DAMAGES (SCOTLAND) BILL

EXPLANATORY NOTES

INTRODUCTION

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Damages (Scotland) Bill, introduced in the Scottish Parliament on 26 November 2026.

2. The following other accompanying documents are published separately:

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

3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So, where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

BACKGROUND AND OVERVIEW

5. Most of the Bill is concerned with implementing the recommendations of the Scottish Law Commission ("the SLC") published in its Report on Damages for Personal Injury[1] ("the Report") and is, to that extent, based on the draft bill published as an annex to the Report. References in these notes to recommendations are to the recommendations made by the SLC in the Report. The Report followed on from a discussion paper of the SLC: Discussion Paper on Damages for Personal Injury[2] ("the Discussion Paper"), in which the SLC reviewed aspects of damages for personal injury, outlining the existing law, and identifying what might require modernisation, simplification, or clarification. The Bill also contains some reforms which were not reported on by the SLC, but which are concerned with the same area of law.

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[1] Scottish Law Commission Report on Damages for Personal Injury, published 2024.
[2] Scottish Law Commission Discussion Paper 174: Damages for Personal Injury, published 2022.

6. The Bill changes various aspects of the law of damages for personal injury. The Scots law of damages for personal injury seeks to put a person who has been injured as a result of delictual conduct (conduct which breaches a duty of care and causes loss and which is a civil wrong) back into the position they would have been in had the injury not occurred (so far as money can do so). Statutes and decisions of the court provide principles and precedents which assist in the quantification of claims. Significant social and legal change has taken place since the general law of damages for personal injury was last considered[3] and the Bill seeks to update the statute book to accommodate that change.

7. The Bill contains reforms on five topics:

- limitation in respect of certain asbestos-related disease;
- awards of damages for services provided to an injured person;
- deductions from awards of specific benefits;
- the management of damages awarded to children;
- allowing for inflation for the purposes of the personal injury discount rate (PIDR, referred to in the Bill as the assumed rate of return on investment), and for the purposes of periodic payment orders.

8. The provision under the fifth topic listed above does not result from the SLC's work but was separately identified by the Scottish Government as a necessary reform[4] and is within the same subject matter as the SLC's recommendations, being concerned with the law of damages for personal injury.

9. Four of these five topics concern damages for personal injury, while the topic of the management of damages awarded to children is concerned with damages more generally.

10. The Bill is small and technical in nature. It is an entirely amending bill, operating exclusively by amending existing pieces of legislation. It operates on four different pieces of legislation and is organised accordingly, with the nine substantive sections of the Bill being organised under four italic cross-headings that reference those enactments. They are:

- Amendments of Prescription and Limitation (Scotland) Act 1973
- Amendments of Administration of Justice Act 1982
- Amendments of Children (Scotland) Act 1995
- Amendments of Damages Act 1996.

11. The provision under the fifth and final italic cross-heading of the Bill (final provisions) consists of provision usually found at the end of a Bill: the power to make ancillary provision by way of regulations, and the sections dealing with commencement and short title.

[3] The Administration of Justice Act 1982 implemented recommendations made by in the Scottish Law Commission Report on Damages for Personal Injuries (Report on (1) Admissibility of Claims for Services and (2) Admissible Deductions), published 1978.

[4] 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.

GENERAL INTERPRETATIVE MATTERS

Crown Application

12. Section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010 provides that the Crown will be bound by an Act of the Scottish Parliament or Scottish statutory instrument unless the provision expressly exempts it. This Bill applies to the Crown in the same way as it applies to everyone else. The Bill makes no change to the application to the Crown of the enactments that it amends.

Interpretation

13. The Bill's freestanding text, that is its sections, are interpreted in accordance with the Interpretation and Legislative Reform (Scotland) Act 2010.

14. Text that the Bill inserts into other enactments is to be interpreted in accordance with the interpretation legislation that applies to that enactment. All of the enactments amended by the Bill are interpreted in accordance with the Interpretation Act 1978.

SECTION BY SECTION

15. The provision contained under the first three italic crossheadings of the Bill replicates (with some minor drafting changes) the provision made in the draft SLC bill annexed to the Report. The notes explaining that provision are based on the SLC's notes accompanying that bill.

