

Euan Donald
Clerk to the Delegated Powers and Law Reform Committee
Room T1.01
Scottish Parliament
EH99 1SP



26 September 2017

Dear Euan

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill at Stage 1

Thank you for your letter of 13 September 2017 to James Hynd, the Head of the Cabinet, Parliament and Governance Division of the Scottish Government, setting out questions raised by the Delegated Powers and Law Reform Committee in relation to the above Bill. I am replying on behalf of the Scottish Government as I am part of the Bill team.

The Scottish Government was asked in relation to section 5(1)(b):

To explain further why it requires a power to exclude other types of civil proceedings in the future. If there were other such areas, what prohibits the Scottish Government from identifying them now and placing them on the face of the Bill?

The Scottish Government responds as follows:

The Committee is correct in pointing out that Sheriff Principal James Taylor only recommended that it would be inappropriate for success fee agreements to be used in family actions. This is because the resolution sought in family proceedings will not necessarily be a financial award (though that may be part of the resolution) from which a success fee could be paid: as Sheriff Principal Taylor notes, the court may require to make a range of different orders dealing with various aspects of matrimonial breakdown aside from purely financial matters. This may turn out to be the case in other kinds of proceedings as well.

The Scottish Government has an open mind as to whether there are any other types of civil proceedings which should be excluded from the use of success fee agreements. That is not to say, however, that it might become apparent in the future that a particular kind of civil proceedings might be inappropriate for the use of success fee agreements. For example, a new type of civil proceedings created by future legislation which could be legislation of the UK Parliament. The power in section 5(1)(b) is intended to avoid the possibility – however remote – that it might become necessary to exclude that kind of civil proceedings by regulations.

The Scottish Government was asked in relation to section 7(4):

To explain why the power in subsection (4) is necessary and proportionate. Could the power be expressed more narrowly and still obtain the policy objective of enhancing the certainty, predictability and transparency of success fee agreements?

In particular, the Committee asked the Scottish Government to explain why it is considered necessary to take a power to amend all of Part 1 of the Bill and to provide examples of the sorts of modifications that it considers may need to be made to the provisions in Part 1 using the powers in section 7(3) and (4).

The Scottish Government responds as follows:

The Scottish Government does not accept that the power in subsections (3) and (4) is unjustified or unduly wide. Provision in exercise of subsection (4) would be limited to the matters permissible in terms of subsection (3) and would be made in pursuance of the important policy objective of certainty, predictability and transparency of success fee agreements. Amendments to Part 1 of the Bill may become necessary in the future depending on the experience of the operation of success fee agreements in the years ahead. The Scottish Government would wish to be able to react to any anomalies or abuses concerning success fee agreements that may emerge and that could imperil the policy objectives referred to.

The Scottish Government was asked in relation to section 9(3):

To explain why section 9 does not include a provision equivalent to sections 8(6), 10(5) and 11(3) of the Bill.

The Scottish Government responds as follows:

The Scottish Government takes the view that court rules could be made under the core rule making powers in sections 103 and 104 of the Courts Reform (Scotland) Act 2014 about payments to charities. Sections 8(6), 10(5) and 11(3) of the Bill allow court rules to make provision for exceptions or limitations to the provision made in those sections. As it is intended that rules of court ancillary to section 9 would be in the nature of complementary or supplementary provisions, no specific provision about court rules is needed in that section.

We hope that the Committee will find the information provided helpful.

Hamish Goodall
Scottish Government