



The Scottish Parliament  
Pàrlamaid na h-Alba

## JUSTICE COMMITTEE

### AGENDA

15th Meeting, 2017 (Session 5)

Tuesday 25 April 2017

The Committee will meet at 10.00 am in the Mary Fairfax Somerville Room (CR2).

1. **Criminal Finances Bill (UK Parliament legislation):** The Committee will take evidence on legislative consent memorandum LCM-S5-6a from—

Michael Matheson, Cabinet Secretary for Justice, Linda Hamilton, Deputy Director, Defence, Security and Cyber-Resilience, Alastair Crerar, Head of Organised Crime Policy, and Craig French, Directorate for Legal Services, Scottish Government.

2. **Subordinate legislation:** The Committee will consider the following negative instrument—

Damages (Personal Injury) (Scotland) Order 2017 (SSI 2017/96).

3. **Justice Sub-Committee on Policing:** The Committee will consider a report back from the Sub-Committee meeting on 20 April 2017.

4. **Railway Policing (Scotland) Bill (in private):** The Committee will consider a draft Stage 1 report.

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The papers for this meeting are as follows—

**Agenda item 1**

Paper by the clerk - Criminal Finances Bill LCM

J/S5/17/15/1

**Agenda item 2**

Paper by the clerk - SSI 2017-96

J/S5/17/15/2

**Agenda item 3**

Paper by the clerk - Justice Sub-Committee on Policing

J/S5/17/15/3

**Agenda item 4**

Private paper - Railway Policing (Scotland) Bill

J/S5/17/15/4 (P)

## Justice Committee

15th Meeting, 2017 (Session 5), Tuesday 25 April 2017

### Evidence session with Cabinet Secretary on supplementary Legislative Consent Memorandum in relation to the UK Criminal Finances Bill

#### Note by the Clerk

#### Introduction

1. This paper provides background information in relation to the evidence session with the Cabinet Secretary on the legislative consent memorandum (LCM) lodged by the Scottish Government in relation to the Criminal Finances Bill on 30 March 2017. The supplementary LCM is attached at **Annexe A**.

#### Legislative consent memorandum process

2. The LCM process is the mechanism for the Scottish Parliament to give its consent to the UK Government to legislate on devolved matters in the UK Parliament. Chapter 9B of Standing Orders<sup>1</sup> sets out the procedure governing the process. To give consent, the Parliament must agree to a legislative consent motion. This shall not normally be lodged until the lead committee has reported on the LCM.

3. Under Standing Orders, an LCM must summarise what the UK Bill does and what its policy objectives are, and specify the extent to which the Bill makes provision for any purpose within the legislative competence of the Scottish Parliament, or which alters the executive competence of the Scottish Ministers. Such provisions are known as “relevant provisions” under Standing Orders. If, as is the case in this instance, the intention of the lodger of the LCM is to lodge a draft legislative consent motion, then the LCM should also set out a draft legislative consent motion.

4. The underlying rationale for the process set out in Standing Orders is to facilitate a decision by the Scottish Parliament on whether to consent to the relevant provisions being made (a) *following* a recommendation by the lead Committee, as set out in a report, but (b) *before* the UK Parliament takes a final decision on the provisions. However, there is some built-in flexibility in the language of Chapter 9B in recognition of the fact that the timetabling of legislation at Westminster is outwith the control of the Scottish Government and Scottish Parliament (and can on occasion be unpredictable), as is the process of notifying the Scottish Government of the existence of relevant provisions in UK Bills.

#### Previous LCM on the Criminal Finances Bill

5. A LCM in respect of the Criminal Finances Bill was lodged by the Scottish Government on 22 November 2016. The Parliamentary Bureau referred the LCM to the Justice Committee. At its 13 December meeting, the Committee agreed to issue a call for evidence and decide what further scrutiny, if any, to undertake in the light of submissions received. The Committee received four submissions. These made some comment on specific provisions, in some cases welcoming them, in others making relatively neutral observations on technical matters. None of the four submissions indicated serious concerns with relevant provisions in the Bill.

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<sup>1</sup> <http://www.scottish.parliament.uk/parliamentarybusiness/26512.aspx>

6. In view of this, the Committee decided to take no further evidence on the LCM and to make a short report to Parliament, recommending that the Scottish Parliament agree to a legislative consent motion. The report was published on 2 February.<sup>2</sup> See Annexe B for an extract from the report. The Scottish Parliament duly agreed to the motion.

7. Further background information on the prior scrutiny process for relevant provisions of the Criminal Finances Bill, is set out in the supplementary LCM itself, alongside commentary on the main purposes of the UK legislation.

### **Reason for supplementary LCM, and timetable for reporting**

8. The Justice Committee was informed at the time of its scrutiny of the initial LCM for the Criminal Finances Bill that there was a possibility of amendments being tabled that would introduce further relevant provisions into the Bill, therefore requiring a supplementary LCM to be lodged. This has now come to pass, as explained further in the supplementary LCM itself. The supplementary LCM provides further information on the new relevant provisions in the Bill, or which are anticipated in further amendments.

