RESPONSE TO THE PUBLIC PETITIONS COMMITTEE

by

SCOTTISH LEGAL AID BOARD

in relation to

PETITION PE1525 Calling on the Scottish Government to change the law to provide that legal aid is available to defend actions of defamation and challenge judgements in defamation cases

The Scottish Legal Aid Board (hereafter "the Board") notes the issues upon which the Public Petitions Committee would wish to have the views of the Board. The Board would comment as follows.

1. Comments on the Petition PE1525 generally

The Board is only able to offer brief remarks on the petition. While is it noted that the petitioner describes having sought help from a number of bodies and persons, it is not clear at what stage, an in respect of what issues, the help was sought. The Board has no record of an application for civil legal aid from the petitioner in relation to the proceedings she defended at first instance. It is understood the petitioner was represented by solicitors in those proceedings.

The policy behind the exclusion of defamation from the ambit of legal aid is of course a matter for the Scottish Government. The changes to the law in 2007 removed the exclusion of defamation case from legal aid, through the use of Directions by Scottish Ministers whereby in certain limited circumstances, the exclusion could be circumvented. Although the position between 2007[1] and 2010 was that the bar was set quite high for applicants, with the "exceptionality" requirement applying to all applicants other than those who could rely on the cross-border disputes provision, that changed with the 2010 Direction. The change was perhaps more radical than has been appreciated in all quarters. In relation to the "wider public interest" arm of the Direction, exceptionality went from being a necessary condition, to being completely removed. "Overwhelming importance" as a test was replaced with "effective participation" and in relation to effective participation instead of exceptionality being a necessary condition, it became a sufficient one. That is to say, the effective participation requirement could be established without the need to establish exceptionality, if the Board was satisfied in terms of paragraph 5(1) and (1) of the 2010 Direction, but the exceptionality provision remained to the effect that if exceptionality could be established, then the Board was directed to hold the effective participation test met per paragraph 5(3).

The relevance of these remarks is that the Board would contend that it is not accurate to say that applicants are excluded from obtaining legal aid other than in very exceptional circumstances, in terms of the position since the introduction of the 2010 Direction and the supersession of the 2007 and 2008 Directions.

2. Comments on the discussions at the meeting of the Petitions Committee on 5th August 2014

It is understood from the discussions at the Committee meeting on 5th August that much of the petitioner's concerns have related to her position, and steps open to her, after the judgment against her was pronounced. It is not clear to what extent the issues arising at that stage related to the availability of legal aid in proceedings involving defamation, or to other issues. For any challenge to a decision in a defamation case (presumably by way of appeal) civil legal aid would potentially be available, but the eligibility test remains the same, and apart from financial eligibility, and satisfying the Direction, there remain the tests of probable cause and reasonableness that have to be addressed. That in turn would require an applicant to establish that there was a legal basis for the challenge/appeal and that it was reasonable to grant legal aid. A desire to appeal no matter how earnest, would not suffice in the absence of material to satisfy the statutory tests.

The Board emphasises that there is no Board-derived policy or decision not to fund actions which involve defamation nor indeed would such a step ever be competent or contemplated. The Board is charged with, and effects, administration of the statutory regime.

For completeness the Board notes the Committee discussion about obtaining details in relation to potential expansion of criteria. This is not separately included in the formal request made of the Board by the letter of 7th August 2014 inviting our response, but simply under the general request to comment on the meeting, the Board

[1] i.e. per the 2007 and 2008 versions of the Direction

indicates that it is a matter for the Scottish Government to consider the relevant policy issues, but that the Board will provide such input as is appropriate to assist in any deliberations.

3. Comments on the exceptionality test of the Civil Legal Aid for Defamation or Verbal Injury Proceedings (Scotland) Direction 2010 and comments on exceptional cases

In responding to this point, the Board refers to the explanation of the exceptionality issue provided at paragraph 1 above. Attention is being directed against the exceptionality test, and comment on that will be given, but it is critical and worth repeating that neither the "wider public interest" not the "effective participation" test require exceptionality, and it would be wrong to base an assessment of the current provision on the basis that exceptionality was a hurdle that every applicant had to surmount if their case involves defamation. Put simply, exceptionality was central to the tests in the 2007 and 2008 Directions, but the 2010 Direction radically changed that position.

