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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Damages (Investment Returns and Periodical Payments (Scotland) Bill at Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meetings on 4 September, 2 and 23 October, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Damages (Investment Returns and Periodical Payments) (Scotland) Bill.ⁱ The Scottish Government issued a Delegated Powers Memorandum (“DPM”).ⁱⁱ
2. The Committee submits this report to the lead Committee for the Bill (the Economy, Energy and Fair Work Committee) under Rule 9.6.2 of Standing Orders.
3. This Scottish Government Bill was introduced by the Cabinet Secretary for Justice on 14 June 2018.

ⁱ The Bill as introduced is available [here](#).

ⁱⁱ The Delegated Powers Memorandum is available [here](#).

Overview of the Bill

4. The Bill consists of 9 sections and one schedule.
5. Part 1 of the Bill makes provision for a new statutory regime for calculating the personal injury discount rate which should be applied to future pecuniary losses in personal injury cases. Section 1 requires a court to take account of the rate of return which is to be set by the official rate assessor. Section 2 and the schedule to the Bill set out the detail of how the rate is to be reviewed and set by the rate-assessor.
6. Part 2 of the Bill contains provisions which give courts the power to impose periodical payment orders for future pecuniary loss in personal injury actions. It also contains provisions for the variation and suspension of periodical payment orders and similar agreements reached by parties.
7. Part 3 of the Bill contains general and ancillary provisions.

Delegated Powers Provisions

8. At its meeting on 4 September 2018, the Committee agreed to write to the Scottish Government to raise questions in relation to the delegated powers provisions in new section 2C of the 1996 Act (section 3 of the Bill).

Part 2 – periodical payments of damages

Section 3 – Award, continuity and index linking

New section 2C of the 1996 Act – list of recognised bodies and office-holders

- **Power conferred on: the Scottish Ministers**
- **Power exercisable by: regulations**
- **Parliamentary procedure: negative**

Provisions

9. Section 2C(7)(a) of the 1996 Act (as inserted by section 3(2) of the Bill) provides the Scottish Ministers with a power to add to the list in new section 2C(6) of the 1996 Act of recognised bodies and office-holders that the court are able to assume are capable of reasonably secure continuity of payments under a periodical payments order. These new entries are limited to health service bodies or non-government bodies.
10. Section 2C(7)(b) allows the Scottish Ministers to create exceptions to an entry which was originally contained in the list in new section 2C(6). A periodical payment order can only be made by the court where it is satisfied that the continuity of payment under the order would be reasonably secure.

Committee consideration

11. The Committee queried, in relation to the powers in section 2C(7) generally, why, given these powers allow primary legislation to be amended by subordinate legislation, it is appropriate for the powers to be subject to the negative rather than the affirmative procedure.
12. In relation to section 2C(7)(b), the Committee sought an explanation of the circumstances in which the Scottish Government anticipates this power will be used to provide for an exception to the entries in section 2C(6) and why it is appropriate for this power to be delegated.
13. The Committee's questions, and the response received from the Scottish Government to those questions, are reproduced in the Annex.

Recommendations

14. At its meeting on 2 October, the Committee considered the Scottish Government's response and was content with the explanation given by the Scottish Government in answer to the Committee's questions. The Committee agreed that it did not need to draw the attention of the Parliament to the delegated powers.

15. The Committee was also content with the remaining powers in the Bill:
- Section 1 – Assumed return on investment - New section B1(4)(b) of the 1996 Act
 - Section 2 – Process for setting rate of return - New Schedule B1 of the 1996 Act, paragraph 8 – Returns-based assessment: modification of period
 - Section 2 – Process for setting rate of return - New Schedule B1 of the 1996 Act, paragraph 9(2) – Returns-based assessment: inflation
 - Section 2 – Process for setting rate of return - New Schedule B1 of the 1996 Act, paragraph 11 – Standard adjustments
 - Section 2 – Process for setting rate of return - New Schedule B1 of the 1996 Act, paragraph 14 – Details within portfolio: ascribing meaning
 - Section 2 – Process for setting rate of return - New Schedule B1 of the 1996 Act, paragraph 15 – Details within portfolio: types of investments and allocations
 - Section 2 – Process for setting rate of return - New Schedule B1 of the 1996 Act, paragraph 21 – Single or multiple rates
 - Section 3 – Award, continuity and index linking - New section 2D of the 1996 Act – alternative indexation basis
 - Section 7 – Ancillary provision
 - Section 8 – Commencement

