

This document relates to the Damages (Investment Returns and Periodical Payments) (Scotland) Bill as amended at Stage 2 (SP Bill 35A)

Damages (Investment Returns and Periodical Payments) (Scotland) Bill

[As Amended at Stage 2]

Revised Explanatory Notes

Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these revised Explanatory Notes are published to accompany the Damages (Investment Returns and Periodical Payments) (Scotland) Bill (which was introduced in the Scottish Parliament on 14 June 2018) as amended at Stage 2. Text has been added or deleted as necessary to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by side-lining in the right margin.
2. These revised Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

The Bill

4. The Bill will put in place a statutory methodology for calculating the discount rate which should, where necessary, be used in the assessment of future pecuniary losses in personal injury cases; establish a timeframe

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for the review of the discount rate; and provide that the task of reviewing the rate will fall to the Government Actuary. It will also give courts the power to impose periodical payments orders for damages for future pecuniary loss and makes other provision about the making of periodical payment orders and about periodical payments.

5. The Bill amends the Damages Act 1996 (“the 1996 Act”).

Commentary on sections

The structure of the Bill

6. The Bill is in three Parts and comprises nine sections and a schedule. Part 1 of the Bill relates to the assumed rate of returns on investment of damages. Section 1 requires a court, when determining the return to be expected on the investment, to take account of the assumed rate. Section 2 and the schedule detail the process which is required to be followed in reviewing the rate of return; and the frequency of review.

7. Part 2 of the Bill relates to periodical payments. Section 3 enables the courts to impose a periodical payment order for damages for future pecuniary loss without the consent of the parties; makes provision relating to the secure continuity of periodical payments; and for the index linking of periodical payments. Section 4 enables periodical payments for future pecuniary loss (whether awarded by a court or agreed by parties) to be varied or suspended through application to the court. Section 5 amends the 1996 Act to set out the requirement for judicial approval of the assignation of the right to receive some periodical payments. Section 6 puts in place protections for the element of a periodical payments order which relates to future pecuniary loss in the event of the pursuer becoming insolvent.

8. Part 3 of the Bill makes ancillary and final provisions. Section 7 deals with the ancillary provisions. Section 8 deals with commencement and section 9 sets out the short title of the Act.

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Part one – returns on investment of damages

Section 1 - Assumed return on investment

9. Section 1 inserts a new section B1 into the Damages Act 1996 (“the 1996 Act”) to replace the existing section 1 of the 1996 Act (which is repealed by section 1(2) of the Bill). Subsection (1) of inserted section B1 provides that a court must have regard to the rate (the Personal Injury Discount Rate or “PIDR”) set by the rate-assessor in deciding the return a pursuer is expected to receive from investing damages for future pecuniary loss. Courts must consider this as part of calculating the size of an award of such damages to be paid by way of a lump sum, as they do now with the rate set by the Scottish Ministers under the existing section 1 of the 1996 Act. Section 1(2) of the Bill therefore removes the Scottish Ministers’ role (under the existing section 1) of setting the PIDR. As with the existing duty under section 1 of the 1996 Act, the duty under section B1(1) is subject to any rules of court made for the purposes of the section. No such rules of court have, to date, been made for the purposes of section 1 of the 1996 Act and none are presently proposed to be made for the new section B1. Section B1(2)(b) also preserves the ability of courts to take into account a different rate if shown to be more appropriate in the circumstances of the case (restating section 1(2) of the 1996 Act).

10. Subsection (3) of the inserted section B1 introduces Schedule B1 which is inserted into the 1996 Act by section 2 of the Bill (see paragraph 12 below).

11. Subsection (4) of the inserted section B1 provides that the rate-assessor is the Government Actuary and in the event that the office of Government Actuary is vacant, the rate-assessor will be the Deputy Government Actuary. The Government Actuary is the head of the Government Actuary’s Department, a non-ministerial department in the United Kingdom Government. The Scottish Ministers will have the power to appoint a different rate-assessor by regulations (subject to the affirmative procedure) under subsection (4)(b) as well as somebody to deputise for that person (subsection (5)). The appointment is subject to the agreement of the person to be appointed as the Scottish Ministers must, before making regulations under subsection (4)(b), obtain the agreement of the person to be appointed in those regulations (whether as the replacement for the Government Actuary, or the person who is to deputise for that replacement).

