SUMMARY OF THE KEY ISSUES AND PROPOSALS RAISED IN THE WRITTEN EVIDENCE RECEIVED ON THE DAMAGES (RETURN ON INVESTMENT) BILL

GENERAL COMMENTS ON THE LEGISLATION		DOJ RESPONSE/COMMENTS
Minister of Health	The framework for setting the discount rate and subsequent compensation levels is a matter for the Department of Justice to formulate with consideration to ensuring plaintiffs are suitably compensated. Any framework should adhere to the principles of reimbursement to maintain compensation at near 100% levels i.e. there should be full compensation for losses but no more and no less.	The Bill provides for the detail of how the discount rate is to be set and any subsequent changes to it proposed by the Department would have to be approved by the Assembly. The proposed framework for setting the rate adheres to the 100% principle.
Association of British Insurers (ABI)	Welcomes the legislation. The reform is long overdue as the PIDR is currently set using an out-dated formula which does not reflect real-life circumstances. This means Northern Ireland is an outlier in both UK and international terms. Plaintiffs and defendants need to see a more stable and fairer method for setting the PIDR. The NI rate is about to swing from one extreme to the other under the current *Wells v Wells* methodology with limited incentive for one party to settle at either extreme. That is not fair or equitable and requires reform urgently. Shares the commitment to the principle of 100% compensation. This means both claimant and defendant are treated fairly in a settlement.	

	Notes that the Justice Minister has said “higher awards of damages are ultimately funded by businesses and consumers through higher insurance premiums, and by the taxpayer through higher payments made directly by, for example, the health service.” ABI does not support the decision to use the methodology based on the Scottish Act as this does not meet the principle of 100% compensation. This Bill as introduced would have a significant financial impact on individuals and organisations that purchase liability insurance and on compensators including insurers, organisations that self-insure and public bodies including the Health and Social Care Service in NI.	The Department considers that the Scottish model gives effect to the 100% compensation principle. The costs for defendants and compensators of a discount rate set under the proposed new framework flows from the legal liability to pay a claimant 100% compensation for injuries and losses caused by a defendant’s negligence.
NFU Mutual Insurance Society Limited (NFU)	Is fully committed to the 100% rule of compensation and welcomes a revision to the PIDR which best achieves this overriding principle. It is vital that the methodology of determining the PIDR is transparent and truly reflects the reality of investment decisions of claimants considered “low risk” investors which factors in sufficient caution to ensure the 100% rule is consistently attained whilst also addressing the interests of justice for all parties. Does not believe that the new methodology is the most appropriate to achieve the desired result. In the DoJ consultation NFU supported adoption of the England and Wales model as this is the framework which best achieves the 100% compensation rule and delivers a fair and reasonable outcome to plaintiffs and defendants.	The Department considers that the proposed methodology for setting the discount rate in the Bill based on the Scottish model is more transparent than the England and Wales model because the detail of how the rate is to be set is prescribed in primary legislation. Both the Scottish and the England and Wales models are intended to deliver 100% compensation. There is no basis for saying that the

		England and Wales model best achieves that result.
Aviva	It is essential that any new discount rate methodology for Northern Ireland delivers a clearer system that strikes a fair balance between the interests of claimants and the requirement for affordable access to insurance for consumers and businesses. Believes that further consideration should be given to adopting or mirroring the methodology from England and Wales to achieve a fairer outcome. The framework used in Scotland is based on a policy decision taken by Scottish Ministers to over-compensate claimants. This has the consequence of generating additional costs for compensators including HSCNI and other public bodies as well as insurers.	It is a long established legal principle that the purpose of an award of damages for future financial loss is to compensate a plaintiff for their losses in full (no more and no less). This is the “100% rule”. The Scottish model provides transparency and clarity about how the rate is set. The Scottish policy memorandum for their bill prior to it becoming legislation stated that it did nothing to disturb the 100% compensation principle.
Zurich Insurance	Shares the commitment to the principle of 100% compensation where both claimant and defendant are treated fairly in a settlement but does not believe that the proposed methodology to calculate the PIDR is the most appropriate to achieve as close to 100% compensation as possible. Highlights that the recent interim discount rate of -1.75% will lead to over-compensation in approximately 90% of cases.	See comments above in relation to the 100% compensation principle. The Department acknowledges that the current rate, set under *Wells v Wells*, is likely to tend towards over-compensation. It is anticipated that a rate set under the

