



Briefing for the Public Petitions Committee

Petition Number: [PE 1525](#)

Main Petitioner: Catherine Fraser

Subject: Access to Justice

Calls on the Parliament to urge the Scottish Government to change the law to provide that legal aid is available to defend actions of defamation and challenge judgments in defamation cases.

Background

The petitioner has had personal experience of being involved in a defamation case and believes that the restrictions applying to the receipt of legal aid in these circumstances limit access to justice. She is calling for legal aid for defamation matters to be available on the same basis as for other civil law cases.

Legal aid

Legal aid is financial help towards the cost of legal advice and representation so that people on low and moderate incomes can gain access to the legal system. It is paid for out of public funds and administered by the Scottish Legal Aid Board (SLAB). There are a number of different types of legal aid. "Civil Legal Aid" is the type most relevant to the petitioner's situation.

Civil Legal Aid must be provided by a solicitor and covers proceedings, and related work, in the sheriff court, Court of Session and UK Supreme Court (as well as several other forums). There are some exceptions in relation to the court proceedings for which Civil Legal Aid is available.

There are several tests an applicant must pass in order to qualify for Civil Legal Aid. The three key things the applicant must demonstrate to SLAB are that:

- there is "probable cause" – ie. that there is a plausible legal basis for the case
- "it is reasonable in the particular circumstances of the case" that the applicant should receive legal aid – this covers consideration of the

costs and likely benefits of the action, as well as the likelihood of success¹

- the applicant passes the financial eligibility test

Civil Legal Aid is currently available to those with an income of £26,239 or less **after** deductions for necessary expenditure (eg. rent/mortgage costs) have been made, although an applicant may still be expected to make a significant contribution to their legal costs from income. SLAB also considers capital (such as savings or other assets) when assessing financial eligibility.

Legal aid in defamation cases

The availability of Civil Legal Aid in defamation cases is restricted, so that applicants must meet criteria beyond the tests outlined above if they are to qualify. The restrictions are intended to operate to prevent Civil Legal Aid being available in most defamation cases.

Civil Legal Aid is generally available to defend a “counterclaim” of defamation made in other proceedings – ie. only when the (non-legally aided in this respect) defender in legal proceedings raises a claim of defamation against a (legally-aided) pursuer² whose original action was about other matters. Otherwise, in order to get Civil Legal Aid for defamation, an applicant has to demonstrate that at least one of the following criteria are met. That:

- there is a wider public interest in proceedings (ie. that the case has the potential to produce real benefits for other individuals)
- effective representation is not possible without public funding (considering whether the applicant could, without additional assistance, challenge information before the court and/or present their arguments to the court in an effective manner)
- the European Union directive on access to justice in cross-border disputes³ requires legal aid to be made available

Before 2007, Civil Legal Aid was not available in defamation cases except to defend a counterclaim of defamation. However, the Legal Profession and Legal Aid (Scotland) Act 2007 changed the law in light of the case of *Steel and Morris v the UK*⁴ (the “McLibel” case). This case involved two campaigners who handed out leaflets criticising the food available in McDonald’s restaurants and the practices of the McDonald’s Corporation. McDonald’s sued for defamation, resulting in the longest case in English legal

¹ An example of a situation where the reasonableness test might not be met is where the cost of taking legal action significantly outweighs the likely financial return – eg. pursuing an appeal to the Court of Session over a faulty washing machine

² In Scotland, a pursuer is the person/body initiating court action. The defender is the person/body defending the action.

³ Directive 2003/8/EC.

⁴ 68416/01 [2005] ECHR 103.

history. The campaigners represented themselves throughout due to the non-availability of legal aid for such cases in England.

Ultimately, the campaigners brought a case in the European Court of Human Rights on the basis that the failure to provide legal aid was a breach of the right to a fair trial and the right to freedom of speech guaranteed in the European Convention on Human Rights. The Court found that the UK Government had not done enough to protect the campaigners' rights and awarded compensation. As a result of the legislative changes which flowed from this case, legal aid is now available in defamation cases in the limited circumstances described above.

Legal aid – Advice and Assistance

“Advice and Assistance” is a type of legal aid available to cover advice (but not representation in court) from a solicitor. It is subject to a financial eligibility test only, although the amount of time a solicitor can spend on the matter is usually capped. Advice and Assistance is available for defamation cases but would not assist with representation in court.

Scottish Government Action

The Scottish Government produced the [Civil Legal Aid for Defamation or Verbal Injury Proceedings \(Scotland\) Direction 2010](#), which sets out the criteria highlighted above as additional criteria to be met before Civil Legal Aid can be granted for defamation proceedings. This replaced the [Civil Legal Aid for Defamation or Verbal Injury Proceedings \(Scotland\) Direction 2008](#), which contained slightly different criteria. This, in turn, replaced a 2007 direction.

The Scottish Government has carried out other activity in relation to defamation (for example, consulting on the ability to sue if a deceased person is the subject of defamatory comments), but none of it is relevant to the availability of legal aid.

Scottish Parliament Action

The Scottish Parliament passed the Legal Profession and Legal Aid (Scotland) Act 2007, which amended the Legal Aid (Scotland) Act 1986 to provide for legal aid to be available in limited circumstances in relation to defamation. During Stage 2 proceedings, the then Deputy Minister for Justice (Hugh Henry MSP) stated⁵:

“As the general exclusion of defamation from the scheme will remain in place, legal aid will be approved in only the most exceptional cases.”

The Scottish Parliament has dealt with defamation on a number of other occasions. [Petition PE 504](#) (on behalf of James and Margaret Watson) raised the issue of defamation of those who have been the victims of murder, and the fact that the current law does not provide any basis for defending their

⁵ Scottish Parliament Justice 2 Committee. [Official Report 31 October 2006](#). Col. 2908.

reputations. The petition called for legal aid to be available to the families of deceased victims who wished to take action. Otherwise, the Scottish Parliament's consideration of defamation has not related to the availability of legal aid for defamation proceedings.

Abigail Bremner
Senior Research Specialist

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