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Section 2 – Process for setting rate of return

12. Section 2 inserts a new Schedule B1 into the 1996 Act, providing the detail about how the rate-assessor is to approach the review and setting of the discount rate. Schedule B1 is for insertion before Schedule 1 to the 1996 Act, as being so numbered by the Civil Liability Bill introduced in the House of Lords on 20 March 2018 ((HL Bill 90) which had its Second Reading in the House of Lords on 24 April 2018).

Schedule – investments: setting rate of return

13. Paragraphs 1 to 3 of the inserted Schedule B1 oblige the rate-assessor to review the PIDR and deal with the timing of those reviews.

14. The first review is to be a review of the PIDR set by the Scottish Ministers under the existing section 1 of the 1996 Act in force when the provisions of the schedule are brought into force (paragraph 1). This was last set by the Damages (Personal Injury) (Scotland) Order 2017 (S.S.I. 2017/96) at minus 0.75%. If no such rate is in force (for example if that Order were to be revoked without being replaced before the schedule of the Bill comes into force) then the first review is to be a review of there being no prescribed rate. The first review is to start on the date on which the schedule is brought into force.

15. Paragraph 2 deals with the timing of subsequent reviews. It requires the rate-assessor to start a review at on the day after the end of the three five- year period beginning with the day on which the previous regular review must be started (establishing a fivethree-year cycle of regular reviews). The Scottish Ministers may (under paragraph 2(1)(b)) require the rate-assessor to conduct a review starting earlier than the next regular review would do, but, if that occurs, the extra review does not disturb the threefive-year cycle of regular reviews.

16. Paragraph 3 requires reviews (whether the first review or any subsequent regular or extra review) to be concluded within a 90 day period beginning on the day on which it must be started.

17. Paragraph 4 sets out an overview of the rate-setting process. Paragraph 5 provides that a review will determine whether the rate is to remain the same or be changed. Paragraph 6 provides that the rate assessor must have regard to views of any person the rate-assessor

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chooses to consult or whose advice has been sought. This provision enables the rate-assessor to seek and discuss views as well as obtain particular factual or other pieces of information necessary to carry out the rate-assessor's functions. (This includes views received before the schedule comes into force – see paragraph 29).

18. Paragraph 7 sets out the basis upon which the rate-assessor is to determine the new PIDR. Subject to standard adjustments and rounding of figures discussed below, it provides that the PIDR should reflect the rate of return for the notional portfolio provided for in paragraph 12 over a 30-year period. (Paragraph 8 gives the Scottish Ministers power (by regulations subject to the affirmative procedure) to change the period of 30 years to another period or periods.)

19. Paragraph 9 provides for an adjustment to the rate of return to take account of inflation by reference to the retail prices index or to an alternative source of information as prescribed by Scottish Ministers in regulations subject to the affirmative procedure.

20. Paragraph 10 provides for standard adjustments to the rate of return arrived at on the above basis. The rate-assessor is to deduct 0.5 of a percentage point to take account of the impact of taxation and the cost of investment advice and management. The rate-assessor is also to deduct 0.5 of a percentage point as a further margin, which recognises that there is risk inherent in even the most carefully advised and invested portfolio. Paragraph 11 provides that the adjustment figures may be changed by the Scottish Ministers by regulations subject to the affirmative procedure. The resulting figures may be zero or a positive number. They cannot be a negative number (so the adjustments can never raise the rate of return). They need not be whole numbers but can include a decimal fraction. Unlike the rate ultimately set by the rate-assessor (see paragraph 18), these numbers are not limited to being expressed in steps of a quarter percentage point.

21. Paragraph 12 sets out the notional portfolio with the types of investments and percentage holdings on which the rate-assessor is to determine the rate of return. Paragraph 13 provides that if the type of investment is not defined by regulations under paragraph 14, it is to be interpreted by the rate-assessor in the way it is commonly understood in investment contexts. Paragraph 14 provides that the Scottish Ministers may

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make regulations to define any of the types of investment. (Those regulations are subject to the affirmative procedure.) Paragraph 15 provides that the Scottish Ministers may make regulations to make changes to both the list of investments and the percentage holdings.