Amendment of Prescription and Limitation (Scotland) Act 1973

Section 1 - Actions where damages claimed are for certain injuries attributable to asbestos exposure

16. Section 1 of the Bill amends the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"). Part 2 of the 1973 Act sets out time limits within which an action must be raised in court, failing which a procedural barrier prevents the claim from proceeding. An action of damages in respect of personal injuries is subject to a three-year limitation period. In cases where it is not apparent that an injury has occurred, simply put, time starts to run from the date on which the pursuer became aware of their right of action, if that is later than the date of injury (under section 17 of the 1973 Act).

17. Section 1 of the Bill is concerned with certain injuries attributable to asbestos exposure. Typically, development of asbestos-related disease takes many years from the initial exposure. There are further particularities in relation to such injuries, especially pleural plaques, which are lesions on the pleura, the membrane surrounding the lungs. These are nearly always asymptomatic, but they signify exposure and, therefore, an increased risk of developing more serious asbestos-related conditions such as mesothelioma or bronchial carcinoma, with such conditions often arising many years after the diagnosis of pleural plaques[5].

[5] See paragraph 4.12 of the Discussion Paper.

18. These particularities have, in Scotland, interacted with legislation[6] and subsequent caselaw[7] to result in a situation in which, those who become aware that they have developed pleural plaques, have three years from the date of that awareness to raise proceedings, even in respect of any future claim for a co-occurring, more serious asbestos-related disease, such as mesothelioma. The detail as to how this situation has arisen and the serious difficulties that it can cause a person who ultimately develops a more serious asbestos-related condition are set out in the Report[8].

19. Accordingly, the SLC recommended (Recommendation 12 of the Report[9]) that:

a) *For the purposes of section 17 of the 1973 Act, asymptomatic asbestos-related conditions should be distinguished from symptomatic asbestos-related conditions, such that failure to raise an action within time for asymptomatic asbestos-related conditions would not preclude that injured person from subsequently raising an action for a symptomatic asbestos-related condition, including asbestos-related conditions which have become, but were not previously, symptomatic.*

b) *The 3-year time-bar for the symptomatic asbestos-related condition will begin no earlier than the date on which the injured person became aware of the fact mentioned in section 17(2)(b)(i) of the 1973 Act[10] with respect to the symptomatic condition.*

c) *Where an asbestos-related disease which was recognised while asymptomatic becomes symptomatic, the 3-year time-bar will begin no earlier than the date on which the injured person is informed by a registered medical practitioner that the condition had caused, or had begun causing, impairment of that person's physical condition.*

d) *In the event of that injured person's death, the relatives' claim would no longer be time barred. For that purpose, section 18 of the 1973 Act would also be amended.*

20. Section 1 of the Bill implements this recommendation by amending the 1973 Act in various ways. Subsections (2) and (3) insert new sections 17ZA and 18ZZA, respectively, into the 1973 Act. These sections provide an exception to the three-year limitation periods contained in sections 17 and 18 of the 1973 Act, but only in the context of the asbestos-related conditions of pleural plaques, pleural thickening and asbestosis[11].

21. New section 17ZA applies to actions identified in subsection (1), that is, actions where the damages claimed consist solely of damages in respect of an injury that (a) is wholly or partly

[6] The 1973 Act and the Damages (Asbestos-related Conditions) (Scotland) Act 2009 which, contrary to the ruling in the House of Lords in *Rothwell v Chemical and Insulating Co Ltd* [2008] 1 AC 281, deems asbestos-related pleural plaques, asymptomatic pleural thickening, and asymptomatic asbestosis to be personal injuries which are "not negligible" but on the contrary are "actionable harm[s] for the purposes of an action of damages for personal injuries".
[7] The decision of the Court of Session is *Aitchison v Glasgow City Council* 2010 SC 411, which authoritatively confirmed the "one wrong, one action" or the "single-action" rule, such that all consequences of a negligent exposure to asbestos (such as pleural plaques, pleural thickening, asbestosis, asbestos-induced lung cancer, mesothelioma, and other conditions) are to be treated as one injury for the purposes of the three-year time-limit.
[8] See paragraphs 4.16 to 4.22 of the Report.
[9] See paragraphs 4.40 to 4.49 of the Report.
[10] I.e. that the injuries in question were sufficiently serious to justify bringing an action of damages on the assumption that the person against whom the action was brought did not dispute liability and was able to satisfy a decree.
[11] Which are the conditions specified as actionable harms in the Damages (Asbestos-related Conditions) (Scotland) Act 2009.

attributable to asbestos exposure and (b) has caused or is causing impairment of the person's physical condition (i.e. a symptomatic condition). In actions of this type, the overall effect of new section 17ZA is that the action is not time-barred by a preceding asymptomatic condition; instead, a new three-year limitation period applies only to the symptomatic condition.

