

# Interest (Scotland) Bill

CONSULTATION AND DRAFT BILL



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SCOTTISH GOVERNMENT

# Interest (Scotland) Bill

CONSULTATION AND DRAFT BILL

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## Foreword by the Cabinet Secretary for Justice

I am delighted to publish for consultation these proposals to change the law in Scotland on interest on debt and damages. The Scottish Government wants to bring forward legislation which improves the rights of individuals and businesses in Scotland and this draft Bill is a small step in the right direction.

Scots law is behind modern European and Commonwealth legal systems and most US states in restricting the interest that can be claimed to the period following the date of citation rather than when a debt fell due or when the loss was sustained. This can be some considerable time after the loss has occurred; years in some cases.

This consultation document and the draft Interest (Scotland) Bill build on the earlier comprehensive work carried out by the Scottish Law Commission in their review of the law which resulted in their *Report on Interest on Debt and Damages*. Policy in this area has developed further, including some consideration of the financial implications of the proposals.

I look forward to your response to this consultation.

A handwritten signature in black ink that reads "Kenny MacAskill". The signature is written in a cursive, slightly slanted style.

Kenny MacAskill  
Cabinet Secretary for Justice

## **Introduction**

1. This consultation paper has been prepared by the Scottish Government. It contains a draft of the Interest (Scotland) Bill. This Bill has been developed from the Scottish Law Commission (SLC) Report on Interest on Debt and Damages and draft Bill published (Scot Law Com No. 203) in September 2006. That report recommended the creation of a general statutory entitlement to interest, to run from the time when a sum of money becomes due by one person to another, whether for debt or damages.

2. The draft Bill is a small progressive law reform which could benefit individuals and businesses in Scotland and sits well with the Government's strategic priority of a 'fairer and wealthier' Scotland.

3. The draft Bill is made up of 18 sections and 2 schedules. The text of this paper broadly follows the order of the sections. It is not a comprehensive description of each section of the draft Bill but focuses on the key issues. This consultation paper will also raise some of the potential financial implications of the draft Bill which were not covered in the work of the SLC.

4. The SLC examined the law and issues surrounding entitlement to interest in some detail. The consultation paper will often direct the reader to the SLC discussion paper and report if they want to look at the development of the proposals in more depth.

5. A series of questions has been included to focus on the key issues which are either raised in the draft Bill or which might yet be included in it depending on the responses to the questions. The list of questions is not intended to restrict responses. While we particularly appreciate respondents' views on the questions set out in the paper, all comments and views are welcomed and will be carefully considered. After responses have been analysed Ministers will consider what proposals to introduce to the Scottish Parliament.

## Background to the Bill

6. In November 2003 the then Minister for Justice made a reference to the SLC asking them to carry out a review of the law on interest on debt and damages:

“To examine the law of Scotland relating to interest on claims for payment of money arising from contractual and other obligations, including claims within the jurisdiction of tribunals and courts or submitted for decision to arbitration, adjudication or some other form of dispute resolution, and to make recommendations as to possible reform of the law.”

7. As part of that work the SLC published their ‘*Discussion Paper on Interest on Debt and Damages*’ (Discussion Paper No. 127) in January 2005<sup>1</sup>. The paper provided an in-depth look at the law in Scotland regarding interest on debt and damages. The paper put forward proposals for reform and invited comments from interested parties. Ten organisations and individuals responded to the discussion paper.

8. This led to the SLC publishing their Report in September 2006 as mentioned above. The SLC found five main areas of concern in the existing law on interest on claims for payment of money:

- the treatment of interest is inconsistent between claims arising from debt and claims arising from damages and this is unjustified;
- in debt claims, interest is not payable unless the sum has been “wrongfully withheld”. For contractual debts this means that interest does not begin to run from the date payment fell due but rather from the date on which court proceedings were commenced;
- uncertainty of when interest starts to run on particular heads of claims for damages;
- the law is unclear in relation to interest in other circumstances; and
- the current judicial rate of interest (8%) is changed infrequently so does not represent commercial rates of interest and is not truly compensatory.

9. Accordingly, the SLC set out their ‘guiding principles’ for the law reform in relation to interest on debt and damages:

- so far as practicable, interest should run on pecuniary claims during the same period and at the same rate regardless of whether the claim takes the form of a claim for payment of a contractual debt, a non-contractual debt or damages;
- the primary goal of an award for interest should be the realistic compensation, in commercial terms, of the creditor for loss of the use of money or property. Interest should not, as a general rule, be payable at a punitive rate; and

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<sup>1</sup> The Discussion Paper and Report are available at <http://www.scotlawcom.gov.uk/html/cpinterest.htm>

- an award of interest should compensate the creditor for loss of the use of money or property for the period during which that loss has subsisted.<sup>2</sup>

10. The SLC made 38 recommendations to reform the law on interest on obligations to pay in its Report and also published a draft Bill to implement those recommendations.

11. In summary, the main SLC recommendations were:

- to provide consistency in treatment, interest should run on different types of claims for money during the same period and at the same rate regardless of whether the claim is for payment of a contractual debt, a non-contractual debt or damages. This period should commence on the date on which the person lost the use of his money. In general terms, in cases of contractual debt, entitlement to interest will arise from the date on which payment fell due and in damages claims from the date on which the loss in question was sustained;
- the current judicial rate of interest should be abolished and replaced by a statutory rate which would fluctuate in line with the Bank of England rate. Running at 1.5% above that rate, it would reflect the rate at which businesses and consumers can borrow money and so would provide adequate compensation to the claimant without being punitive to the debtor;
- the court's discretionary power in damages cases (and its duty in personal injury cases) to award interest should be replaced by an entitlement to interest on each head of loss; and
- in respect of all claims, there should be a judicial discretion to refuse, or reduce an award of interest by reason of the conduct of the claimant. The conduct of the debtor would not be a relevant factor.

12. On 5 September 2007, the First Minister announced the intention to put forward legislation to Parliament:

“We will also introduce legislation later in the Parliamentary year to develop fair and consistent rules for the application of interest to payments of debt and damages in Scotland. This follows from recommendations made by the Scottish Law Commission and will reform an area of law that currently dates back to the 19<sup>th</sup> Century.”<sup>3</sup>

13. This consultation is the next step in the development of the proposals.

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<sup>2</sup> SLC Report paragraph 1.10

<sup>3</sup> Principles and Priorities: The Government's Programme for Scotland

## THE PROPOSALS

14. In line with the guiding principles set out by the SLC the draft Bill contains a number of elements which are intended to:

- create a general statutory entitlement to interest to run from the time when a sum of money becomes due by one person to another, whether by way of debt or damages;
- outline the circumstances when interest is not payable;
- set out when statutory interest starts to run from;
- provide for how statutory interest is calculated; and
- provide a power for the court to waive or reduce interest, depending on the circumstances of the case.

15. The following sections of the consultation paper expand on each of the main proposals, and set out a series of questions on which we would particularly welcome your views.

### **Creation of a statutory right to interest on debt and damages (Section 1)**

16. Section 1 of the draft Bill creates a general statutory entitlement to interest on obligations to pay money. This entitlement is to apply to contractual debts, non-contractual debts, other obligations to pay money and to claims for damages. The entitlement exists independently from court proceedings, although in order to enforce the right, court proceedings may be necessary.

17. Despite the fact that there has been legislation dealing with interest on damages and on commercial debts in recent years, Scots law in this area lacks principle and consistency. Interest may or may not run on a claim for payment depending on whether it is categorised as a debt or as a claim for damages.

18. At the moment interest will not generally start on a debt until there has been either a judicial demand for payment or intimation by the creditor that if payment has not been made by a specified date, interest will begin to run. However, if the claim is categorised as a contractual claim for damages, interest may run, depending on the exercise of the court's discretion, from any time from the date when the right of action arose.

19. The entitlement will apply to all obligations to pay no matter what the sum involved is. There is to be no minimum threshold above which the entitlement will apply. This section is necessary to ensure that the entitlement to interest in the draft Bill is wide enough to cover all debts and damages.

## **Circumstances in which interest is not payable (Section 2)**

20. The SLC proposed a number of specific exceptions to the general rule and these remain intact in the draft Bill. These exceptions are important as they narrow the application of the draft Bill.