9. A supplementary LCM is dealt with no differently from an LCM. That is to say, the lead Committee must report on it, normally in advance of any motion on the LCM being taken in the Chamber. The Bureau has agreed to refer the supplementary LCM to the Justice Committee. The Delegated Powers and Legislative Reform Committee will also consider new relevant provisions containing delegated powers.

10. The timetable for consideration of the supplementary LCM was always likely to be tight. The House of Common's agreement to hold a general election on 8 June means that the timetable for agreement of the Bill is likely to be accelerated. In view of this, a motion to agree to the UK Government legislating in the areas set out in the supplementary LCM is now likely to be taken in the Chamber on the afternoon of Tuesday 25 April. Ideally, the Committee would report on the LCM before the motion is taken.

### **Cabinet Secretary's attendance to give evidence on the LCM**

11. In view of the above, the Convener invited the Cabinet Secretary and officials to give oral evidence on the supplementary LCM as the first item of business for the 25 April meeting. Depending on what issues arise during evidence-taking, it may be possible for a short report to be made to Parliament before the motion is taken at Decision Time later that day.

12. The Cabinet Secretary will speak to the reasons for lodging the supplementary LCM and answer any questions Members may have. Members will note from the supplementary LCM that the Scottish Government supports the UK Government legislating in relation to the relevant provisions. The clerks understand that, as of 20 April, some amendments making provisions that may alter the executive competence of the Scottish Ministers have yet to be tabled at Westminster. It is likely that the Cabinet Secretary may take the opportunity to update the Committee on the current situation during the evidence session.

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<sup>2</sup> <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/103353.aspx>

**SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM****CRIMINAL FINANCES BILL****Background – the original Legislative Consent Memorandum and consideration of the Bill to date**

1. This supplementary Legislative Consent Memorandum (LCM) has been lodged by Michael Matheson, MSP, Cabinet Secretary for Justice. This supplementary LCM augments the original LCM on the Criminal Finances Bill which was lodged on 22 November 2016. That LCM identified a number of provisions contained within the Bill that alter the executive competence of the Scottish Ministers and/or which fall within the legislative competence of the Scottish Parliament. Those provisions related to the Proceeds of Crime Act 2002 (POCA) and the Anti-terrorism, Crime and Security Act 2001 and included provisions on:

- unexplained wealth orders;
- forfeiture of personal (or moveable) property;
- forfeiture of money held in bank/building society accounts;
- seized money; and
- recovery orders relating to heritable property.

2. In addition, the Cabinet Secretary for Justice wrote to the Convener of the Justice Committee on 20 January to notify the Committee of the potential “Magnitsky” amendment which would explicitly insert an additional form of unlawful conduct – gross human rights abuses or violations – into Part 5 of POCA. The Cabinet Secretary then wrote again on 24 February to confirm the inclusion of a UK Government-drafted “Magnitsky” amendment in the Bill (clause 12 in the current draft of the Bill) and a consequential amendment to section 19B of the Prescription and Limitation (Scotland) Act 1973.

3. The letter of 24 February also set out possible further amendments in consequence of what is currently clause 28 of the Bill (recovery orders relating to heritable property). These amendments would ensure that (a) the new provisions being inserted by clause 28 are effective in enabling the trustee for civil recovery to secure vacant possession of any heritable property that is subject to a recovery order; (b) the procedure for removing any persons occupying such property is consistent with that for other types of action for removing and gives occupiers fair notice of the need to vacate the property, and (c) the Scottish Ministers notify the local authority of any application for a recovery order made in respect of a dwellinghouse in the local authority’s area, to complement existing safeguards against homelessness.

4. In addition, the letter of 24 February also highlighted a possible need to amend the information-sharing provisions in Part 10 of POCA in order to enable the Scottish Ministers to disclose and receive particular information with respect to Unexplained Wealth Orders (UWOs).

5. Since that letter was sent to the Convener of the Justice Committee, further work has been done to instruct and draft the amendments referred to in paragraphs 3 and 4

above. The amendments referred to in paragraph 4 were agreed at the Committee Stage in the House of Lords on 28 March. The amendments referred to in paragraph 3 are due to be considered at Report Stage.

6. Subsequent to the correspondence referred to above and consideration by the Justice Committee of the original LCM, the Legislative Consent Motion for the Criminal Finances Bill was passed by the Parliament on 2 March.