22. Paragraph 16 provides that before a review of any subsequent rates by the rate assessor, the Scottish Ministers must conduct their own review to assess whether the notional portfolio remains suitable for the hypothetical investor whose characteristics are set out in paragraph 17 and consider whether regulations under paragraph 14 or 15 are required. In carrying out their review, the Scottish Ministers must consult with persons they consider appropriate. When the Scottish Ministers intend to make changes by regulations under paragraphs 14 and 15, they must take account of the characteristics of the hypothetical investor which are set out in paragraph 17. Paragraph 18 sets out that for the purposes of paragraphs 16 and 17, the damages are for future pecuniary loss in an action for personal injury and they are paid in a lump sum.

23. Paragraph 19 provides that the rate will be set as a percentage figure, whether a whole number of percentage points or multiple of a quarter percentage point. It can be expressed in quarter percentage points and rounded to the nearest whole number or quarter percentage point. Paragraph 20 provides for the rounding of the figure so as to comply with that requirement.

24. Paragraph 21 provides that there will be a single rate which will apply to all cases unless regulations provide otherwise. Where the Scottish Ministers set out in regulations (subject to the affirmative procedure) that there should be more than one rate, a review is to be carried out separately for each rate of return. Under paragraph 22, the regulations must set out the circumstances in which each rate is to apply and may require the rate-assessor to report separately on each rate of return.

25. Under paragraph 23, the rate-assessor must send a report to the Scottish Ministers when the review has concluded and no later than the last day of the 90-day period for carrying out the review. The report must be dated and contain the rate determination and a summary of how the rate is calculated. Under paragraph 24, the Scottish Ministers must lay the report before the Scottish Parliament as soon as practicable after it has been received, and on the same day the rate assessor must publish the report.

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The rate will come into effect on the day after the report is laid (paragraph 25).

26. Paragraph 26 provides for the reimbursement of the rate-assessor's costs unless the rate-assessor becomes someone who is part of the Scottish Administration (for example, if the Scottish Ministers exercise their powers under section B1(4)(b) to appoint such a person in place of the Government Actuary).

27. Paragraphs 27 to 30 make provisions for transitional arrangements. Paragraph 31(1) allows regulations under the new Schedule B1 to make different provision for different purposes. For example, in the event that the Scottish Ministers make regulations under paragraph 21 requiring more than one rate to be set, paragraph 8 (as read with paragraph 31(1)) could be used to prescribe different periods to be used in connection with the setting of the different rates. Paragraph 31(2) provides that regulations made under the schedule are subject to the affirmative procedure. Paragraphs 32 and 33 provide for interpretation of the schedule.

Part two – periodical payments of damages

Section 3 – Award, continuity and index-linking

28. Section 3(1) of the Bill amends section 2 of the 1996 Act. It inserts a new subsection (A2) which requires courts to consider whether awarding damages by way of periodical payments is appropriate. It also gives the court the power to make an order for periodical payments without the consent of the parties. This duty to consider, and the power to make orders, will apply only where the court is awarding damages for future pecuniary loss (that is losses which will arise after the date of the award and which can be readily quantified in monetary terms, such as the cost of personal and nursing care, or earnings or pension which the pursuer will lose because of the injury). When awarding damages for other types of loss (e.g. damages for pain and suffering and loss of expectation of life (known as *solatium*) or past pecuniary loss) the court will still have the power to make periodical payment orders under subsection (1) with the consent of the parties. Subsection (A2) applies regardless of the type of proceedings in which the issue arises (i.e. whether it is an action, a petition or otherwise).

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3029. New subsection (1A) requires the court to be satisfied that the continuity of the payments is reasonably secure before it makes a periodical payments order. The court must also set out the reasons it is satisfied that the continuity of payment would be reasonably secure. These requirements apply whether the order is to be made under subsection (A2) or under subsection (1).

30. Section 3(2) of the Bill inserts into the 1996 Act a new section 2C which sets out further information on the continuity of periodical payments. Paragraphs 31 to 37 below describe the effects of the particular provisions in the inserted section 2C. The new section 2C is said to be inserted after section 2B, despite there being no existing sections 2A and 2B in the Scottish text of the 1996 Act. However, this reflects the existence of sections 2A and 2B as part of the law of England and Wales and Northern Ireland (see the Courts Act 2003, section 100).

