Briefing for the Public Petitions Committee

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<th>PE 1645</th>
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<td><strong>Main Petitioner:</strong></td>
<td>James Ward</td>
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<td><strong>Subject:</strong></td>
<td>Legal aid</td>
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Calls on the Parliament to urge the Scottish Government to review legislation relating to access to legal aid in Scotland, particularly in relation to clarity about discretionary powers.

Background

*The petitioner's concern*

The petitioner’s concern is that Scottish Ministers can currently use discretionary powers to decide whether someone can access legal aid. He believes that the powers are not clearly defined, making the law unclear and open to misapplication.

*Legal aid*

Legal aid provides financial assistance to enable those on low and moderate incomes to access legal services. It is funded by the Scottish Government and administered by the Scottish Legal Aid Board (SLAB).

There are various types of legal aid, covering criminal, civil and some tribunal matters. An individual who wishes legal advice can apply for legal aid via their solicitor.

Legal aid is a vital tool in ensuring the right to a fair trial.

Further information about how legal aid operates is available from the SPICe briefing “Legal Aid” (2011). The briefing is not up-to-date in terms of recent policy developments.

*Discretionary powers*

The statutory framework for legal aid is set out in the Legal Aid (Scotland) Act 1986. This has been amended on a number of occasions. Much of the detail is contained in subordinate legislation.
The 1986 Act contains a number of provisions which give Scottish Ministers discretionary powers. However, most do not relate to an ability to decide whether an individual should be awarded legal aid.

**Scottish Ministers power over the Scottish Legal Aid Fund**

It seems most likely that the constituent’s concern stems from the power that Scottish Ministers have to determine that payments should be made from the Scottish Legal Aid Fund. This power is contained in section 4(2)c) of the 1986 Act.

Essentially, this provision enables Scottish Ministers to authorise payments to be made which are outside the normal framework for legal aid. For example, it was this provision which was used to grant legal aid for private prosecution proceedings in relation to the Glasgow bin lorry tragedy.

The legislation gives Scottish Ministers very wide discretion to make payments out of the legal aid fund which would not otherwise be granted. However, the principles of administrative law do create general limits to the way the power can be exercised. For example, it could not be used to make payments which were not connected to legal aid, or which conflicted with the existing rules.

The Scottish Government has described in more detail how a decision to exercise the power would be approached. It states¹:

“...In deciding whether to exercise the power, the Scottish Ministers will assess each case on its merits and whether it is reasonable to grant assistance in the particular circumstances to ensure effective participation in legal proceedings. Accordingly, it is not possible to set out an exhaustive list of factors that are considered. However, the approach taken by Scottish Ministers in considering whether to grant legal aid generally involves consideration of whether –

(a) it is necessary to protect [European Convention on Human Rights] rights

(b) the creation of eg. new civil proceedings in legislation has created a temporary gap which needs to be filled pending amendment of existing regulations.”

It is possible to challenge a ministerial decision in relation to the discretionary power to make payments in the courts. This is done by way of judicial review.

Judicial review looks at the process and legality of official decision-making, rather than the merits of the decision itself. It is also expensive to undertake. This is because judicial review actions must be raised in the Court of Session, Scotland’s most senior civil court. This requires representation from an advocate as well as a solicitor.

Scottish Government Action

On the 1st February 2017 (cols 16 to 20), the Scottish Government announced that it was setting up an independent group to review the legal aid system. The remit of the group is “legal aid in the 21st Century: how best to respond to the changing justice, social, economic, business and technological landscape”.

Separately, the Scottish Government is undertaking work to simplify and streamline the current legal aid system. Further information is available from the Scottish Legal Aid Board’s website.

Scottish Parliament Action

The Scottish Parliament has considered legal aid issues on a number of occasions. Previous Justice Committees have carried out Stage 1 scrutiny of two Bills dealing with legal aid. In the first session of the Scottish Parliament, the Justice 1 Committee carried out an inquiry into legal aid (2001).

The 2016 manifestos of the SNP, Scottish Conservatives, Scottish Labour and the Scottish Greens all contained a commitment to reviewing legal aid.

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