

Equalities, Human Rights and Civil Justice Committee
Tuesday 21 May 2024
12th Meeting, 2024 (Session 6)

Subordinate legislation: consideration of affirmative instruments

Overview

1. At this meeting, the Committee will take evidence from the Minister for Victims and Community Safety and officials on the following four draft affirmatives before debating the relevant motions inviting the Committee to recommend approval of the instruments.
 - **The Equality Act 2010 (Specification of Public Authorities) (Scotland) Order 2024 [draft]**
 - **The Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2024 [draft]**
 - **The Scottish Tribunals (Listed Tribunals) Regulations 2024 [draft]**
 - **The Damages (Review of Rate of Return) (Scotland) Regulations 2024 [draft]**
2. These are draft Scottish Statutory Instruments (SSIs), which require approval by resolution of the Parliament before they can become law.

Procedure

3. Under the affirmative procedure, an instrument must be laid in draft and cannot be made (or come into force) unless it is approved by resolution of the Parliament.
4. Once laid, the instrument is referred to:
 - the Delegated Powers and Law Reform (DPLR) Committee, for scrutiny on various technical grounds, and
 - a lead committee, whose remit includes the subject-matter of the instrument, for scrutiny on policy grounds.
5. The lead committee, taking account of any recommendations made by the DPLR Committee (or any other committee), must report within 40 days of the instrument being laid.
6. The normal practice is to have two agenda items when an affirmative instrument is considered by the lead committee:
 - an evidence session with the Minister and officials, followed by

- a formal debate on a motion, lodged by the Minister, inviting the lead committee to recommend approval of the instrument.
7. Only MSPs may participate in the debate, which may not last for more than 90 minutes. If there is a division on the motion, only committee members may vote. If the motion is agreed to, it is for the Chamber to decide, at a later date, whether to approve the instrument
 8. Information about the instruments are summarised in the order in which they will be taken on the Agenda below.

The Equality Act 2010 (Specification of Public Authorities) (Scotland) Order 2024 [draft]

Link to instrument: [The Equality Act 2010 \(Specification of Public Authorities\) \(Scotland\) Order 2024 \[draft\]](#)

Laid under: [The Equality Act 2010](#)

Laid on: 18 April 2024

Procedure: Affirmative

Lead committee to report by: 27 May 2024

Commencement: If approved, the instrument comes into force on 1 July 2024

Delegated Powers and Law Reform Committee consideration

9. The DPLR Committee considered the instrument on 30 April 2024 and reported on it in its [31st Report, 2024](#). The DPLR Committee made no recommendations in relation to the instrument.

Purpose of the instrument

10. The purpose of the instrument is to add the Patient Safety Commissioner for Scotland (“PSCS”) and Community Justice Scotland (“CJS”) to the list of public authorities in Part 3 of schedule 19 of the 2010 Act. Listed public authorities are required to comply with the public sector equality duty.
11. The public sector equality duty is a duty to have regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act, to advance equality of opportunity and to foster good relations between persons who share a relevant protected characteristic and persons who do not share that protected characteristic.
12. This Order also removes community justice authorities and the chief officer of a community justice authority from the list of Scottish public authorities in Part 3 of schedule 19 of the Act. All community justice authorities were dissolved on 31 March 2017 by section 36(1) of the Community Justice (Scotland) Act 2016.

13. The Policy Note accompanying the instrument is included in Annexe A. It includes a summary of consultation undertaken on the instrument, impact assessments carried out, and the anticipated financial effects.

The Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2024 [draft]

Link to instrument: [The Equality Act 2010 \(Specific Duties\) \(Scotland\) Amendment Regulations 2024 \[draft\]](#)

Laid under: [The Equality Act 2010](#)

Laid on: 18 April 2024

Procedure: Affirmative

Lead committee to report by: 27 May 2024

Commencement: If approved, the instrument comes into force on 1 July 2024

Delegated Powers and Law Reform Committee consideration

14. The DPLR Committee considered the instrument on 30 April 2024 and reported on it in its [31st Report, 2024](#). The DPLR Committee made no recommendations in relation to the instrument.

Purpose of the instrument

15. The purpose of the instrument is to make the Patient Safety Commissioner for Scotland (“PSCS”) and Community Justice Scotland (“CJS”) listed authorities for the purpose of the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (“the 2012 Regulations”). Listed authorities have specific duties which enable them to better perform the public sector equality duty (the “equality duty”) under section 149 of the Equality Act 2010.
16. The 2012 Regulations place the following specific duties on listed authorities, to support them to better perform the equality duty set out in the 2010 Act:
- To report progress on integrating the equality duty into the authority’s other work
 - To publish equality outcomes which the authority has decided to work on in particular and report on progress made to achieve those outcomes
 - To assess and review policies and practices against the needs which form the equality duty
 - To gather and use employee information
 - To publish gender pay gap information, where the authority has more than 20 employees
 - To publish statements on equal pay and occupational segregation, where the authority has more than 20 employees
 - To consider whether award criteria and conditions in relation to public procurement should include consideration of whether a bid will help the authority better perform the equality duty

- To publish these statements and reports in an accessible manner
- To consider other matters which the Scottish Ministers may further specify

17. The Policy Note accompanying the instrument is included in Annexe A. It includes a summary of consultation undertaken on the instrument, impact assessments carried out, and the anticipated financial effects.

The Scottish Tribunals (Listed Tribunals) Regulations 2024 [draft]

Link to instrument: [The Scottish Tribunals \(Listed Tribunals\) Regulations 2024 \[draft\]](#)

Laid under: [The Tribunals \(Scotland\) Act 2014](#)

Laid on: 15 April 2024

Procedure: Affirmative

Lead committee to report by: 24 May 2024

Commencement: If approved, the instrument comes into force on 10 June 2024

Delegated Powers and Law Reform Committee consideration

18. The DPLR Committee considered the instrument on 23 April 2024 and reported on it in its [28th Report, 2024](#). The DPLR Committee made no recommendations in relation to the instrument.