31. Subsection (1) provides that continuity of payments is assumed to be reasonably secure if it is protected by a ministerial guarantee (on which, see paragraph 13 above about the numbering of Schedule 1 to the 1996 Act) or the Financial Services Compensation Scheme or where the source of the payments is a recognised body or office-holder (on which see the notes on subsections (6) and (7) below). The court will not be bound to follow that assumption where, for example, it is presented with evidence which suggests the payments would not, in fact, be reasonably secure.

32. Subsection (2) enables the court to include in an order provision about the method of payment and any steps which the person responsible for paying (the defender/compensator) must make to secure continuity of payment. The court will not be able to make provision about such steps where the circumstances covered by subsection (1) apply (i.e. that the payment is assumed to be reasonably secure for a reason given there).

33. Subsection (2)(c) allows the court to pave the way for the provisions on method of payment or required steps to be varied on a subsequent application to the court. If no such provision is included it will not be possible for the court to vary the order under subsection (4) (see paragraph 36 below).

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34. Subsection (3) permits the use of a payment method other than that specified in the order, but only where the other method is backed by one of the protections or secure sources mentioned at paragraph 31 above).

35. Subsection (4) allows an application to be made to the court for a variation of the order's provisions on how the payment is to be made and for the court to act upon such an application. This power to vary the order is separate from the power under section 2F (see below). Subsection (4) ensures that a court can only exercise this power of variation where the way for the application has been paved when the original order was made and that, after variation, the periodical payments will remain reasonably secure.

36. Subsection (5) ensures that subsection (4)(a) does not prevent payments being made in accordance with an order as varied under section 2F. (Subsection (3)(b) would not prevent that anyway because it is mirrored in section 2F(4)).

37. Subsection (6) provides for the meaning of the term "recognised body or office-holder" used elsewhere in the section. The starting point is that the term includes the core central government departments, bodies and ministers (both UK Government and Scottish Government), but subsection (7) and (8) allow the Scottish Ministers to make regulations (subject to the negative procedure) altering that definition. This will permit bodies within the National Health Service or outside government to be added where the Scottish Ministers consider it appropriate that the assumption in section 2C(1) should apply to those bodies. Similarly, it will allow the Scottish Ministers to make exceptions to the entries for central government where they consider it inappropriate for the assumption to apply.

38. Section 3(2) of the Bill also inserts a new section 2D into the 1996 Act. This allows the court to ensure that the real value of periodical payments is preserved over the whole period for which they are payable. By default, periodical payment orders will have the effect that the amount of the periodical payment will alter by reference to the retail prices index in accordance with rules of court made on this matter (subsection (1) read with subsection (6)(a)).

39. However, the Scottish Ministers may, by regulations, provide that a different basis for indexation be used instead (subsection (6)(b)). For

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example, this could include providing for periodical payments awarded in respect of nursing care to alter in line with a published survey of the average earnings in the relevant sector.

40. Courts will also be able, in individual cases, to include provision in the periodical payment order which replaces or modifies the default provisions on indexation (subsections (3) to (5)).

41. These provisions on index linking apply to orders made under section 2(A2) of the 1996 Act (inserted by section 3(1)(a)) and to those made under section 2(1). They will not apply to orders made before the commencement of section 3 of the Bill (subsection (2)).

Section 4 – Variation or suspension of settlement

42. Section 4 of the Bill inserts a series of sections (2E to 2I) into the 1996 Act to deal with variation and suspension of orders and agreements which deal with periodical payments for future pecuniary loss. These provisions do not apply to orders which only include provision for lump sums, or to orders which make provision for periodical payments in respect of other types of loss (i.e. those made under section 2(1) of the 1996 Act with the consent of the parties).

43. New section 2E describes the circumstances in which a court may make an order for periodical payments capable of being varied or suspended by the court in the future. (For shorthand, such an order is referred to here as a “variable order”.) To do this it must include provision in the original order which paves the way for a subsequent application to be made to the court for the variation or suspension (or both variation and suspension) of the order or rights to payments under it. Without such a paving provision it will not be possible for an application to be made to the court under the following provisions inserted into the 1996 Act. (This is separate to the provisions of section 2C(4) concerning applications for variation of the method of payment.)

