DAMAGES (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is 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:

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

3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

POLICY OBJECTIVES OF THE BILL

4. The Scots law of damages for personal injury seeks to put a person who has been injured as a result of negligence or other delictual conduct back into the position they would have been in had the injury not occurred. Significant social and legal changes have taken place since the general law of damages for personal injury was last considered in 1982.

5. 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").

6. The Bill's overall policy aim is to make the law of damages fit for 21st century Scotland, seeking greater fairness in the context of awards of damages for personal injury in Scotland. A modernised and refined law of damages would contribute to greater legal certainty and fairer outcomes.

General overview of the Bill

7. 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 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.
- In the context of services rendered to an injured person, extending provision to non-relatives.
- 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.

Limitation and asbestos-related conditions

Current law

8. Pleural plaques are lesions on the membrane surrounding the lungs (the pleura) caused by exposure to asbestos dust. They are nearly always asymptomatic but, many years after diagnosis, a person who has pleural plaques may also develop a more serious condition, such as mesothelioma or bronchial carcinoma, which are also caused by exposure to asbestos. In other words, a person exposed enough to asbestos to develop pleural plaques carries an overall higher risk of developing mesothelioma compared to someone with no exposure to asbestos.

9. The Damages (Asbestos-related Conditions) (Scotland) Act 2009 ("the 2009 Act") provides that asbestos-related pleural plaques are an actionable harm for the purposes of raising a legal claim of damages for personal injuries (section 1). Those who have been injured have three years from the date that they became aware that they have pleural plaques in which to raise legal proceedings. This is because the general law of limitation applies in these circumstances to set a time limit for raising such legal proceedings.[1]

10. Although pleural plaques are nearly always asymptomatic, the limitation period against any future claim that the injured person may have as a consequence of the same exposure to asbestos also begins from the date of awareness of the pleural plaques. The practical effect is that injured persons are often, perhaps through no fault of their own, not in a position to raise an action for damages for a serious and fatal disease such as mesothelioma because the limitation period has expired. For example, without appropriate legal advice, a person diagnosed with pleural plaques may not know that they have a right of action or that they must raise legal proceedings within three years to claim damages if they also develop a more serious condition. Some years later, should they develop a serious and fatal symptomatic condition, they would not have any legal remedy for damages as a result of a failure to act because the time limit has expired.

Consultation

11. The SLC asked consultees whether there is a problem with the way provisional damages operate in cases involving asbestos-related disease claims.[2] The majority of respondents agreed, saying the law was uncertain, unpredictable, inconsistent, and unfair.[3]

12. While there was general agreement about the existence of a problem there was disagreement about the way forward. The SLC invited comments on three options for reform, of which option B was the most popular (followed by option A):

- Option A: provide that a diagnosis of asbestos-related pleural plaques would not, on the basis of time bar, preclude further action at any future time.[4]
- Option B: provide that a claim for asbestos-related pleural plaques (or pleural thickening or asbestosis) itself would become time-barred three years after diagnosis but that claims for any subsequent related disease such as mesothelioma would not be so time-barred.[5]
- Option C: create provision similar to the Limitation (Childhood Abuse) (Scotland) Act 2017 that would remove the three-year limitation period for an action of damages in respect of personal injuries arising from exposure to asbestos. This was the least popular option.[6]

[1] There is judicial discretion under section 19A of the Prescription and Limitation (Scotland) Act 1973 to over-ride a time limit and allow a claim to proceed if it seems to the court that it is equitable to do so.
[2] Provisional damages are an initial court award or settlement in a personal injury claim that lets an injured person get compensation now while preserving their legal right to later apply for more compensation if their health deteriorates.
[3] Of the 32 consultees commenting on Question 19 of the Discussion Paper, 16 agreed that such a problem exists, while a further eight agreed that there is a problem but preferred to classify it as arising from the law of limitation, and particularly the case of *Aitchison*. Four consultees thought that there was no problem, and four further consultees made no comment.
[4] Seven consultees favoured this option.
[5] Eleven consultees favoured this option.
[6] Two consultees favoured this option outright, while pursuers' agents on the Law Society's committee thought that option (a) or (c) would provide a quick fix for asbestos cases where a fair trial is possible.

Reform

13. In line with the option preferred by the majority of respondents, section 1 of the Bill provides that a claim for asbestos-related pleural plaques (or asymptomatic pleural thickening or asymptomatic asbestosis) would become time-barred after the standard three-year limitation period, but claims for any subsequent asbestos-related disease, such as mesothelioma, would not.