Purpose of the instrument

19. These Regulations add the Transport Tribunal to the tribunals listed in schedule 1 of the Tribunals (Scotland) Act 2014 whose functions may be transferred to the Scottish Tribunals under that Act.
20. This instrument amends schedule 1 of the Tribunals (Scotland) Act 2014 ('the 2014 Act') to include the Transport Tribunal. The instrument also specifies the functions exercisable by the Transport Tribunal to which the entry in schedule 1 relates. The functions are those exercisable by the Transport Tribunal by virtue of section 39(6) of the Transport (Scotland) Act 2001 ('the 2001 Act') in relation to a penalty imposed under any paragraph of section 39(1) of that Act except paragraph (d).
21. The Scottish Ministers intend to transfer the specified functions of the Transport Tribunal into the Scottish Tribunals. The intention is to transfer the specified appeal functions under section 39 of the 2001 Act as they relate to devolved matters. The only appeal functions under section 39 which are not to be transferred to the Scottish Tribunals are those relating to a penalty imposed under section 39(1)(d). Appeals of penalties imposed for a failure to comply with a requirement of regulations made under section 181A of the Equality Act 2010 will remain in the Transport Tribunal, as they relate to reserved matters.

22. A further set of regulations will be brought forward to transfer the specified functions of the Transport Tribunal into the Upper Tribunal for Scotland.
23. The Policy Note accompanying the instrument is included in Annexe A. It includes a summary of consultation undertaken on the instrument, impact assessments carried out, and the anticipated financial effects.

The Damages (Review of Rate of Return) (Scotland) Regulations 2024 [draft]

Link to instrument: [The Damages \(Review of Rate of Return\) \(Scotland\) Regulations 2024 \[draft\]](#)

Laid under: [The Damages Act 1996](#)

Laid on: 25 April 2024

Procedure: Affirmative

Lead committee to report by: 3 June 2024

Commencement: If approved, the instrument comes into force on 1 July 2024

Delegated Powers and Law Reform Committee consideration

24. The DPLR Committee considered the instrument on 7 May 2024 and reported on it in its [32nd Report, 2024](#). The DPLR Committee made no recommendations in relation to the instrument.

Purpose of the instrument

25. These Regulations alter some of the parameters which are to be used by the official rate-assessor in setting the rate of return for the purposes of section B1(1) of the Damages Act 1996. That rate is known as the Personal Injury Discount Rate and is used in the calculation of awards of damages for future pecuniary loss in actions for personal injury.
26. In terms of the aforementioned schedule B1 of that Act, the rate is to be set so as to reflect the return which a hypothetical investor could reasonably be expected to achieve if investing in a notional investment portfolio over a notional period, subject to a number of standard adjustments.
27. 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 was last reviewed in 2019 and will change from 0.75% to 1.25%
 - the period of investment will change from 30 to 43 years.

28. The Policy Note accompanying the instrument is included in Annexe A. It includes a summary of consultation undertaken on the instrument, impact assessments carried out, and the anticipated financial effects.

Evidence received

29. Ahead of the Committee's consideration of this instrument, written submissions were received from three stakeholders. The submissions express concerns over the adjustment from 0.75% to 1.25% and the potential to lead to over-compensation in some cases. They suggest that the Scottish Government may be better placed to adopt the approach by the Government's Actuary Department (GAD) in England and Wales to help address the element of over-compensation.

30. All correspondence and briefings received are attached at Annexe B.

Report

31. The Committee is invited to consider any issues which it wishes to raise on all four instruments and to delegate to the Convener responsibility for finalising for publication a report that the Clerks will prepare on the basis of today's meeting.

Clerks to the Committee
May 2024

Annexe A: Scottish Government Policy Notes

The Equality Act 2010 (Specification of Public Authorities) (Scotland) Order 2024 [draft]

The above instrument was made in exercise of the powers conferred by Section 151(3) of the Equality Act 2010 (“the 2010 Act”). The instrument is subject to affirmative procedure.

Summary

The purpose of the instrument is to add the Patient Safety Commissioner for Scotland (“PSCS”) and Community Justice Scotland (“CJS”) to the list of public authorities in Part 3 of schedule 19 of the 2010 Act. Listed public authorities are required to comply with the public sector equality duty.

Policy objectives

The public sector equality duty in section 149(1) of the 2010 Act requires public authorities to have due regard, when exercising their functions, to the need to:

- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the 2010 Act
- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it, and
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Those bodies and office holders subject to the public sector equality duty are listed in Part 3 of schedule 19 of the 2010 Act.

The Patient Safety Commissioner for Scotland Act 2023 (“the 2023 Act”) established the PSCS and sets out their general functions, which are to advocate for systemic improvement in the safety of health care, and to promote the importance of the views and experiences of patients and other members of the public in relation to the safety of health care.

The Community Justice (Scotland) Act 2016 (“the 2016 Act”) established CJS and sets out its main functions, namely to promote the National Strategy for Community Justice; to monitor, promote and support improvement in, and keep the Scottish Ministers informed about, performance in the provision of community justice; to promote and support improvement in the quality and range of provision of community justice and making the best use of the facilities, people and other resources available to provide community justice; and to promote public awareness of benefits arising from persons who are convicted of offences being sentenced to community disposals rather than imprisonment or detention in penal institutions, and managing and supporting certain persons with a view to them not offending in future or, if that is not realistic, reducing future offending by them. Equality legislation was not updated when the new model of community justice was established under the 2016 Act, and the Equality and Human Rights Commission subsequently recommended that appropriate changes be made to include CJS (though up to this point CJS has considered itself to be under the general Public Sector Equality Duty, within section

149 of the 2010 Act, through the application of section 149(2)). The Scottish Government agrees with that recommendation.