		proposed new framework will be higher than the current rate and reduce the likelihood of over-compensation as compared to a rate set under the current framework.
AXA	Supports the commitment to follow a principle of 100% compensation for personal injury claimants. Does not support the use of the methodology based on the Scottish model as this does not meet the principle of 100% compensation which is fair to all parties and if introduced would have a significant financial impact on consumers and organisations that purchase liability insurance, and on insurers, self-insureds and public bodies including the Health and Social Care Service. Recommends the adoption of the England and Wales methodology as this would be a more equitable model and would align to the principle of 100% compensation. The new interim rate of -1.75% is too low and is the lowest in all of the UK jurisdictions as well as the Republic of Ireland. It will result in over-compensation and have significant implications for consumers, business, key professions and the wider Northern Ireland economy and its competitiveness.	 See comments above in respect of the Scottish model. See comments above in relation to a rate set under the proposed new framework compared to a rate set under the current framework.
Forum of Insurance Lawyers Northern Ireland (FOIL NI) and the	Acknowledges that the new proposed statutory methodology for calculating the PIDR is infinitely preferable to the current methodology used under *Wells v Wells* under which the new rate of -1.75% is based.	

British Insurance Brokers' Association (BIBA)	The key consideration in achieving the principle of 100% compensation is in striking a fair balance between the plaintiff and the defendant and between the risk of over and under compensation. In the context of the urgent need to complete consideration of the legislation given the recent decision by the Department of Justice to strike a new rate of -1.75% under the current *Wells v Wells* methodology which will carry significant risk of over-compensation FOIL NI and BIBA would not at this time seek to argue that a model based on the English framework would be preferable but if the passage of this Bill were to be delayed further we would wish to return with further submissions reserving our positions in relation to arguments around the efficacy of a methodology for calculating the PIDR using the English model and refer to the content of our original submission to the Department's consultation.	
BLM	Agrees that the legal framework for setting the PIDR should no longer be tied to *Wells v Wells* because the principles of that case and in the Damages Act 1996 are no longer fit for purpose. Favours the England and Wales model in which setting the PIDR is a matter for Ministerial discretion as opposed to the Scottish model which requires the Government Actuary to perform a series of technical adjustments to the investment return on a prescribed notional investment portfolio. While the Scottish model is not our preferred model the reasons for selecting it have been set out by the Department. It is reasonably straightforward to apply the 100% principle in vehicle damage cases and in minor injury claims because there will generally be concrete forensic evidence of past losses and case law guidance on injury damages. However, cases in which the PIDR is used to calculate lump sum awards are by definition the most serious injury claims types involving the further needs of the plaintiff, often over a long period, in respect of ongoing medical care and/or loss of earnings. The levels of these elements are not at all certain.	See comments above in respect of the Scottish model. The Department agrees with the points made about the inherent difficulties in assessing future losses.