14. The effect is that someone with *asymptomatic* asbestos-related pleural plaques would not be time-barred when seeking to raise an action of damages for mesothelioma (or any symptomatic condition) which develops many years later. The three-year limitation period for the *symptomatic* condition will begin to run once a registered medical practitioner informs the injured person that the injury is causing (or has caused) harm. This avoids the current situation of different outcomes being achieved when the court's discretion is relied on and also the type of situation described above where a pursuer is not able to raise an action within the time limit. It also brings Scotland into line with other jurisdictions in the UK. Pursuers will need to seek legal advice on their particular circumstances, including whether they have previously pursued litigation, in order to ascertain if they can benefit from the change in the rules.

15. Relatives of a deceased person who was exposed to asbestos will be able to raise legal proceedings for damages if, when the deceased was alive, they would have qualified in terms of the proposed reform to the limitation period.[7]

16. The reform will apply to all actions commenced on or after the date on which the new section comes into force, or which are in court at that date (i.e., not finally disposed of). The effect is that previously time-barred claims are not revived. The Scottish Government considers that this approach strikes a fair balance between the interests of pursuers and defenders overall, and is one which is considered to be the most fair and practicable approach to commencement.

Alternative approach

17. One alternative approach would be to repeal the Damages (Asbestos-Related Conditions) (Scotland) Act 2009. The possible effect of repeal might be that courts will decide that pleural plaques and other symptom-free asbestos-related conditions are not an "actionable harm" for the purposes of an action of damages for personal injury. Therefore, a diagnosis of an asymptomatic asbestos-related condition would no longer trigger the 3-year limitation period for a symptomatic asbestos-related condition, as is the current position. Only one respondent to the consultation, however, suggested this approach. The Scottish Government's view is that pleural plaques, asymptomatic pleural thickening and asymptomatic asbestosis are conditions that cause "actionable harms" – such as anxiety or depression - given that these conditions are evidence of exposure to asbestos, and this exposure to asbestos may lead to extremely serious conditions such as mesothelioma or asbestos-induced lung cancer.

18. A second alternative would be to remove the three-year limitation period so that a time limit does not apply for an action of damages in respect of personal injuries arising from exposure to asbestos, in a similar way to the Limitation (Childhood Abuse) (Scotland) Act 2017 ("the 2017 Act") exempted an action in respect of personal injuries arising from childhood abuse. The general effect of this option would be that injuries which occurred a very long time ago would be capable

[7] Relatives will be able to raise legal proceedings for damages within three years beginning from the date of death.

of founding an action. There are, though, exceptional circumstances surrounding childhood abuse in Scotland which prompted the approach taken in the 2017 Act which are not present in claims involving asbestos-related conditions and it was the least favoured approach amongst respondents.

19. A third alternative would be to look more widely at the general law of limitation and the court's power to allow a time-barred case to proceed.[8] The majority of consultees did not favour this approach, preferring the alternative options consulted upon. The SLC has started work on a reform project looking at the general law of limitation, including sections 17 and 19A of the Prescription and Limitation (Scotland) Act 1973, and whether an asymptomatic condition should no longer result in a time-bar preventing recovery of damages for a later-developing symptomatic condition.

Who can claim for providing services to an injured person or by an injured person

Current law

20. Section 8 and section 9 of the Administration of Justice Act 1982 ("the 1982 Act") concern awards of damages for services rendered to an injured person or by an injured person. For example, a relative who cares for the injured person as a result of their injuries may be entitled to an award of damages. At present, claims under both sections are restricted to "relatives" as defined in section 13(1) of the 1982 Act.

21. The Scottish Government understands that the underlying policy intention of those sections is that the definition of "relatives" covered by the 1982 Act should be the same as those who would be entitled to claim damages for loss of support where there is a fatal accident. At the time of the 1982 Act, the definition of "relative" was based on the definition in the Damages (Scotland) Act 1976,[9] but this has since been repealed. Damages for wrongful death are now determined by the Damages (Scotland) Act 2011 ("the 2011 Act").[10]

22. The overall effect is that there is a difference between the definition of "relative" in the 1982 Act and the 2011 Act: certain classes of person cannot claim damages for providing care to an injured person but can claim damages for loss of support if that person wrongfully died. Currently, children/parents, grandchildren/grandparents, and siblings who are accepted as part of the family, and ex-partners are counted as "relatives" in fatal cases but not in non-fatal cases.

