DAMAGES (INVESTMENT RETURNS AND PERIODICAL PAYMENTS) (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

INTRODUCTION

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Damages (Investment Returns and Periodical Payments) (Scotland) Bill. It describes the purpose of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

OUTLINE OF BILL PROVISIONS

3. The Bill has 9 sections and one schedule which cover the following matters: -

- Returns on Investment of Damages (Part 1)
- Periodical Payments of Damages (Part 2)
- Ancillary and Final Matters (Part 3).

4. Parts 1 and 2 of the Bill operate through making amendments to the Damages Act 1996 ("the 1996 Act").

5. The overall policy aim of Part 1 of the Bill in reforming the law on the setting of the personal injury discount rate is to make provision for a method and process which is clear, certain, fair, regular transparent and credible. Part 1 of the Bill will:

- put in place a new statutory regime for calculating the discount rate which should be applied to future pecuniary losses for personal injury cases;
- establish a timeframe for the review of the discount rate;
- provide that the task of reviewing and assessing the rate will fall to the Government Actuary.

6. Part 2 of the Bill will give courts powers to impose periodical payments orders for future pecuniary loss.

7. Further information about the Bill's provisions is contained in the Explanatory Notes and Financial Memorandum published separately as SP Bill <Bill Number>, and in the Policy Memorandum published separately as SP Bill <Bill Number>.

RATIONALE FOR DELEGATED POWERS

8. The Bill contains various delegated powers which are explained in more detail below. In deciding whether legislative provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has had regard to:

- the need to make proper use of valuable Parliamentary time;
- the need to provide the flexibility to respond to changing circumstances without the need for further primary legislation;
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by Parliament; and
- the desire to allow adjustments to the technical detail of the law relating to technical issues around the law of damages without the need for further primary legislation.

DELEGATED POWERS

Part 1 – Returns on investment of damages

Section 1 – Assumed return on investment

New section A1 of the 1996 Act

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

Provision

9. Section A1(4)(b) of the 1996 Act (as inserted by section 1 of the Bill) provides the Scottish Ministers with the power to appoint someone in place of the Government Actuary as the rate-assessor and to also appoint someone to deputise for the person appointed in place of the Government Actuary.

Reason for taking this power

10. The Bill provides that the rate-assessor is to be the Government Actuary and places various duties on them in relation to that role. Where the role of Government Actuary is vacant, the Deputy Government Actuary is to assume the role (for example, where the Government Actuary has retired and a new Government Actuary has yet to be appointed).

11. Whilst it is expected that the Government Actuary will undertake this role for the foreseeable future it is possible, for example, that the office may at some point be materially changed or even

abolished and that it is no longer appropriate or possible for the Government Actuary to undertake this role. The role of the rate-assessor is integral to the process of setting the rate of return. In these, and other unforeseen circumstances, another person would need to be appointed to the role of rate-assessor and that of their deputy.

Choice of procedure

12. The rate-assessor has important responsibilities and functions under the Bill. Any change to who undertakes this role should benefit from the scrutiny afforded by the affirmative procedure on the basis that the Scottish Parliament would want to be satisfied that the appointee had the necessary professional standing, ability and expertise to undertake the role. Before exercising this power the Scottish Ministers must obtain the agreement of those to be appointed.

Section 2 – Process for setting rate of return

New Schedule A1 of the 1996 Act, paragraph 8 – Returns-based assessment - modification of period

Power conferred on: **the Scottish Ministers**
Power exercisable by: **regulations**
Parliamentary procedure: **affirmative**

Provision

13. Section 2 and the schedule of the Bill insert a new schedule A1 into the 1996 Act. Paragraph 8 of that Schedule provides the Scottish Ministers with a power to modify the period over which the rate of return should be assessed.

Reasons for taking this power

14. The initial rate of return (i.e. before the standard adjustments and rounding are applied) will reflect the notional investment portfolio and a notional award period which has been set at 30 years (paragraph 7(2)(b)). The basis for the notional period of 30 years is simply that it would seem to sit somewhere between a short duration and a long duration and is a reasonable choice.

15. Should an evidence base be developed that indicated another award period would be more applicable as a proxy intended to better meet the needs of a hypothetical investor then this power would allow the Scottish Ministers to change the award period. There may also be other unforeseen circumstances that would make a change to the period necessary.