### *Agreement between the creditor and the debtor*

21. The intention in the draft Bill is that, where there is express or implied agreement between parties, interest is due on a basis different from the draft Bill. This will include where both parties have agreed that no interest will be due. This provision is to ensure that parties are free to make their own arrangements should they desire to do so and the draft Bill cannot overrule and ignore that choice. This is often known as 'contracting out'.

### *Fines, penalties and taxes due to a public authority*

22. The draft Bill ensures that where a payment is due to a public authority which is related to the sphere of fines, penalties and taxes statutory interest under this draft Bill cannot apply on late payment. This means that the provisions of the draft Bill will not apply to such areas as council tax and parking fines.

### *Interest already covered by statutory provisions*

23. If a transaction is already covered by a statutory provision, other than the draft Bill or the Late Payment of Commercial Debts (Interest) Act 1998, then statutory interest under this draft Bill cannot be claimed.

### *Late Payment of Commercial Debts (Interest) Act 1998*

24. In 1998 the UK Government introduced the Late Payment of Commercial Debts (Interest) Act 1998 to give businesses a statutory right to claim interest from other businesses for the late payment of commercial debts. The 1998 Act gives effect to the UK's obligation to implement Directive 2000/35/EC of 29 June 2000 on combating late payment in commercial transactions. The 1998 Act was brought fully into force in 2002 and amended to render it fully compliant with the Directive.

25. Interest is not claimable under this draft Bill if it consists of a sum in respect of which a creditor claims interest under the 1998 Act.

### *Ministerial power to exclude certain debts from the interest regime*

26. The draft Bill provides the Scottish Ministers with a power to exclude categories of debt which, for policy reasons, ought to be exempted.

27. After consulting with Citizens Advice Scotland and the Scottish Consumer Council the Scottish Government believe in principle that utility payments and rent arrears due to public sector landlords should be exempt from the provisions of the draft Bill. It is not the intention to increase the level of indebtedness in these areas

as the ultimate consequences of non-payment can be the loss of an essential service or possible eviction.

### **Question 1**

Do you agree that utility debts should be exempt from the statutory interest regime? Please provide reasons for your answer.

### **Question 2**

Do you agree that rent arrears due to public sector landlords should be exempt from the statutory interest regime? Please provide reasons for your answer.

### **Question 3**

Are there other categories of debt which should be excluded from the statutory interest regime? Please provide reasons for your answer.

## **Starting date for interest (Sections 3 – 8)**

### *General approach*

28. The draft Bill takes the approach of the SLC Bill and provides that statutory interest is to run from when the debt is due until payment of the principal sum.

29. The date on which payment of a financial obligation becomes due ought to be clear in the case of many payments provided for by contract. However, there are a variety of obligations to pay money for which the date on which payment is due may be more difficult to determine. The draft Bill does not go into detail in all these cases but instead relies on the application of the relevant existing law to determine when the payment became due.

### *Express provision required for the date on which the debt is due*

30. There are some types of debts for which the SLC recommended that the appropriate date from when interest is to run should be specified. These include:

- contracts for the supply of goods and services;
- cautionary obligations;
- claims under contracts of insurance;
- contracts of loan; and
- fees and outlays in proceedings.

31. In developing the draft Bill, changes have been made to the provisions relating to claims under contracts of insurance and contracts of employment. These are discussed below.

### *Contracts for the supply of goods and services*

32. It is anticipated that contracts for the supply (including sale) of goods and for performance of services will be the most common type of contract which will be covered by the statutory interest regime. The majority of businesses, including small and medium sized companies, have agreed terms and conditions under contract to deal with late payment. However, a recently published survey indicates that there are a significant number of small and medium sized businesses who do not have standard terms and conditions for late payment. For these businesses the draft Bill could provide a useful means of compensating for late payment.

33. The draft Bill sets out the straightforward rules that will apply:

- if the contract states when a payment becomes due then that date is when statutory interest starts to run from.
- if no contractual provision is made then statutory interest starts to run 30 days after the goods have been delivered or the service performed and the creditor has informed the debtor of the amount of money owed. If these two events do not occur at the same time then statutory interest will start to run 30 days from when the later event took place.

34. This is the proposal put forward by the SLC and follows the model in the Late Payment of Commercial Debts (Interest) Act 1998.

35. There may be some circumstances in which the buyer is dissatisfied with the goods or services provided and wishes to exercise a right of rejection in the case of goods or to demand rectification in the case of substandard services. Like the 1998 Act, no provision for dealing with disputes is contained in the draft Bill and this is expected to be dealt with by agreement between the parties, through a contractual mechanism where it exists or through existing legislation such as the Supply of Goods Act 1979 or the Supply of Goods and Services Act 1982.

### *Cautionary obligations: cautioner's right of relief*

36. While there have been some drafting changes in the development of the draft Bill provisions relating to cautionary obligations, the effect remains the same as the SLC Bill. Statutory interest will run on a sum paid by a cautioner in satisfaction of a debt due by the principal debtor from the date when payment by the cautioner was made unless provision, such as under a contract, has been made in which case the date specified would apply.

### *Insurance and other claims for indemnity*

37. The SLC Bill included express provision in relation to insurance contracts. The intention was to cover all types of insurance contract which require payment of a sum of money (such as life assurance, motor insurance, home insurance where payment of money such as stolen cash is claimed and marine insurance) and which are silent as to interest. The SLC commented that in practice most insurance contracts make provision for interest.

38. In considering when payment can be described as being “due” under a contract of insurance, the SLC noted that there are three conditions which must be satisfied before payment is due:

- the event insured against has occurred;
- in the context of indemnity insurance, the policyholder has sustained a loss as a consequence of the occurrence; and
- the claim has been intimated to the insurer in the manner provided for by the contract, including the insured providing appropriate vouching of the occurrence of the event insured against and the amount of loss.

39. The SLC intention was that statutory interest should run from the day, whichever is the later of:

(a) the date 30 days after the date when a claim in respect of the occurrence of the event insured against is intimated to the insurer and vouched in accordance with the conditions of the contract; and

(b) where the insured has sustained a loss as a consequence of the occurrence of the event insured against, the date when the loss was sustained.

40. In developing the draft Bill an issue arose concerning legislative competence relating to insurance and therefore the specific provisions relating to insurance have been removed from the draft Bill.

41. However, this does not remove insurance contracts from the application of the draft Bill. Insurance contracts would now be covered by the general rule on contracts in section 3(2). This would mean that, where the contract did not state when payment was due, statutory interest would start to run from the date when the event insured against has occurred. The other conditions set out in paragraph 39 would no longer apply. Depending on the circumstances of the case, this could mean that a greater sum of money is to be paid as statutory interest.

42. The practical consequences of a change to the draft Bill is limited by the fact that most insurance contracts already make provision for interest. Further, a representative of the insurance industry indicated that the change would have limited effect but it could impact on areas such as business interruption insurance which are often paid some time after the event insured against occurred.

#### Question 4

- a) Do you think the draft Bill will have an effect on the provision of insurance for individuals? If yes, what do you think that effect would be?
- b) Do you think the draft Bill will have an effect on the provision of insurance for businesses? If yes, what do you think that effect would be?
- c) Do you think the draft Bill will have an effect on the insurance industry? If yes, what do you think that effect would be?

#### *Contracts of Employment*

43. The draft Bill implements the SLC proposals on contracts of employment with some modifications. The SLC recommended that for payments relating to remuneration for services, interest should begin to run 30 days after the end of the period in respect of which the service under the contract is remunerated, unless the contract contains a contrary provision. For example, if the employee is paid monthly, then interest runs from 30 days after the end of the month; if the employee is paid weekly, then interest runs from 30 days after the end of the week.<sup>4</sup>

44. There are a variety of payments which may be made to employees such as wages, fees, bonuses, allowances, expenses, redundancy payments and payment in lieu of notice. If these payments are contractual payments for services, they would be covered by the rule outlined in paragraph 43 as the SLC proposed. Otherwise, they would be covered by the general rule creating an entitlement to interest (section 1(4) of the SLC Bill) and statutory interest would run from the time the payment is due with no 30 days credit period. For example, a right to a commission payment is a non-contractual right. As such it would be subject to the general rule that interest starts to run on the date on which the commission payment is due. Therefore, the SLC proposals may not produce an entirely consistent result.

