Damages (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament's Standing Orders in relation to the Damages (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 3–EN);
- a Financial Memorandum (SP Bill 3–FM);
- a Policy Memorandum (SP Bill 3–PM);
- statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 3–LC).

3. This Memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

Outline of Bill provisions

4. The Bill implements recommendations of the Scottish Law Commission (SLC) published in its 2024 Report on Damages for Personal Injury. The SLC's recommendations focus on four areas: limitation and asbestos-related disease; damages for services; deductions from damages; and management of children's awards of damages. The Bill also includes provision updating and adding flexibility to how allowance is made for inflation when the personal injury discount rate (PIDR) is being calculated; and when calculating a periodical payment under the default arrangements for a periodical payment order (PPO).

5. In general terms, the Bill aims to achieve greater fairness in cases about damages for personal injury. In particular, the Bill does this by:

- Introducing a new legislative provision altering the application of time-bar rules by distinguishing asymptomatic asbestos-related conditions from symptomatic asbestos-related conditions, such that failure to raise an action within the limitation period for an asymptomatic condition such as pleural plaques, would not preclude an injured person from subsequently raising an action for a symptomatic asbestos-related condition such as mesothelioma.
- In the context of compensation for services rendered: (i) by relatives to an injured person, by removing the requirement that the person delivering the services be a relative and so include any person such as a friend or neighbour, and (ii) by an injured person to their relatives, redefining 'relative' to include persons accepted into a family as a parent, grandparent, sibling, or grandchild of the injured person, or an ex-cohabitant of the injured person.
- Clarifying the deductibility of payments made to an injured employee from a Permanent Health Insurance (PHI) scheme.
- Making provision, similar in effect to section 2(4) of the Law Reform (Personal Injuries) Act 1948, that an injured person is entitled to opt for private care and accommodation rather than rely on local authority provision where it is available.
- Providing that the court, when considering making an award of damages to a child, is to have regard to: (i) the welfare of the child, (ii) that no court order may be made unless the court considers it would be better for the child that the order be made than that no order be made, and (iii) the views of the child.
- Enhancing the role of the court and the Accountant of Court in supervising awards of damages made to children by imposing a duty on the court to inquire into the administration of an award of damages made to a child and to remit the matter to the Accountant of Court for consideration.
- In relation to both the PIDR and PPOs, the Bill firstly, updates the default index used for the calculation of inflation from the retail prices index (RPI) to the consumers prices index (CPI), and, secondly, will allow for inflation to be accounted for in a way which more accurately reflects the inflation actually experienced by awards of damages for personal injury. It does so by giving the Scottish Ministers powers to prescribe an adjustment to the default rate.

6. The provision under the last item listed above does not result from the SLC's work but was separately identified by the Scottish Government as a necessary reform[1] and is within the same subject matter as the SLC's recommendations, being concerned with the law of damages for personal injury.

Rationale for subordinate legislation

7. The Scottish Government has had regard, when deciding where and how provisions should be set out in subordinate legislation rather than on the face of the Bill, to the need to:

[1] See the Scottish Government's consultation on Personal injury discount rate: inflation index and determining the judicial rate of interest, which concluded in June 2026.

- strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances;
- make proper use of valuable parliamentary time;
- take account of the likely frequency of amendment;
- allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation; and
- anticipate unexpected issues arising which might otherwise frustrate the purpose of provisions in primary legislation approved by the Parliament.

8. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power was taken in the Bill and, where relevant, why the selected form of parliamentary procedure has been considered appropriate.

Delegated powers

Section 8(3) inserting section 2D(6A) of the Damages Act 1996 ("1996 Act") – Periodical payment orders: statutory basis of alteration for inflation

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

9. Section 8(3) inserts subsections (6A) to (6C) into section 2D of the 1996 Act so as to enable the Scottish Ministers, by regulations, to add (or subtract) a number of percentage points to (or from) the rate of inflation by which the amount of a periodical payment is altered, and which is deemed to be incorporated in an order for periodical payments.

Reason for taking power

10. A periodical payment order (PPO) is a court order which requires a defender to pay damages compensation in the form of regular payments to the pursuer rather than via a single lump sum payment. A PPO is capable of being varied over time and linked to an inflation index so that if a pursuer's needs change or economic conditions change, the pursuer is not impacted in the same way as they may have been had they taken their award of damages in the form of a single lump sum. Once Part 2 of the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 is in force, PPOs will, by default, be deemed to include a requirement for the amount of payments to be altered at intervals, thereby

allowing the real value of periodical payments to be preserved over the whole period for which they are payable.[2] In the absence of provision in the court's order to the contrary, the payments are to be altered by reference to the Retail Prices Index (RPI), although the Bill seeks to change this to the Consumer Prices Index (CPI).