22. This is achieved by subsection (2), which provides that the reference to "injuries in question" in section 17(2)(b)(i) of the 1973 Act is to be read as referring only to symptomatic conditions. Subsection (3) makes clear that that reference does not include the asymptomatic conditions listed: pleural plaques and (where not causing physical impairment) pleural thickening and asbestosis. The effect is that, for symptomatic conditions, the time-bar will not begin running until the person became (or it was reasonably practicable for the person to have become) aware of the fact mentioned in section 17(2)(b)(i) of the 1973 Act in relation to the symptomatic condition i.e. that the symptomatic condition is sufficiently serious to justify the injured person bringing an action of damages (assuming that the defender does not dispute liability and is able to pay any damages).

23. Subsections (4) and (5) of new section 17ZA make additional provision for cases where either pleural thickening or asbestosis[12] have progressed from being in asymptomatic form to symptomatic form. The three-year time-bar will not start running until a registered medical practitioner has informed the injured person that the injury has progressed to a symptomatic condition. Subsection (6) makes clear that it does not matter whether the injured person was aware that they had the asymptomatic condition in the first place.

24. Subsection (7) makes provision as to which situations in time section 17ZA applies to. It provides that section 17ZA applies to any action (a) commenced on or after the date on which the new section comes into force, regardless of whether the right of action accrued before, on or after that day, or (b) commenced before the date on which the new section comes into force, provided the action has not been finally disposed of. The meaning of "finally disposed of" is set out in subsections (8) and (9) and includes an action that has been decided where there is no further avenue for appeal. The new section will therefore apply to some actions which commenced prior to it becoming law and to actions where the right of action accrued before the section comes into force, which is a limited type of retrospective effect. A right of action for personal injuries accrues when injury was sustained as a result of the act or omission in question. This is separate to when the pursuer becomes aware of the injuries and when the procedural three-year limitation period starts to run. In the context of asbestos-related diseases, as noted previously, there can be a substantial gap between the exposure and the onset of the diseases.

25. Injury resulting from asbestos exposure can lead to the death of the injured person. In such cases of fatal asbestos exposure, another person, such as a family member of the injured person, can take an action for damages. Section 18(4) of the 1973 Act provides that, if no action was taken within the limitation period while the person was alive in respect of the injuries and the person subsequently dies, no action can be taken in respect of the injuries or death. New section 18ZZA modifies the application of section 18(4). Subsection (1) sets out those cases to which the section applies. They are cases in which the injured person died from injury that is wholly or partially resulting from asbestos exposure before the new section comes into force and section 18(4) would otherwise prevent an action being brought because an action for the injury was time-barred.

[12] Note that pleural plaques are not included.

Subsection (2) provides that in cases where, by virtue of new section 17ZA, the deceased would have been entitled to raise an action to which section 17 applies had they not died before section 17ZA came into force, section 18(4) does not prevent the action being brought.

26. Subsections (3) and (4) make further provisions about what actions, in chronological terms, new section 18ZZA applies to. The effect of subsection (3) is to apply the new section to actions commenced on or after it comes into force but also actions commenced before the coming into force, if the action has not been finally disposed of on that date. Subsection (4) provides for the meaning of an action being finally disposed of, by referring back to the meaning for the purposes of section 17ZA (discussed above at paragraph 24).

Amendments of Administration of Justice Act 1982

27. Three of the topics covered by the Bill relate mainly to provisions in Part 2 of the Administration of Justice Act 1982 ("the 1982 Act"). They are:

- awards of damages in respect of:
  - services provided to an injured person; and
  - services provided by the injured person to others;
- deductions from awards of damages; and
- awards of provisional damages.

Section 2 - Liability to pay damages for services rendered by persons other than relatives

28. Sections 8 and 9 of the 1982 Act concern awards of damages for services rendered to an injured person (i.e. where a relative cares for the injured person as a result of their injuries) or by an injured person (i.e. where the injured person is unable to continue providing services to their relative because of their injuries). At present, claims under both sections 8 and 9 are restricted to "relatives", as defined in section 13(1) of the 1982 Act.

29. Section 8(1) provides that the defender has liability for reasonable remuneration and expenses for necessary services rendered to the injured person by a relative in consequence of the injuries in question (but the injured person must account to the relative for any such damages recovered (subsection (2)). Subsection (3) relates to future services.