44. Subsection (2) of inserted section 2E provides that a court may only include such a facility if it is satisfied that there is a significant deterioration or improvement in the pursuer’s medical condition which can be foreseen at the time of the original order and that as a consequence of that change the pursuer would end up being either significantly over- or under-compensated.

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45. Subsection (3) of inserted section 2E sets out what the court must specify in a variable order including details about the type of change in condition which would trigger any application to vary and the period within which an application must be made.

46. New section 2F goes on to describe what the court may do to vary an order which includes: altering the amount of payment, its indexation, the frequency of payment, the method of payment and period of payment as well as providing for a lump sum instead of or in addition to periodical payments. Whilst in general the court may not vary an order more than once in respect of any specified change, or outside the application period specified in the original order, it may do so where there are exceptional circumstances (subsection (5)). This is intended to provide the courts with the necessary flexibility to take account of a range of circumstances. The court will also be able to vary a variable order on an application made outside the application period if the party making the application shows cause for the lateness of the application linked to a delay in the party being made aware of relevant information (subsection (6)). (For example, this would cover a situation where the defender has been unable to make an application within the period specified in the original order because the pursuer failed to make the defender aware of a relevant change of circumstances, so long as the defender did not then delay in making the application.) The court will not be able to vary the order unless the continuity of payment remains reasonably secure (subsection (4)).

47. New section 2G enables the court to suspend periodical payments. This provision reflects the judgement in *AA v CC [2013] EWHC 3679 (QB)* that the 1996 Act and the Civil Procedure Rules in relation to England and Wales did not provide courts with the power to make an order for “periodical payments which are expected to stop at some uncertain time and to re-start again at some uncertain time later” and recognises that suspension goes further than variation. There is no limit to the number of occasions payments may be suspended under this section. The criteria which must be met before a court decides to suspend payments are otherwise the same as those for variation.

48. New section 2H extends the court’s power to vary and suspend to agreements made between parties which settle personal injury claims or actions and which make provision for periodical payment in respect of future pecuniary loss. Section 2H does not limit the number of occasions on

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which a right to a payment under an agreement can be suspended. Otherwise, and subject to the terms of the agreement restricting this, the court will have the same power to vary an agreement, or suspend the right to receive payments under one, as it would to vary an order, or suspend a right, under section 2F or 2G.

49. Section 2I sets out the circumstances in which a suspension under either section 2G or 2H may be lifted. The court must be satisfied that the injured person's physical and/or mental condition has altered since the time of the suspension and that the person would be significantly under-compensated should the suspension continue.

50. New section 2J limits the circumstances in which courts may make awards of expenses against the injured person in proceedings for variation, suspension or lifting of suspension of a periodical payment under an order or an agreement. Section 8 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 ("the Civil Litigation Act") makes provision for a qualified one-way costs shifting (QOCS) regime in Scotland for personal injuries, including clinical negligence. New section 2J makes specific provision, similar to that applying generally under the Civil Litigation Act, applicable to qualifying proceedings (as defined in subsection (3)) and appeal proceedings (as defined in subsection (4)). Subsection (5) allows agreements to make provision on expenses which differs from that which would, by virtue of section 2J, otherwise apply to qualifying proceedings arising from the agreement. Subsections (6) and (7) align section 2J with the Civil Litigation Act in terms of acts of sederunt restricting the types of claim to which QOCS can be applied and in terms of what is meant by proceedings being conducted "in an appropriate manner". Subsection (9) defines "injured person" so as to include a representative such as a guardian or judicial factor where the qualifying proceedings or appeal proceedings are not run in the name of the person who suffered the injury.