23. Separately, under section 8 of the 1982 Act the current law does not allow a neighbour or friend who provides care to the injured person to compensation. As of 2024, 37% of households in Scotland consist of a single adult living alone.[11] This does not mean that those 37% of households would have to rely on neighbours or friends to provide support. It is, though, indicative of a significant number of single-person households who may have to depend on a friend or neighbour to provide for necessary services when they are injured.

[8] As set out in section 19A of the Prescription and Limitation (Scotland) Act 1973.
[9] The definition of "relative" is set out in schedule 1 of the Damages (Scotland) Act 1976.
[10] The definition of "relative" is set out in section 14(1) of the 2011 Act.
[11] Estimates based on data from the Scottish Household Survey show that in 2024 over a third (37%) of households consisted of a single person. An estimated 946,000 people lived alone, 17% of the population.

Consultation

24. The SLC asked respondents whether the definition of "relative" in the 1982 Act should be amended to include children/parents, grandchildren/grandparents, and siblings who are accepted as part of the family.

25. There was a total of twenty-eight responses and all those who answered were in favour. Respondents gave two main reasons for their view: (i) the desire to achieve consistency and provide equal treatment of relatives in both fatal and non-fatal cases, and (ii) the need for the law to adapt to keep pace with societal changes.

26. The SLC then went on to ask whether ex-partners should be included in the definition of "relative" in the 1982 Act. Nineteen respondents were in favour, amongst whom a number explained that they were in favour for the sake of consistency in both fatal and non-fatal cases. Some others also referred to societal changes and the need for the law to reflect modern familial structures.

27. Seven respondents were opposed, saying that including ex-partners was a step too far. Horwich Farrelly Scotland said that they were not aware of "any evidence to suggest that there is a failure to deliver justice which requires the statutory definition to be extended to apply to an ex-partner who was not a spouse or civil partner." The Medical and Dental Defence Union of Scotland felt strongly that the desire to bring the definition of relative in section 13 of the 1982 Act into line with the definition in section 14 of the 2011 Act was flawed.

28. Finally, the SLC asked whether the law should be extended to individuals who are not family members when it comes to claims in respect of necessary services provided gratuitously. There were twenty-seven responses: sixteen supported extending the law to non-relatives, ten opposed an extension, and one supported the extension only in exceptional circumstances.

29. Those in favour of extending the law pointed to changed social attitudes since the law was last considered and how it is now more common for individuals to rely on friends and neighbours for help. Those opposed said that extending the law would lead to an increase in spurious claims and add to the complexity of managing claims.

30. Finally, the SLC asked whether an injured person should be able to obtain damages for personal services which had been provided gratuitously by the injured person to a third party who is not their relative. Twenty-seven consultees responded: twelve were in favour and fourteen were opposed.

31. The position of those opposed was well expressed by the Faculty of Advocates: "The Faculty considers that the loss which the extension of section 9 would be intended to address would be too remote to justify the significant innovation which the suggested extension would represent. The loss under contemplation is that of a person outwith the family group and the personal services themselves would be rendered outwith the family group. That loss may therefore readily be distinguished from the loss addressed by the present section 9: the loss there is suffered by the injured person, characterised as the loss of their ability to offer a counterpart in kind for the benefits

that they receive within the family group. The latter loss is therefore reasonably proximate to the wrong which caused the injuries."

Reform

32. Section 5 of the Bill concerns services rendered by an injured person. It updates the definition of "relative" in the 1982 Act to make the law more consistent, providing equal treatment of relatives in fatal and non-fatal cases. The Scottish Government agrees with the majority of consultees who were against replacing the list of relatives so services rendered by an injured person to an individual would be recoverable.

33. Section 2 of the Bill reforms the law such that an individual who is not a relative may claim in respect of necessary services provided to the injured person (whereas such a claim is currently restricted to the list of "relatives" as defined in the 1982 Act). The Scottish Government agrees with the majority of respondents that, given social change, there should no longer be a distinction between services rendered by relatives and services rendered by non-relatives. The increase in the number of single-person households in Scotland means that it can be expected that in some circumstances family members may no longer be the only providers of necessary services, and that friends or neighbours may also provide help.

Alternative approach

34. An alternative approach is to do nothing but this would mean that the certain classes of person could be compensated for loss of support in fatal cases but not for providing services by the injured person in non-fatal cases. The Scottish Government does not agree that this type of difference should persist in the law of damages. Insofar as services rendered to the injured person, doing nothing would not adequately reflect the social changes that have taken place since the general law of damages was last considered for reform.