### **Links to the Original LCM and the letters of 20 January and 24 February**

7. The original LCM is available here: <http://www.parliament.scot/SPLCM-S05-6.pdf>

8. The letter from the Cabinet Secretary for Justice to the Convener of the Justice Committee dated 20 January 2017 is available here:  
[http://www.parliament.scot/S5\\_JusticeCommittee/General%20Documents/20170120CSfJtoMM.pdf](http://www.parliament.scot/S5_JusticeCommittee/General%20Documents/20170120CSfJtoMM.pdf)

9. The letter from the Cabinet Secretary to Convener of the Justice Committee dated 24 February 2017 is available here:  
[http://www.parliament.scot/S5\\_JusticeCommittee/General%20Documents/20170224CSfJtoMM.pdf](http://www.parliament.scot/S5_JusticeCommittee/General%20Documents/20170224CSfJtoMM.pdf)

### **The latest version of the Bill**

10. The latest iteration of the Bill, as introduced in the House of Lords on 22 February 2017, is available here:  
<https://www.publications.parliament.uk/pa/bills/lbill/2016-2017/0104/17104.pdf>

### **Need for a supplementary LCM**

11. The Scottish and UK Governments have been working together on refining certain provisions of the Bill to make them as effective as possible. The UK Government has tabled further amendments to the Bill for consideration at Lords Committee Stage (28 March and 3 April). Further amendments are due to be tabled for Lords Report Stage.

12. Where these amendments are not covered by the scope of the original LCM, and where they fall within the legislative competence of the Scottish Parliament or alter the executive competence of the Scottish Ministers, then a supplementary LCM is required.

13. The amendments detailed below largely build on, and make further provision in consequence of, the provisions of the Bill covered by the original LCM. They are aimed at improving the recovery of criminal assets under POCA and ensuring that Scotland, and the UK as a whole, is a more hostile place for those seeking to move, hide, use or reinvest the proceeds of crime or corruption. Since POCA is a UK-wide regime which relates to both reserved and devolved matters, this Bill offers the most efficient and effective means of making the provisions on a UK basis. The Scottish Government therefore recommends that the Scottish Parliament gives consent for the UK Parliament to consider these provisions as they extend and apply to Scotland.

## Summary of developments and changes to the Bill

### UWOs

14. Three separate amendments to the provisions on UWOs were tabled and then agreed at the Lords Committee Stage on 28 March. These amendments are included in this supplementary LCM because they extend the application of, and add to, the UWO provisions as set out in the original LCM. In so far as the amendments relate to the recovery of the proceeds of devolved crime, they fall within the legislative competence of the Scottish Parliament. In addition, these amendments further alter the executive competence of the Scottish Ministers. Accordingly, the Scottish Parliament's consent is being sought as the amendments aim to strengthen the UWO-related provisions whilst also ensuring that adequate safeguards are in place.

#### *UWOs – reducing the threshold*

15. The first of these amendments changes the minimum value of any property which may be subject to a UWO from “greater than £100,000” to “greater than £50,000”. This change brings more properties into the scope of the provisions, particularly in parts of the UK where property prices are lower. The original LCM referred to the figure of £100,000 which was in the Bill as introduced (paragraph 2 of page 6 of the original LCM).

#### *UWOs – property held in trust*

16. The second UWO-related amendment amends the provisions on UWOs to explicitly include property that is held in a trust arrangement. These amendments ensure that UWOs can apply in situations where property is held in trust and/or corporate structures.

#### *UWOs – compensation*

17. The third UWO-related amendment provides for compensation to be paid, in certain circumstances, where an interim freezing order made in connection with a UWO is recalled. Any such compensation would be payable by the Scottish Ministers. This will bring the provisions on UWOs into line with other orders made under POCA which contain explicit compensation provisions so that a person can seek a remedy in the event of their property being wrongly frozen.

### Seizure and forfeiture of cash – betting slips

18. A further amendment was agreed to at the Lords Committee Stage to expand the definition of cash that can be seized and forfeited under POCA to include betting slips (“betting receipts”). The Scottish Government pressed for this amendment to be made, so as to make the cash forfeiture regime more effective in countering the increasingly sophisticated ways in which criminals try to prevent the recovery of their criminal gains. Consent is therefore being sought, as this amendment falls within the Scottish Parliament's legislative competence to the extent that it relates to the civil recovery of cash which is the proceeds of devolved crime.

### Reconsideration of discharged confiscation orders

19. A new clause introduced at the Lords Committee Stage amends section 109 of POCA to make it explicit that the discharge of a confiscation order under section 109 (inadequacy of available amount: discharge of order) is not a barrier to the revisiting of that order under section 106 or section 107. This is a relatively minor amendment to ensure that the confiscation regime is fully effective. Consent is being sought because this amendment makes provision in relation to a matter which falls, in part, within the legislative competence of the Scottish Parliament.

#### Amendments to the Civil Jurisdiction and Judgments Act 1982

20. In addition, further amendments to the Civil Jurisdiction and Judgments Act 1982 were agreed to at Lords Committee Stage, which will mean that UWOs issued in the civil courts of one UK jurisdiction can be recognised and enforced in any of the other jurisdictions. These are consequential on the UWO provisions in clause 4, and supplement similar consequential amendments in paragraph 3 of Schedule 5 to the Bill regarding Interim Freezing Orders (clause 5), Account Freezing Orders and Account Forfeiture Orders (both clause 15). They will allow Scottish UWOs to be recognised and enforced elsewhere in the UK, and vice versa, in line with other similar types of order made under POCA. Consent is therefore being sought as these amendments make provision for a purpose which falls, in part, within the Scottish Parliament's legislative competence.