16. The period specified in paragraph 7(2)(b) may also need to be replaced if the Scottish Ministers exercised their power to require that more than one rate of return be set (see paragraph 21(1)). If that were done, different periods may need to be specified for different circumstances (see paragraph 31(1)(b)), corresponding to the circumstances to which the different rates would apply.

Choice of procedure

17. The award period is an integral part of the method which will be used by the rate-assessor when setting the rate and the affirmative procedure is therefore appropriate. Similarly if a change was needed as a consequence of moving to more than one rate the same level of scrutiny would be required.

Section 2 – Process for setting rate of return

New Schedule A1 of the 1996 Act, paragraph 9 – Returns-based assessment: inflation

Power conferred on:	**the Scottish Ministers**
Power exercisable by:	**regulations**
Parliamentary procedure:	**affirmative**

Provision

18. Paragraph 9 of new schedule A1 of the 1996 Act provides the Scottish Ministers with a power to prescribe information other than the Retail Price Index to inform the allowance which must be made by the rate-assessor for the impact of inflation on the value of the return or the investment.

Reason for taking this power

19. The Bill provides that the default indexation for inflation for calculating the return on investment in the notional portfolios to be the Retail Prices Index (RPI). However, over time it may be more appropriate for another index to be used. For example, in 2013 the RPI lost its status as a national statistic and it was replaced by the Consumer Prices Index (CPI). It is therefore possible that Scottish Ministers may, in the future, want to adopt a different default indexation for inflation.

Choice of procedure

20. Index linking is an important aspect of awards of damages. A change in the index to be applied could make a significant difference to the calculation of the discount rate. For example the CPI is currently 2.2% and the RPI 3.4%, back in January the difference was even greater in so far as the CPI was 2.7% and the RPI was 4.1%. Any decision to apply a different rate should therefore be afforded the level of scrutiny attributed to the affirmative procedure.

Section 2 – Process for setting rate of return

New Schedule A1 of the 1996 Act, paragraph 11 – Standard adjustments

Power conferred on: **the Scottish Ministers**
Power exercisable by: **regulations**
Parliamentary procedure: **affirmative**

Provision

21. Paragraph 11 of new schedule A1 provides Scottish Ministers with the power to modify the standards adjustments which must be made by the rate-assessor to the rate of return derived from the national investment portfolio.

Reason for taking the power

22. The Bill sets out the standard adjustments which must be applied to the rate of return derived from the notional investment portfolio. The adjustments are expressed as percentage points which must be deducted for the impact of taxation and the costs of investment advice and management as well as a further margin.

23. It is likely that in terms of taxation, investment advice and management costs that these will vary over time. If they are not kept current they will impact on the level of damages for future pecuniary losses paid to pursuers. In the case of the further margin, which is intended to reduce the chances of a pursuer being under-compensated, ahead of each review the Scottish Ministers will need to take a view on the appropriate level of further margin to achieve this.

Choice of procedure

24. The standard adjustments form a critical part of the information which informs the rate-assessor's review. It is right that changes to these figures are subject to the scrutiny afforded by the affirmative procedure.

Section 2 – Process for setting rate of return

New Schedule A1 of the 1996 Act, paragraph 14 – Details within portfolio – ascribing meaning

Power conferred on: **the Scottish Ministers**
Power exercisable by: **regulations**
Parliamentary procedure: **affirmative**

Provision

25. Paragraph 14 of new schedule A1 provides the Scottish Ministers with the power to define the types of investments listed in the first column of the table at paragraph 12(2) of the Schedule which sets out the notional investment portfolio on which the rate assessment is based.

Reason for taking the power

26. The investment types listed in the notional investment portfolio should be terms which have a common understanding amongst those with a professional knowledge of investments. Indeed in the absence of any regulations under this paragraph the meaning which is to be attributed to them is that which someone with professional knowledge of investments would commonly understand them to be (see paragraph 13).

27. However, it may be the case that an investment type may change to the extent that a common understanding of the terminology based on professional knowledge is no longer possible, perhaps for example as a result of new products entering the market and blurring what was a well understood term. This power will enable the Scottish Ministers to set out a definition of any or all of the types of investment listed in the notional investment portfolio to ensure clarity and certainty for the rate-assessor in the fulfilment of their duties.