Deductions from awards of damages - permanent health insurance schemes

Current law

35. Insurance policy payments which an injured person has arranged and *wholly contributed to* are not deductible from a damages award (known as "the insurance exception", see section 10 of the 1982 Act). The lack of clarity surrounding the deductibility of payments from a permanent health insurance (PHI) scheme has caused difficulty. There are different types of PHI schemes, with some requiring opt-ins by employees, some resulting in direct or indirect contributions by employees, and some not involving any choice or action or reduced wage on the part of employees. A typical policy, though, provides income to employees who are unavoidably absent from work for prolonged periods. Usually the premiums are paid by the employer but the employee may contribute in some way.

36. Two decided cases, of *Lewicki v Brown & Root Wimpey Highland Fabricators Ltd*[12] in Scotland and *Gaca v Pirelli General plc*[13] in England, reached different conclusions on the deductibility of payments from a PHI scheme from an award of damages. In *Lewicki*, payments the pursuer had received under a PHI scheme were not deductible from his award of damages

[12] 1996 SC 200.
[13] [2004] 1 WLR 2683.

while in *Gaca*, the payments received under the PHI scheme were deductible from the award of damages.

Consultation

37. The SLC asked consultees whether clarification or reform of section 10 of the 1982 Act is required. There was a total of 24 responses, nineteen of whom agreed that there should be clarification while four disagreed.

38. Thirteen respondents went on to outline the essential elements of any clarification or reform. They unanimously favoured the approach outlined by the SLC, in which the law is clarified to make it clear that where an employee contributes financially[14] then any payments made under that policy should not be deducted from an award of damages.

Reform

39. Section 3 clarifies that an injured person should be deemed to have contributed financially to a PHI scheme where they have either (i) made a direct payment to the scheme; (ii) paid tax or national insurance on membership of that scheme as a benefit; or (iii) forfeited the offer of a greater salary with their employer in order to gain access to that scheme, or to increased benefits under that scheme. The result would be that insurance policy payments paid out from this type of scheme would not be deductible from a damages award.

Alternative approach

40. An alternative approach is to do nothing. This, however, would mean that the current lack of clarity would continue where a PHI scheme is taken out to cover an employee's absence from work.

Deductions from awards of damages - benefits in kind (care and accommodation)

Current law

41. Generally in the law of delict, there is a duty upon the injured person to take reasonable steps to mitigate their loss. In circumstances where they fail to do so, though, they cannot make a claim for any expenses incurred. Aside from monetary payments, an injured person may receive access to certain benefits, the most substantial likely being medical treatment, provided by the NHS or arranged privately.

42. Section 2(4) of the Law Reform (Personal Injuries) Act 1948 ("the 1948 Act") directs the court that, where the injured person has opted for private medical treatment, the court should disregard the possibility of taking advantage of NHS treatment in assessing whether the injured person has taken reasonable steps to mitigate their loss. The effect is that a responsible person (that is, the defender in legal proceedings) cannot argue that an injured person ought to have used the NHS, since the duty to mitigate does not require the injured person to do so.[15]

[14] At a minimum this would be through paying tax and national insurance contributions on membership of the scheme as a benefit.

[15] A responsible person can, though, argue that the injured person is not in fact going to incur the expense.

43. Section 2(4) of the 1948 Act has been criticised because it might lead to over-compensation of injured persons and injustice to responsible persons. Responsible persons might have to pay for more expensive private care or accommodation costs even though there is available NHS care. Alternatively, those in favour of section 2(4) pointed out the following: (i) that an injured person should have the freedom to choose without having to justify a particular choice; (ii) the risk that an injured person might incur irrecoverable private medical costs; and, (iii) increased pressure on NHS resources owing to recourse to the NHS by people who would otherwise have sought private treatment.

Consultation

44. The SLC asked consultees whether section 2(4) of the 1948 Act should remain in force. There were twenty-seven responses to this question. Twenty-six agreed that the section should remain in force.

45. The Medical and Dental Defence Union of Scotland were the only respondent to disagree. It argued that section 2(4) means the NHS and other defendants must foot the bill for private healthcare, even if the NHS ultimately ends up providing the care in question. The Scottish Government understands that courts will not award damages for expenses that they are not convinced the pursuer will actually incur.

