

## Briefing for the Public Petitions Committee

**Petition Number:** [PE 1766](#)

**Main Petitioner:** Andrew Buchan

**Subject:** Legal aid for private criminal prosecutions for unwaged and, or, learning-disabled victims of abuse.

Calls on the Parliament to urge the Scottish Government to change the law to provide free legal aid to people who are unwaged and/or learning-disabled victims of abuse who wish to bring a private prosecution.

### Background

The petitioner wishes legal aid to be made available to certain victims of abuse to enable them to bring private prosecutions.

Broadly, legal aid is currently available to those with low incomes. However, the present legal aid rules would not allow a solicitor to represent someone in relation to a private prosecution.

However, a bigger hurdle for the petitioner is likely to be the difficulty in bringing private prosecutions. The court exercises its discretion to allow private prosecution very rarely and has to be persuaded that the circumstances are “exceptional”.

These issues are discussed in more detail below.

### Legal aid

Legal aid provides financial assistance to enable those on low and moderate incomes to access legal services. The Scottish Legal Aid Board administers legal aid on behalf of the Scottish Government. There are several different types of legal aid, depending on the type of assistance required and the court procedure involved.

There are three types of criminal legal assistance:

- **Advice and Assistance** –allows a solicitor to provide advice, but not representation in court, on any aspect of Scots law.

- **Assistance By Way of Representation (ABWOR)** – a form of Advice and Assistance which enables a solicitor to represent their client in certain, specified legal forums.
- **Criminal Legal Aid** – provides representation in court for those accused under solemn procedure (for more serious crimes) and those who plead not guilty under summary procedure (for less serious crimes).

The only form of legal aid currently available to someone who wishes to bring a private prosecution would be Advice and Assistance. This would cover advice on the legal procedures only – not representation in court nor the initiation of court proceedings by a solicitor on behalf of their client.

Legal aid was made available to several families (including families of some of the victims of the Glasgow bin lorry tragedy) to pursue private prosecutions. This required a specific determination<sup>1</sup> by Scottish Ministers that money should be paid out of the legal aid fund for this purpose.

The then Cabinet Secretary for Justice, Michael Matheson MSP, outlined the Scottish Government’s reasons for making the determination in response to a parliamentary question ([Question S4W-30521](#), from Roderick Campbell MSP). The response made clear that the decision rested on the circumstances of those particular cases.

#### Financial eligibility

Those applying for criminal legal assistance must meet financial eligibility criteria.

Very broadly, Advice and Assistance and ABWOR may be available to someone whose net weekly income does not exceed £245. Net income is income after certain allowances for dependants and essential expenditure are deducted. Applicants cannot have capital assets worth more than £1,716.

Note though, that applicants may be required to make a contribution from their own income towards their legal aid bill. This contribution increases as the applicant’s income approaches £245 per week.

Criminal Legal Aid may be available where meeting the expenses of the case would cause “undue hardship” to the applicant or their dependants. Those who qualify are not required to make a financial contribution to the costs of their case.

An applicant may also have to meet other criteria in order to access legal aid.

#### Private prosecution

Prosecution in Scotland is almost always carried out by the Lord Advocate. He makes his decisions about whether to prosecute on the basis of “the public

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<sup>1</sup> Under Section 4(2)(c) of the Legal Aid (Scotland) Act 1986.

interest”. Procurators fiscal, employed by the Crown Office and Procurator Fiscal Service, act on the Lord Advocate’s behalf.

While it remains theoretically possible, private prosecution is extremely rare in practice. There has only been one successful case in the past 100 years<sup>2</sup>.

In the Glasgow bin lorry case, the [court stated](#) (paragraph 85):

“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.”

In that case, the court found that the circumstances were not exceptional and permission to proceed was refused.

The [SPICe briefing on Petition PE 1633](#) provides more information about private prosecution.

### **Scottish Government Action**

The Scottish Government determined that legal aid should be made available to ask the court for permission to take forward private prosecutions in the Glasgow bin lorry and Convy/Stewart cases. This is discussed in more detail above.

### **Scottish Parliament Action**

The [Scottish Parliament considered Petition PE1633](#), calling for an extension to the right to bring a private prosecution in Scotland. The Justice Committee closed this petition in February 2019. However, initial [correspondence with the Scottish Government](#) and [Crown Office and Procurator Fiscal Service](#) provides useful background information on the issue.

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2 December 2019

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<sup>2</sup> X v Sweeney (1982) SCCR 509.

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