Choice of procedure

28. Whilst this is essentially a care and maintenance power it is nonetheless subject to the affirmative procedure on the basis that any aspect of the notional investment portfolio is integral to the determination of the discount rate and that this level of scrutiny will ensure that any changes remain suitable for a hypothetical investor.

Section 2 – Process for setting rate of return

New Schedule A1 of the 1996 Act, paragraph 15 – Details within portfolio - types of investments and allocations

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

Provision

29. Paragraph 15 of new schedule A1 provides the Scottish Ministers with the power to modify, add or remove the investment types contained in the notional investment portfolio and also to modify, add or remove the percentage figure allocated to the investment types in the notional investment portfolio.

Reason for taking the power

30. The investment markets are subject to on-going change. New products enter the market, established products may be discontinued. The level of risk associated with different types of investment may change in the light of wider societal and even global changes. As the notional investment portfolio is the basis of the method for assessing changes to the discount rate it needs to be kept accurate and current. It must also reflect the investment needs of a hypothetical investor as set out at paragraph 16 to 18 of the Schedule. This power will enable the Scottish Ministers to ensure that ahead of every review the notional investment portfolio is meaningful, up-to-date, and in line with the needs of a hypothetical investor.

Choice of procedure

31. Whilst this is essentially a care and maintenance power it is nonetheless subject to the affirmative procedure on the basis that any aspect of the notional investment portfolio is integral to the determination of the discount rate. Paragraph 16 of the Schedule places a duty on the Scottish Ministers, when considering proposals for these regulations, to have regard to the need to ensure that any changes to the notional investment portfolio remain suitable for a hypothetical investor. This level of scrutiny is therefore appropriate for this power.

Section 2 – Process for setting rate of return

New Schedule A1 of the 1996 Act, paragraph 21– Expression of rate set

Power conferred on: **the Scottish Ministers**
Power exercisable by: **regulations**
Parliamentary procedure: **affirmative**

Provision

32. Paragraph 21 of new schedule A1 provides a power for the Scottish Ministers to require the rate-assessor to set more than one rate of return.

Reason for taking the power

33. Although to date there has only ever been one prescribed rate of return in Scotland and indeed the rest of the United Kingdom, some other jurisdictions prescribe more than one rate, usually on the basis of the duration of the award. So for example one rate would apply for awards up to 15 years and another for beyond 15 years. This is intended to better reflect the different risks and returns available on short and long term investments. The Scottish Ministers will keep the need for more than one rate under review. This power will enable the Scottish Ministers to secure that more than one rate of return is set. In these circumstances a review would be carried out for each rate and will require the rate-assessor to report separately on each rate of return.

34. This replicates the existing legislation as set out at section 1(3) of the 1996 Act which enables the Scottish Ministers to prescribe different rates of return for different classes of case.

Choice of procedure

35. A move to more than one rate would be a change to the approach that has been adopted to date and the level of scrutiny afforded by the affirmative procedure would therefore be appropriate to this power.

Part 2 – periodical payments of damages

Section 3 – Award, continuity and index linking

New section 2C of the 1996 Act - list of recognised bodies and office-holders

Power conferred on: **the Scottish Ministers**
Power exercisable by: **regulations**
Parliamentary procedure: **negative**

Provision

36. Section 2C(7) of the 1996 Act (as inserted by section 3(2) of the Bill) provides the Scottish Ministers with a power to add to the list of recognised bodies and office-holders that the court are able to assume are capable of reasonably secure continuity of payments under a periodical payments order. (These new entries are limited to health service bodies or non-government bodies). It also allows the Scottish Ministers create exceptions to entries in that list as enacted in the Bill. A periodical payment order can only be made by the court where it is satisfied that the continuity of payment under the order would be reasonably secure.

Reason for taking this power

37. The list of recognised bodies and office-holders for the purposes of providing payments which are reasonably secure comprises those who are a part of the Scottish Administration, a Minister of the Crown or a department of the Government of the United Kingdom. These bodies and office-holders are not capable of being removed from the list. Other bodies and office-holders who are categories of health service bodies or non-government bodies may however be added to the list. Such bodies would only be added where the Scottish Ministers were satisfied that they were able to ensure reasonably secure continuity of payments. This power will enable Scottish Ministers to add to the list and also remove such additions from the list so that the list remains as relevant and appropriate as possible.