Reform

46. The Bill does not make any substantive reform to the law but the 1948 Act is outdated and many of its original provisions have been repealed. Therefore, in order to modernise the law and ensure accessibility, section 4 of the Bill repeals and re-enacts section 2(4) of the 1948 Act.[16] By repealing and restating the provision in the 1982 Act the Scottish Government can repeal section 2 of the 1948 Act in its entirety (the rest of that section has already been repealed by other legislation) and ensure that persons looking for general provisions on the law of damages, including those not legally trained, are able to find as much of the relevant legislation as possible in one place.

Alternative approach

47. An alternative approach is to repeal section 2(4) of the 1948 Act and not replace it. The provision has been criticised because it might lead to over-compensation of injured persons and injustice to responsible persons. Responsible persons might have to pay for more expensive private care or accommodation costs even though there are available NHS care.

48. As mentioned above, almost all respondents agreed that that the section should remain in force. Those in favour said that: (i) an injured person should have the freedom to choose without having to justify a particular choice; (ii) there is a risk that an injured person might incur irrecoverable private medical costs; and, (iii) there would be a pressure on NHS resources owing to recourse to the NHS by people who would otherwise have sought private treatment.

[16] The provision is re-enacted in a new section 10A of the 1982 Act.

Awards of damages made to children – the three fundamental principles

Current law

49. Where a child is seriously injured an award of damages can be substantial, especially where those damages are to meet the costs of care or accommodation for the rest of the child's life. There are other situations in which a child might be awarded a substantial amount of damages, such as the unlawful death of a parent. It is important that a damages award is managed appropriately, in the best interests of the child, so that the child's needs are met for as long as required.

50. Section 13 of the Children (Scotland) Act 1995 ("the 1995 Act") provides that a court may make such order as it thinks fit relating to the payment and management of a damages award where, in any court proceedings, a sum becomes payable to, or for the benefit of, a child.[17]

51. When making an order of this kind the court does not have to take into account the three principles which apply when courts make orders under section 11 of the 1995 Act relating to parental responsibilities and rights: (i) the welfare of the child; (ii) whether making an order would be better for the child than making no order (often referred to as the "no order" principle); or, (iii) the views of the child. Together, these are often referred to as the "three fundamental principles" of child law in Scotland.

Consultation

52. The SLC asked consultees whether the court should have regard to the three fundamental principles when making an order in terms of section 13 of the 1995 Act. Of the thirteen respondents who answered this question, nine supported it or did not outright oppose the proposal. The Senators of the College of Justice responded that while it favoured the court considering the three fundamental principles this should be discretionary.

Reform

53. The Scottish Government agrees with the majority of respondents that the court should have regard to the three fundamental principles when making an order in terms of section 13 of the 1995 Act. These principles are equally relevant to orders about the payment and management of sums for the benefit of the child and to orders under section 11 of that Act. Accordingly, section 7 of the Bill makes this change.

Supervision of awards of damages made to children

Current law

54. As mentioned above, section 13 of the 1995 Act provides that a court may make such order as it thinks fit relating to the payment and management of a damages award to, or for the benefit of, a child. The range of possible orders includes appointment of a judicial factor to manage an award; that money be paid to the sheriff clerk or Accountant of Court ("the AoC") to be managed under the directions of the court; that money be paid directly to the child or their parents/guardians. Between 2007 and 2021 there were 14 referrals to the AoC, and between 2014 and 2020 there were no instances where funds were consigned with a sheriff clerk.

[17] This includes extra-judicial settlements so long as they are agreed in the course of court proceedings.

Consultation

55. The SLC asked consultees whether there were any problems with the operation of section 13. While a majority considered there were no serious operational issues, a number of respondents raised concerns about a general lack of oversight of awards of damages made to children, the lack of orders made under section 13, and the difficulties faced by pursuer solicitors who are considering applying for an order (which can be seen as challenging the trustworthiness or capabilities of the parents who have instructed the legal proceedings).

56. The SLC went on to ask consultees whether the court should have a duty, when making a damages award to a child, to make inquiries about the future administration of any funds and property to be held for the child. Where the court considers it necessary, it would have the power to remit the case to the AoC for a report.

57. While responses were generally mixed, a small majority of seven respondents, including the Senators of the College of Justice, agreed that the court should have such a duty, while a further three thought that the duty should apply above a certain level of damages award. Six respondents disagreed citing a number of reasons including proportionality, delay in payment of the damages award, and the additional resource burden that would be placed on the Scottish Courts and Tribunals Service and the AoC.

