STATES OF JERSEY

DRAFT DAMAGES (JERSEY) LAW (S.R.1/2019): RESPONSE OF THE CHIEF MINISTER

Presented to the States on 3rd April 2019
by the Chief Minister

STATES GREFFE

DRAFT DAMAGES (JERSEY) LAW (S.R.1/2019): RESPONSE OF THE CHIEF MINISTER

Ministerial Response to:	S.R.1/2019
Ministerial Response required by:	11th March 2019
Review title:	Draft Damages (Jersey) Law
Scrutiny Panel:	Corporate Services Scrutiny Panel

INTRODUCTION

The Chief Minister would like to thank the Panel for its work in reviewing the Draft Damages (Jersey) Law 201- (P.131/2018). The Chief Minister notes that a broad range of stakeholders responded to the Panel's call for evidence, expressing a range of very different and, at times, competing views. It was therefore a complex review to undertake as the Panel, in framing their findings and recommendations, had to navigate those differences.

The Chief Minister is therefore grateful to the Panel for undertaking the review in a timely manner and for helping to avoid any further delay in bringing forward this legislation.

FINDINGS

	Findings	Comments
1	Most stakeholders acknowledged the need for a statutory discount rate.	Agreed.
2	Article 2(7) of the draft Law prevents the discount rate from being amended to below 0%. The rationale for this is explained in a footnote on page 8 of P.131/2018. Some stakeholders were concerned that in extreme economic conditions, this could lead to under-compensation for damages claimants.	It is acknowledged that some stakeholders expressed concern about the 0% floor for the discount rate. Others supported it. It is also acknowledged that in the event of extreme economic conditions, in which inflation exceeds investment returns, it is possible that the level of compensation provided may not equate to full compensation. However, if extreme economic conditions were to arise, it would be essential to balance the rights of the claimant and the public interest; it would not be in the public interest for damages awards to be 'recession-proof' when all other areas of public provision and private services are not.
3	The discount rate is split into two periods – claims for below 20 years and claims for over 20 years. This is recommended in the report from the Chief Economist and Treasurer of the States	The proposal for using a split rate arises from the average portfolio returns over different time periods from the UK Government Actuary's analysis – see page 39 of P.131/2018.

	Findings	Comments
	included at page 15 of P.131/2018. However it is not clear what evidence this recommendation was based on.	The dual rate recognises that greater investment returns can be gained over longer periods than over shorter periods, during which investment returns are likely to be lower. The dual rate received widespread support from stakeholders. The Chief Minister agrees with the stakeholder who said: "A dual approach should ensure that those claimants with the shortest investment period, who cannot rely as easily on returns for investments and equities, are not under-compensated. A higher long-term rate is appropriate. It is noted that the concept of a dual rate is already used in other jurisdictions and permitted within the draft legislation for England and Wales and for Scotland.". This is likely to become a common feature in other jurisdictions, and Jersey is merely leading the way alongside other jurisdictions that currently have a dual rate.
4	There is an absence of detail in the draft Damages Law as to how any changes to the discount rate will be calculated in the future.	The Damages Law sets out that this detail may be provided for via Regulations. It may be helpful to have a degree of flexibility as to the matters taken into account when fixing the discount rate. The more statutory factors, the longer the rate-setting process will be, as the England and Wales experience demonstrates.
5	The draft Scottish Damages Bill proposes to use the UK Government Actuary to set the discount rate in Scotland. Without access to an equivalent body in Jersey, the setting of a discount rate in Jersey will be a political decision.	The Damages Law provides that the rate will be set by the Chief Minister, but it also provides a Regulation-making power which allows for the States Assembly to determine whether the rate should be set by someone else, including whether or not this is someone with democratic accountability. The UK Government Actuary has offered their assistance and support with future rate-setting reviews for Jersey, should this be required.
6	The proposed discount rate for Jersey is based on a report of the UK Government Actuary's Department. The report was commissioned by the Ministry of Justice as part of its review of the discount rate in the United Kingdom and used data from UK wealth managers on how their clients invested damages awards.	Agreed. During and since the consultation process, no evidence was produced to the effect that the findings of the report were not appropriate for Jersey.