30. "Necessary services" are not defined in the legislation but have been held to include services such as nursing care and housekeeping. An individual will only be entitled to compensation under section 8 where they are a relative of the injured person. Where services have been rendered by someone other than a relative, damages will be recoverable by the injured person only if there exists a contractual arrangement between the injured person and the person providing those services.

31. The SLC made two recommendations in respect of section 8:

> *3. [It] should be extended to claims in respect of necessary services provided to the injured person by an individual who is not a relative of the injured person.*

> *4. [It] should be amended to provide that services rendered by any person are recoverable so long as the services are provided (a) without a contractual right to payment or (b) otherwise than in the course of a business, profession or vocation.*

32. Section 2 implements Recommendations 3 and 4, by extending the class of persons who are entitled to damages under section 8 of the 1982 Act.

33. Subsections (2) to (4) and (6) amend section 8 to remove references to a "relative" and replace with an "individual". This allows non-relatives to be compensated for (i) necessary services provided to the injured person as a consequence of their injury and (ii) necessary services that will be required to be provided in the future to the injured person as a consequence of their injury. The new reference to an "individual" captures modern support structures, where, alongside family members, friends and neighbours may also assist with the provision of services[13].

34. Subsection (5) inserts new subsection (3A) to section 8 and creates an exception whereby the defender will not be liable to compensate an individual for services if they are rendered contractually for payment and/or in the course of business etc.

Section 3 - Payments made under insurance arranged by injured person's employer

35. Section 10 of the 1982 Act provides that, in the assessment of damages for personal injury, no deductions should be made in respect of various listed benefits. In Recommendation 7, the SLC recommended that the list should be amended to clarify that, where an employee contributes financially to a Permanent Health Insurance (PHI) scheme in certain ways any sums paid out under the scheme are a non-deductible contractual benefit[14].

36. Recommendation 7 identified those financial contributions that should qualify as consideration for participation in a PHI scheme: (i) making a direct payment; (ii) paying tax or National Insurance contributions (NIC) on membership of the scheme as a benefit; or (iii) forfeiting the offer of additional remuneration or earnings with their employer in order to gain access to the scheme, or to increased benefits under that scheme. Finally, it recommended that, where no such contribution is made, payments made under the scheme should be deductible from an award of damages.

37. Section 3 of the Bill implements Recommendation 7. Subsection (3) of section 3 of the Bill inserts new subsections (2) to (6) into section 10 of the 1982 Act, setting out when sums paid out under a PHI-type scheme will not be deducted from an award of damages. The following references are to section 10 of the 1982 Act as amended by the new subsections (2) to (6) introduced in the present Bill.

38. Subsection (2) provides that certain payments are to be regarded as a contractual benefit for the purposes of section 10(1)(a) (that is, the payment is non-deductible from an award of damages) only if one of the conditions set out in the new subsection (4) is satisfied. Those payments are (a) money paid, or that is due to be paid, to the injured person under a qualifying

[13] See paragraph 2.56 of the Report.
[14] See paragraphs 3.44 to 3.53 of the Report for the current law.

insurance arrangement or (b) money paid to the injured person by their employer so long as the employer has received that money, or can receive that money, under a qualifying insurance arrangement. The meaning of "qualifying insurance arrangement" is set out in subsection (6) and includes PHI and similar income protection schemes.

39. Subsection (3) makes it clear that, if a payment listed in subsection (2)(a) or (b) does not meet one of the conditions set out in subsection (4), then that payment is to be regarded as remuneration or earnings for the purposes of section 10(1)(i) (that is, the payment is deductible from an award of damages).

40. Subsection (4) sets out the conditions that, if applying in relation to a payment listed under subsection (2)(a) or (2)(b), will mean that the payment is non-deductible from an award of damages. One condition applying to a payment is sufficient for it to be non-deductible. The conditions are (a) that the injured person made a payment in order to become a member of the insurance scheme (including payment via a deduction from the injured person's wages); (b) the injured person chose to take a lower salary with their employer in order to be a member of the insurance scheme or to receive increased protection under the insurance scheme; or (c) the injured person paid tax or national insurance on membership of the insurance scheme as a benefit. An injured person who satisfies one of the conditions is recognised as having contributed to a PHI-type scheme and is therefore entitled to benefit from any payment received under that scheme without the risk that any award for damages might be reduced by deducting the payment.