11. This power enables the Scottish Ministers to add a number of percentage points to (or subtract such a number from) the rate of inflation in the default index, by which the amount of a periodical payment is altered. Given that damages inflation will lie somewhere between prices-inflation and wages-inflation, the regulations will, in effect, provide for the rate of inflation to be CPI inflation plus 0.5% for example, or Average Weekly Earnings inflation minus 0.5%. This flexibility to vary the rate of inflation in the default inflation index used to adjust periodical payments will mean that the default inflation rate can, for example, more accurately reflect the inflationary pressures faced by an injured person. These are likely to be a mix of prices inflation and earnings inflation. Currently the Scottish Ministers are able only to prescribe a default prices or earning index and there is no ability to adjust the rate of inflation in that index, which can result in some injured persons being over- or under-compensated depending on what index is used. It would be disproportionate to use primary legislation to make these adjustments at the level of frequency that will be required and primary legislation would not be able to respond sufficiently quickly to economic circumstances. The PIDR must, by statue, be reviewed every five years, with the next review to take place in 2029.[3]

Choice of procedure

12. The affirmative procedure is considered to be appropriate given this regulation making power enables the adjustment of a rate of inflation that is provided for in in primary legislation.

[2] The Scottish Civil Justice Council are considering the need for court rules, upon which the Scottish Government considers commencement of Part 2 is dependent.
[3] See paragraph 2 of schedule B1 of the Damages Act 1996. The Scottish Ministers can trigger an early review without disturbing the five-year cycle.

Section 8(4) amending section 2D(7)(a) of the 1996 Act – Periodical payment orders: statutory basis of alteration for inflation

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

13. Section 8(4) substituting new section 2D(7)(a) of the 1996 Act enables the Scottish Ministers, by regulations, to make different provision for different circumstances in respect of the new power under section 2D(6A) of the 1996 Act to adjust the inflation rate. There is an existing regulation-making power under regulation 2D, which is the power to prescribe an alternative to the retail prices index. Under existing paragraph (a) of section 2D(7), that regulation-making power may make different provision for different circumstances. Substituted paragraph (a) will provide that, in respect of both the existing power and the new power, as well as the existing ability to make different provision for different circumstances, there will be the ability to make incidental, supplementary, consequential, transitional, transitory or saving provision as appropriate. There will also be the ability in respect of both powers for regulations to modify any enactment (including an Act of the Scottish Parliament).

Reason for taking power

14. This power is to allow flexibility, such as accommodating situations where there is a change in measure or adjustment mid-way through a 12-month period, or otherwise to address any unforeseen circumstances which may arise. For example, if there is a periodical payment to be paid monthly this would require adjustment of the default inflation index to take into account the fact that the calculation of each payment would be different from the calculation of a periodical payment paid annually. The same need for transitional or transitory provision to deal with part-year changes is evident in relation to the existing power to prescribe an alternative inflation measure, so the ancillary powers are applied to that power too (the existing power under section 2D(7)(a) does not allow transitional or transitory provision to be made and there is none elsewhere in the 1996 Act). In respect of both regulation-making powers, to achieve the proper transitory or transitional provision, it may be necessary or expedient to amend primary or secondary legislation.

Choice of procedure

15. The affirmative procedure is considered to be appropriate given this regulation making power enables Scottish Ministers to add to, replace or omit any part of

primary legislation, particularly as it will allow changes to how a periodical payment can be altered in relevant circumstances.

Section 9(3) inserting paragraph 9(3) of schedule B1 of the 1996 Act – Assumed rate of return on damages invested: allowance for inflation

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

16. Section 9(3) inserting paragraph 9(3) of schedule B1 of the 1996 Act enables the Scottish Ministers, by regulations, to increase or decrease by a number of percentage points the rate of inflation to be used by the official rate-assessor (currently the Government Actuary) when making an allowance for inflation in determining the personal injury discount rate ("PIDR").

Reason for taking power

17. The PIDR is frequently used when calculating an award of damages for future losses to reflect the fact that the injured person is able to invest the money before the loss or expense for which it awarded has actually occurred. That investment will generate a return and the PIDR aims to take that into account so as to avoid over- or under-compensation. The PIDR is determined by the rate-assessor based on a number of parameters set out in schedule B1 of the Damages Act 1996, and the methodology requires the rate-assessor to make an allowance for inflation.