	In order to arrive at financial figures to resolve cases, hypothetical assumptions inevitably have to be made about clinical progress and care needs as well as about probable future career development (in respect of future loss of earnings claims). Assessing future losses in personal injury cases using a discount rate based approach will always have inherent flaws because assumptions about the future necessarily have to be made, and fixed, once and for all at a given point in time (the day of settlement or trial). The overall objective of achieving 100% compensation is not an exact science. It is also possible to look at 100% compensation at a macro level. The statistical concept is that over a large number of cases any levels of over or under compensation due to the approach adopted would broadly even out over the group of cases as a whole. Under this, the 100% principle would be respected by setting a PIDR at the median point in the population of claims, meaning that half of the claims were overcompensated and half were undercompensated. Although finding the median point would simply be a question of statistical analysis, as a policy choice it may be unattractive as it is implicit in it that half of the claimants will be under-compensated. The Government Actuary commented on this in his advice to the Lord Chancellor in 2019 when he said *"Whilst it is possible to set the PIDR equal to this net median level of return, there is a 50/50 likelihood that a claimant experiences a rate of return that is lower than this. To safeguard claimants from the likelihood of not being able to meet their needs, it may be considered appropriate to set the PI discount rate at a lower level."* Enacting the 100% principle in a legal framework requires a number of subjective (and difficult) choices about investment and risk and inevitably there is room for argument on such matters. The Department has explained its choices and for the most part has been able to provide evidence in support of them.	 This is the rationale for applying a margin of prudence under both the Scottish and England and Wales models.

	The new statutory rate of -1.75% can be described as ‘veering’ inevitably towards guaranteed over-compensation. The adverse effects of over-compensation have been clearly set out by the Department: *“if claimants receive higher returns than are assumed under the discount rate, they will be overcompensated. Over-compensation means that compensators, including insurance companies and the public sector (most significantly the health service) pay more than is necessary to compensate people for personal injuries. This may increase the cost of insurance to businesses and consumers and is likely to reduce the amount of funds available for direct spending on health and other public services”.* This rate is unsustainable because it is extreme over-compensation and it is in the interests of all stakeholders that a sustainable PIDR is set at a much more realistic and balanced level.	See comments above in relation to a rate set under the proposed new framework compared to a rate set under the current framework.
International Underwriting Association of London (IUA)	Broadly supportive of the legislation which should be progressed as a matter of urgency in order to bring a stable, longer-term rate to replace the interim rate of -1.75% which is based on an outdated methodology and will severely impact upon the well-established 100% compensation principle. Highlights the advice provided by the Government Actuary to the Lord Chancellor in June 2019 that illustrated that a rate as low as -1.75% would likely result in over-compensation in more than 90% of claims. Firmly supports the overall intention to ensure the rate is set in a way that gives effect to the 100% rule and is fair to both claimants and defendants.	See comments above in relation to a rate set under the proposed new framework compared to a rate set under the current framework.
Medical Protection Society (MPS)	Changes to the PIDR have profound consequences on the cost of clinical negligence and this in turn has a significant impact on healthcare professionals and on the costs for the Department of Health in terms of the cost of claims against HSC.	

	It is important that there is reasonable compensation for patients who are harmed due to clinical negligence but this must be balanced against society's ability to pay. If the cost of claims rises too high than the balance could tip too far and the cost will become significantly greater for the Department of Health, for healthcare professionals and for society. A balance needs to be struck between ensuring the compensation awarded is fair and also that the wider costs are affordable.	It is a long established legal principle that the purpose of an award of damages for future financial loss is to compensate a plaintiff for their losses in full (no more and no less). The costs for defendants and compensators of a discount rate set under the proposed new framework flows from the legal liability to pay a claimant 100% compensation for injuries and losses caused by a defendant's negligence. The cost of under-compensation is ultimately met by society in the form of publicly-funded health provision and social security.
Association of Personal Injury Lawyers (APIL)	The Personal Injury Discount Rate is vital to ensure that compensation does what it is required to do: return the injured person to the position in which he would have been if it were not for the injury. No more, no less. It is important to recognise that the people who are affected are those who have sustained catastrophic, life-changing injuries at the hands of other people – and that those responsible have been proven to have caused needless, avoidable harm. If an injured person is given a lump sum payment, he/she is expected to invest that sum to ensure it lasts for the rest of his/her life.	