This draft Order proposes to add the PSCS and CJS to Part 3 of schedule 19 of the 2010 Act so as to require them to comply with the general public sector equality duty. It will also remove references to Community Justice Authorities and Chief Officers of Community Justice Authorities, which were dissolved by the 2016 Act.

EU alignment consideration

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

Consultation

In accordance with the requirement under section 152(3) of the 2010 Act, the Commission for Equality and Human Rights was consulted and is content with the proposal to add the PSCS and CJS to Part 3 of schedule 19 of the 2010 Act. Stakeholders who were consulted during development of the 2023 Act, are aware of the intention to add the PSCS to the list of authorities subject to the public sector equality duty and support these proposals. In addition, CJS has been consulted and is content with the proposals.

Impact assessments

A combined Equality, Fairer Scotland and Health Inequalities impact assessment (EFHIA) was undertaken in relation to the Patient Safety Commissioner for Scotland Bill which preceded the 2023 Act. That EFHIA is published at <https://www.gov.scot/publications/patient-safety-commissioner-scotland-bill-combined-equality-fairer-scotland-health-inequalities-impact-assessment/>. The EFHIA supports the application of equality duties to the PSCS. It was made clear during passage of the Bill that the policy intention was to ensure the PSCS was subject to these duties.

An equality impact assessment (EQIA) was undertaken in relation to the Community Justice (Scotland) Bill which preceded the 2016 Act. This notes that the new national body (CJS) will generate opportunities to advance equality of opportunity. That EQIA is published at <https://webarchive.nrscotland.gov.uk/20200121004254/https://www2.gov.scot/Publications/2015/05/6773/downloads>.

Child Rights and Wellbeing, Island Communities, Data Protection and Strategic

Environmental impact assessments were not carried out for this instrument as these assessments were either carried out fully or screened out during preparation for the respective Bills and this instrument is not considered to result in any further impacts.

Financial effects

The Cabinet Secretary for Justice and Home Affairs confirms that no BRIA is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

The Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2024 [draft]

The above instrument was made in exercise of the powers conferred by sections 153(3), 155(1)(c) and (2), and 207(4) of the Equality Act 2010 (“the 2010 Act”). The instrument is subject to affirmative procedure.

Summary

The purpose of the instrument is to make the Patient Safety Commissioner for Scotland (“PSCS”) and Community Justice Scotland (“CJS”) listed authorities for the purpose of the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (“the 2012 Regulations”). Listed authorities have specific duties which enable them to better perform the public sector equality duty (the “equality duty”) under section 149 of the Equality Act 2010.

Policy objectives

The 2012 Regulations place the following specific duties on listed authorities, to support them to better perform the equality duty set out in the 2010 Act:

- To report progress on integrating the equality duty into the authority’s other work
- To publish equality outcomes which the authority has decided to work on in particular and report on progress made to achieve those outcomes
- To assess and review policies and practices against the needs which form the equality duty
- To gather and use employee information
- To publish gender pay gap information, where the authority has more than 20 employees
- To publish statements on equal pay and occupational segregation, where the authority has more than 20 employees
- To consider whether award criteria and conditions in relation to public procurement should include consideration of whether a bid will help the authority better perform the equality duty
- To publish these statements and reports in an accessible manner
- To consider other matters which the Scottish Ministers may further specify.

The Patient Safety Commissioner for Scotland Act 2023 (“the 2023 Act”) established the PSCS and sets out their general functions, which are to advocate for systemic improvement in the safety of health care, and to promote the importance of the views and experiences of patients and other members of the public in relation to the safety of health care.

The Community Justice Scotland Act 2016 (“the 2016 Act”) established CJS and sets out its main functions, namely to promote the National Strategy for Community Justice; to monitor, promote and support improvement in, and keep the Scottish Ministers informed about, performance in the provision of community justice; to promote and support improvement in the quality and range of provision of community justice and making the best use of the facilities, people and other resources available to provide community justice; and to promote public awareness of benefits arising from persons who are convicted of offences being sentenced to community

disposals rather than imprisonment or detention in penal institutions, and managing and supporting certain persons with a view to them not offending in future or, if that is not realistic, reducing future offending by them. Equality legislation was not updated when the new model of community justice was established under the 2016 Act, and the Equality and Human Rights Commission subsequently recommended that appropriate changes be made to include CJS (though up to this point CJS has considered itself to be under the general Public Sector Equality Duty, within section 149 of the 2010 Act, through the application of section 149(2)). The Scottish Government agrees with that recommendation.

These draft Regulations propose to make the PSCS and CJS listed authorities for the purposes of the 2012 Regulations so as to require them to comply with these specific duties. They will also remove references to Community Justice Authorities and Chief Officers of Community Justice Authorities, which were dissolved by the 2016 Act.

EU alignment consideration

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

Consultation

In accordance with the requirement under section 152(3) of the 2010 Act, the Commission for Equality and Human Rights was consulted and is content with the proposal to add the PSCS and CJS to Part 3 of schedule 19 of the 2010 Act. Stakeholders who were consulted during development of the 2023 Act, are aware of the intention to add the PSCS to the list of authorities subject to the public sector equality duty and support these proposals. In addition, CJS has been consulted and is content with the proposals.