18. The 1996 Act provides that a single published index or measure must be used to represent inflation when reviewing the discount rate. There is no mechanism for adjusting the rate of inflation in that index. When the Scottish Government considered the PIDR in 2024, the view was taken that there was insufficient flexibility to prescribe a *modified* inflation rate in regulations. The effect was that, while the inflationary pressures faced by an injured person will mostly lie somewhere between a prices-based or earnings-based inflation index, the regulations can only prescribe an unmodified prices-based or earnings-based index or measure. Accordingly, when the PIDR was last set, the Scottish Parliament agreed that the most suitable published measure was the earnings measure Average Weekly Earnings.

19. It is important that the allowance for inflation made when determining the PIDR accurately reflects inflation in real-world damages claims, insofar as possible. As inflationary pressures faced by an injured person will mostly lie somewhere between a prices-based or earnings-based inflation index, inserted paragraph

9(3) of schedule B1 of the 1996 Act allows for this adjustment. The Scottish Ministers will seek advice from the rate-assessor as to what the adjustment should be and then regulations will provide for the rate of inflation to be adjusted accordingly, for example, CPI inflation plus 0.5%. It would be disproportionate to use primary legislation to make such allowance for inflation at the level of frequency that will be required and primary legislation would not be able to respond sufficiently quickly to advice from the rate-assessor.

Choice of procedure

20. The affirmative procedure is considered to be appropriate given this regulation making power enables the adjustment of a rate of inflation that is provided for in in primary legislation , particularly as it will affect the parameters used by the rate-assessor to determine how an award of future damages should be adjusted.

Section 10(1) – ancillary provision

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative (unless adding to, replacing or omitting any part of the text of an Act, in which case affirmative)

Provision

21. Section 10(1) enables the Scottish Ministers, by regulations, to make incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to the Bill or any provision made under it. Regulations made under this section may modify any enactment (including the Act resulting from the Bill).

Reason for taking power

22. This power is to allow flexibility when implementing the Bill or otherwise to address any unforeseen circumstances which may arise. While the SLC and the Scottish Government have given careful consideration to the provisions of the Bill, this power is considered appropriate by the Government to ensure that any unexpected issues which require further changes are able to be dealt with effectively so the purpose of the Bill is not inadvertently obstructed following Royal Assent. The power is restricted as it can only be used for the purposes of, or in connection with the Bill, or for the purposes of giving full effect to, any provision of the Bill or provision made under it.

Choice of procedure

23. Regulations made under this section which contain provision which adds to, replaces or omits any part of primary legislation are subject to the affirmative procedure. Otherwise, they are subject to the negative procedure. This approach

is typical for ancillary powers of this type and provides safeguards considered appropriate to the significance of the type of legislation which can be made.

Section 11(2) – commencement

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: laid, no further procedure

Provision

24. Section 11(2) enables the Scottish Ministers, by regulations, to appoint the day or days on which the provisions of the Bill (other than this section and sections 10 and 12) come into force. Regulations made under this section may make different provision for different purposes and may include transitional, transitory or saving provision (see subsection (3)).

Reason for taking power

25. The Scottish Government considers it appropriate for the substantive provisions of the Bill to be commenced at such date as Ministers appoint to be suitable. It is common for commencement provisions to be dealt with by subordinate legislation.

26. The coming into force of the Bill's substantive provisions will have implications for injured parties and defenders/insurers who are managing a claim for damages for personal injury. In order to allow parties to manage their affairs, it is important for the Scottish Ministers to have power to allow for the planning of orderly implementation and to commence the substantive changes when appropriate.

27. It is preferable to ensure there is flexibility in the commencement powers in case it transpires that there is a need for staged commencement of the Bill's provisions. The Scottish Government therefore considers that, in accordance with usual practice for Government bills, the commencement Regulations should be capable of making transitional, transitory or saving provision or to make different provision for different purposes.

Choice of procedure

28. As is usual for commencement regulations, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies. Commencement regulations bring into force provisions whose underlying policy has already been considered by the Parliament during the passage of the Bill, and accordingly this procedure is considered to be appropriate. Any regulations under this section will be laid before the Parliament as soon as practicable after being made.

This document relates to the Damages (Scotland) Bill (SP Bill 3) as introduced in the Scottish Parliament on 26 November 2026

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