45. This Bill is drafted so that interest on all payments of money payable to employees by employers, arising from their employment or apprenticeship, should run from the date the payment is due. This removes the need to have a specific provision in relation to employment contracts and that sections 3(2) or 4(1) would apply.

46. This change from the SLC proposals could have some practical consequences for businesses. There can be occasions where, for a variety of reasons and not always the fault of the employer, wages or salaries are paid a day or two late. Under the draft Bill all employees would be entitled to claim for statutory interest in these circumstances. This could place an additional administrative burden upon employers to process claims made for minor sums owed. The SLC Bill would rule out these claims, but we consider that rather than take that approach, further consideration should be given to the issue and the views of consultees sought.

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<sup>4</sup> SLC Report paragraphs 3.33 and 3.34

**Question 5**

a) Do you think that statutory interest should run on late payments under contracts of employment?

b) If so, do you think that the statutory interest should run from the date on which payments are due?

**Question 6**

Do you think that statutory interest should begin to run 30 days after the end of the period in respect of which the service under the contract is remunerated?

**Question 7**

If you think that statutory interest should run on late payments under contracts of employment, do you think there are any particular circumstances when interest should not run on late payments? If so, then what would these be?

47. There are also some potentially significant financial implications that could occur as a result of the SLC proposals on contracts of employment. These are discussed in more detail in paragraphs 82 to 92 below.

*Loans*

48. The draft Bill preserves the common law presumption that interest is chargeable on loans of money from the date on which the loan was made, unless contrary agreement can be shown. There is no change from the SLC Bill.

*Damages*

49. The draft Bill does not differ from the SLC proposal. It deals with the difficulties outlined by the SLC with the existing law<sup>5</sup>:

- the provisions in the Interest on Damages (Scotland) Act 1958, as amended by the Interest on Damages (Scotland) Act 1971, are reliant on judicial discretion and provide no express guidance to the court as to how they are to be applied;
- there are uncertainties such as the date from which interest should run on:-
  - out-of-pocket expenses which are capable of quantification at a date earlier than the date on which they are incurred, and
  - damages for the destruction of property which is not replaced;

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<sup>5</sup> SLC Report paragraphs 2.6 to 2.11.

- the test of “wrongful withholding” which the courts have continued to apply to actions for damages should be abolished; and
- it is thought that the 1958 Act is unclear in its terms.

50. The intention is that reform of the law will provide better consistency in the application of interest to claims for damages. It will also ensure consistency with the proposals dealing with interest on contractual and other obligations to pay.

#### *Fees and outlays in proceedings*

51. Judicial expenses include legal fees and fees paid to expert witnesses. This is discussed by the SLC at paragraphs 6.6 and 6.7 of their Report. There is no general entitlement to interest on these expenses incurred before the date of decree and the court can award interest but only in special circumstances.

52. The SLC considered this to be too restrictive and recommended that specific provision be made so that where a party to litigation is found entitled to recover fees and outlays in judicial expenses from another party, statutory interest should be payable on such expenses from the dates when they were respectively paid. The draft Bill does not differ from the SLC proposal.

#### **Calculation of interest (Sections 9 – 10)**

53. The draft Bill implements the SLC proposals in the calculation of interest. The rate of statutory interest (“the statutory rate” as it is defined in section 17(1) of the draft Bill) is to be linked to the bank rate (called the “official dealing rate” in the draft Bill and also defined in section 17(1)) which is announced by the Monetary Policy Committee of the Bank of England<sup>6</sup>. The linking of the statutory rate to the bank rate ensures that it moves automatically in line with commercial interest rates.

54. The SLC propose that the statutory rate is to be set 1.5% above the official dealing rate. Their Report suggested that 1% or 1.5% above base would have been a fair rate of interest to be set in the proposed legislation.<sup>7</sup> This has been taken forward in the draft Bill.

55. As the statutory rate is linked to a floating rate, this can mean that the rate of accrual of interest can fluctuate during the period when the principal sum owed is outstanding. An interest rate calculator has been provided on the Scottish Government website at [www.scotland.gov.uk/Publications/2008/01/interestondebt](http://www.scotland.gov.uk/Publications/2008/01/interestondebt) for illustrative purposes and to help calculate interest owed.

56. In line with the SLC proposal the draft Bill provides that the interest should be simple interest. The SLC originally proposed the use of compound interest in their discussion paper but changed the proposal based on feedback from those

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<sup>6</sup> This Committee was established by section 13 of the Bank of England Act 1998 and implements monetary policy by deciding on short-term interest rates.

<sup>7</sup> SLC Report paragraph 7.13

consulted. However, a recent House of Lords judgement<sup>8</sup> states that when interest is calculated it should be done at a compound rate as this is the norm in commerce.

### **Question 8**

- a) Should the rate of statutory interest be simple interest? Please provide reasons for your answer.
- b) Should the rate of statutory interest be compound interest? Please provide reasons for your answer.

### *Obligations to pay in a foreign currency*

57. Obligations to pay may be in a foreign currency. For example, under contract or by virtue of a court order, Scottish courts may competently award decree in a currency other than sterling. The draft Bill implements the SLC proposals and provides that where payment of a sum of money is to be in a foreign currency, statutory interest would run at a rate appropriate to the currency concerned based on the equivalent official dealing rate of the country in question. Where no such equivalent exists, a rate which best meets the interests of justice is to be applied.

### **Power of court to waive or reduce interest (Section 11)**

58. The SLC looked in some depth at the issue of whether they should include judicial discretion to withdraw entitlement to interest<sup>9</sup>, if it is in the interests of justice to do so. They noted that there are persuasive arguments both for and against the inclusion of judicial discretion to waive or reduce statutory interest. The reasons for limiting judicial discretion looked at by the SLC included:

- a wide ranging judicial discretion would be inconsistent with the creation of a general statutory entitlement to interest. The SLC feared it could lead to the courts being left free to apply common law principles and revive rules – such as ‘wrongful withholding’ – which the SLC wanted to replace.
- the rate of interest in the proposals is designed to be compensatory. It will not penalise the debtor (and the level of interest moves automatically with market rates), so there is therefore no need for wide judicial discretion.
- wide ranging judicial discretion might lead to uncertainty as to the parties’ rights in the absence of court action and potentially discourage the resolution of claims for interest on debts paid late without recourse to the court.

59. The SLC did concede that there could be circumstances where statutory interest could apply that are not fair to the debtor, particularly where this is due to the way in which the creditor has acted. As a consequence the SLC recommended that:

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<sup>8</sup> *Sempra Metals Limited (formerly Metallgesellschaft Limited) v. HM Commissioners of Inland Revenue and another* [2007] UKHL 34.

<sup>9</sup> SLC Report Part 5, paragraphs 5.1 to 5.13.

‘There should be a judicial discretion to remit interest in whole or in part in respect of a period for which it would otherwise run where the interests of justice so require, but only by reason of any conduct of the creditor.’<sup>10</sup>

60. In making their recommendation the SLC stated that ‘it addresses most of the circumstances which have occurred to us in which it might be thought unjust to award statutory interest’<sup>11</sup>.

61. During the development of policy following the SLC Report we began to examine if this proposal was too restrictive. We thought that there could be other reasons the court should look at when considering varying the amount of interest payable.

62. We noted that in their responses to the SLC discussion paper, the Faculty of Advocates and Citizens Advice Scotland considered that complete judicial discretion would be preferred.

63. Wider judicial discretion could prevent instances of injustice where the debtor would be unfairly or harshly penalised in the circumstances of the individual case. This could cover cases where the cause of statutory interest being payable is due entirely to external factors rather than the actings of either party. For example, where an obligation to pay could not be fulfilled as a result of an ‘act of god’ (such as a flood or other natural event) or the debtor unexpectedly being admitted to hospital.

64. The draft Bill covers a wide range of circumstances and cuts through a large amount of common law. It is likely that unpredictable circumstances will arise and limiting judicial discretion could potentially lead to instances of injustice against debtors. This is particularly true in cases of unjustified enrichment (where an individual who receives an unmerited or unjustified benefit from another person’s loss should recompense that person for the loss) where the debtor may not be aware they owe money and interest. The body of law on unjustified enrichment is built on considerations of equity and it could be anomalous if decisions made in a case before the court was based on what was equitable in the circumstances but the application of statutory interest was not.

