PROPOSED DAMAGES (SCOTLAND) BILL

STATEMENT OF REASONS BY BILL BUTLER MSP ON WHY CONSULTATION ON THE DRAFT PROPOSAL IS NOT REQUIRED

Background to proposal

1. In line with Rule 9.14.3 of Standing Orders, my draft proposal for a Damages (Scotland) Bill was lodged on 29 April 2009. The proposal is for a Bill—

in relation to rights to damages in respect of personal injuries and death.

2. At present, the legislation concerned with the law of damages in respect of death from personal injury is the Damages (Scotland) Act 1976. Two types of claim for damages arise on the death of a person from personal injury: the victim's own claim which can transmit to his or her executor and a claim by the deceased's relatives.

3. The Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 changed the law in relation to claims for damages where a person dies of mesothelioma. As a result the deceased's immediate family can now claim damages for non-financial loss (such as loss of the deceased's society, support and services) even although the deceased may have obtained damages or settled their claim before they died. Mesothelioma victims no longer have to decide whether or not to pursue their own claims while alive: they can do so without affecting the separate right of their immediate family to claim damages for non-financial loss after their death.

4. When the Mesothelioma Bill was being debated in the Scottish Parliament, the then Scottish Ministers decided that some aspects of the law of damages for wrongful death merited further examination. The Scottish Law Commission (SLC) was asked to undertake a review of the law and, in particular, the provisions of the Damages (Scotland) Act 1976.

5. That Act remains the foundation of the rules governing damages for wrongful death. However, in its Report on Damages for Wrongful Death, published 30 September 2008, the SLC concluded that there are some areas of the current law which no longer reflect the economic realities of modern family structures and reform was advisable. In addition, it felt reform was necessary, as the Act had become over-complex and contained inaccuracies as a consequence of numerous amendments made to it.

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1 Mesothelioma is a form of cancer that is almost always caused by exposure to asbestos. It is a cancer of mesothelial cells. These cells cover the outer surface of most of the internal body organs, forming a lining that is sometimes called the mesothelium.


3 Amendments include: Damages (Scotland) Act 1993 (c.5); Administration of Justice Act 1982 (c.53); International Transport Conventions Act 1983 (c.14); Consumer Protection Act 1987 (c.43); Antarctic Minerals Act 1989 (c.21); Law Reforms (Parent and Child)(Scotland)
6. Having read the report and discussed the matter with Professor Thomson, the lead Commissioner on the project, I believe that the current system of damages for wrongful deaths can be improved and reform should be implemented urgently. I am proposing to introduce the appropriate legislation as a Member’s Bill, which is supported by the work carried out by the SLC.

Consultation
7. A Discussion Paper on Damages for Wrongful Death (no.135) was published by the Scottish Law Commission on 1 August 2007. The Discussion Paper invited comments on a number of questions relating to the reform of the law in cases where someone dies as a result of personal injury. The paper – which is the equivalent to a consultation paper – was issued to a wide range of organisations. On the day of publication of the paper, the SLC held a news conference and gave interviews about the content of the paper. The news conference was later broadcast on Scottish television news. The paper was also made available on the SLC’s website for interested parties to download.

8. The discussion paper produced 15 formal responses and the majority of these expressed support for the idea of reform in the areas of the Bill under discussion. These views were adopted by the SLC and informed its final recommendations. The Report sets out the separate areas of the draft Bill and discusses the responses.

9. The SLC was assisted throughout its deliberations by an advisory group of legal practitioners and academics. The group provided comment and practical advice during the process, in particular on issues that emerged from the consultation paper (and which are set out in the Report).

10. Following the consultation period, the SLC analysed all the responses and published its Report on Damages for Wrongful Death on 30 September 2008. The Report is in three parts – an introduction, an outline of the current law and the recommendations for reform – and examines each of the issues posed in the Discussion Paper. It places the responses in the context of those issues and then makes a recommendation. The final list of recommendations totals 15. This detailed work has informed the production of a draft Bill which is annexed to the Report.


Statement of reasons
12. In relation to my draft proposal for this Bill, I do not consider that further consultation is required for the following reasons.

Act 1986 (c.9); Civil Partnership Act 2004 (c.33); Family Law (Scotland) Act 2006 asp2; Rights of Relatives to Damages (Mesothelioma)(Scotland) Act 2007 asp 18.
13. The Scottish Law Commission carried out a wide consultation which was robust, open and transparent. The SLC also ensured that the consultation paper was specifically targeted at certain organisations in an attempt to attract impartial analysis and an informed response to the proposals.

14. There have been further opportunities for key stakeholders and members of the public to express their views on the proposal subject matter as the Discussion Paper has been available on the SLC’s website since August 2007.

15. I have continued to take an interest in this issue since the SLC’s consultation period ended. I was aware that the report by the SLC on Damages for Wrongful Death was in response to a reference in September 2006 from Scottish Ministers under Section 3(1)(e) of the Law Commission Act 1965. Since the Report's publication, I have met with, amongst others, Professor Joseph M. Thomson, a Commissioner and signatory to the Report. His advice, and that of other legal professionals, has convinced me of the need for urgent reform in this area of law in Scotland. Views being expressed to me outwith any Bill proposal consultation do not differ from those expressed within the Bill proposal consultation period therefore I consider that there is no reason to consider that stakeholder/public views have altered significantly.

16. There have been no developments or changes in the relation to the damages system in Scotland since the consultation period ended. Therefore there appears to be no reason to issue another consultation paper to consultees on the same issues as were covered in the SLC’s Discussion Paper.

17. I consider that further consultation on the same proposal would duplicate effort, incur unnecessary cost and could create the impression of 'over consultation'

18. I do not consider that a further consultation exercise need be conducted on my proposal for a Bill for the reasons set out above. I believe that there is ample published, current and pertinent information to help test, develop and refine my specific proposal and proceed with the development of the Bill’s policy and its eventual production.

19. I understand that this statement is not about the merits or demerits of the proposed Bill. I appreciate that it is a matter for the Committee to decide if there has been enough consultation on the policy objectives of the proposed Bill. My own view is that we should not send the proposal out for consultation in the public domain again - at public expense - and start the process again.

**Conclusion**

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6 The Damages (Asbestos-related Conditions)(Scotland) Act 2009 asp 4, which makes changes to the law of damages, has not been brought into force as yet.
20. The proposed Bill largely restates the existing law and removes some inaccuracies and ambiguities. However, the major reform is to simplify the way patrimonial\textsuperscript{7} loss to the deceased’s family is calculated. The new formula has been approved by lawyers who represent the families of deceased persons and the defenders’ insurance companies. They were agreed that the reform is sensible, will save legal costs and result in speedier and just resolution of cases. I therefore request the Justice Committee consider this statement of reasons and confirm that it is satisfied with the reasons for not consulting further on the draft proposal.

Bill Butler MSP
29 April 2009

\textsuperscript{7} Inherited or inheritable by – usually legal – rules; a thing, which comes from the father, and by extension, from the mother or other ancestor.