#### Possible amendment to clause 51: power to make consequential provision

21. The Scottish and UK Governments are discussing the need to amend clause 51 to extend the Scottish Ministers' regulation-making power to include also the power to (a) make provision in consequence of clause 28 (recovery of heritable property), and (b) amend, repeal or revoke (as required) any provision relating to devolved matters contained in an Act of Parliament or an instrument made under such an Act (as well as any provision in an Act of the Scottish Parliament, or an instrument made under an Act of the Scottish Parliament, as currently provided). Given the tight timetable for this Bill, the Scottish Parliament's consent to the UK Parliament considering an amendment of this sort is being sought on a contingency basis, as it would further alter the executive competence of the Scottish Ministers.

#### **Draft legislative consent motion**

22. The draft motion, which will be lodged by the Cabinet Secretary for Justice, is:

“That the Parliament agrees that provisions of the Criminal Finances Bill, introduced in the House of Commons on 13 October 2016, relating to Unexplained Wealth Orders, the seizure and forfeiture of cash in the form of betting receipts, discharged confiscation orders, the Civil Jurisdiction and Judgments Act 1982 and powers to make consequential provision, so far as these matters fall within the legislative competence of the Scottish Parliament or alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament.”

## ANNEXE B

**EXTRACT FROM REPORT OF JUSTICE COMMITTEE ON PRIOR LCM ON  
CRIMINAL FINANCES BILL, 2 FEBRUARY 2017****Call for evidence**

26. On 14 December 2016 the Committee issued a call for evidence<sup>i</sup> on the LCM. Four written responses were received: from Families Outside, the Law Society of Scotland, Police Scotland and the Scottish Legal Aid Board. The responses can be found in Annexe D.

**Evidence received**

27. The submission from the Law Society of Scotland (the Society) did not set out a general view on whether it agrees with the provisions outlined in the LCM but instead provides a largely neutral commentary on the relevant provisions in the Bill. In a small number of instances, it expressed a view on particular provisions. The Society stated that has also provided a briefing on the Bill for MPs.
28. The Society's submission stated that the creation of Unexplained Wealth Orders should make it easier for Scottish Ministers to obtain property via civil recovery proceedings. It observed that such orders may be made against property thought to be held by "politically exposed persons" (PEPs), but that enforcement agencies are not required to demonstrate reasonable grounds to suspect PEP involvement in serious crime.
29. The Society explained that clause 25 provides for the High Court of Justiciary or Sheriff to order any realisable property in the form of money held in a bank or building society be paid to satisfy a Confiscation Order. The Bill enables Scottish Ministers to amend this provision, by way of regulations, so that it applies to money held by other financial institutions or other realisable cash or cash like products. The submission described the power as a "Henry VIII power" (ie a power enabling Ministers to amend primary legislation by subordinate legislation) and noted that the clause does not require Scottish Ministers to consult on draft regulations prior to laying them in the Scottish Parliament. It states that a requirement for pre-legislative scrutiny of draft regulations would provide an additional layer of scrutiny in this area. As mentioned above the DPLR Committee reported on provisions in the Bill conferring subordinate legislation making powers on the Scottish Ministers and expressed no concerns in relation to this power.
30. The Society's submission stated that it believes that an additional layer of scrutiny would be provided if there were a requirement for prior scrutiny of draft regulations made under clause 49 (power to make consequential provisions). It again describes this as a Henry VIII power. The DPLR Committee did not express any concerns in relation to this power.

31. Police Scotland's submission stated that it was involved in ongoing discussions with the Scottish Government, the Crown Office and Procurator Fiscal Service (COPFS) and the Home Office in relation to the Bill. It stated that—

” Overall, Police Scotland is supportive of the Criminal Finances Bill however there are some practicalities which require to be addressed. The Home Office is aware of these issues, and is engaging already with the Scottish Government and the COPFS.

32. The submission highlighted three main measures which were of interest to Police Scotland. In respect of Disclosure Orders, Police Scotland argued that they would represent an opportunity to achieve real savings both for Police Scotland itself and for the COPFS as they would dramatically reduce the work currently required for Production Orders.

33. Police Scotland stated that it supported the proposed reform of the Suspicious Activity Report (SAR) regime, which will provide an extension to the current 31 day moratorium in relation to SARs which includes a request for Consent to Transact (now known as a Defence Against Money Laundering (DAML)). However it believes there are practical issues which require to be addressed and notes that these have already been raised directly with the Scottish Government and the Home Office by the COPFS.

34. Police Scotland stated that the Bill will strengthen current legislation by allowing law enforcement agencies to take action against criminal cash by allowing an order to be granted to the holder of cash (such as a bank or insurance company) to release funds to satisfy a Confiscation Order.