Impact Assessments

A combined Equality, Fairer Scotland and Health Inequalities impact assessment (EFHIA) was undertaken in relation to the Patient Safety Commissioner for Scotland Bill which preceded the 2023 Act. That EFHIA is published at

<https://www.gov.scot/publications/patient-safety-commissioner-scotland-bill-combined-equality-fairer-scotland-health-inequalities-impact-assessment/>. The EFHIA supports the application of equality duties to the PSCS. It was made clear during passage of the Bill that the policy intention was to ensure the PSCS was subject to these duties.

An equality impact assessment (EQIA) was undertaken in relation to the Community Justice Scotland Bill which preceded the 2016 Act. This notes that the new national body (CJS) will generate opportunities to advance equality of opportunity. That EQIA is published at

<https://webarchive.nrscotland.gov.uk/20200121004254/https://www2.gov.scot/Publications/2015/05/6773/downloads>.

Child Rights and Wellbeing, Island Communities, Data Protection and Strategic Environmental impact assessments were not carried out for this instrument as these

assessments were either carried out fully or screened out during preparation for the respective Bills and this instrument is not considered to result in any further impacts.

Financial Effects

The Cabinet Secretary for Justice and Home Affairs confirms that no BRIA is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

The Scottish Tribunals (Listed Tribunals) Regulations 2024 [draft]

The above instrument was made in exercise of the powers conferred by section 27(2) of the Tribunals (Scotland) Act 2014. The instrument is subject to affirmative procedure.

Summary

The purpose of the instrument is to add the Transport Tribunal to the list of tribunals in schedule 1 of the Tribunals (Scotland) Act 2014 whose functions may be transferred to the Scottish Tribunals under that Act.

Policy objectives

This instrument amends schedule 1 of the Tribunals (Scotland) Act 2014 ('the 2014 Act') to include the Transport Tribunal. The instrument also specifies the functions exercisable by the Transport Tribunal to which the entry in schedule 1 relates. The functions are those exercisable by the Transport Tribunal by virtue of section 39(6) of the Transport (Scotland) Act 2001 ('the 2001 Act') in relation to a penalty imposed under any paragraph of section 39(1) of that Act except paragraph (d).

The Scottish Ministers intend to transfer the specified functions of the Transport Tribunal into the Scottish Tribunals. An existing tribunal must be listed in schedule 1 of the 2014 Act before its functions can transfer into the Scottish Tribunals.

The intention is to transfer the specified appeal functions under section 39 of the 2001 Act as they relate to devolved matters. The only appeal functions under section 39 which are not to be transferred to the Scottish Tribunals are those relating to a penalty imposed under section 39(1)(d). Appeals of penalties imposed for a failure to comply with a requirement of regulations made under section 181A of the Equality Act 2010 will remain in the Transport Tribunal, as they relate to reserved matters.

A further set of regulations will be brought forward to transfer the specified functions of the Transport Tribunal into the Upper Tribunal for Scotland.

Further details of the policy objectives relating to the 2014 Act are set out in the Policy Memorandum which accompanied the Tribunals (Scotland) Bill. The link below shows the passage of the Bill through Parliament and includes the Policy Memorandum:

<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/62938.aspx>

EU alignment consideration

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

Consultation

A public consultation took place from 7 August 2023 to 27 October 2023. There were five responses to this consultation. Three respondents gave permission to publish their responses, which are available on the Scottish Government website:

<https://consult.gov.scot/tribunals-and-administrative-justice/tribunals-scotland-act-2014-draft-regulations/>

Consultation responses did not highlight any issues with these regulations and no changes have been made following the consultation.

Impact assessments

An Equality Impact Assessment has already been completed for the Tribunals (Scotland) Bill:

<https://webarchive.nrscotland.gov.uk/20200120085425/https://www2.gov.scot/Resource/0042/00421637.pdf>

It was considered that no further Equality Impact Assessment was required for these regulations.

Financial effects

A Business and Regulatory Impact Assessment was completed for the 2014 Act. The Minister for Victims and Community Safety confirms that no Business and Regulatory Impact Assessment is necessary for this instrument as it has no financial effects on the Scottish Government, local government or on business.

The Damages (Review of Rate of Return) (Scotland) Regulations 2024 [draft]

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

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%
- 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. Copies are available on request from the Civil Law and Legal System Division, Justice Directorate, Scottish Government.

The Scottish Government asked GAD to consider these responses and other available evidence to provide advice to the Scottish Government.

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: [The Damages \(Review of Rate of Return\) \(Scotland\) Regulations 2024 \(legislation.gov.uk\)](https://www.legislation.gov.uk). The impact of this policy on business is neutral as updating the factors used in 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.

Annexe B: Written submissions

Letter from the Association of British Insurers, 13 May 2024

Dear Convener

I am writing to you in my capacity as Director General of the Association of British Insurers, which represents motor and liability insurers in the UK. Together, these firms support millions of customers and businesses and fully support ensuring that those who suffer life-changing injuries receive reasonable and appropriate compensation.

Attached is a briefing on the Personal Injury Discount Rate (PIDR), which sets out our members' perspective on the Damages (Review of Rate of Return) (Scotland) Regulations 2024. In summary, there is a standard adjustment to the PIDR which accounts for the cost of investment expenses and taxation to pursuers. In Scotland, this standard adjustment is currently 0.75%. However, the proposed regulations would increase the standard adjustment to 1.25%. We believe that there is already some over-prudence in the extent to which the PIDR in Scotland currently accounts for investment expenses and taxation. Further increasing the standard adjustment from 0.75% to 1.25% would move beyond the principle of 100% compensation as set out in the relevant legislation, and lead to over-compensation for pursuers. In doing so, it would create significant additional costs for premium paying businesses and customers in respect of motor, employers' liability and public liability premiums, as well as the NHS in respect of clinical negligence claims.