41. Subsection (5) provides that, for the purposes of determining whether the injured person meets the conditions set out in subsection (4)(a) or (4)(c), it does not matter that they could have chosen not to participate in that particular qualifying insurance arrangement.

Section 4 - Expenses relating to medical treatment, care, accommodation and equipment

42. Generally in the law of delict, there is a duty upon the injured person to take reasonable steps to mitigate their loss i.e. to avoid additional or more extensive loss or costs. Where the injured person fails to do so, they cannot make a claim against the responsible person for any expenses incurred.

43. However, section 2(4) of the Law Reform (Personal Injuries) Act 1948 provides that, where an injured person incurs expenses (for example relating to medical treatment, care, accommodation and/or equipment), the existence of facilities available from the National Health Service or a public authority is to be disregarded in determining the reasonableness of those expenses[15].

44. The effect is that, in an action for damages, the responsible person may be liable to pay reasonable expenses arising from private medical treatment or private care, accommodation or equipment, even where the injured person could have avoided those expenses by using NHS facilities. Section 2(4) of the Law Reform (Personal Injuries) Act 1948 already provides for private medical expenses to be disregarded in the way described above. The SLC recommended (Recommendation 8) that section 2(4) of the Law Reform (Personal Injuries) Act 1948 should be repealed and re-enacted in the 1982 Act.

[15] See paragraphs 3.67 to 3.81 and 3.91 to 3.123 of the Report.

45. Often, a local authority will be under a statutory duty to provide care and accommodation to an injured person. Where there is such a duty on the local authority, but the injured person decides instead to arrange private care and accommodation, because there is no equivalent to section 2(4) of the 1948 Act for expenses of this kind, the question arises whether the responsible person should be liable for the associated costs. The SLC further recommended (Recommendation 10) that there should be provision, similar in effect, that an injured person is entitled to opt for private care and accommodation rather than rely on local authority provision where it is available.

46. Section 4 implements recommendations 8 and 10 of the Report by inserting new section 10A into the 1982 Act.

47. Paragraph (a) of new section 10A enacts these provisions in the 1982 Act so that provision on private medical treatment can be dealt with in the same statute as provision on private care, accommodation and equipment. Section 2 of the 1948 Act is consequently repealed by subsection (2) of section 4.

Section 5 - Meaning of "relative"

48. Section 13 of the 1982 Act defines "relative" for the purposes of sections 8, 9 and 10[16], discussed above. In relation to the injured person, it means—

- the spouse or divorced spouse;
- the civil partner or former civil partner;
- any person, not being the spouse of the injured person, who was, at the time of the act or omission giving rise to liability in the responsible person, living with the injured person as husband or wife;
- any person, not being the civil partner of the injured person, who was, at the time of the act or omission giving rise to liability in the responsible person, living with the injured person as the civil partner of the injured person;
- any ascendant or descendant;
- any brother, sister, uncle or aunt; or any issue of any such person;
- any person accepted by the injured person as a child of his family.

49. The original underlying intention behind the definition was that services rendered by or to those members of the family group who, in a fatal accident claim, would be entitled to claim damages for loss of support, would be the only ones which should be covered. The definition was therefore based on that set out in schedule 1 of the Damages (Scotland) Act 1976.

50. Damages for wrongful death are now governed instead by the Damages (Scotland) Act 2011 ("the 2011 Act"). The definition of "relative" as set out in section 14(1) of the 2011 Act provides for persons accepted as the parent, grandparent, grandchild or sibling of the deceased following a fatal injury to be treated as a "relative" for the purposes of "loss of society" claims.

[16] Although note that changes made by section 2 of the Bill will mean that the definition will no longer apply for the purposes of section 8 of the 1982 Act (see paragraph 33 of these Explanatory Notes).

This means that, at present, there is a difference between the definition of relative in the 2011 Act and the definition of relative in the 1982 Act. The latter does not make such allowances for persons accepted as part of the family (with the exception of children accepted as part of the family). A further issue identified was that former spouses and civil partners were included but former co-habitants were not.

51. Referring to the social change that had occurred in the intervening period, the Report made two recommendations in respect of the definition: firstly, that it should be amended to include persons accepted into family as a parent, grandparent, sibling or grandchild of the injured person; and, secondly, that it should be expanded to include ex-cohabitants of the injured person.