35. The Scottish Legal Aid Board (SLAB)'s submission stated that it has considered the LCM with a view as to whether or not there may be any implications of the availability of legal aid or advice and assistance to an individual affected by the proposed legislation. SLAB concluded that—

” It is not anticipated that the proposed legislation will necessarily lead to a significant increase in litigation, and, therefore material increased costs to the [Scottish Legal Aid] Fund.

36. Families Outside is an organisation which works on behalf of children and families affected by imprisonment. Its written submission highlighted the potential impact of the Bill on family members who may not be aware that their income derives from the proceeds of crime. While Families Outside did not suggest specific amendments to the Bill, it argued that the legislation should take into account the impact on non-offending family members and what consideration might be given to them, for example in a situation where the recovery of the proceeds of crime renders a family homeless or in crisis. We ask the Scottish Government to note this concern.

### **Possible new relevant provision**

37. In his letter of 20 January 2017 (see Annexe C) the Cabinet Secretary drew the Committee's attention to an amendment (commonly referred to as the "Magnitsky amendment") which has been tabled for Commons Report Stage. He indicated that this backbench amendment has attracted cross party support. Its intention is to allow for civil recovery proceedings to be raised in respect of individuals involved in human rights abuses overseas with property in the UK.
38. The Cabinet Secretary's letter makes clear that, although the amendment does not mention Scotland, its effect if passed would be to confer functions on the Scottish Ministers (in respect of their role with regard to civil recovery). As a result of that, the amendment would require the agreement of the Scottish Parliament through a Legislative Consent Motion.

## Recommendations

39. The Committee is supportive of the UK Government legislating in the areas set out in the Legislative Consent Memorandum on the Criminal Finances Bill. This is on the basis of an absence of any evidence raising significant concerns about relevant provisions in the UK Bill.
40. The Committee therefore recommends that the Parliament approves the legislative consent motion on the Criminal Finances Bill, to be lodged by the Scottish Government. In doing so the Committee recommends the Scottish Government takes regard of the points raised in the written responses it has received, as set out in this report.
41. The Committee notes that an additional amendment has been tabled for Commons Report Stage and, assuming it is agreed to, would welcome further information from the Cabinet Secretary prior to its inclusion in this, or a future, Legislative Consent Motion

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<sup>i</sup> Call for evidence <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/102703.aspx>

**Justice Committee**

**15<sup>th</sup> Meeting, 2017 (Session 5), Tuesday 25 April 2017**

**Subordinate legislation**

**Note by the clerk**

**PURPOSE**

1. This paper invites the Committee to consider the following negative instrument:
  - [Damages \(Personal Injury\) \(Scotland\) Order 2017 \(SSI 2017/96\)](#) [see page 3].

**JUSTICE COMMITTEE CONSIDERATION**

2. If the Committee agrees to report to the Parliament on the instrument it is required to do so by 15 May 2017.

**Procedure for negative instruments**

3. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. This means they become law unless they are annulled by the Parliament. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).
4. Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.
5. If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.
6. Each negative instrument appears on the Justice Committee’s agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. Members should however note that, for scheduling reasons, it is not *always* possible to continue an instrument to the following week. For this reason, if any Member has significant concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.
7. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

### **Guidance on subordinate legislation**

8. Further guidance on subordinate legislation is available on the Delegated Powers and Law Reform Committee's web page at:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>

### **Recommendation**

9. **The Committee is invited to consider the instrument.**

**DAMAGES (PERSONAL INJURY) (SCOTLAND) ORDER 2017 (SSI 2017/96)****Introduction**

10. The instrument is made under section 1 of the Damages Act 1996 (c. 48), as amended by the Scotland Act 1998 (Consequential Modifications) (No. 2) Order 1999 (S.I. 1999/1820, schedule 2, paragraph 126).

11. Further details on the purpose of the instrument can be found in the policy note (see below).

12. The instrument came into force on 28 March 2017. This was in breach of the “28 day rule”, which provides that where a Scottish statutory instrument is subject to the negative procedure, it must be laid at least 28 days before the instrument comes into force. A breach of the rule does not affect the validity of the Order. [See further page 6 below].

**Policy Note: Damages (Personal Injury) (Scotland) Order 2017 (SSI 2017/96)****Policy objectives**

1. The Order sets out the rate of return (“the discount rate”) to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury. The courts must take this rate into account unless a party to the action shows that another rate would be more appropriate in the case in question.
2. The objective of an award for damages for personal injury is to put the pursuer in the same position financially as they would have been if it had not been for the injury. When damages are awarded for personal injury, sometimes a one-off payment will suffice. However, if the injured person will suffer loss of earning or need care stretching into the future, it may be more appropriate to assess damages in terms of their life expectancy and the losses which are expected for the future.
3. The discount rate is used to determine how much cash needs to be paid at the time of the award to provide a capital sum which can be used to yield exactly enough to cover the anticipated needs and lost earnings every year, for as long as they are expected to continue. It is not intended that the pursuer is left with a capital sum when the period covered by the award has expired.
4. Assessment of the amount of an award is complex. It takes into account the annual cost a pursuer is likely to need, the number of years over which the losses are likely to continue and applies a discount to reflect the effects of paying the whole amount in one lump sum. The discount rate indicates how much a prudent investor should get, allowing for inflation, and reflecting the fact that they are financially dependent on the lump sum, often for long periods or for the remainder of their life.
5. In the English case of *Wells v Wells* [1999] 1 AC 345, the House of Lords unanimously concluded that, in order to provide full compensation the discount rate should be based on the average rate of return from investment in Index

Linked Government Securities (ILGS) and on the assumption that the successful pursuer would invest prudently and invest their money in ILGS.