65. Section 11 of the draft Bill provides for judicial discretion to decide, if it is in the interests of justice, either that statutory interest is not payable or that the amount of interest to be paid is to be less than it would be under the other provisions of this draft Bill. The court is directed to have particular regard to the conduct of the person to whom statutory interest would be payable. This is an alternative to the SLC proposal.

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<sup>10</sup> SLC Report paragraph 5.13.

<sup>11</sup> SLC Report paragraph 5.12.

**Question 9**

a) Should the draft Bill contain provisions for complete judicial discretion in awarding interest? Please provide reasons for your answer.

b) Should the draft Bill contain provisions for limited judicial discretion in awarding interest? Please provide reasons for your answer.

**Tenders (Section 12)**

66. A tender is a judicial offer by a party to pay a part of the sum asked for by the party's adversary after a court action is raised. They are usually made by a defender to a pursuer, but where there is a counterclaim, it may be the other way round. Tenders affect liability for the expenses of an action. Where a pursuer gets an award of an amount greater than a tender, the pursuer is entitled to an award of the whole expenses of process. Where the amount awarded is less than a tender, the award of expenses from the date of the tender will normally be made in favour of the defender.

67. The draft Bill implements the SLC proposals and provides that a tender is presumed to be in full satisfaction of any claim for interest. Also, in considering whether the tender has equalled or exceeded the award, the court will not include interest between the date of the tender and the date the award is made.

**Transitional provisions (Section 14)**

68. Any transition to a new statutory interest regime will require to balance competing concerns. Agreements which have been entered into under the existing system should not be readily disturbed. Also it would not be appropriate to have two regimes of entitlement to interest operating in tandem.

69. The SLC proposed that the new legislation should apply to all claims for interest, except those in respect of which an action has been raised before the commencement date.

70. In looking at these issues we are concerned about the retrospective nature of the SLC Bill as it will create additional financial obligations and risks that could have been dealt with at the time of the original agreement, if they had been known.

71. The draft Bill contains a standard set of transitional provisions that allow for the commencement of the Bill by order.

**Question 10**

a) Should the draft Bill allow for any retrospective effects?

b) If so, what should have retrospective effect and why?

**Question 11**

Should there be a difference in transitional arrangements for contractual debts, non-contractual debts or damages? If so, please give reasons.

**Financial Impacts**

72. It is not within the remit of the SLC to look in any detail at the financial effects of their proposals. During the development of the draft Bill a number of financial impacts have come to light, some more significant than others.

*Individuals*

73. The draft Bill will allow individuals to claim statutory interest. The decision to do so will, to a large extent, depend on the amount to be claimed. The direct financial impact on individuals is difficult to assess as the circumstances of each case will produce different outcomes dependent on the value of the claim and the how long the money has been owed.

74. To assist with the calculation of statutory interest an interest calculator has been placed on the Scottish Government's website. The calculator can be accessed on the consultation document website at:

[www.scotland.gov.uk/Publications/2008/01/interestondebt](http://www.scotland.gov.uk/Publications/2008/01/interestondebt)

This allows for the calculation of simple interest over a given time period for a given amount.

75. A recent report by Citizens Advice Scotland<sup>12</sup> shows that the most enquiries they receive on debt issues relate to:

- consumer debt (bank loans etc)
- housing
- taxes (including council tax)
- utilities

76. The majority of these debts would be exempt from the provisions of the draft Bill as they would fall under the exemptions in section 2: consumer debts above would likely have contract terms and conditions on interest, council tax would be

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<sup>12</sup> Social Policy Statistics Report 2006-2007, published October 2007 by Citizens Advice Scotland.

exempt as it is a tax due to a public authority and we are proposing to exempt utility debts from the draft Bill provisions by order.

77. Therefore the draft Bill itself will not have a great impact on the majority of debts of importance to individuals. However, it will apply to late payment of wages and other categories of non-contractual debt such as unjustified enrichment and aliment. These were highlighted by the SLC as areas where the Bill would have some impact.

#### **Question 12**

Do you think the draft Bill will have a financial impact for individuals? Please provide reasons for your answer.

#### *Businesses*

78. Late payments are an ongoing problem for companies in Scotland, in particular for small and medium sized companies. Late payment legislation is already in force in Scotland for commercial debts through the Late Payment of Commercial Debts (Interest) Act 1998. This allows the creditor to claim interest at the Bank of England rate plus 8%. This is intended to penalise those who pay late. Each business will have to look at its relationship with the debtor and decide if it is appropriate to use legislation. Guidance is available on the Better Payment Practice Group's website [www.payontime.co.uk](http://www.payontime.co.uk).

79. For businesses, the draft Bill will not affect those who do not offer credit terms and already have standard terms in contracts. As the existing late payment legislation already applies to commercial debt and applies an interest significantly higher than the draft Bill, it is likely that businesses would use the 1998 Act when claiming interest. However, as many businesses have an ongoing commercial relationship with those who pay late they may choose to claim interest under the draft Bill or not claim interest at all.

80. We may expect a benefit for small and medium size companies who do not use standard terms for late payments in contracts. In a 2005 survey for the Scottish Government<sup>13</sup> 39% of small and medium sized businesses surveyed did not have written terms and conditions with their customers covering what they will pay them and 64% said that late payments had given rise to cash flow problems.

81. The survey does not indicate how many businesses to which the existing late payment legislation would apply but it states that 15% of businesses surveyed took customers to court over late payment. No indication was given in the survey of the values of the late payments. This would suggest that the draft Bill could have a beneficial impact for small and medium sized businesses.

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<sup>13</sup> Annual Survey of Small Businesses: Scotland 2005

### Question 13

Do you think the draft Bill will have a financial impact for businesses? Please provide reasons for your answer.

#### *Contracts of Employment*

82. A significant impact has been identified during the development of the draft Bill which relates to contracts of employment and late payment of wages. This was not raised during the consultation undertaken by the SLC.

83. The main reasons why pay, which is usually due on a certain date, could be paid late are:

- it has been wrongfully withheld in whole or in part;
- an employee has been mistakenly underpaid; or
- pay is “late” due to a protracted pay negotiation, and agreement is not made until some time after the expected settlement date.

84. For the first two reasons the draft Bill is clear that, unless separate agreement has been reached, an employee should be able to claim interest on any late payment. The outcome from the third reason is less clear.

85. For example, on 1 July, a pay settlement, agreed with any relevant union, is reached. The settlement states that an individual employee is to earn an extra £100 per month and this is to be backdated to 1 January. The settlement gives the individual an entitlement to payment of £600, being the increase in salary for the period 1 January to 30 June. It is this entitlement that the draft Bill may affect. See further details in paragraph 92.

86. There are different possible outcomes of whether the employee in this example would be entitled to claim statutory interest on backdated pay under the draft Bill. In particular, the terms and conditions of the individual’s contract of employment may already rule out the entitlement to interest and the terms of the pay settlement itself may rule out an entitlement to interest as it could be an agreement to pay at a future date a sum representing an increase in salary in the past.

87. This scenario when a pay award made by an organisation is backdated to an earlier time is a common outcome across the public sector. Across the wide range of organisations there are different employee contracts and different pay settlements which make quantification of costs difficult. It is more helpful to look at a range of financial exposure or risk. Initial investigations indicate that:

- the total amount of pay increases across those bodies whose pay requires the approval of the Scottish Government and who entered into a new settlement during 2006-07 was approximately £21 million per annum. If this was backdated 12 months at the current rate of 7%, the amount of interest due

under the draft Bill would be approximately £750,000. However, it is unlikely that every pay settlement would be backdated 12 months and it may be that some organisations would not have to pay interest due to their employment contracts or the terms of the settlement. The range of financial risk is therefore between £0 and approximately £750,000.

- NHS employers go through a lengthy process to determine the annual pay awards for NHS Scotland staff. This means that often the implementation of the pay award is delayed beyond its effective date of 1 April. Taking 2006-07 as an example, the pay award was implemented four months after its effective date. A pay award of 2% would be worth approximately £70m, which could lead to potential interest payable in the region of £1.7 - £2m for that four month period.