In addition to the proposed increase in the standard adjustments from 0.75% to 1.25%, there are also other factors which may lead to over-compensation in the setting of the PIDR in Scotland:

- The relevant regulations in Scotland propose that the Retail Prices Index (RPI) is replaced by Average Weekly Earnings (AWE) for calculating the impact of inflation. While we welcome the move away from RPI (as it is no longer an appropriate index to use in damages claims), it must also be noted that AWE will overstate inflation. The wording of the Damages Act 1996 suggests that it would be possible to adopt the approach used by the Government Actuary's Department (GAD) in England and Wales in the previous PIDR review: $CPI + X\%$, which would factor out this element of over-compensation. Indeed, a pursuer's losses can only be expected to increase over time at around $CPI + 0.6\%$.
- It is proposed to maintain the further margin adjustment of 0.5%. This reflects a policy choice to over-compensate pursuers, but undermines the principle that pursuers should not receive any more or less than 100% compensation (neither over nor under-compensation), as is provided for in the relevant legislation. It also has the consequence of creating significant additional costs for premium paying businesses and customers, as well as the NHS.
- The PIDR in Scotland should factor in the benefit from an improved environment for investment returns, meaning low risk investors of lump sums will be able to receive higher returns. However, this improved environment for investment returns could be negated by over-accounting for investment

expenses and taxation.

Taking these factors together, it is clear there is potential for the setting of the PIDR in Scotland to result in significant over-compensation. This is an outcome which should be avoided if the intent of the legislation is to be preserved (namely, that pursuers should not receive any more or less than 100% compensation), and if significant additional costs are not to be borne as a consequence by the NHS, as well as premium paying customers and businesses.

If there is any point on which the ABI can assist further, please do not hesitate to contact Alastair Ross, Head of Public Policy (Scotland, Wales & Northern Ireland). We would also welcome the opportunity to give evidence to the Committee if that would assist.

Yours sincerely

Hannah Gurga
Director General, Association of British Insurers

Briefing from the Association of British Insurers on the Personal Injury Discount Rate, 13 May 2024

Executive summary

There are standard adjustments to the Personal Injury Discount Rate (PIDR) which account for the cost of investment expenses and taxation to pursuers. In Scotland, these standard adjustments are currently 0.75%. However, the Damages (Review of Rate of Return) (Scotland) Regulations 2024 would increase the standard adjustments to 1.25%. We believe that there is already some over-prudence in the extent to which the PIDR in Scotland currently accounts for investment expenses and taxation. Further increasing the standard adjustments from 0.75% to 1.25% would move beyond the principle of 100% compensation as set out in the relevant legislation, and lead to over-compensation for pursuers. In doing so, it would create significant additional costs for both the NHS in respect of clinical negligence claims, and premium paying businesses and customers in respect of motor, employers' liability and public liability premiums.

In addition to the proposed increase in the standard adjustments from 0.75% to 1.25%, there are also other factors which may lead to over-compensation in the setting of the PIDR in Scotland:

- The relevant regulations in Scotland propose that the Retail Prices Index (RPI) is replaced by Average Weekly Earnings (AWE) for calculating the impact of inflation. While we welcome the move away from RPI (as it is no longer an appropriate index to use in damages claims), it must also be noted that AWE will overstate inflation. The wording of the Damages Act 1996 suggests that it would be possible to adopt the approach used by the Government Actuary's Department (GAD) in England and Wales in the previous PIDR review: $CPI + X\%$, which would factor out this element of over-compensation. Indeed, a pursuer's losses can only be expected to increase over time at around $CPI + 0.6\%$.
- The regulations also propose to maintain the further margin adjustment of 0.5%. This reflects a policy choice to over-compensate pursuers, but undermines the principle that pursuers should not receive any more or less than 100% compensation (neither over nor under-compensation), as is provided for in the relevant legislation. It also has the consequence of creating significant additional costs for premium paying businesses and customers, as well as the NHS.
- The PIDR in Scotland should factor in the benefit from an improved environment for investment returns, meaning low risk investors of lump sums will be able to receive higher returns. However, this improved environment for investment returns could be negated by over-accounting for investment expenses and taxation.

Taking these factors together, it is clear there is potential for the setting of the PIDR in Scotland to result in significant over-compensation. This is an outcome which should be avoided if the intent of the legislation is to be preserved (namely, that pursuers should not receive any more or less than 100% compensation), and if significant additional costs are not to be borne as a consequence by the NHS, as well as premium paying customers and businesses.

It is also reasonable for pursuers to expect that their awards will be exhausted at the end of the award term. However, in practice we are not aware of any evidence of pursuers having exhausted their awards, whether due to investment outcomes or otherwise. This means that over-compensation in the setting of the PIDR is unnecessary.

What is the PIDR and how does it work?

The PIDR is a mechanism which aims to make sure a pursuer receives 100% compensation (neither over nor under-compensation) when they have suffered life-changing injuries. In a personal injury case, the compensation settlement for a successful pursuer will include damages for any future financial losses, such as their loss of earnings and cost of future care, which are usually paid by the defender in a lump sum.

The PIDR is applied by a court to adjust that lump sum to take account of the return that may be earned from investing it, in accordance with the legal principle that pursuers should be fully compensated for their losses, but no more and no less. Compensation for these cases is mainly claimed against motor insurance (for road traffic accidents), or liability policies including employer liability (for accidents at work) and public liability. The PIDR is also applied to NHS settlements for medical negligence, and by other public bodies liable in personal injury cases (such as local authorities and transport operators).

The current low PIDR in Scotland (minus 0.75%) is an outlier compared to many other countries in Europe: for example, as of early 2024 the PIDR is 1% in Belgium, 1% in France, 4-6% in Germany (although there is judicial discretion), 2.5% in Norway, 2.5% in Spain, 3% in Sweden and 3.5% in Switzerland.