6. The rate currently used by the courts in Scotland was set in 2002 and is 2.5%. It was considered appropriate at that time, taking into consideration the ILGS rate. There have been significant changes in the markets since 2002.
7. The Lord Chancellor set the rate at minus 0.75% for England and Wales and this came into force on 20 March 2017. The Lord Chancellor placed her statement of reasons in the libraries of the House of Parliament on 27 February 2017<sup>1</sup>.
8. Scottish Ministers have considered all relevant material before them in deciding the rate for Scotland. The Scottish Government accepts the Lord Chancellor's reasons for setting the rate at minus 0.75% and believes that there are no particularly Scottish factors that would indicate a need for a different rate in Scotland. A statement of that decision is annexed.

### Consultation

9. In setting the rate, section 1 of the Damages Act 1996 requires that the Scottish Ministers consult the Government Actuary and that has taken place. While the Lord Chancellor must also consult with HM Treasury, there is no such requirement on Scottish Ministers, but they have sought the Chief Economic Adviser's advice.
10. The Scottish Government joined the UK Government and the Northern Ireland Executive on 2 previous consultations concerning the discount rate: the first published in 2012, Damages Act 1996: the discount rate - how should it be set?<sup>2</sup> The second, Damages Act 1996: the discount rate - review of the legal framework, was published in February 2013<sup>3</sup>. The 3 administrations also sought the views of an expert panel in 2015<sup>4</sup>.

### Financial effects

11. In making their decision Scottish Ministers did not consider the financial impact of a change to the discount rate, including to their own interests as potential defenders. They only considered the relevant material before them as set out in the Annex. No Business and Regulatory Impact Assessment was therefore prepared before they made their decision.
12. There will be a financial impact on the public sector, such as the NHS. There will also be an impact on insurers who will bear much of the costs of increased awards against local government, business and private individuals (particularly motorists).

<sup>1</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/594972/discount-rate-statement-of-reasons.pdf/](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/594972/discount-rate-statement-of-reasons.pdf/)

<sup>2</sup> <https://consult.justice.gov.uk/digital-communications/discount-rate/>

<sup>3</sup> <https://consult.justice.gov.uk/digital-communications/damages-act-1996-the-discount-rate-review-of-the/>

<sup>4</sup> <https://consult.justice.gov.uk/digital-communications/discount-rate/results/discount-rate-report.pdf/>

**Discount rate in Scotland: statement of the Scottish Ministers - 27 March 2017**

Scottish Ministers have the power, under section 1 of the Damages Act 1996, from time to time, to set the rate of return (discount rate) applied to sums awarded as damages for future pecuniary loss in an action for personal injury.

Scottish Ministers have carried out a review of the discount rate for Scotland. In the course of that review and in coming to a decision on the appropriate discount rate, they have considered all relevant material before them. This includes: responses to a joint consultation with the UK Government and the Northern Ireland Executive in 2012; the report of an expert panel in 2015 (which reached majority and minority conclusions); the reasons why the Lord Chancellor (on 27 February 2017) set the rate for England and Wales at minus 0.75%<sup>5</sup>; the response of the Government Actuary, who under section 1(4) of the Damages Act 1986 Scottish Ministers must consult before setting the discount rate in Scotland; the response of the Chief Economic Adviser to the Scottish Ministers; a statement made by the Association of British Insurers (ABI) and arguments made by the Medical and Dental Defence Union for Scotland (MDDUS) in their pre action protocol letter for judicial review of the Lord Chancellor's decision on the discount rate for England and Wales.

The responses to the joint consultation in 2012 were published by the Lord Chancellor on 27 February 2017.

This statement sets out the decision of Scottish Ministers on a new discount rate for Scotland and the reasons for that decision.

**Decision**

Scottish Ministers have decided that the appropriate discount rate for Scotland is minus 0.75%.

**Reasons**

The Lord Chancellor set the rate at minus 0.75% for England and Wales on 27 February 2017 and made a statement setting out her decision and reasons on that day. The Scottish Ministers accept the Lord Chancellor's reasons for setting the rate at minus 0.75% and consider that those reasons apply equally in Scotland. Scottish Ministers consider that there are no particularly Scottish factors that would indicate that it is appropriate to set a different discount rate in Scotland.

Following the decision of the Lord Chancellor on 27 February 2017, the ABI issued a statement in relation to the impact of the new rate in England and Wales on insurance premiums. Scottish Ministers do not consider the issues dealt therein to be a relevant consideration in determining the discount rate for Scotland.