88. The examples above are indicative of the financial exposure that could result from the draft Bill. The Government is concerned that this unanticipated expenditure could have a significant impact on the ability of Government bodies and Health Boards to deliver services, particularly as we move into a period of restricted government spending.

**Question 14**

Do you think the draft Bill will have an effect on backdated pay? Please provide reasons for your answer.

**Question 15**

Do you think the draft Bill should exempt backdated pay from the statutory interest regime? Please provide reasons for your answer.

89. The Government is also concerned that an indirect and unintended consequence of the draft Bill is that it could impact on pay negotiations and industrial relations in ways which are not easy to predict.

**Question 16**

Do you think the draft Bill will have implications for future pay negotiations? Please provide reasons for your answer.

**Question 17**

Do you think the draft Bill will alter behaviour and negotiating positions? Please provide reasons for your answer.

90. In considering the position on backdated pay the Government is aware that the draft Bill may also extend to claims made under equal pay legislation. This would have a financial impact which would depend on the number and value of claims for statutory interest.

**Question 18**

Do you think the draft Bill will have an impact on equal pay claims?

**Question 19**

If yes, what would be the likely financial impact on your organisation or the organisations you represent?

**Question 20**

Do you think the draft Bill should exempt equal pay claims from the statutory interest regime? Please provide reasons for your answer.

91. There is a further financial risk associated with the draft Bill arising from the fact that it is based on an individual claiming interest on debts. If an organisation could owe interest on backdated pay then if they dealt with claims on an individual basis there could be short-term administration costs in validating and processing the claims.

92. The calculation is not a straightforward application of a percentage of a total sum payable. The interest on that entitlement needs to be apportioned to each month due. For example if pay is back dated for six months and at a rate of £100 per month, the employee could be entitled to interest on *each* month. To clarify: pay is back dated to 1 January. At the end of that month the employee is due the first additional £100 for the salary increase. The next payment is due 1 February so the employee is due an additional £100 again. Interest on each month that the salary increase is late must be calculated separately. It is only the first £100 that would attract interest over a six month period. The interest rate may also have changed in that period.

*Other costs identified*

93. Development of the proposals has also led to some other costs for the Scottish Government being identified.

Scottish Courts Service

94. Scottish Courts Service estimate the cost of reprinting an annual supply of advice booklets and forms for all summary cause and small claims action to be £20,500 for a reprint of amended forms and £13,000 for amended guidance booklets.

### Scottish Legal Aid Board

95. The Scottish Legal Aid Board estimate that the amount of interest that would be payable from the legal aid fund per year would be in the region of £850,000 as shown in the table below for each category of claim.

Costs per year	£
Advice & Assistance	190,000
Civil	240,000
Criminal	400,000
Children	20,000
<b>Total</b>	<b>850,000</b>

96. There are also potential administrative consequences of the draft Bill. The Scottish Legal Aid Board estimate that the interest payments could consist of almost 51,000 separate claims. The handling of these claims could significantly affect the Board's ability to meet their commitment to the legal profession of dealing with accounts within 30 days of receipt. The administrative resources required have been estimated at up to £150,000.

### Registers of Scotland

97. The Keeper has a statutory obligation to pay indemnity in terms of section 12 of the Land Registration (Scotland) Act 1979 for those who have suffered a loss. The 1979 Act makes no provision for the payment of interest, although it is sometimes paid in practice depending on the circumstances of the case. Registers of Scotland estimate that the time between the date of entitlement to claim indemnity and the date when a claim is intimated is on average six to twelve months and the additional financial cost is estimated to be £20,000 – £30,000 per annum. The amount would be payable from the Registers of Scotland trading fund of £75 million.

## **Glossary**

Arbitration	The hearing and decision of a dispute.
Business interruption Insurance	Insurance to cover the period of loss of trade between the date of loss and the date of reinstatement of business.
Caution	Security for a deed or a debt.
Cautioner	Individual taking out a bond of caution.
Damages	A sum of money claimed as compensation for loss, injury or damage.
Debt	Money legally owed.
Decree	The final judgement of a court.
Head of loss	(Sub) categories of claim - what is claimed for each potential aspect of the claim.
Indemnity insurance	Insurance cover for loss or damage.
Judicial rate	Rate of interest to be charged on claims for debt or damages, set by the courts.
Jurisdiction	The authority of the court to administer justice and to apply laws, within a particular territorial area.
Litigation	The process of bringing or contesting a lawsuit.
Obligation	A legal agreement between two people where a creditor is entitled to enforce rights and duties.
Official dealing rate	The rate set by the Monetary Policy Committee of the Bank of England for the money market.
Pecuniary	Relating to money.
Recompense	To restore value.
Rectification	To put right.
Remuneration	Payment.
Restitution	To restore property to the owner.
Summary cause action	A court action seeking payment or delivery of goods to the value of £1,500.
Unjustified enrichment	Where an individual receives unmerited or unjustified benefit from another person's loss.

## How to respond

We welcome your views on any or all of the consultation points raised in this document. To help you make a response we have prepared a summary response paper which is enclosed. Please answer any/all questions as you wish. There is additional space at the end of the response paper to include any extra comments you wish to make.

Comments should be made by Friday, 4 April 2008. Earlier responses will be very welcome.

It would be helpful to have your response by e-mail. The electronic response forms can be accessed at the following website address:

[www.scotland.gov.uk/Publications/2008/01/interestondebt](http://www.scotland.gov.uk/Publications/2008/01/interestondebt) and should be emailed to the mailbox below.

However to help those who want to comment but do not have e-mail facilities we will be happy to accept written submissions too. Your two options for completing and submitting your response are:

Email submissions: [Helen.grosset@scotland.gsi.gov.uk](mailto:Helen.grosset@scotland.gsi.gov.uk)

Written Submissions:      Family Law and Administrative Justice  
Civil Justice, Law Reform and International Directorate  
2 West, St Andrew's House  
Regent Road  
Edinburgh  
EH1 3DG

Telephone      0131 244 4837

Fax              0131 244 8325

## Acknowledgements

All responses will be acknowledged either in writing or electronically.

## Additional Copies of the Consultation Document and Response Paper

Further copies of the consultation document and the response document are available from the above address or can be downloaded from the Scottish Executive's web site at [www.scotland.gov.uk/Publications/2008/01/interestondebt](http://www.scotland.gov.uk/Publications/2008/01/interestondebt).

For further information, or if you would like the consultation document or this paper in another format or language, please contact the above address. We will try to meet your needs.

A summary of the consultation responses will be produced and will be available on the Scottish Government website [www.scotland.gov.uk](http://www.scotland.gov.uk) from 11 April 2008.



# Interest (Scotland) Bill

[CONSULTATION DRAFT]

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# Interest (Scotland) Bill

## [CONSULTATION DRAFT]

An Act of the Scottish Parliament to make provision for the creation of an entitlement to interest in certain circumstances; to change the law on entitlement to interest on damages payments; to make provision about interest and tenders in proceedings; and for connected purposes

### **1 Entitlement to interest**

- (1) A person entitled to payment of a sum of money is entitled to interest on that sum in accordance with the provisions of this Act.
- (2) Interest to which a person is entitled under subsection (1) is in this Act referred to as “statutory interest”.

### **2 Circumstances in which interest not payable**

Where a person (in this section referred to as “the creditor”) is entitled to payment of a sum of money from another person (in this section referred to as “the debtor”), statutory interest is not due on that sum if—

- (a) there is express or implied agreement between the creditor and the debtor—
  - (i) that interest is to be due on that sum on a basis different from that provided for in this Act; or
  - (ii) that no interest is to be due on that sum;
- (b) the payment represents a fine, penalty or tax due to a public authority;
- (c) any enactment (other than this Act or the Late Payment of Commercial Debts (Interest) Act 1998 (c.20))—
  - (i) makes provision for interest to be due on that sum; or
  - (ii) provides that no interest is due on that sum;
- (d) interest is due on that sum by virtue of that Act of 1998 and is claimed as so due by the creditor; or
- (e) the payment is of a type specified by the Scottish Ministers by order.