Recommendation

16. **Accordingly, the Committee therefore reports that it is content with the delegated powers provisions contained in the Bill.**

Annex

LETTER FROM THE SCOTTISH GOVERNMENT OF 13 SEPTEMBER 2018 RESPONDING TO THE COMMITTEE'S QUESTION

DAMAGES (INVESTMENT RETURNS AND PERIODICAL PAYMENTS) (SCOTLAND) BILL AT STAGE ONE

Thank you for your letter of 5 September to James Hynd in which you seek a further explanation on the powers contained at new section 2C of the Damages Act 1996 as inserted by section 3 of the Damages (Investment Returns and Periodical Payments) (Scotland) Bill ("the Bill"). It has been passed to me to reply as my team has policy responsibility for the Bill.

For ease of reference I have replicated the questions asked by the Committee and set out our corresponding explanation below.

(1) In relation to the powers in section 2C(7) generally, the Committee asks the Scottish Government for a further explanation of why, given these powers allow primary legislation to be amended by subordinate legislation, it is appropriate for the powers to be subject to the negative rather than the affirmative procedure.

As set out in the Delegated Powers Memorandum the power is essentially one of care and maintenance which will allow Scottish Ministers to add bodies to the list to ensure that it is current and relevant. The fact that a power authorises the amendment of primary legislation is not determinative of whether the power should be subject to the affirmative, as opposed to the negative, procedure. Rather it is the nature and substance of what can be done with the power which should count.

The inclusion of a body or office-holder in the list at section 2C(6) has two effects. Firstly, it engages section 2C(1)(b) so that, if the body or office-holder is to be the source of a periodical payment, then a court is to assume that the continuity of that payment is reasonably secure, and the court is permitted to make the periodical payment order (as the terms of section 2(1A) are satisfied). That assumption is not absolute: it can be rebutted by evidence to the contrary. Secondly, it engages section 2C(3)(b) so that the method of making a periodical payment can be changed without the need to apply to the court to vary the method of payment provided for in the periodical payment order. Both of these effects avoid the need for unnecessary court procedure where it has already been determined in the legislation that the body or office-holder will be in a financial position which can be taken as providing reasonable security of continuity of payment.

The powers to adjust the section 2C(6) list do not therefore permit a significant change to the principles of how the periodical payment orders regime is to operate. It provides some necessary flexibility.

For comparison, the equivalent power in England and Wales is also subject to negative procedure (see section 2A(2) of the Damages Act 1996 as it applies in England and Wales). The list of "government or health bodies" in England and Wales is contained entirely in subordinate legislation subject to negative procedure.

The Scottish Government would maintain that the choice of negative procedure is the most proportionate for this type of power, striking an appropriate balance between the

significance of the legal effects which would flow from the exercise of the power and an appropriate use of parliamentary time and that there is no reason in principle (as far as we can see) why negative procedure is not appropriate.

(2) In relation to section 2C(7)(b), the Committee asks the Scottish Government for an explanation of the circumstances in which it anticipates this power will be used to provide for an exception to the entries in section 2C(6) and why it is appropriate for this power to be delegated.

Whilst we consider that the bodies set out at section 2C(6) would satisfy the requirement in 2C(1) which sets the threshold as 'reasonably secure', we cannot be certain that in the future this will always be the case. At some point in the future the nature and status of a body may change in a way that results in them no longer meeting the 'reasonably secure' test. In which case we would wish to make them an exception to the bodies covered by 2C(6). We do accept that this may be an unlikely and rare occurrence.

The power is therefore a means of dealing with what are generally unforeseen matters and is intended to future proof the provisions to deal with the risk that a designated body which is no longer reasonably secure would present to a pursuer. It is therefore very difficult to provide examples as the reason that the power is needed is because the circumstances currently remain unforeseen and may only transpire once the Bill is enacted and in operation.