	Findings	Comments
7	The proposed discount rate for Jersey is based on a report from the Chief Economist and the Treasurer of the States, and a UK Government Actuary's Department report. There has been no external expert verification of the basis on which the proposed discount rate has been arrived at.	Noted. The Chief Minister is, and remains, open to consideration of any expert evidence produced which might indicate that the discount rates approved by the Assembly need to be reviewed.
8	A number of stakeholders criticised the reliance on the UK Government Actuary's Department report in setting the discount rate.	Noted. It is important to recognise, however, that the UK Actuary consulted widely with industry experts, wealth managers, etc. They did not produce their report in isolation. It should also be noted that in Scotland, the discount rate will be set by the Government Actuary, indicating trust and confidence in the Government Actuary in other jurisdictions.
9	The evidence we received highlighted that Periodical Payment Orders can be made currently under Jersey customary law. The draft Damages Law expressly provides this power in statute.	Agreed. It was essential for the periodical payments regime to be placed on a statutory footing.
10	The draft Damages Law does not limit the number of times a Periodical Payment Order can be reviewed. Some stakeholders highlighted the lack of clarity around the grounds on which a PPO can be reviewed.	The Damages Law provides that this detail may be set out in Regulations. Claimant lawyers welcomed the fact that there is no limit on the number of PPO reviews. "Material change of circumstances" is not defined in the Law and, if it is the experience of the Courts that further definition is warranted, Regulations will be placed before the Assembly for its consideration.
11	One of the purposes of the draft Damages Law is to minimise the time given to legal argument regarding compensation, however this is unlikely to be seen in cases which are already active.	This is not correct. The Damages Law provides transitional arrangements for cases which commence prior to the Law coming into force.

RECOMMENDATIONS

	Recommendations	To	Accept/ Reject	Comments	Target date of action/ completion
1	The Chief Minister should keep the need for a split discount rate under review and consider moving to a single rate if economic conditions change.	CM	Accept	Any Regulations brought forward may make provisions with regard to review of the discount rate, including the need for a split rate.	Ongoing; in response to economic conditions
2	The Chief Minister should bring forward Regulations within 3 months to provide more detail as to how changes to the discount rate will be managed in the future.	CM	Reject	The Scrutiny review served to highlight the complexity associated with determining the discount rate. Different stakeholders have very different views on the amount of the rate, the process for determination, and the underlying policy decisions. It is not realistic to expect this work to be undertaken in 3 months. P.131/2018 suggested that any Regulations would be brought forward for debate within 12 months of the Law coming into force. A political oversight group will be established to consider matters related to the development of any Regulations.	Political oversight group to be established within 2 months of the new Law coming into force
3	The Regulations brought forward by the Chief Minister should include a requirement to take appropriate professional actuarial advice when determining a change to the discount rate.	CM	Accept, subject to consult-ation	This recommendation is accepted, subject to the outcome of any consultation that will be undertaken in relation to any Regulations referenced in Recommendation 2 above. The Chief Minister would need to see further actuarial or similar advice prior to altering the statutory discount rate.	As above
4	The Chief Minister should bring forward Regulations within 3 months to set out the grounds and process by which a Periodical Payment Order can be reviewed.	CM	Reject	See comments relating to Recommendation 2 above.	As above
5	Revenue Jersey should publish and maintain guidance on the tax treatment of damages awards (both lump sum awards and Periodical Payment Orders).	CM/ Min. T&R	Accept	Minister for Treasury and Resources will publish the necessary guidance.	By year-end

CONCLUSION

The Chief Minister notes that the Scrutiny review highlighted a wide divergence of views about the draft Law, albeit it was unanimously adopted by the States Assembly. The Chief Minister is committed to establishing a political oversight group to consider the development of any Regulations that should be brought forward. Given the complexity of these matters, the Chief Minister does not accept that 3 months is a realistic timeframe to bring forward proposals. The Chief Minister is, however, committed to creating a political oversight group with 2 months of the new Law coming in force.