Exceptionality is defined in paragraph 5(4) of the 2010 Direction:

> 5(4) A case is "exceptional" for the purpose of sub-paragraph (3) if the degree of exceptionality is the same as, or is approximately the same as, in the facts found in those cases in which the Court of Session, the Supreme Court or the European Court of Human Rights has indicated that the absence of public funding for representation violates one or more of the Convention Rights (as defined in the Human Rights Act 1998

The Briefing Paper for the Public Petitions Committee has narrated relevant history, which we simply refer to, pointing in particular to the "McLibel" case[2]. That was and perhaps remains the leading case dealing with the issue of circumstances where the level of work, skill and resources required to conduct a case is so high that convention rights would be violated in the absence of legal representation. In the McLibel case, that was violation of Article 6 (right to fair trial, etc.) and Article 10 (right to freedom of expression). The Board has not had any applications since 2010 in which reference has been made to any other authorities, or for that matter, to any other or additional convention rights, in the context of defamation action applications.

The Board's consideration of "exceptionality", where required, has involved and would continue to involve consideration of such matters. To clarify, however, the Board would not actually envisage that "exceptionality" would figure in applications where the applicant can establish either wider public interest, or an inability effectively to participate as set down by paragraphs 5(1) and 5(2) which are set out below for ease of reference.

> 5(1) This paragraph applies if the Board is satisfied that without public funding for representation the applicant would be unable to bring or defend the proceedings effectively.
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> (2) In considering an applicant's ability to bring or defend the proceedings effectively without public funding for representation, the Board is to take into account the applicant's ability (with the assistance of any accompanying person)—
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> (a) to consider and challenge any document or information before the court; and
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> (b) to present his or her views and arguments to the court in an effective manner.

4. Information on numbers of applicants granted legal aid to defend actions of defamation

The introduction of the 2010 Direction created a significantly different legal framework for legal aid in defamation cases, with the move away from exceptionality as a necessary component. It has not been possible to extract details for pre pre-2010 cases, but generally speaking it is known that pre-2010 Direction there were very few cases indeed where the 2007 or 2008 Directions were satisfied. We would suggest that in fact the pre-2010 Direction picture is perhaps not particularly helpful to the Committee, given the way things moved on with the 2010 Direction.

We have been able to extract details of applications after the commencement date of the 2010 Direction. Before narrating the statistics, by way of explanation, it is worth highlighting that the main statutory test for legal aid involves assessment of probable cause and reasonableness. The Direction, in defamation cases, is in essence an additional test, but traditionally the Board has assessed the standard criteria first. There is no right or wrong approach to the order of the test. However, if an application fails on probable cause, or more commonly,

[2] Steel and Morris v UK 68416/01 [2005] ECHR 103

reasonableness, there may not be any need to form a determined view on whether the Direction would have been met. It is very common to find the applicant does not actually supply enough information to allow the determination to be considered, but there is in any event a sound basis for refusal for other reasons. The effect of this will be seen in the statistics below.

There are a total of 30 persons who have applied for legal aid in connection with defamation between 28th October 2010[3] and 30th September 2014 5 have been granted.

The application outcomes break down as follows:

Legal Aid Granted

Granted (with the Direction being met via effective participation)	**4**
Granted (with the Direction being met via wider public interest)	**1**

Legal Aid Refused

Note the basic statutory test, leaving the separate 2010 Direction criteria to one side, is that the applicant can establish that there is probable cause to litigate, and that it is reasonable to grant legal aid. The references to probable cause and reasonableness below are therefore references to the two prongs of the basic statutory eligibility test. That is to say, in each of the following, the applications, for the reasons indicated, did not meet the basic statutory test, irrespective of the 2010 Direction criteria..

Refused – No Probable Cause, Unreasonable and Direction considered and not met	**0**
Refused – No Probable Cause, Unreasonable and Direction not sufficiently addressed by applicant	**5**
Refused – Probable Cause, but Unreasonable and Direction considered and not met*	**3**
Refused - Probable Cause, but Unreasonable and Direction not sufficiently addressed by applicant	**13**
Abandoned (where the applicant decides not to proceed)	**3**
Rejected (where the application does not meet minimum standards for acceptance)	**1**
Total	**30**

**Note: in these three cases the refusal record in the system does not record detail of in what respect the Direction was not met*

5. Comments on review by the Board of provision of legal aid in defamation cases

The provision of legal aid in defamation cases is regulated by the statutory and regulatory framework for legal aid in Scotland. Policy issues in relation to any changes to that framework are a matter for Scottish Government. The Board seeks to administer the framework in handling applications for legal aid, and to assist applicants, and solicitors acting for applicants, as well as Board staff, the Board publishes and maintains online guidance in the form of handbooks and other published materials. The Board has been reviewing the online guidance in relation to applications for civil legal aid in defamation cases, and some revisals to the guidance have been identified and prepared and will be issued shortly.

[3] The date when the 2010 Direction became effective