52. Section 5 of the Bill implements recommendations 1 and 2, and updates the definition of "relative" in section 13(1) of the 1982 Act. It brings the definition of "relative" in line with section 14 of the Damages (Scotland) Act 2011, thereby ensuring consistency in the legislation on personal injury. The provisions introduce an expanded definition of "relative" that is not restricted to traditional family structures, for the reasons discussed in paragraphs 2.14 to 2.21 of the Report (for example, many modern family units are connected by family bond rather than by blood relation). Subsections (2)(a) to (2)(c) simply pave the way for subsection (2)(d), which substitutes new paragraphs (b) to (cb) for existing paragraphs (b) to (e).

53. New paragraph (b) of section 13(1) provides that either a current or an ex-cohabitant of the injured person is a "relative" for the purposes of the 1982 Act.

54. New paragraph (bb) provides that either a parent or child or someone who is accepted as either is a "relative" for the purposes of the 1982 Act, while paragraph (bc) has equivalent effect in respect of a sibling or someone raised in the same household and accepted as a child of the family, and paragraph (bd) in respect of a person who is a grandparent or grandchild or someone who is accepted as either.

55. New paragraph (c) provides that ascendants and descendants of the injured person are relatives for the purposes of the 1982 Act. Paragraph (ca) provides that siblings of the injured person's parents (in other words, the injured person's aunts or uncles) are relatives for the purposes of the 1982 Act, while paragraph (cb) has the same effect in respect of someone who is a child or other issue of either the injured person's siblings (in other words, a niece or nephew etc. of the injured person) or of the injured person's aunts or uncles (in other words, a cousin etc. of the injured person).

Amendments of Children (Scotland) Act 1995

Section 6 - Duty to consider how damages payable to children will be managed

56. Section 6 of the Bill amends section 13 of the Children (Scotland) Act 1995 ("the 1995 Act"). Section 13 is concerned with awards of damages to children and empowers the court, where in any court proceedings a sum "becomes payable to, or for the benefit of" a child under 16 years of age, to make such order as it thinks fit "relating to the payment and management of the sum for the benefit of the child." In respect of section 13, the SLC recommended (Recommendation 14):

> *Section 13 of the Children (Scotland) Act 1995 should be amended to impose a duty on the court, prior to granting decree for damages for a child, to inquire into the future administration of the award and, if the court considers it necessary, to remit the case to the Accountant of Court… If the court does not remit the case to the Accountant of Court, the judge or sheriff should have a duty to explain, in a written report, why this is not necessary.*

57. Section 6 amends section 13 of the 1995 Act. Subsection (1) amends section 13(1) of the 1995 Act by substituting new subsections (A1), (A2) and (A3). If an award of a sum of money in damages becomes payable to or for the benefit of a child under the age of 16 in any court proceedings, the court must inquire how the sum of money will be administered in the future for the benefit of the child. The duty to inquire is intended to provide further protection for damages awarded to or for the benefit of children, to ensure that any money is properly managed until the child gains capacity to take ownership of the award.

58. New subsection (A2) provides that the court must consider a written proposal about how the money will be invested or applied for the benefit of the child, encouraging parties to plan appropriately. The court must either remit the case to the Accountant of Court or, if deciding not to remit, explain in writing why it considers it unnecessary to do so. In deciding whether to remit the case, the court must have regard to the matters set out in subsection (A3), which are: (a) the sum of money awarded, (b) the specific care and accommodation needs of the child, and (c) if a trust is proposed, the terms of the trust, and the identity and qualifications of the trustees. By exercising its discretionary power, the court can ensure that, in cases where the award is sizeable or no professional trustee is appointed, independent oversight may be provided.

Section 7 - Application of certain duties in cases involving awards of damages to children

59. Section 13 of the 1995 Act sits in Part 1 of that Act, which includes provisions about parents and children, in particular concerning parental responsibilities and rights and related court orders. Provision is made for three fundamental principles to be applied in making certain court orders (those under section 11(1)). The three principles are that (i) the welfare of the child is the court's paramount concern; (ii) 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 court will have regard to the child's views, taking into account the age and maturity of the child.

60. Those principles do not currently apply to decisions of the court under section 13. The SLC recommended (Recommendation 13) that:

> *The court should be required, when applying section 13 of the Children (Scotland) Act 1995, to have regard to the same matters that it has to consider when determining an application under section 11(1) of the 1995 Act, namely (i) the welfare of the child, (ii) the "no order" principle and (iii) the views of the child.*

61. Section 7 inserts new subsection (4) into section 13. The new subsection requires a court to take account of the three principles set out in sections 11ZA and 11ZB of the 1995 Act when considering whether to: (a) remit a case to the Accountant of Court under new subsection (A2) of section 13 (inserted by section 6 of the Bill), or (b) making an order under subsection (1) of section

13, relating to the payment and management of an amount of damages payable to (or for the benefit of) a child.