Choice of procedure

38. This is a straightforward care and maintenance provision which will enable the list to be added to when relevant bodies are identified as being capable of ensuring reasonably secure continuity of payments and thereafter for those the list to be kept up-to-date to reflect for example, changes in the names of bodies or the removal of bodies who are no longer deemed secure.

Section 3 – Award, continuity and index linking

New Section 2D of the 1996 Act – alternative indexation basis

Power conferred on: **the Scottish Ministers**
Power exercisable by: **regulations**
Parliamentary procedure: **affirmative**

Provision

39. Section 2D(6)(b) of the 1996 Act (as inserted by section 3(2) of the Bill) provides the Scottish Ministers with a power to prescribe information other than the Retail Price Index as the statutory basis of alteration incorporated in an order for periodical payments.

Reason for taking this power

40. The Bill provides that the default indexation for future pecuniary losses paid in the form of a periodical payment order is to be the Retail Prices Index (RPI). However, over time it may be more appropriate for another index to be used. For example, in 2013 the RPI lost its status as a national statistic and it was replaced by the Consumer Prices Index (CPI). It is therefore possible that Scottish Ministers may, in the future, consider it more appropriate to index link damages paid through a periodical payment order to the CPI or another index such as the Annual Survey of Hours and Earnings (ASHE) on the basis that it may be more appropriate for future care costs.

Choice of procedure

41. Index linking is an important aspect of future pecuniary losses paid in the form of a periodical payment order. A change in the index to be applied could make a significant difference to the level of damages awarded. For example the CPI is currently 2.2% and the RPI 3.4%, back in January the difference was even greater in so far as the CPI was 2.7% and the RPI was 4.1%. Any decision to apply a different rate should therefore be afforded the level of scrutiny attributed to the affirmative procedure..

<u>Part 3 – ancillary and final matters</u>

Section [7] – Ancillary Provision

Power conferred on: **the Scottish Ministers**
Power exercisable by: **regulations**
Parliamentary procedure: **affirmative/negative**

Provision

42. Section 7 of the Bill provides the Scottish Ministers with the power to make, incidental, supplementary, consequential, transitional, transitory or saving provision that they consider appropriate for the purposes of, in connection with, or for giving full effect to any provision of the Bill. Subsection (2) provides that such regulations may modify any enactment, including any provision made by the Bill.

Reason for taking this power

43. To provide the flexibility to make any ancillary provision when commencing the provisions or that may arise in light of experience on the operation of the Act. The Scottish Government recognises the potentially broad application of this power, which includes the facility to modify primary legislation, and to alter the provisions in the Bill. Any supplementary use of the power would though need to be appropriate for the purposes of, in connection with or for giving full effect to the Act. While the Scottish Government has not identified the need for any such provision, given the technical and detailed nature of some of the Bill and some of the legislation it relates to, for example the law on bankruptcy, it is considered prudent to have these powers in case there is a need for any fine-tuning to ensure the workability in practice of the matters addressed in the Bill.

Choice of procedure

44. Where the power is used to modify primary legislation, it would require the level of parliamentary scrutiny attached to the affirmative procedure. Other uses will require the negative procedure. These procedures are typical for ancillary powers and provide the necessary safeguards with regard to the type of legislation which can be made.

Section 8 – Commencement

Power conferred on: **the Scottish Ministers**
Power exercisable by: **regulations**
Parliamentary procedure: **laid, no procedure**

Provision

45. To enable the Scottish Ministers to commence the Bill, including transitional, transitory or savings provisions.

Reason for taking this power

46. The Scottish Government considered that in accordance with usual practice, the Bill should be commenced by Commencement Regulations to ensure that it is satisfied that those affected by the legislation have sufficient notice of the provisions of the Bill to be able to plan for them coming into effect.

Choice of procedure

47. No procedure is provided for aside from laying in Parliament in line with the Interpretation and Legislative Reform (Scotland) Act 2010, which is typical for commencement powers.

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