Reform

58. While the Scottish Ministers do not consider that parents will deliberately set out to mismanage or misappropriate an award of damages made for their child, an ill-advised purchase or investment could result in an award being exhausted. Section 6 of the Bill therefore places a new responsibility on the court to inquire into the future administration of a child's damages award. Pursuers' legal representatives will be required to explain to the court how the damages award will be safeguarded. Taking this information and other relevant factors into account, the court will have to decide whether to remit the case to the AoC for advice on how the award should be managed, or, if the court decides this is not necessary, it must explain in a written report why that is the case.

59. This reform will ensure that there is an improved and enhanced check on the management of a damages award made to a child. This will safeguard and protect a child's award of damages while, at the same time, encourage parties to consider and plan how an award of damages will be used in the best interests of the child.

Alternative approach

60. An alternative approach would be to make it mandatory in all cases for parties to report to the AoC where the court has made a damages award to a child. When consulted upon by the SLC, three respondents took the view that there should be an automatic report made to the Accountant of Court. Eight respondents had more nuanced views on this question in the sense that they were supportive of the proposition that a mandatory report should be made to the Accountant of Court, but only under certain circumstances. These circumstances include the value of the award, whether the child is represented or not, and to whom the responsibility for providing a report to the Accountant of Court falls. Either approach would have more significant resource implications for the AoC than the discretionary approach taken in the Bill.

Inflation index - the personal injury discount rate

Current law

61. The personal injury discount rate ("PIDR") is an adjustment of an award of damages 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 current rate in Scotland is +0.5% and was set in September 2024.[18]

62. The method for calculating the PIDR is set out for Scotland in schedule B1 to the Damages Act 1996 ("the 1996 Act") and is designed to create a fair and accurate way to set the discount rate, taking account of a range of factors, including the impact that inflation may have on the value of the investment. Currently, the schedule refers to the retail prices index (RPI) although Average Weekly Earnings has been prescribed as the measure to be used in place of RPI.[19]

63. In 2023, when the Government Actuary Department ("GAD") was asked whether the RPI remains the most suitable reference for allowing for the impact of inflation in the calculation of the PIDR, it was clear in its advice that it was no longer suitable. RPI is no longer classified as a national statistic and there are recognised flaws in its calculation methods. That RPI no longer remains a suitable inflation index measure was also clear from the consultation responses received prior to the last rate-setting.

64. The 1996 Act provides that, when reviewing the discount rate, inflation is to be allowed for by reference to a single published index or measure. There is no ability to modify the rate based on the published index. When the Scottish Government considered the PIDR in 2024 the view was taken that there was insufficient flexibility to prescribe a *modified* rate of inflation 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 a published prices-based or earnings-based index or measure and there is no ability to modify the rate of inflation in that index. Accordingly, when the PIDR was last set, the Scottish Parliament agreed that the most suitable published measure was the earnings measure Average Weekly Earnings.

Consultation

65. The Scottish Government consulted on an appropriate inflation index to reference in legislation. The proposal was to replace the reference to RPI in the legislation with a prices index, such as the consumer prices index ("CPI").

66. Consultees were asked whether they had a preference for CPI or CPIH (the consumer prices index plus housing), or another index, as the appropriate inflation index to be referenced in legislation. There were 21 responses to this question and sixteen respondents thought CPI should be referenced; two respondents thought that CPIH should be used; and three said neither.

[18] The next review is to take place in 2029.

[19] See schedule B1, paragraph 9(2) of the 1996 Act and S.S.I 2024/136.

67. Of those in favour, it was said that CPI is generally the measure of inflation adopted at the UK level (for example, to index benefits and state pensions). A second reason for preferring this index was because its adoption would result in a more consistent UK-wide measure being used to calculate the PIDR. Of those who said CPIH, only one respondent gave a reason: CPIH was preferred because of its link to gilts allowing for a market-based price.[20]

68. The Scottish Government then went on to ask consultees whether they agreed that the 1996 Act should be amended to enable the possibility of a modified rate of inflation based on the index to be used in the calculation of the discount rate. There were twenty responses to this part of the question and nineteen respondents agreed.

69. Finally, the Scottish Government presented consultees with two options for how the inflation index may be modified. The first, referred to in the consultation as Option A, would allow the inflation index to be modified by the rate-assessor at the time they carry out the review. The second, Option B, would allow the index to be modified by the Scottish Ministers, by regulations, and agreed by the Scottish Parliament, prior to the review.

