POLICY NOTE

THE DAMAGES (REVIEW OF RATE OF RETURN) (SCOTLAND) REGULATIONS 2024

SSI 2024/XXX

The above instrument was made in exercise of the powers conferred by paragraphs 8, 9(2)(b) and 11(1) of schedule B1 of the Damages Act 1996. The instrument is subject to affirmative procedure.

Summary Box

These regulations amend the factors used in reviewing the personal injury discount rate ("the discount rate"), as set out in the Damages Act 1996. The review of the discount rate will be undertaken by the Government Actuary and its purpose is to determine whether the current discount rate is to remain the same or be changed.

Policy Objectives

The method for calculating the discount rate is set out in schedule B1 of the Damages Act 1996 ("the 1996 Act"). It is currently minus 0.75% and was last reviewed in September 2019. 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) index;
- the standard adjustment for tax and costs will change to 1.25%; and
- the period of investment will change to 43 years.

Rate of inflation

RPI no longer remains a suitable inflation index measure. This is clear from the Government Actuary's Department (GAD)'s advice and the consultation responses.

The legislation provides that a single unadjusted published index must be used to represent inflation when reviewing the discount rate. The Scottish Government has therefore opted for what we consider to be the most suitable published measure available. The chosen index is Average Weekly Earnings (AWE) which is an earnings measure. Compared to a prices based measure, an earnings measure better reflects inflation in relation to loss of earnings and care costs (including nursing) – both of which are likely to be associated with awards of future pecuniary loss to which the discount rate is relevant. An unadjusted prices index - such as the consumer prices index (CPI) - is likely to undercompensate. AWE is preferred over other earnings measures because it is considered to be more appropriate for projecting future rates of change and provides a continuous measure.

Taxation and costs of investment advice/management

The discount rate methodology recognises that pursuers face costs associated with the investment of their funds, namely tax and investment advice. The current deduction is 0.75%. Changes in investment yields and tax rates over the intervening period have increased the tax burden on pursuers by around 0.5% per annum on average. Investment costs are largely unchanged but there are still some indications of higher costs. The recommended narrower range suggested by GAD is between 1% to 1.75%. Adopting a figure at the very bottom of the narrower range - that is, 1% - would likely not cover the full average increase in the tax burden. Therefore, to fully reflect this an increase of 0.5% is appropriate, taking the deduction to 1.25%.

Investment period
The investment period determines the length of time over which a pursuer is assumed to invest their fund. In simple terms, because more funds could be invested in growth asset, the longer the investment period the better the assumed returns. Currently the assumed period of investment in Scotland is 30 years and in England & Wales and Northern Ireland it is 43 years.

The 30-year investment period was put forward by the Scottish Government, and agreed to by the Scottish Parliament, in the absence of little available data on the life expectancy of personal injury pursuers. Since then evidence supplied to the call for evidence for England and Wales in 2019 provided a more detailed analysis of evidence supplied by the Association of British Insurers and new data from NHS Resolution.

The Scottish Government considers that the investment period should be changed to 43 years to reflect the more detailed evidence available.

EU Alignment Consideration
This instrument is not relevant to the Scottish Government's policy to maintain alignment with the EU.

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 GAD to consider these responses and other available evidence to provide advice to the Scottish Government.[2]

Impact Assessments
The Scottish Government considers that a full Child Rights and Wellbeing Impact assessment (CRWIA), Equality Impact Assessment (EQIA), Island Communities Impact Assessment (ICIA), Fairer Scotland Duty (FSD), Strategic Environmental Assessment (SEA) and Data Protection Impact Assessment (DPIA) are not required for these regulations.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. The impact of this policy on business is neutral as updating the factors used in

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[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.

reviewing the discount rate will ensure that the review of the PIDR will be based on investment data which reflects current assumptions on the economic outlook.

Scottish Government
Civil Law and Legal System, Justice Directorate

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