### **3 Starting date generally**

- (1) In a case where a starting date falls to be ascertained in accordance with section 4, 5, 6, 7 or 8, statutory interest runs for the period beginning on the day after that date and ending on the day or days on which the principal sum is paid.
- (2) In any other case, statutory interest runs for the period beginning on the day after the date on which the principal sum is due and ending on the day or days on which that sum is paid.

**4 Starting date: certain obligations where provision is made for date of payment of principal sum**

- (1) Where a contract (other than a contract of loan or a contract of cautionry) makes provision as to the date on which any payment under the contract is due, that date is the starting date in respect of that payment.
- (2) In the case of a cautionary obligation, where provision is made as to the date on which any payment due in satisfaction of the cautioner's right of relief against the principal debtor or any co-cautioner is due, that date is the starting date in respect of that payment.

**5 Starting date: certain obligations where no such provision is made**

- (1) Where—
  - (a) a contract of a type referred to in subsection (2) makes no provision; or
  - (b) in the case of an obligation of a type referred to in subsection (3) no provision is made,as to the date on which any payment due under the contract, or the obligation, and mentioned in that subsection is due, the starting date in respect of that payment is to be ascertained in accordance with whichever of those subsections is applicable.
- (2) In the case of a contract for the supply of goods or services (other than a contract of employment or apprenticeship), the starting date in respect of any payment due under the contract is the date 30 days after whichever is the later of—
  - (a) the day on which the supplier's obligation is performed; and
  - (b) the day on which the other party has notice of—
    - (i) the amount of the debt; or
    - (ii) where that amount is unascertained, the sum which the supplier claims is the amount of the debt.
- (3) In the case of a cautionary obligation, the starting date in respect of any payment due in satisfaction of the cautioner's right of relief against the principal debtor or any co-cautioner is the day on which the payment in respect of which the right of relief arises is made by the cautioner.

**6 Starting date: contracts of loan**

In the case of a contract of loan, the starting date is the day on which the loan is made.

**7 Starting date: damages**

- (1) Where statutory interest is due on a sum of money payable as damages, the starting date in respect of any part of that sum representing a head of loss is the day on which the loss in question is sustained.
- (2) Nothing in this section prevents a court from treating a loss (including non-patrimonial loss) in respect of which an award of damages is made as having been sustained over a period of time.

## **8 Starting date: fees and outlays in proceedings**

Where a party to proceedings is liable to pay any fees or outlays incurred by another party to those proceedings, the starting date is the day on which they are paid by the other party.

## **9 Calculation of interest**

- (1) Subject to section 10, statutory interest in respect of any period runs at the statutory rate for that period.
- (2) Subject to subsection (3), statutory interest is simple interest.
- (3) Where a court orders payment of a sum of money on which statutory interest is to run, interest starts to run on the day after the date of the order on both—
  - (a) the principal sum; and
  - (b) any interest accrued on that sum as at that date.
- (4) Subsection (3) does not apply in respect of—
  - (a) an order authorising execution in Scotland of a foreign judgment; or
  - (b) any order made in connection with, or in consequence of—
    - (i) the registration of a document for execution; or
    - (ii) a bill protested for non-payment by a notary public.

## **10 Principal sum payable in foreign currency**

- (1) Where a principal sum is payable in a foreign currency, statutory interest on that sum runs at—
  - (a) the rate 1.5% per year over such rate as is, in relation to the foreign currency in question, that currency's nearest equivalent to the official dealing rate; or
  - (b) if it is not possible to identify such an equivalent, such rate as best meets the interests of justice.
- (2) The Scottish Ministers may by order amend paragraph (a) of subsection (1) so as to substitute a different percentage for the percentage for the time being specified there.

## **11 Power of court to waive or reduce interest**

- (1) If a court considers that it would be in the interests of justice to do so, having regard in particular to any conduct which it considers relevant of the person to whom statutory interest would be payable, it may decide that—
  - (a) statutory interest which, but for this section, would be payable is not to be payable;
  - (b) an amount payable as statutory interest is to be less than, but for this section, it would be.
- (2) In subsection (1), “conduct” includes any act or omission (whether before or after the time when the principal sum fell due for payment).

## **12 Tenders**

- (1) Where a tender is made in the course of any proceedings, the tender is, unless it states otherwise, in full satisfaction of any claim for interest in the action by any person in whose favour the tender is made.
- (2) Where a court is considering whether a sum of money payable under an order made by it is equal to or greater than an amount tendered in the proceedings, it is to leave out of account any element of the sum which represents interest in respect of the period between the making of the tender and the date of the order.

## **13 Application of Act**

This Act binds the Crown.

## **14 Ancillary provision**

- (1) The Scottish Ministers may by order make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes, or in consequence, of this Act or for giving full effect to any of its provisions.
- (2) An order under subsection (1) may modify any enactment.

## **15 Modification and repeal of enactments**

- (1) Schedule 1, which modifies enactments, has effect.
- (2) The enactments mentioned in the first column of schedule 2 are repealed to the extent specified in the second column.

## **16 Orders**

- (1) Any power conferred by this Act on the Scottish Ministers to make orders—
  - (a) must be exercised by statutory instrument;
  - (b) may be exercised so as to make different provision for different purposes.
- (2) A statutory instrument containing an order made under this Act (except an order made under section 18(2)) is, subject to subsection (3), subject to annulment in pursuance of a resolution of the Scottish Parliament.
- (3) A statutory instrument containing—
  - (a) an order under section 2(e);
  - (b) an order under section 14 containing provisions which add to, replace or omit any part of the text of an Act,

is not to be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament.

## **17 Interpretation**

- (1) In this Act—

“court” includes any tribunal, arbiter or adjudicator;

“the official dealing rate” means the rate announced from time to time by the Monetary Policy Committee of the Bank of England (“the Bank”) and for the time being in force as the official dealing rate, being the rate at which the Bank is willing to enter into transactions for providing short term liquidity in the money markets;

“principal sum” means a sum of money on which statutory interest is payable;

“starting date” means the date on which statutory interest on a sum of money begins to run;

“statutory interest” has the meaning given by section 1(2);

“the statutory rate” means the rate 1.5% per year over the official dealing rate;

“supply” includes “sale” and “supplier” includes “seller”.

- (2) The Scottish Ministers may by order amend the definition of “the statutory rate” in subsection (1) so as to substitute a different percentage for the percentage for the time being specified there.

## **18 Short title and commencement**

- (1) This Act may be cited as the Interest (Scotland) Act 2007.
- (2) This Act (other than sections 14, 16, 17 and this section) comes into force in accordance with provision made by the Scottish Ministers by order.

SCHEDULE 1  
*(introduced by section 15(1))*  
MODIFICATION OF ENACTMENTS

*Trusts (Scotland) Act 1921 (c.58)*

- 1 In section 29 of the Trusts (Scotland) Act 1921, after the word “interest” insert “at the statutory rate (within the meaning of the Interest (Scotland) Act 2007 (asp 00))”.

*Conveyancing and Feudal Reform (Scotland) Act 1970 (c.35)*

- 2 In paragraph 7(3) of Schedule 3 to the Conveyancing and Feudal Reform (Scotland) Act 1970, for the words “bank rate” substitute “statutory rate (within the meaning of the Interest (Scotland) Act 2007 (asp 00))”.

*Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c.55)*

- 3 In section 18 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, for the words from “same rate” to “that decree or extract” substitute “statutory rate (within the meaning of the Interest (Scotland) Act 2007 (asp 00))”.

*Bankruptcy (Scotland) Act 1985 (c.66)*

- 4 In section 51(7)(a) of the Bankruptcy (Scotland) Act 1985, for the words “prescribed rate” substitute “statutory rate (within the meaning of the Interest (Scotland) Act 2007 (asp 00))”.

*Debtors (Scotland) Act 1987 (c.18)*

- 5 In the definition of “specified rate” in section 73(1) of the Debtors (Scotland) Act 1987, for paragraphs (a) and (b) substitute “means the statutory rate (within the meaning of the Interest (Scotland) Act 2007 (asp 00))”.

*Late Payment of Commercial Debts (Interest) Act 1998 (c.20)*

- 6 In section 3(2) of the Late Payment of Commercial Debts (Interest) Act 1998, after the words “of this Act” insert “or the Interest (Scotland) Act 2007 (asp 00)”.