62. Sections 11ZA and 11ZB of the 1995 Act are to be inserted by section 1 of the Children (Scotland) Act 2020, once commenced (which will also repeal section 11(7) of the 1995 Act, which is being largely restated).

Amendments of the Damages Act 1996

63. The amendments to the Damages Act 1996 ("the 1996 Act") in this part of the Bill operate on different parts of the 1996 Act, both concerned with allowing for the effect of inflation in awards of damages, and bring about the same changes in both contexts. They change the default index from the Retail Prices Index ("RPI") to the consumer prices index ("CPI").

64. The average damages award is a mix of losses for different sorts of goods and services and wages, each of which experience different rates of inflation. Therefore, the rate of inflation in each of the main published indices, which each focus exclusively on a different type of metric (for example, prices or wages) does not particularly accurately reflect the actual inflation experienced by damages awards, which may fall between measures of inflation relating to prices and earnings. The Bill therefore gives to the Scottish Ministers the ability to prescribe an adjustment to the published, in-principle rate, for example, CPI inflation. This will allow them to tailor it to the particular context of a damages award, rather than having to choose the best published inflation rate available, which is likely to be either higher or lower than damages inflation.

Section 8 - Periodic payment orders: statutory basis of alteration for inflation

65. A court awarding damages for future pecuniary loss can make an order under which all or part of those damages is paid in a series of regular payments, instead of as a lump sum. Such an order is known as a periodical payment order ("PPO")). A PPO will give an injured person a regular income and can be varied over time and linked to inflation, ensuring that if an injured person's needs change as a result of their injuries, or economic conditions change dramatically, they will not be adversely affected in the same way as they could be with a single, unalterable final payment. A PPO may be especially appropriate in cases where substantial damages are awarded or where the parties do not agree about the injured person's life expectancy. The 1996 Act gives courts the power to impose PPOs and makes other provision about the making of PPOs and about periodical payments. Provision is made in section 2D, to be inserted into the 1996 Act by section 3(2) of the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019), once commenced, about the index-linking of the amount of periodical payments. There is deemed to be included in any periodical payment order a requirement for the amount of payments to be altered at intervals. This allows the real value of periodical payments to be preserved over the whole period for which they are payable. In the absence of provision to the contrary, the amount of payments is to be altered by reference to the RPI, with rules of court prescribing the timing, frequency and manner of alterations. The courts have the power to modify the deemed requirement, including the power to substitute an alternative basis of alteration or to order that there should be no alteration. The Scottish Ministers have the power to prescribe an alternative to the retail prices index as the default basis of alteration.

66. If a court orders that the damages awarded are to be paid in the form of periodical payments (in whole or in part), the order is to be treated as providing that the amount of each periodical payment is to be altered according to the default index of inflation (this is referred to as the "statutory basis of inflation" in section 2D of the 1996 Act) unless this default rule is modified or replaced in the court order.

67. Section 8 amends section 2D of the 1996 Act. Subsection (2) substitutes the CPI for the RPI as the default index by which to measure inflation (unless, under section 2D(6)(b) of the 1996 Act, an alternative default index is prescribed by the Scottish Ministers in regulations). Subsection (2) refers to the CPI being published by the Statistics Board. The Statistics Board is established by section 1 of the Statistics and Registration Service Act 2007 and has statutory duties. It is known as the UK Statistics Authority (by resolution of the Statistics Board) and uses the Office of National Statistics, among others, to fulfil some of its duties.

68. Section 8 also adds three new subsections to section 2D of the 1996 Act. They give the Scottish Ministers power to increase or decrease the rate of inflation by a number of percentage points (subsection (6A)). The prescribed number may be a whole number or a decimal fraction (subsection (6B)). What is meant by the "rate of inflation" is set out in subsection (6C): it is the annual percentage change in the index or information to which reference must be had under subsection (6) for the purpose of altering the amount of periodical payments on the statutory basis.