Implications of a low PIDR

The lower the PIDR is set, the higher the compensation settlement that is paid to a pursuer and the greater the cost to compensators, including the NHS and other public bodies, as well as insurers on behalf of their customers (both individuals and businesses). Insurance underwriters need to take this into account when setting premiums for all customers, which means the lower the PIDR, the more inflationary pressure there is on liability insurance premiums. This also affects the affordability of insurance for motorists and businesses.

Scotland already has higher motor insurance costs than other parts of the UK, due to a combination of factors including higher accident rates, compensation payments and the legal costs involved in a compensation claim. The potential cost of a serious injury claim is incorporated into every motor insurance policy, and so a continued low PIDR in Scotland would continue to put inflationary pressure on motor insurance premiums, in particular for young drivers who are at greater risk of being involved in an accident.

The NHS in Scotland is also a significant compensator for settlements involving discount rates, usually in clinical or medical negligence cases. A continued low PIDR in Scotland which results in over-compensation would mean that the NHS needs to reserve a higher amount of funds against future claims.

Our concerns with the proposed standard adjustments in the regulations

There are standard adjustments to the PIDR which account for the cost of investment expenses and taxation to pursuers. In Scotland, these standard adjustments are currently 0.75%. However, the Damages (Review of Rate of Return) (Scotland) Regulations 2024 would increase the standard adjustments to 1.25%.

We believe that there is already some over-prudence in the extent to which the PIDR in Scotland currently accounts for investment expenses and taxation. Most properly advised pursuers will pay very little tax over the long-term. This is because, over the long-term, investment in various tax wrappers will mitigate income and capital gains tax risks. Indeed:

- Most of those whose personal injury claims are subject to the PIDR are either non, starter, basic or intermediate rate taxpayers.
- By investing the monies in different tax wrappers (for example, insurance company bonds/collectives and ISAs, where appropriate), income and capital gains tax is greatly mitigated.
- In some years there is no tax to pay.
- Any tax liability will also be reduced over time as withdrawals are made from the fund.
- Where relevant, substantial income can be paid free of income tax via a periodical payment order (PPO). This is an alternative to a lump sum for damages.

While a case could be made for a higher adjustment for taxation in a higher interest rate environment, when considering the impact of economic factors such as interest rates, it is essential that there is only a focus on long-term (not short-term) trends. Interest rates need to be considered over the long-term, i.e. 43 years to reflect average periods of loss for injured pursuers. It is not likely that the current high interest rate environment will continue over this time period, and interest rate cuts are already widely anticipated in 2024.

It is also the case that overall, higher taxes and investment expenses are associated with more active investment approaches which should generate higher net returns. However, recipients of personal injury compensation, as low risk investors, are assumed to take a passive investment approach in line with their lower appetite for investment risk. Given the low levels of risk that are assumed for a pursuer, there will be limited management of the long-term fund and so investment fees can be kept relatively low (and within the range allowed by the Government Actuary's Department (GAD) in the previous PIDR review).

Our view is therefore that there is already some over-prudence in the extent to which the PIDR in Scotland currently accounts for investment expenses and taxation.

Further increasing the standard adjustments from 0.75% to 1.25% would move beyond the principle of 100% compensation as set out in the relevant legislation, and lead to over-compensation for pursuers. In doing so, it would create significant additional costs for both the NHS in respect of clinical negligence claims, and premium paying businesses and customers in respect of motor, employers' liability and public liability premiums.

The need to avoid over-compensation

In addition to the proposed increase in the standard adjustments from 0.75% to 1.25%, there are also other factors which may lead to over-compensation in the setting of the PIDR in Scotland:

1. The relevant regulations in Scotland propose that the Retail Prices Index (RPI) is replaced by Average Weekly Earnings (AWE) for calculating the impact of inflation. While we welcome the move away from RPI (as it is no longer an appropriate index to use in damages claims), it must also be noted that AWE will overstate inflation. The benefit in applying RPI for the previous PIDR review was that it was tracking at around CPI + 1%. This reflected (in GAD's view) a midpoint between CPI and earnings inflation, and therefore represented an appropriate index that neither over nor underestimated inflation. GAD has noted in their report¹ as follows:

We note that the legislation in Scotland requires a single, unadjusted, published index to represent damages inflation. Therefore, options such as making an adjustment to CPI ie CPI + X%, the publication of a bespoke index or using the further margin to adjust for inflation were deemed to be not possible under the legislation and have not been considered further.

We have considered the wording of Schedule B1 to the Damages Act 1996. It is not clear to us why it is considered that the legislation requires a single, unadjusted published index to represent damages inflation. The legislation states:

The impact of inflation is to be allowed for by reference to, whether indicating an upward or downward trend-

- (a) the retail prices index within the meaning of section 833(2) of the Income and Corporation Taxes Act 1988, or
- (b) some published information relating to costs, earnings or other monetary factors as is, for use instead of the retail prices index, prescribed in regulations made by the Scottish Ministers.

The words 'by reference to' suggest that it would be possible to adopt the approach used by GAD in England and Wales in the previous PIDR review: CPI + X%. This would represent an outcome closer to a midpoint between CPI and earnings, which ensures that there is no over or underestimate of inflation. Applying a rate at CPI + X% (instead of applying AWE) would factor out this element of over-compensation.