*Adults with Incapacity (Scotland) Act 2000 (asp 4)*

- 7 In each of section 81(1) of, and paragraph 8(7) of schedule 2 to, the Adults with Incapacity (Scotland) Act 2000, for the words “rate fixed by Act of Sederunt as applicable to a decree of the sheriff” substitute “statutory rate (within the meaning of the Interest (Scotland) Act 2007 (asp 00))”.

SCHEDULE 2  
*(introduced by section 15(2))*

REPEALS

<i>Enactment</i>	<i>Extent of repeal</i>
Sheriff Courts (Scotland) Extracts Act 1892 (c.17)	Section 9.
Interest on Damages (Scotland) Act 1958 (c.61)	The whole Act.
Interest on Damages (Scotland) Act 1971 (c.31)	The whole Act.
Administration of Justice (Scotland) Act 1972 (c.59)	Section 4.

# INTEREST (SCOTLAND) BILL

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## EXPLANATORY NOTES

### INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Executive 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.
2. 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

#### Section 1 – Entitlement to interest

3. This section creates an entitlement to interest for a person entitled to payment of a sum of money. The interest is referred to in the Bill as “statutory interest”.
4. The general rule in this section applies to a wide range of Scots law obligations to pay money, subject to the exceptions set out in section 2. For example, obligations to pay money arising from contract and promise, trust, succession, quasi-contractual situations, such as unjustified enrichment, claims for legal rights and aliment, and damages claims (such as delict or breach of contract).
5. This new statutory rule will replace the existing law on entitlement to interest which is predominantly common law. It will also replace the existing statutory provisions dealing with interest on damages contained in the Interest on Damages (Scotland) Act 1958 (c.61) which is repealed by schedule 2 of the Bill. The Interest on Damages (Scotland) Act 1971 which amended that Act is also repealed.

#### Section 2 – Circumstances in which interest not payable

6. This section sets out those obligations to pay which are to be exceptions to the general rule set out in section 1.
7. Paragraph (a) disapplies the general rule in section 1 to situations where interest is due on a different basis (or not due at all) by reason of an express or implied agreement between the parties. This means that parties can agree to contract out of an entitlement to statutory interest.

8. Paragraph (b) provides that no statutory interest is due on obligations to pay which are a fine, penalty or tax due to a public authority.

9. Paragraph (c) provides that no statutory interest is due on obligations to pay for which there is already legislation which specifies that interest, including no interest, is to be paid.

10. By virtue of paragraph (d) where a person claims interest on a sum of money under the Late Payment of Commercial Debts (Interest) Act 1998 (c.20) then no statutory interest is due on the sum under this Bill. If no claim has been made under the 1998 Act, a person may claim under either that Act or the Bill. That Act was introduced on 1 November 1998 to implement Directive 2000/35/EC of the European Parliament and of the Council on combating late payment in commercial transactions. It gives commercial parties a right to claim interest if another commercial party is late in paying sums due. Under the Late Payment of Commercial Debts (Rate of Interest) (Scotland) Order 2002 (SI 2002/No 336) the interest rate is currently 8% per annum above the Bank of England rate.

11. Paragraph (e) gives Scottish Ministers the power to make an order to exempt other types of payment from the statutory interest regime.

### **Section 3 – Starting date generally**

12. This section provides for the starting date of statutory interest. “Starting date” for the purposes of this section and sections 4 to 8 is defined in section 17 of the Bill to mean the date on which statutory interest on a sum of money starts to run. “Principal sum” for the purpose of this section and other sections in which the term appears (namely sections 4, 9(3), 10 and 11(2)) is defined in section 17 of the Bill to mean a sum of money on which statutory interest is payable.

13. Subsection (1) requires to be read with sections 4 to 8. Those sections make it clear what the starting date is for statutory interest in relation to certain types of obligation. For those obligations which are covered, interest starts to run on the day after the starting date until the day or days on which the principal sum of money owed is paid. The reference to “days” in this section covers payments which are paid in instalments.

14. Subsection (2) covers all other types of obligations to pay which are not covered in sections 4 to 8. This includes non-contractual payments due by way of redress for unjustified enrichment and awards of aliment. It will apply to such obligations where the parties to the contract have not agreed that interest should be due on a different basis or have agreed interest should not be due.

15. The rule set out is that statutory interest starts to run on the day after the principal sum is due to be paid, ending on the day before the date or dates of payment of that sum. The date when the principal sum is due to be paid is to be determined by application of the relevant existing law.

#### **Section 4 – Starting date: certain obligations where provision is made for date of payment of principal sum**

16. This section provides that when a contract states the date when payment under the contract is due then that is the starting date for statutory interest. This starting date is then applied in the general rule set out in section 3(1), discussed above. This section applies to all contracts (other than a contract of loan specifically dealt with in section 6 of the Bill or a contract of cautionry dealt with in subsection (2)).

17. Subsection (2) provides that for cautionary obligations the starting date for statutory interest is the day on which any payment is made by the cautioner.

#### **Section 5 – Starting date: certain obligations where no such provision is made**

18. This section provides for a starting date for payments due under contracts for the supply of goods and services when the contract does not specify the date when payment is due.

19. Subsection (2) provides that for a contract for the supply of goods and services, the starting date for statutory interest is 30 days after the later of two dates. Those are firstly, the day on which the supplier performs the supplier's obligation. This could, for example, be the delivery of goods or the performance of a service. The second date is the day on which the person receiving the goods or services has been informed of the amount due. Notice of the amount due could be given either in writing or simply verbally.

20. The terms "supply" and "supplier" are defined in section 17 of the Bill to make it clear that supply includes sale and supplier includes seller. This section therefore covers the sale of goods.

21. Subsections (3) provides that for a cautionary obligation, the starting date for statutory interest is the day on which the payment of the right of relief is made by the cautioner.

#### **Section 6 – Starting date: contracts of loan**

22. This section provides that statutory interest should run on a loan of money from the date on which the loan is made. It preserves the common law presumption that interest on a contract of loan runs from the date on which the loan is made.

#### **Section 7 – Starting date: damages**

23. Section 7(1) sets out the general rule that in an action for damages, interest should run on each head of loss from the date on which the loss in question was sustained. Determination of the relevant date will be made according to the particular facts and circumstances of the case.

24. Section 7(2) provides that a court can consider a loss as having been sustained over a period of time, including solatium for pain and suffering, and would allow the court to apply statutory interest at a rate the court considers appropriate in the circumstances of a particular case throughout the period during which the loss was sustained. This is because

some consequences of injury continue over a period of time and are not sustained on any particular date. “Court” is defined in section 17 to include any tribunal, arbiter or adjudicator.

### **Section 8 – Starting date: fees and outlays in proceedings**

25. This section provides that where a party to an action has paid fees (such as legal fees or fees for an expert witness) or outlays and is entitled to recover them from another party, statutory interest is payable from the dates when the fees or outlays were paid. An entitlement to recover fees derives from an award of judicial expenses. This section applies to proceedings before a court, tribunal, arbiter or adjudicator.

### **Section 9 – Calculation of interest**

26. Section 9 provides that statutory interest for any period runs at the statutory rate. The statutory rate is defined in the Bill under section 17 as being 1.5% above the “official dealing rate”. The official dealing rate is also defined in section 17 of the Bill. It is the rate announced by the Monetary Policy Committee of the Bank of England as the official Bank Rate, though its name has varied over time. By virtue of section 17(2) of the Bill the Scottish Ministers can make an order to substitute a different percentage rate for the rate specified in the definition of “statutory rate”.

27. Subsection (2) provides that statutory interest is to be calculated as simple interest. Simple interest is interest paid only on the amount of the principal sum due and so does not include interest on past interest. Interest accrues daily.

28. Subsection (3) provides that at the date of a court order for payment of a sum of money to which statutory interest applies then statutory interest will be applied to both the principal sum and the sum of the interest accrued to that date. In effect this is a one-off compounding of interest to the date of the court order. Again, this applies to any court, tribunal, arbiter or adjudicator by virtue of the definition in section 17 of the Bill.

