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Mr A Proudfoot
Clerk
Delegated Powers and Law Reform Committee
Room T1:01
Scottish Parliament
EH99 1SP

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Dear Andrew

**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, the 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 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.

Yours sincerely

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