In advising the Scottish Government, GAD provided illustrative ranges for AWE at CPI +1.5% – +1.8% (based on its in-house pensions valuation advisory guidance and OBR data as at July 2022). However, we commissioned expert evidence which concluded that if 50% of losses are price-related and 50% wage-related (as was assumed by GAD in its 2019 report to the Lord Chancellor²), a pursuer's losses can only be expected to increase over time at

¹ [Personal Injury Discount Rate regulation features advice – Scotland](#), 27 March 2024

² [Setting the Personal Injury Discount Rate: Government Actuary's advice to the Lord Chancellor](#), 25 June 2019

around CPI +0.6%. (This advice is based on a midpoint between ASHE (real wage growth forecast at 1.2% a year) and CPI. The advice that we have received looks at ASHE and AWE and concluded, contrary to GAD's recommendations, that ASHE should in fact be the preferred index. For personal injury practitioners, ASHE is already the index that they are used to applying as earnings related periodical payments are linked to it).

2. The regulations in Scotland propose to maintain the further margin adjustment of 0.5%. This is designed to reduce the risk of under-compensation and so reflects a policy choice to over-compensate pursuers. However, the further margin adjustment undermines the principle that pursuers should not receive any more or less than 100% compensation (neither over nor under-compensation), as is provided for in the relevant legislation. It also has the consequence of creating significant additional costs for premium paying businesses and customers, as well as the NHS, and is unnecessary because significant layers of prudence are already built into discount rate modelling by GAD.

Should the reference to AWE be retained as the inflation index, it is clear that inflation will be overestimated which will lead to over-compensation – therefore compounding the level of over-compensation caused by the further margin of 0.5%.

3. The PIDR in Scotland should factor in the benefit from an improved environment for investment returns, meaning low risk investors of lump sums will be able to receive higher returns. Indeed, we commissioned expert evidence which shows that pursuer financial advisers are able to achieve very favourable investment returns for their clients. These are considerably better than those anticipated when setting the current low PIDR in Scotland. A commensurately higher PIDR would help to reduce the pressure on the NHS in respect of clinical negligence claims, and the pressure on motor, employers' liability and public liability premiums. However, an improved environment for investment returns could be negated by over-accounting for investment expenses and taxation.

Taking these factors together, it is clear there is potential for the setting of the PIDR in Scotland to result in significant over-compensation. This is an outcome which should be avoided if the intent of the legislation is to be preserved (namely, that pursuers should not receive any more or less than 100% compensation), and if significant additional costs are not to be borne as a consequence by the NHS, as well as premium paying customers and businesses.

It is also reasonable for pursuers to expect that their awards will be exhausted at the end of the award term. However, in practice we are not aware of any evidence of pursuers having exhausted their awards, whether due to investment outcomes or otherwise. This means that over-compensation in the setting of the PIDR is unnecessary.

Amendment of the investment period in Scotland

The ABI welcomes the amendment of the investment period in Scotland from 30 to 43 years. However, it is important that the modelling applied in calculating the PIDR reflects real-world rates of return over a 43 year period. We have previously made representations that reference should be made to wide-ranging market studies, such as the Barclays Equity Gilt Study, to ensure that real-world outcomes are applied.

Examples of the effect of the PIDR on compensation settlements

The following illustrative only case studies show theoretical lump sums at several different discount rates. These demonstrate that even minor changes in the PIDR can significantly affect the level of compensation and therefore, the prospect of achieving the aim of 100% compensation (neither over nor under-compensation).

The case studies show theoretical lump sums at the following discount rates: 2.5%, 2%, 1.5%, 1%, 0.5%, 0%, -0.25% (the current PIDR in England and Wales), -0.5%, -0.75% (the current PIDR in Scotland), -1%, -1.5% (the current PIDR in Northern Ireland) and -2%. The calculations make use of the updated 8th Edition Ogden tables, provided by GAD.

Example 1: A 25-year-old male is severely disabled in a car accident and cannot work again. He is employed, has a degree and it is determined he would have earned a net figure of £25,000 a year until retirement at 67. His cost of care is going to be £150,000 a year for the rest of his life. His stated life expectancy is 70.

PIDR	Lump sum
Minus 2%	£12,410,178
Minus 1.5% (current PIDR in Northern Ireland)	£10,920,343
Minus 1%	£9,655,665
Minus 0.75% (current PIDR in Scotland)	£9,095,591
Minus 0.5%	£8,578,688
Minus 0.25% (current PIDR in England and Wales)	£8,100,152
0%	£7,657,953
0.5%	£6,868,685
1%	£6,188,065
1.5%	£5,602,273
2%	£5,091,943
2.5%	£4,650,089

Example 2: A 42 year old man is severely injured in an accident and can now only do sedentary work. He was employed and has A-levels. He would have earned a net figure of £27,500 per year until retirement at age 68, but can now expect to earn £7,500. The cost of care will be £13,500 per year.

PIDR	Lump sum
Minus 2%	£1,531,356
Minus 1.5% (current PIDR in Northern Ireland)	£1,369,242
Minus 1%	£1,231,263
Minus 0.75% (current PIDR in Scotland)	£1,169,817
Minus 0.5%	£1,113,021
Minus 0.25% (current PIDR in England and Wales)	£1,060,122
0%	£1,011,063
0.5%	£922,881
1%	£846,315
1.5%	£779,397
2%	£720,390
2.5%	£668,562

Written submission from the Forum of Insurance Lawyers (FOIL), 13 May 2024

I am sending this communication on behalf of the Forum of Insurance Lawyers (FOIL) in respect of The Damages (Review of Rate of Return) (Scotland) Regulations 2024.

FOIL represents over 8,000 lawyers across the United Kingdom and Republic of Ireland. It exists to provide a forum for communication and the exchange of information between lawyers acting predominantly or exclusively for insurance clients.