29. Subsection (4) provides that there can be no such compounding for interest due on foreign judgments authorised for execution in Scotland or under documents registered for execution in the Books of Council and Session or the sheriff court books.

### **Section 10 – Principal sum payable in foreign currency**

30. Obligations to pay may be in a foreign currency, for example, under contract or by virtue of a court order. Scottish courts may competently award decree in a currency other than sterling. This was decided in the case of *Commerzbank AG v Large* 1977 SC 375. Section 10 provides that where payment of a sum of money is to be in a foreign currency, statutory interest would run at a rate appropriate to the currency concerned based on the equivalent official dealing rate of the country in question. Where no such equivalent exists, a rate which best meets the interests of justice is to be applied. This could be applied either by a court or by parties.

31. Subsection (2) provides that the percentage above the official dealing rate can be amended by order by the Scottish Ministers.

## **Section 11 – Power of court to waive or reduce interest**

32. This section provides for judicial discretion to decide if it is in the interests of justice either that statutory interest is not payable or that the amount of interest to be paid is to be less than it would be under the other provisions of this Bill. The court is directed to have particular regard to the conduct of the person to whom statutory interest would be payable. The court's discretion applies to all obligations to pay including damages. The definition of court in section 17 makes it clear that this power to remit interest is given also to tribunals, arbiters and adjudicators.

## **Section 12 – Tenders**

33. This section deals with statutory interest on tenders. A tender is a judicial offer by a party to pay a part of the sum asked for by the party's adversary after an action is raised. They are usually made by a defender to a pursuer, but where there is a counterclaim, it may be the other way round. Tenders affect liability for the expenses of an action. Where a pursuer gets an award of an amount greater than a tender the pursuer is entitled to an award of the whole expenses of process. Where the amount awarded is less than a tender, the award of expenses from the date of the tender will normally be made in favour of the defender.

34. This section provides that a tender is presumed to be in full satisfaction of any claim for interest and, in considering whether the tender has equalled or exceeded the award, the court (including a tribunal, arbiter or adjudicator) will not include interest between the date of the tender and the date the award is made.

## **Section 13 – Application of Act**

35. This section provides that this Act binds the Crown to the conditions imposed by the Bill on everyone else.

## **Section 14 – Ancillary provision**

36. This section allows the Scottish Ministers to make provision ancillary to the Act in subordinate legislation.

## **Section 15 – Modification and repeal of enactments**

37. This section gives effect to schedules 1 and 2 to the Bill which modify and repeal certain enactments.

## **Section 16 – Orders**

38. This section sets out the Parliamentary procedure for statutory instruments made under powers given in this Bill. Most orders which may be made under the Bill, such as an order to change the way the statutory rate is calculated, are to be made by negative procedure which would allow orders to be made quickly, for example to reflect changing market conditions.

## **Section 17 – Interpretation**

39. The section has been discussed above where relevant. It provides a number of definitions used throughout the Bill and also allows the Scottish Ministers to amend by order the definition of the “statutory rate” of interest to change the percentage rate above the official dealing rate which will apply in the calculation of statutory interest.

# **INTEREST (SCOTLAND) BILL**

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## **EXPLANATORY NOTES**

# Interest (Scotland) Bill

## Consultation Response Paper

This response paper should be read in conjunction with the Scottish Government's consultation document and draft Bill on interest on debt and damages.

**It is not necessary to answer all of the questions and you can focus on those in which you have a particular interest.**

Please tick the response that most closely matches your opinion. Some questions invite you to expand on your answer and space is provided to do so. If you wish to do so you can also use the space at the end of this document to make additional comments.

### Your Details

Name: .....

Job Title: .....  
(if applicable)

Address: .....  
.....  
.....

Postcode: .....

### Your Organisation's Details

Title of Organisation: .....  
(if applicable)

Type of Organisation: .....  
(individual, business, advice organisation,  
professional body,  
legal body, statutory body)

Address: .....  
.....  
.....

Postcode: .....



We will make all responses available to the public in the Scottish Government library unless confidentiality has been requested. Responses from those who reply in confidence will only be included within numerical totals and names and text will not appear in the list of respondents or in any published analysis.

**Confidentiality:**

Yes	<input type="checkbox"/>
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**Deadline for Responses: Friday 4 April 2008**

**Completion and Submission of Responses**

It would be helpful to have your response by e-mail. However to help those who want to comment but do not have e-mail facilities we will be happy to accept written submissions too. Your two options for completing and submitting your response are:

Email submissions: [Helen.grosset@scotland.gsi.gov.uk](mailto:Helen.grosset@scotland.gsi.gov.uk)

Written Submissions:      Family Law and Administrative Justice  
Civil Justice, Law Reform and International Directorate  
2 West, St Andrew's House  
Regent Road  
Edinburgh  
EH1 3DG

Telephone      0131 244 4837  
Fax              0131 244 8325

**Acknowledgements**

All responses will be acknowledged either in writing or electronically.

**Additional Copies of the Consultation Document and Response Paper**

Further copies of the consultation document and the response document are available from the above address or can be downloaded from the Scottish Executive's web site at [www.scotland.gov.uk/Publications/2008/01/interestondebt](http://www.scotland.gov.uk/Publications/2008/01/interestondebt)

For further information, or if you would like the consultation document or this paper in another format or language, please contact the above address. We will try to meet your needs.



## Questions

Ref	Question	Yes	No	Don't know	Comments
Q1	Do you agree that utility debts should be exempt from the statutory interest regime? Please provide reasons for your answer.				
Q2	Do you agree that rent arrears due to public sector landlords should be exempt from the statutory interest regime? Please provide reasons for your answer.				
Q3	Are there other categories of debt which should be excluded from the statutory interest regime? Please provide reasons for your answer.				
Q4a	Do you think the draft Bill will have an effect on the provision of insurance for individuals? If yes, what do you think that effect would be?				
Q4b	Do you think the draft Bill will have an effect on the provision of insurance for businesses? If yes, what do you think that effect would be?				
Q4c	Do you think the draft Bill will have an effect on the insurance industry? If yes, what do you think that effect would be?				
Q5a	Do you think that statutory interest should run on late payments under contracts of employment?				

Ref	Question	Yes	No	Don't know	Comments
Q5b	If so, do you think that the statutory interest should run from the date on which payments are due?				
Q6	Do you think that statutory interest should begin to run 30 days after the end of the period in respect of which the service under the contract is remunerated?				
Q7	If you think that statutory interest should run on late payments under contracts of employment, do you think there are any particular circumstances when interest should <b>not</b> run on late payments? If so, then what would these be?				
Q8a	Should the rate of statutory interest be simple interest? Please provide reasons for your answer.				
Q8b	Should the rate of statutory interest be compound interest? Please provide reasons for your answer.				
Q9a	Should the draft Bill contain provisions for complete judicial discretion in awarding interest? Please provide reasons for your answer.				
Q9b	Should the draft Bill contain provisions for limited judicial discretion in awarding interest? Please provide reasons for your answer.				
Q10a	Should the draft Bill allow for any retrospective effects?				
Q10b	If so, what should have retrospective effect and why?				

Ref	Question	Yes	No	Don't know	Comments
Q11	Should there be a difference in transitional arrangements for contractual debts, non-contractual debts or damages? If so, please give reasons.				
Q12	Do you think the draft Bill will have an effect on individuals? Please provide reasons for your answer.				
Q13	Do you think the draft Bill will have an effect on businesses? Please provide reasons for your answer.				
Q14	Do you think the draft Bill will have an effect on backdated pay? Please provide reasons for your answer.				
Q15	Do you think the draft Bill should exempt backdated pay from the statutory interest regime? Please provide reasons for your answer.				
Q16	Do you think the draft Bill will have implications for future pay negotiations? Please provide reasons for your answer.				
Q17	Do you think the draft Bill will alter behaviour and negotiating positions? Please provide reasons for your answer.				
Q18	Do you think the draft Bill will have an impact on equal pay claims?				
Q19	If yes, what would be the likely financial impact on your organisation or the organisations you represent?				

Ref	Question	Yes	No	Don't know	Comments
Q20	Do you think the draft Bill should exempt equal pay claims from the statutory interest regime? Please provide reasons for your answer.				

Please use this section if you wish to make additional comments



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Government**

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