69. The power in subsection (6A) is added to the existing provision in subsection (7) of section 2D, which enables regulations to make different provision for different circumstances. The Bill extends that ability so as to enable such regulations to also make incidental, supplementary, consequential, transitional, transitory or saving provision and to modify any enactment. These powers could, for example, be used to make provision as to how a change in measure or an adjustment mid-way through a 12-month period is to be accommodated. By existing paragraph (b) of subsection 2D(7), regulations listed in the subsection's opening words are subject to the affirmative procedure (see section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010).

Section 9 - Assumed rate of return on damages invested: allowance for inflation

70. The 1996 Act also makes provision as to the rate of return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury (this assumed rate of return is also known as the personal injury discount rate ("PIDR")). A court is to take into account the rate of return when assessing the amount of damages.

71. Provision is made in the 1996 Act for a rate-assessor whose role is to set the rate of return and who will be the Government Actuary (GA), unless another person is appointed in the GA's place. The 1996 Act also provides for the process which is required to be followed in reviewing the rate of return, and the frequency of review. Schedule B1 of the 1996 Act makes detailed provision about setting of the rate of return, providing that it should reflect the return that could reasonably be expected from investing in a notional portfolio over a period of 43 years (paragraph 7). The rate of return is to be set as a percentage figure (paragraph 19).

72. Paragraph 9 of schedule B1 requires that, in setting the rate of return, allowance must be made by the rate-assessor for the impact of inflation (paragraph 9(1)). Such allowance for inflation is to be by reference to the index mentioned there (currently RPI or prescribed alternative index (paragraph 9(2)(a) and (b)). An index measures relative changes over time, while the rate of inflation is the difference between indices at different points in time and it is expressed as a percentage.

73. Section 9 of the Bill amends paragraph 9 of schedule B1 of the Damages Act 1996. Subsection (2) substitutes the CPI for the RPI as the default index.

74. The Bill gives to the Scottish Ministers the ability to prescribe an adjustment to the rate of inflation in the index to which the rate-assessor is directed by paragraph 9(2) for the purpose of allowing for inflation in the rate of return. The percentage increase or decrease set down by the Scottish Ministers is to an in-principle rate, for example, CPI inflation i.e. the inflation assumption that is set by sub-para (2).

75. To achieve this, section 9 adds 3 new sub-paragraphs to paragraph 9. They give the Scottish Ministers power to impose in regulations a requirement on the rate-assessor to adjust the rate of inflation upward or downward (subparagraph (3)). The adjustment will be expressed as a number of percentage points, which may be a whole number or a decimal fraction (inserted subparagraph (4)). What is meant by the "rate of inflation" is set out in subparagraph (5): it is the annual percentage change in the index or information to which the rate-assessor must have reference under sub-paragraph (2) of paragraph 9. By virtue of paragraph 31 of schedule B1, regulations made under the new power may make different provision for different circumstances and are subject to the affirmative procedure.

76. The regulations will specify whether the number of percentage points prescribed are to operate as an increase or a decrease. While the rate-assessor must apply any adjustment that is prescribed, there is no duty on the Scottish Ministers to prescribe an adjustment. If no adjustment is to be made, then no regulations need be made i.e. is it not necessary to have regulations specifying an adjustment of zero.

Section 10 - Ancillary provision

77. This section empowers the Scottish Ministers, by regulations, to make various types of ancillary provision (incidental, supplementary, consequential, transitional, transitory or saving provision) for the purposes of, in connection with, or to give full effect to the Act or any provision made under it.

78. Regulations under section 10 may modify any enactment (including the Act resulting from this Bill). The word "enactment" is defined in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 and includes Acts of the Scottish or UK Parliaments, as well as secondary legislation. If regulations under section 10 textually amend an Act, then they are subject to the affirmative procedure, but otherwise they are subject to the negative procedure (see sections 28 and 29 of the Interpretation and Legislative Reform (Scotland) Act 2010).

Section 11 - Commencement

79. This section sets out when the provisions of the Bill will come into force (i.e. take effect). It provides that three sections come into force automatically on the day after Royal Assent. These sections relate to the commencement of the Bill itself, regulations that may be made under the Bill and the short title of the Bill. The other provisions of the Bill will come into force on such day as the Scottish Ministers may by regulations appoint.

80. Regulations bringing sections into force may include different provision for different purposes and may include transitional, transitory or saving provision. Commencement regulations are laid before the Scottish Parliament but are not otherwise subject to any parliamentary procedure.

Section 12 - Short title

81. This section provides the short title of the Bill. This is the title by which the Bill may be referred to or cited.

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

DAMAGES (SCOTLAND) BILL

EXPLANATORY NOTES

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