We note that the relevant GAD Advice for Scotland (27 March 2024) includes the following statement:

'We note that the legislation in Scotland requires a single, unadjusted, published index to represent damages inflation. Therefore, options such as making an adjustment to CPI ie $CPI + X\%$, the publication of a bespoke index or using the further margin to adjust for inflation were deemed to be not possible under the legislation and have not been considered further.' (p17)³

We have considered the wording of Schedule B1 in the Damages Act 1996. It is not clear to us why it is considered that the legislation requires a single, unadjusted published index to represent damages inflation. The legislation states:

Schedule B1

9(2) The impact of inflation is to be allowed for **by reference to**, whether indicating an upward or downward trend-

(a) the retail prices index within the meaning of section 833(2) of the Income and Corporation Taxes Act 1988, or

(b) **some published information** relating to costs, earnings or other monetary factors as is, for use instead of the retail prices index, prescribed in regulations made by the Scottish Ministers.

The words 'by reference to' and 'some published information' suggest that it would be possible to adopt the approach used by GAD in England and Wales in the previous PIDR⁴ review, namely the application of a mixed or adjusted inflationary index (e.g., $CPI + X\%$). This would enable the adjustment to achieve a balance between consumer prices and earnings-related inflation.

We hope that these observations are helpful.

Kind regards

Dr Jeffrey Wale
Technical Director
Forum of Insurance Lawyers

³ <https://www.gov.uk/government/publications/personal-injury-discount-rate-regulation-features-advice-scotland>

⁴ Personal Injury Discount Rate

Written submission from DAC Beachcroft, 13 May 2024

DAC Beachcroft's Claims Solutions Group provides general insurance claims litigation and claims handling services to insurers in England, Wales, Scotland and Northern Ireland. As part of DAC Beachcroft LLP which services Scotland, Ireland and global markets, we have more than 500 insurance professionals and act for all of the top 20 UK general insurers and have expertise and experience across the entire sector. Our long history of commitment to, and investment in, the insurance sector means that we have an unrivalled depth of experience and breadth of insight. Our claims business reacts quickly to the dynamic claims industry and the changing needs of our clients whilst providing a local service with the support of a global network.

Our team has a deserved market-leading reputation for providing innovative and pragmatic solutions to liability claims disputes of all types and insurance issues generally. We pride ourselves on delivering commercial, value-driven legal services. With specialist expertise covering catastrophic injury, claims validation, costs, credit hire, disease and safety, health and environment law, the team covers the full range of personal injury work. Our strategic Advisory team offers a unique service for insurers dealing with emerging and important market issues.

The Issue

The personal injury discount rate (PIDR) in Scotland is currently set at minus 0.75%. This is an outlier and is one of the lowest in the world – exceeded only by Northern Ireland. Just small changes in the PIDR will lead to significant changes in the amount of compensation that a pursuer will receive.

DAC Beachcroft supports the position that pursuers should receive full compensation. That must however mean exactly that – not over- nor under-compensation. The mechanism for setting the PIDR in Scotland is set out in Schedule B1 to the Damages Act 1996, we are concerned that the changes proposed to Schedule B1 will lead to significant over-compensation of pursuers.

Such over-compensation will be to the detriment of premium paying members of the public, to businesses who may find that they are underinsured as a result of the changes and to the NHS and other public bodies who will be required to make compensation payments.

We comment on the proposals as follows:

The Notional Portfolio

It is proposed that there will be no change to the notional portfolio. As per our response to the consultation, we consider that it is overly cautious. As a starting point, this overly cautious position already builds in an element of over-compensation.

The Assumed Investment Period

We are pleased to note that this is to be increased to 43 years in line with the other UK jurisdictions. It is, however, vitally important when calculating the PIDR, that a real-world approach be adopted. We have previously made representations that reference should be made to wide ranging market-studies, such as the Barclays Equity Gilt Study, to ensure that real-world outcomes are applied.

Inflation

A position appears to have been adopted that under the legislation - any alternative measure to be prescribed must be a single, unadjusted index and not an adjustment to an index. We do not agree that this is the case. The legislation states:

The impact of inflation is to be allowed for by reference to, whether indicating an upward or downward trend-

(a)the retail prices index within the meaning of section 833(2) of the Income and Corporation Taxes Act 1988, or

(b)some published information relating to costs, earnings or other monetary factors as is, for use instead of the retail prices index, prescribed in regulations made by the Scottish Ministers.

The words "by reference to" make it, in our view, possible to have the far better alternative that is applied in England and Wales of an index expressed to be CPI + X%.

When the legislation was introduced, RPI was a reasonable reference point as it tracked at a point between CPI and earnings. By indexing against Average Weekly Earnings (which GAD projects as tracking at somewhere between CPI + 1.5 – 1.8%), there is a very significant level of over-compensation being built into the process. By contrast, the evidence that we obtained from Oxford Economics on behalf of the ABI for the Call for Evidence in England and Wales, proposed that the correct mid-point between services and earnings would be CPI + 0.6%. That evidence also stated that ASHE should be the preferred index for earnings rather than AWE, and we agree that position.

Tax and Expenses

0.75% for tax and expenses should be maintained rather than increased. Recipients of awards to which the PIDR apply will always have access to financial advice. It should be assumed that they are properly advised and are making the full use of tax wrappers to ensure that their exposure to tax is mitigated. Some years there will be no tax to pay and as the award diminishes over time the tax liability is reduced. Given the low risk appetite that is assumed, it should also be expected that a passive approach to investment is adopted, where fees can be kept very much at the bottom end of the range. Overall we consider that a move from 0.75% to 1.25% will compound the likelihood of over-compensation.

Further Margin

Schedule B1 allows for a margin of 0.5%, this is to ensure that the pursuer is not under-compensated. We would stress that in light of the excessively over-cautious approach that would flow from adopting GADs proposals the only possible outcome is over-compensation. Keeping the margin at 0.5% only compounds that position to the detriment of the premium paying public, businesses, the NHS and public authorities. The further margin should therefore be removed or set at 0.0%.