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Graham Simpson MSP
Convener
Delegated Powers and Law Reform Committee
Scottish Parliament
Edinburgh
EH99 1SP

16 April 2018

Dear Graham,

You will recall that I gave an undertaking to notify the Delegated Powers and Law Reform Committee in advance of any proposal to introduce new delegated powers at Stage 3 of a Bill. I am writing to notify the Committee that the Government intends to bring forward an amendment providing for a new delegated power at Stage 3 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill scheduled for 26 April, to be subject to the affirmative procedure so as to allow maximum parliamentary scrutiny.

The Bill will introduce group proceedings (sometimes known as “class actions” or “multi-party actions”) into the Scottish courts for the first time. The Bill as introduced provided for “opt-in” procedure only, which means that each group member must give express consent to being part of the group. Opt-in procedure alone is a major step forward for Scots law and it will take the Scottish Civil Justice Council some time to develop appropriate Court of Session rules.

The group proceedings provisions were amended at Stage 2 on 6 March. Amendments lodged by Liam McArthur MSP widen group proceedings to include “opt-out” as well as opt-in” proceedings. This is a significant policy shift for the Bill raising new issues of practice and principle, and additional challenges for the Scottish Civil Justice Council.

Opt-out procedure means that individual claims are brought within the group **without** each individual’s express consent. A person might even fall within the group without their knowledge. Opt-out procedure therefore gives rise to additional difficult questions of substantive law, as highlighted in a letter sent by the Lord President of the Court of Session to the Justice Committee on 22 February (copy attached).

Another relevant development is the recent publication of the report “An independent strategic review of legal aid in Scotland” which proposes that there be public legal assistance for group proceedings:

<http://www.gov.scot/About/Review/legal-aid-review>.

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New delegated power

The Government does not seek to reverse the Justice Committee's vote at Stage 2, but is faced with the situation that there is no provision in the Bill to deal with substantive law matters such as aggregate or "global" damages. It will be necessary to devise provisions that ensure that adequate compensation is paid to individuals, who may be vulnerable and whose legal entitlements need to be protected. There is also the question of the legal aid complexities raised by opt-out procedure and the Lord President's points require to be addressed in full.

The Government is also mindful that evidence and debate at Stage 1 of the Bill focused on opt-in procedure, as provided for in the the Bill as introduced, and there has been no substantive debate on opt-out procedure. The issues arising in relation to opt-out procedure are substantially different (as indicated by the Lord President).

The Government therefore proposes to lodge an amendment at stage 3 so that the Scottish Ministers are enabled to make further provision about group proceedings in regulations. The power is intended to allow the Scottish Ministers to deal with a range of issues arising as a result of the introduction of opt-out group proceedings and will extend to the modification of rules of law or enactments, for example the law of prescription and limitation or legal aid legislation. The power would not, however, extend to the modification of the law which determines whether a person has a claim. The power would be limited to group procedure so where an individual chooses to litigate individually their legal position would be entirely unaffected.

I hope that this notification is helpful to the Committee and that the Committee welcomes the Government's efforts to support the Justice Committee's vote at Stage 2.



Joe FitzPatrick

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The Scottish Parliament, Edinburgh EH99 1SP
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The Rt Hon Lord Carloway
Lord President

Parliament House
Edinburgh, EH1 1RQ

22 February 2018

Margaret Mitchell, MSP
Convenor,
Justice Committee
The Scottish Parliament
EDINBURGH
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Dear Convenor,

**Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill
Stage 2 Amendments**

I have had an opportunity to consider the amendments to the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill ("the Bill") that have been lodged for consideration at Stage 2. In the course of doing so I have identified a number that may give rise to operational or practical difficulties. I have thought it appropriate to draw these to the attention of the Committee before the amendments are considered.

Section 8

Amendment 6 would result in the benefit of costs protection being lost where a pursuer in personal injury proceedings fails to beat a tender. A specific reference to tenders in primary legislation may be problematic. The Court of Session has the power to regulate judicial settlements by making appropriate rules. This includes the power to replace tenders with some other type of formal offer in settlement. This was recommended by the Scottish Civil Courts Review and will be considered in the context of the Scottish Civil Justice Council's rules re-write project. I am concerned that a reference to tenders in primary legislation would restrict the Court's ability to regulate practice in this area.

In addition, the proposed amendment does not allow account to be taken of when the tender is lodged. If that is correct, the benefit of costs protection would be lost regardless of whether the tender was one that had been lodged with the defences, or one lodged a matter of days prior to the conclusion of proceedings.

In the event of the introduction of a pre-action protocol for claims based on clinical negligence, amendment 7 would result in the benefit of costs protection being lost if a pursuer had unreasonably failed to accept an offer in settlement made under the protocol. While there is an existing pre-action protocol that requires to be followed in relation to certain categories of personal injury claim, and while pre-action protocols for other forms of personal injury claim are in contemplation, the failure to accept an offer made under those protocols would not attract the same sanction. The Committee may therefore take the view that the amendment would be anomalous in both its operation and effect.

Amendment 8 would result in the benefit of costs protection being lost where proceedings were summarily dismissed. The introduction of a general power of summary disposal was recommended by the Scottish Civil Courts Review, and this will be considered as part of the current rules re-write project. However, the Committee should be aware that the existing rules of court do not provide for the "summary dismissal" of a personal injury action, although a claim can be dismissed due to inordinate or inexcusable delay.

Section 17

Any extension of the Group Proceedings provisions of the Bill to permit the adoption of an 'opt-out' model should be approached with considerable caution. The practical and legal challenges presented by an 'opt-out' model are significantly greater than those presented by an 'opt-in' model. One example is the potential extra-territorial effect of orders granted in opt-out proceedings, particularly when a deemed member of a group would otherwise have had the option of raising proceedings in a different jurisdiction. I would urge the Committee to satisfy itself that all such issues have been adequately addressed before adopting amendments 13 to 15.

Yours Sincerely