The MDDUS issued a pre action protocol letter for Judicial Review challenging the Lord Chancellor's decision on 10 March 2017 and seeking the withdrawal of the Order making the change.

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<sup>5</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/594972/discount-rate-statement-of-reasons.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/594972/discount-rate-statement-of-reasons.pdf)

Scottish Ministers have considered the reasoning set out in the MDDUS' Pre-Action Protocol letter and disagree with their conclusions. Scottish Ministers consider that their discretion has to be operated within the principles laid down in the decision in *Wells v Wells* [1999] 1 AC 345.

MDDUS also argue that the Lord Chancellor should have completed a review of the methodology for setting the rate before setting the rate - the earlier consultation in 2013 on that issue and the work of the expert panel did not provide a clear steer on a new approach. If Scottish Ministers were to await the conclusion of a further review it would mean that a rate which is recognised as being wrong and therefore detrimental to injured parties, particularly those who have suffered catastrophic injury and are reliant on long term care, would remain in place for such time as it takes to conclude the review and implement any changes including any necessary legislative change.

## **DELEGATED POWERS AND LAW REFORM COMMITTEE CONSIDERATION**

13. The Delegated Powers and Law Reform Committee considered this instrument at its meeting on 18 April 2017 and agreed to draw it to the attention of the Parliament because the Order does not comply with the requirement that at least 28 days should elapse between the laying of an instrument which is subject to the negative procedure and the coming into force of that instrument.

### ***Extract from the Delegated Powers and Law Reform Committee's 19th Report 2017***

#### **Breach of the "28 day rule"**

The Order fails to comply with the "28 day rule" contained in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 ("ILRA"). It was laid before the Parliament on 27 March, and came into force the day after.

The "28 day rule" provides that where a Scottish statutory instrument is subject to the negative procedure, it must be laid at least 28 days before the instrument comes into force. A breach of the rule does not affect the validity of the Order.

In accordance with section 31 of ILRA, the Deputy Director, Justice Directorate of the Scottish Government wrote to the Presiding Officer, to explain why the requirements of section 28(2) have not been met in this case. The correspondence has been reproduced at **Annex A**.

The correspondence explains that any delay between the making of the Order and its entry into force would prejudice settlements of claims for damages for personal injury. Such a delay would lead to delays in the courts or in reaching settlements, while one party or the other may have sought to postpone cases, to obtain the benefit of the new discount rate. Prior to making the Order, the Scottish Government received representations to that effect.

The Scottish Government also explains in the correspondence that where a pursuer in a case receives damages which (owing to an incorrect discount rate being applied) do not cover their future pecuniary losses, this is contrary to the 'full compensation principle'. The effect can be particularly concerning in cases involving catastrophic injuries, where long term care is involved.

The Damages (Personal Injury) Order 2017 has set the same new discount rate for England and Wales. That Order was laid at Westminster on 27 February and came into force on 20 March, 2017. That timing has respected the '21 day rule' for negative procedure instruments applying at Westminster.

The Committee therefore sought clarification from the Scottish Government why the rule was complied with in England and Wales, but despite that the Scottish Ministers decided to breach the 28 day rule (see **Annex B**). The written response explains that there has been a deliberate decision to take a different approach for Scotland, for the reason outlined above. The reasons for the Ministry of Justice's approach for the equivalent Order "were a matter for the Lord Chancellor, in the light of the circumstances applicable in England and Wales at the time". The Committee clarified informally with the Scottish Government Legal Directorate that they have been unable to obtain further detail of those circumstances.

While the reason provided for the breach of the rule is clear and specific to this Order, the timing of laying the Order just in advance of the Easter Parliamentary recess has meant that this Committee and the lead Committee are only in a position to consider the Order in the week commencing 17 April - 3 weeks after the Order has been brought into force.

**The Committee draws the Order to the attention of the Parliament under reporting ground (j). The instrument fails to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.**

**The Order was laid before the Parliament on 27 March and came into force on 28 March 2017. It does not respect the requirement that at least 28 days should elapse between the laying of an instrument which is subject to the negative procedure and the coming into force of that instrument.**

**The Committee finds the failure to comply with section 28 to be acceptable in the circumstances as outlined in the letter from the Deputy Director, Justice Directorate of the Scottish Government to the Presiding Officer, dated 27 March 2017, supplemented by a written response to the Committee on the Order.**

**Annex A**

**Breach of laying requirements: letter to the Presiding Officer**

27 March 2017

Dear Presiding Officer

**THE DAMAGES (PERSONAL INJURY) (SCOTLAND) ORDER 2017 (S.S.I. 2017/96)**

The above instrument was made under section section 1 of the Damages Act 1996 (c.48), as amended by the Scotland Act 1998 (Consequential Modifications) (No. 2) Order 1999 (S.I. 1999/1820, schedule 2, para 126), today, 27 March 2017. It is being laid before the Scottish Parliament today and comes into force on 28 March 2017.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10) has not been complied with. To meet the requirements of section 31(3) that Act, this letter explains why.