70. Twenty respondents answered this question: seventeen favoured Option A while only one favoured Option B. The main reason offered by those in favour of Option A was that this approach would provide the rate-assessor with the necessary discretion to exercise their professional judgement while embedding the adjustment in legislation (as Option B would do) could impede timely changes as economic conditions fluctuate. The only respondent in favour of Option B said: "Our main reason for preferring this approach is that in our view it most closely reflects the policy aim […] that the key parameters of the PIDR should be pre-set within the legislation itself rather than allowing the rate-setter any discretion."

Reform

71. Given the overwhelming support for CPI to be referred to in the legislation and its general use as the measure of inflation adopted across the UK, section 9(2) of the Bill amends the inflation index referenced in the Damages Act 1996 to refer to CPI.

72. On the question of whether the rate of inflation in the index should be capable of being modified, the Scottish Government agrees, as was pointed out be a number of respondents, that inflationary pressures faced by an injured person will mostly lie somewhere between a prices-based or earnings-based inflation index. An unmodified rate of inflation in the index is unlikely to reflect the blend of inflation in real-world damages claims.

73. While respondents favoured the rate-assessor modifying the allowance for the impact of inflation (that is, Option A as referred to above), section 9(3) of the Bill confers this power on the Scottish Ministers, subject to the affirmative procedure (that is, Option B). Despite the overwhelming support of respondents for Option A the Scottish Government was not persuaded by the arguments put forward in its favour. The main reason given for favouring this approach was timeliness: allowing the rate-assessor to make an adjustment at the time of the review was contrasted with the length of time that it would take to change the legislation. The Scottish

[20] From February 2030, UK index-linked gilts will have their payments indexed to CPIH.

Ministers, though, are able to amend the parameters set out in primary legislation by using regulations which can be done in much shorter time.

74. The Scottish Government found the argument put forward by the only respondent in favour of Option B to be of critical importance. The clear policy aim of the PIDR legislation is that the key parameters of how the PIDR is to be determined are set out in legislation. The Scottish Government would prefer to remain consistent with the underlying policy aim of this legislation, which Option B does much more clearly than Option A, while noting that any modification of the inflation index can be made relatively quickly by way of regulations, as has happened in the past.

Inflation index - periodical payment orders

Current law

75. 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 of being linked to an inflation index so that, if a pursuer's needs change or economic conditions change, they are 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.

76. 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.[21] In the absence of provision to the contrary, the payments are to be altered by reference to RPI. As discussed above, RPI is no longer classified as a national statistic due to recognised flaws in its calculation methods. The Scottish Government, therefore, considers that RPI should no longer be referred to in the legislation.

Consultation

77. The Scottish Government asked consultees what the appropriate inflation index should be for PPOs. There was a total of nineteen responses. Over half suggested that the appropriate inflation index for a PPO should be determined by heads of loss, with most saying that ASHE 6115 was an appropriate inflation index for care costs and CPI was the appropriate index for price-based PPOs. Separately, respondents stressed that the current flexibility of the court to decide the appropriate inflation index should be maintained.

78. The Scottish Government went on to ask whether the default index in section 3(2) should be capable of being modified. There were nineteen responses to this question, with fourteen respondents agreeing.

Reform

79. The Scottish Government considers that legislation on PPOs should be updated to remove reference to RPI as the default index. Section 8 of the Bill accordingly substitutes CPI for RPI. As

[21] The Scottish Civil Justice Council are considering the need for court rules, upon which the Scottish Government considers commencement of Part 2 is dependent.

already mentioned, CPI is generally the measure of inflation adopted at the UK level and one prices-index (RPI) is replaced with another (CPI). No change is made to the current flexibility of the court to decide the appropriate inflation index for a particular PPO, after considering the circumstances of an individual case.

80. As with the PIDR, the Scottish Government's view is that Scottish Ministers should have power, by way of regulations, to vary the rate of inflation in the default inflation index used to adjust periodical payments, which is in line with consultation respondents' views. This flexibility will allow the Scottish Ministers to amend the default inflation rate so that it can, for example, more accurately reflect the inflationary pressures faced by an injured person.

