dorrian, the Lord Justice Clerk, in the Bill for Criminal Letters by (1) John Linda Stewart and (2) Allan and Aileen Convey against William Payne and (1) Matthew McQuade and Jacqueline McQuade and (2) Yvonne Reilly against Henry Clarke states:

Scotland has for many centuries had a system of public prosecution in which the Lord Advocate is recognised as prosecutor in the public interest. By 1961 this system of public prosecution had become so well-acknowledged and respected that the court was able to say that "private prosecutions have almost gone into disuse" (*McBain v Crichton* 1961 JC 25, Lord Justice General at p29). Although it remains open to a private citizen to apply to the court for permission to bring a private prosecution where the Lord Advocate has declined to prosecute or grant his concurrence to a private prosecution, the circumstances in which such permission may be granted have repeatedly been described as exceptional.

[86] The reasons for the requirement of exceptionality are related to the constitutional role of the Lord Advocate. In *McBain v Crichton* the Lord Justice General (p29) observed that the Lord Advocate:

“... is the recognised prosecutor in the public interest. It is for him, in the exercise of his responsible office, to decide whether he will prosecute in the public interest and at the public expense, and under our constitutional practice this decision is a matter for him, and for him alone. No one can compel him to give his reasons, nor order him to concur in a private prosecution. The basic principle of our system of criminal administration in Scotland is to submit the question of whether there is to be a public prosecution to the impartial and skilled investigation of the Lord Advocate and his department, and the decision whether or not to prosecute is exclusively within his discretion.”