The aim of an award of damages for personal injury is to put the pursuer in the same position, financially, as they would have been had it not been for the injury.

Section 1 of the Damages Act 1996 provides that Scottish Ministers can determine the return to be expected from the investment of a sum awarded as damages for future monetary loss (e.g. wages) in an action for personal injury. This is commonly known as the discount rate.

The discount rate is used to determine how much cash needs to be paid at the time of the award to provide a capital sum which can be used to yield exactly enough to cover the anticipated needs and lost earnings every year, for as long as they are expected to continue. It should ensure that a successful pursuer is neither under nor over compensated.

The reason for not complying with section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 is that any delay between the making of the Order and its entry into effect in law would prejudice settlements of claims for damages for personal injury. This would lead to delays in the courts or in reaching settlements while one party or the other sought to postpone cases so as to obtain the benefit of the new rate.

We have already received representations to this effect in response to the fact that Scottish Ministers have been reviewing the rate prior to setting it in this instrument.

Where a pursuer receives damages which do not cover their future pecuniary losses, this is contrary to the full compensation principle described above and the effect can be particularly concerning in cases involving catastrophic injuries where long term future care is involved.

## **Annex B**

### **Damages (Personal Injury) (Scotland) Order 2017 (SSI 2017/96)**

#### **On 29 March 2017, the Scottish Government was asked:**

As referred to at paragraphs 9 and 10 of the policy note for the Order, it adopts the same 'discount rate' as has been set in England and Wales by the Damages (Personal Injury) Order 2017 (S.I. 2017/206). That Order was laid at Westminster on 27 February 2017 and came into force on 20th March 2017. It appears therefore that the Order has complied with the '21 day rule' which applies to instruments which are subject to negative procedure and laid at Westminster.

The letter from the Deputy Director, Justice Directorate in the Scottish Government to the Presiding Officer of 27 March explains that the reason for not complying with section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 ('ILRA') was to avoid any delay between the making of the Order and its coming into force.

Please explain therefore—

(1) Why S.I. 2017/206 was laid and brought into force in compliance with the “21 day rule” (notwithstanding that the effect was a period of delay between the laying of the Order and its coming into force), and

(2) Why despite that position it has been considered appropriate that the Scottish Order should breach the requirement in section 28(2) of ILRA, by being brought into force on the day after laying?

**The Scottish Government responded as follows:**

In response to question (1), the Scottish Government is aware that S.I. 2017/206 was laid and brought into force in compliance with the “21 day rule” applicable to Westminster. This is a departure from the approach taken by the Lord Chancellor the previous time the discount rate was set for England and Wales when the Damages (Personal Injury) Order 2001 (S.I 2001/2301) was laid before the UK Parliament on 27 June 2001 and came into force the following day. The reasons for the Ministry of Justice’s approach in relation to the recent Order were a matter for the Lord Chancellor in the light of circumstances applicable in England and Wales at the time.

In response to question (2), the Scottish Government view is that within Scotland there is no material change to the drivers which necessitated the breach of the 21 day rule in 2001 in England and Wales, and in 2002 in Scotland, when the Scottish Ministers last set the discount rate in the Damages (Personal Injury)(Scotland) Order 2002 (S.S.I. 2002/46 ) which was laid on 7 February 2002 and came into force the next day. It remains the case that any delay between the making of the Order and its entry into effect may prejudice settlements of claims for damages for personal injury. This would lead to delays in the courts or in reaching settlements while one party or another sought to postpone cases so as to obtain the benefit of the new rate.

In the period following the announcement of the Lord Chancellor on 27 February that the discount rate was to be changed for England and Wales and what that new rate would be, as we indicated in our letter of 27 March to the Presiding Officer, the Scottish Government received representations which outlined concerns that should there be any delay in the time between the Scottish Government reviewing the rate and any change coming into effect that there would be prejudice in relation to settlements. We were made aware that there are cases in Scotland which are close to resolution which would be likely to suffer prejudice should there be delay. This informed our view that the correct approach was for the Order to come into force the day after being made and laid. Unfortunately this required the Scottish Government to breach the 28 day rule.

The decision was not reached lightly but the discount rate is an important mechanism for ensuring that where someone is awarded damages for a personal injury which includes future monetary loss, such as loss of earnings, that the award they get is capable of meeting those future needs. For many people who suffer life changing catastrophic injuries knowing that their award will for example meet their future care needs is vital to ensuring their quality of life.

**Justice Committee**

**15<sup>th</sup> Meeting, 2017 (Session 5), Tuesday 25 April 2017**

**Feedback from the Justice Sub-Committee on Policing**

**Note by the clerk**

1. The Justice Sub-Committee on Policing met on 20 April 2017 to take evidence from the Scottish Police Federation, Unison Scotland and the Association of Scottish Police Superintendents on financial planning and Policing 2026
2. The Sub-Committee also considered its future work programme and agreed to next meet on 11 May, when it will take evidence on local policing.