

Business and Regulatory Impact Assessment

Title of Proposal

The Damages (Review of Rate of Return) (Scotland) Regulations 2024

Purpose and intended effect

Background – Personal Injury Discount Rate

Where damages for personal injury are awarded for future loss in the form of a lump sum, that award is adjusted to reflect the fact that the injured person is able to invest the money before the loss or expense for which it is awarded has actually occurred. The factor by which the award is adjusted is determined by the personal injury discount rate which represents the appropriate rate of return on investing the award.

The aim of the discount rate is to ensure that a successful pursuer is neither under or over compensated. On the one hand, there is an individual who has suffered an injury as a result of the neglect of another and whose life has been changed out of all recognition. They will often be unable to live independently and care for themselves and carry out the most basic tasks. For these individuals it is critical the funds awarded as damages do not run out. On the other hand there is a defender, whether that is the NHS, an insurer or other organisation, who will pay the damages.

The current discount rate is minus 0.75% and was last reviewed in September 2019.

Objective

The changes made by these regulations to the legislation for calculating the discount rate are as follows:

- the index for impact of inflation will change to the average weekly earnings (AWE) measure;
- the standard adjustment for tax and costs will change to 1.25%; and
- the period of investment will change to 43 years.

Rationale for Government intervention

The method for calculating the discount rate is set out in schedule B1 of the Damages Act 1996 (“the 1996 Act”). The Scottish Ministers are under a statutory duty to review the discount rate every 5 years.

Reviewing, and where necessary amending, the factors used in reviewing the discount rate ensures that the features of the rate setting methodology remain suitable for the needs of the hypothetical investor as defined in the legislation.

The proposal will support the National Outcome that:

“We live in communities that are inclusive, empowered, resilient and safe.”

Consultation

Within Government

Throughout the development of the policy we have had on-going dialogue with officials from the Northern Ireland Office and the UK Ministry of Justice.

Public Consultation

Before the start of every review the Scottish Ministers must consider whether regulations are required in order to ensure that the range of factors to be taken into account when calculating the discount rate in Scotland remain suitable.

On 31 May 2023, the Scottish Government invited views on the need or otherwise to adjust any of these factors and requested any evidence to support these views. In addition, we invited views/evidence on whether a single or multiple rates should apply. A total of 24 responses were received.¹

The Scottish Government asked the Government Actuary Department (GAD) to consider these responses and other available evidence to provide advice to the Scottish Government.²

Business

Through the consultation the Scottish Government has engaged with a number of insurers and insurers' representative bodies who normally act for defenders in personal injury actions. We also received responses from representative bodies of pursuers in personal injury actions.

Option 1 – Do nothing

To do nothing would not be in line with the Scottish Minister's statutory duty to consider whether regulations are required in order to ensure that the range of factors to be taken into account when calculating the discount rate in Scotland remain suitable. It would be possible to leave unaltered the parameters used for calculating the discount rate in 2019, which was when the rate was last reviewed. This would not, however, reflect the changes since that time which indicates that the factors are no longer suitable.

Option 2 – Amend the parameters for calculating the discount rate

Having considered the advice of GAD on whether the factors remain suitable, taking action to amend some of the factors will ensure that the review of the PIDR will be based on investment data which reflects current assumptions on the economic outlook.

¹ 21 respondents gave consent to publish their response. Copies of those responses are available on request by contacting michael.paparakis@gov.scot.

² The advice is available at the GA's news pages at <https://www.gov.uk/government/organisations/government-actuarys-department> or a copy is available on request from michael.paparakis@gov.scot.

Sectors and groups affected

Both of the options have potential impacts for the following groups and sectors:

- Pursuers in personal injury cases;
- Defenders in personal injury cases, including the NHS and insurers
- Legal services providers, financial advisers and wealth managers

It is not anticipated that more personal injury cases will be raised as a result of these regulations.

Option 1 – Do nothing

Benefits

Persons seeking damages for future pecuniary loss would likely be over- or under-compensated if, as suggested by the consultation responses and advice from the Government Actuary Department, the discount rate is calculated on the basis of factors that are no longer suitable. This could be regarded as a benefit to one side but would be detrimental to the other side. It would also not align with the overall policy aim of the discount rate, which is to ensure that a successful pursuer is neither under or over compensated.

Costs

Those paying such an award of damages are likely, therefore, to be unfairly paying more or less than is required to place the victim in the position they would have been but for the injury. Over compensation would impact adversely on insurance premiums and on the delivery of NHS services. Under compensation would impact adversely on the injured party and may contribute to an unnecessary reliance on public care and health services.

Option 2 - Amend the parameters for calculating the discount rate

Benefits

Amending the factors for calculating the discount rate ahead of the statutory review will help to make sure that pursers are fully compensated for future pecuniary loss incurred as a result of an accident. This would help to address the issues created by over or under compensation.

Costs

The methodology for calculating the discount rate includes the investment needs of the 'hypothetical investor' and an initial portfolio, including their risk exposure. Updating the factors in which the discount rate is calculated will help to ensure that minimal costs are incurred by insurers and national care service providers caused by over or under compensation.

Regulatory and EU Alignment Impacts

It is not anticipated that these regulations will have an impact on intra-UK trade, international trade or the Scottish Government's EU alignment policy.

Scottish Firms Impact Test

It is not anticipated that the proposals would have any significant impact on any particular sector, market or industry.

Competition Assessment

It is not anticipated that the Bill will have an impact on competition within Scotland. The proposals within the Bill do not create a competitive advantage for any particular business or individual.

Consumer Assessment

It is not anticipated that these regulations will have an impact on consumers within Scotland.

Test Run of Business Forms

Under these regulations no new forms for business will be introduced.

Digital Impact Test

It is not anticipated that these regulations will give rise to any immediate or direct impact on technology or technological advances.

Legal Aid Impact Test

We do not anticipate that these regulations will result in more personal injury cases being raised and therefore expect no impact on the legal aid fund.

Enforcement, Sanctions and Monitoring

These regulations do not require any public enforcement and therefore no sanctions.

Implementation and Delivery Plan

We expect that these regulations come into force shortly after agreed to by the Scottish Parliament.

Post-implementation Review

The discount rate is required to be reviewed at least once every 5 years. This review process ensures that the method for calculating the discount rate reflects underlying economic conditions and that the framework established under legislation itself remains fit for purpose.

Summary and Recommendation

Option 2 is being recommended on the basis that it is most likely to achieve the policy aim behind the discount rate, that is, being able to fully compensate for future

pecuniary losses caused by an accident with the award of damages being exhausted at the end of the term of the award.

The changes brought about by these regulations seek to ensure that the calculation of the discount rate adequately reflects changes since the last time the rate was set in 2019.

Declaration and Publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed: Siobhian Brown, Minister for Victims and Community Safety

Date: 22 April 2024

Scottish Government Contact point: Michael Paparakis, Private Law, Justice Directorate