Alternative approach

81. An alternative approach would be to do nothing. This, though, would mean that the default inflation index must be an unadjusted prices or wages index. The Scottish Government would not be able to vary the rate of inflation such that it can more accurately reflect actual damages inflation. Injured persons would, as a result of this inability, risk being over- or under-compensated in circumstances where the default inflation index applies.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

82. An Equality Impact Assessment (EQIA) has been carried out and has been published by the Scottish Government on its website. The EQIA concluded that, overall, the Bill will have no differential impact on identified groups. Some of the proposed reforms will contribute positively to children's rights insofar as they will ensure that the court will have a duty to consider the child's views and their best interests when considering awarding them damages. Overall, the Scottish Government has concluded that the Bill has no impact on a protected characteristic.

Human rights

83. The Scottish Government has considered the effect of the provisions in this Bill on human rights: in particular, Article 6 (right to a fair trial) of the European Convention on Human Rights (the ECHR) and Article 1 of Protocol 1 (right to peaceful enjoyment of property) to the ECHR.

Article 6

84. Both the pursuer and defender have a right to a fair trial under Article 6. The Scottish Government considers that defenders' Article 6 rights are capable of being interfered with through section 1 of the Bill, namely the removal of a limitation defence which would be currently available to them. This will apply to all actions commenced on or after the date on which the new section comes into force, or which are in court at that date (i.e., not finally disposed of), so there will be retrospective application.

85. However, time bar rules, or limitation periods, are inherently an interference with the Article 6 right of that pursuer to obtain that hearing. The Scottish Government considers that that

there are compelling grounds of public interest in curing the unfairness (and uncertainty) of the existing law so that pursuers are not barred from obtaining a fair determination of their claims for damages and that this outweighs the impact on defenders' Article 6 rights.

Article 1 of the First Protocol

86. Removal of a limitation defence which would currently be available to a defender is also capable of raising an issue under Article 1 of the First Protocol ("A1P1"). Legislation which interferes with A1P1 rights retrospectively may be justified if it is pursuant to a legitimate aim, is proportionate, and provided that there is special justification for the measure. The Scottish Government considers that there is a legitimate aim in curing the unfairness (and uncertainty) of the existing law so that pursuers are not barred from obtaining a fair determination of their claims for damages, and that the legislation is proportionate in that it strikes a fair balance between the interests of pursuers and defenders. The Scottish Government considers the fact that the existing limitation provisions are inherently unfair to pursuers and that this provision will operate to address that provides the necessary special justification.

Statement of compatibility under section 23(1) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024

87. The Cabinet Secretary for Justice, Neil Gray MSP, has made the following statement regarding children's rights:

> "In accordance with section 23(1) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024, in my view the provisions of the Damages (Scotland) Bill are compatible with the UNCRC requirements as defined by section 1(2) of that Act."

Island communities

88. The Scottish Government does not anticipate any significant impact on island or rural communities as a consequence of this Bill. The provisions will apply equally to all communities in Scotland, whether situated on an island or the mainland. The Bill will affect those who have been injured in an accident or those providing services to an injured person. These are equally likely to happen to and affect those who live on an island as compared to those who live on the mainland. An impact assessment has been carried out and has been published on the Scottish Government website.

Local government

89. Local authorities will be affected by the Bill's provisions insofar as they are a defender in any damages claims. The effect of the Bill's provisions on potential financial costs are set out in the Financial Memorandum.

90. The Cabinet Secretary for Justice, Neil Gray MSP, has made the following statement:

> "In accordance with section 11(1) of the European Charter of Local Self-Government (Incorporation) (Scotland) Act 2026 (the Act), in my view, the provisions of the Damages (Scotland) Bill are compatible with the Charter Articles as defined by section 1 of the Act."

Sustainable development

91. The Scottish Government does not anticipate any significant impact on the environment as a consequence of the provisions included in the Bill, nor on non-environmental elements of sustainable development. The Bill reforms the Scots law of damages, including what can claimed as part of a damages award.

CROWN CONSENT

92. It is the Scottish Government's view that the Bill as introduced does not require Crown consent. Crown consent is required, and must be signified during a Bill's passage, where the Bill impacts the Royal prerogative, the hereditary revenues of the Crown or the personal property or interests of the Sovereign, the Prince and Steward of Scotland or the Duke of Cornwall. The Scottish Government's view is that this Bill does none of those things.

93. For the source of the requirement for Crown consent, see paragraph 7 of schedule 3 of the Scotland Act 1998, and rule 9.11 of the Parliament's Standing Orders. For further information about the considerations that go into determining whether Crown consent is required for a Bill see Erskine May, the guide to procedure in the UK Parliament.

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

DAMAGES (SCOTLAND) BILL

POLICY MEMORANDUM

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