Section 5 – Restriction on assignation by recipient

51. Section 5 of the Bill deals with the protection of some periodical payments and inserts new section 4A into the 1996 Act. Section 4A ensures that the pursuer cannot assign certain periodical payments (whether outright or in security for some other obligation) without the approval of the court. Whilst there is no express reference to arrestment, the effect of restricting assignation would be to similarly restrict arrestment (the legal mechanism through which creditors are able to attach a debtor's

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property or rights which are in the hands of a third party as a means of recovering a debt). The provision does not restrict the ability of the pursuer to enter into an agreement to assign the right to those periodical payments, only the granting of an assignation itself. This does not affect the pursuer's ability to borrow money using the fact of their entitlement to periodical payments in future as evidence of their financial status and credit worthiness. However, it will prevent loans being secured on the future income stream under the periodical payments unless this is approved by the court.

52. Subsection (1) prevents the assignation of the right to receive certain periodical payments unless the court approves the assignation. The periodical payments in question may arise under an order under section 2, but they may also arise under an agreement settling a claim or action out of court or under an agreement entered into to give alternative effect to, or in substitution for the obligations provided for, in an order under section 2 (subsection (6)).

53. Subsection (2) identifies the portion of the periodical payments which is covered by the restriction in subsection (1). It is only the element of the periodical payments relating wholly to expenditure likely to be incurred by the injured person (or for the person's benefit) which is covered by the restriction. This would include, for example, the element of the award or settlement directed at future care costs, but not future loss of earnings.

54. By virtue of subsection (3), the court must be satisfied that there are special circumstances that make it necessary. In reality this is a high standard of test and it is anticipated that courts, in considering whether or not to give approval, will want to be satisfied that the assignation represents value for money, that it is in the best interests of the individual, and how the individual will be financially supported following the assignation.

55. Subsection (4) makes the assignation of periodical payments to the scheme manager of the Financial Services Compensation Scheme an exception to the requirement for the court's approval.

56. Subsection (5) prevents section 4A having an effect on rights which have vested in a person under an order or agreement made before section 5 of the Bill comes into force.

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Section 6 – Protection on occurrence of insolvency

57. Section 6 of the Bill inserts section 4B into the 1996 Act. Section 4B deals with the treatment of periodical payments in the event of the recipient's insolvency (The recipient may be the person in respect of whose injuries the payments are being made, but may alternatively be another person if the right to the payments has been assigned. On the latter situation, see paragraph 610 below). It applies to certain rights to periodical payments arising not only under orders but also under some agreements (subsection (8), which is in similar terms to section 4A(6), on which see above).

58. Section 4B protects that part of the periodical payment for future pecuniary loss which relates wholly to expenditure likely to be incurred for the person as a result of the personal injury to which it relates (subsection (5)). That is the same portion of the periodical payments as is covered by section 4A (see above). That portion of the periodical payment cannot be required to be paid to a trustee of a protected trust deed where the estate of the recipient of the periodical payment order is sequestrated (subsection (2)). Also, that portion of the periodical payment order will not be payable to the trustee under a debtor contribution order under section 90 of the Bankruptcy (Scotland) Act 2016 (subsection (3)(b)).

59. Section 4B(1) prevents the right to periodical payments for any future pecuniary loss (not just the portion referred to above) from being included within the assets transferred under a trust deed if that trust deed is to get protected status under the Bankruptcy (Scotland) Act 2016. Similarly, subsection (3)(a) prevents those payments (or assets or arrangement backing them) from being available to a trustee in sequestration.

60. The protections do not apply where the right to receive the periodical payments has been assigned after the order was made and the person to whom the right has been assigned is not using the periodical payments for the benefit of the person who suffered the injury to which the periodical payments relate (subsection (6)).

61. Subsection (7) prevents section 4B having an effect on rights which have vested in a person under an order or agreement made before section 6 of the Bill comes into force.

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Part three – ancillary and final matters

Section 7 – Ancillary provision

62. Section 7 allows the Scottish Ministers, by regulations, to make ancillary provision in relation to the Act or provision made under it. Subsection (2)(b) allows those regulations to make different provision for different purposes. By virtue of section 7(3) any ancillary provision amending primary legislation will be subject to the affirmative procedure, otherwise ancillary provision will be subject to the negative procedure.

Section 8 – Commencement

63. This section makes provision in relation to the commencement of the Bill. It provides that, whilst the sections relating to ancillary provision, commencement and the short title will come into force the day after Royal Assent, the remaining provisions of the Bill will come into force on a day appointed by the Scottish Ministers in regulations.

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