	The current method of *Wells v Wells* is the most appropriate to calculate the personal injury discount rate and moving away from that methodology risks leaving people under- compensated for injuries that were caused by someone else's fault. The Department of Justice has however decided to adopt the model used in Scotland as opposed to the model used in England and Wales. While neither system is perfect as they move away from treating injured people as "risk free" investors, there are aspects of the Scottish system that make it preferable to the system implemented in England and Wales.	The evidence from consultation and advice from the Government Actuary is that a claimant would not be advised to invest their lump sum award of damages solely in ILGs as is the case under *Wells v Wells*.
Forum of Complex Injury Solicitors (FOCIS)	Continues to view the *Wells v Wells* formula as the best and most appropriate way to ensure full compensation. It is the only methodology that avoids plaintiffs being exposed to both investment and inflation risk. The debates about fixing the discount rate in England and Wales, Scotland and now Northern Ireland have tended to focus on the fear of over-compensation despite there being no credible evidence that that has ever been the case under the *Wells v Wells* regime.	See comments above in respect of the *Wells v Wells* methodology.
British Medical Association NI General Practitioners Committee BMA (NIGPC)	Acknowledges the need to ensure claimants are appropriately rewarded for claims and should receive 100% compensation but states that the issue cannot be considered in a vacuum. The wider implications and impact of changing the rate must be considered and necessary mitigations put in place through cross-departmental work that is co-ordinated and focused to avoid any unintended consequences on the ability of GP practices to continue to function. The introduction of an interim rate using an outdated method by the Department in May 2021 was particularly unhelpful and it would also likely result in an increase in claims and a stagnation within the system with claims slow to settle and also an increase in speculative claims which would result in significant time and stress pressures within the system.	The purpose of applying a discount rate to reflect the assumed rate of return on investment of a lump sum award of damages for future financial loss is to give effect to the long established legal principle that a lump sum award of damages for future financial losses should fully compensate a claimant, but no more and no less. The financial consequences for defendants and compensators

	While the BMA (NIGPC) has concerns about the potential impact of the legislation on general practice, the HSC and the public purse in NI, it is of the view that it is necessary to avoid having the interim rate in place for a protracted period of time. It is therefore imperative that the legislation is progressed as quickly as possible to mitigate the negative impacts of the interim rate.	flow from the legal liability to pay 100% compensation. Mitigating that liability can only adversely impact personal injury victims who have been injured through no fault of their own. See comments above in relation to a rate set under the proposed new framework compared to a rate set under the current framework.
Medical Defence Union (MDU)	The setting of the personal injury discount rate is not just a legal decision. Decisions on what the rate should be have profound financial consequences for the healthcare system in NI and ultimately the taxpayer. No Minister or Executive should be required through legislation to wilfully overlook the full financial consequences of a PIDR change. While the court held in the 1998 House of Lords decision in *Wells v Wells* that the financial impact on society was not a matter for them it is most certainly a matter for government. We have experience of the sizeable effect on public services of a large drop in the PIDR – when the rate in England and Wales was changed from 2.5% to -0.25 % a claim that was valued at approximately £4.5m at the previous rate settled for £10.6m.	See comments above on the outworking of the legal principle of 100% compensation. The 100% compensation principle is the basis of the current law in all UK jurisdictions and in the Republic of Ireland governing the assessment of damages and is the basis on which the Department consulted and adopted the proposed new methodology.

Health and Social Care NI	There is a balance to be struck between the legitimate right of plaintiffs to get proper and adequate compensation and the compensator's ability to pay. Achieving 100% compensation is not an exact science. In the case of the health and social care system public funds are used to pay the damages.	While achieving 100% compensation is not an exact science, it is a long established legal principle that the purpose of a lump sum award of damages for future financial losses is to put the claimant in the position they would have been in had they not been injured, i.e. to fully compensate them for their losses but no more and no less.
	The gap between the new rate of -1.75% for Northern Ireland against the rest of the UK creates a stark difference which has implications for various industries including the commercial insurance industry, public sector bodies and the health budget. The proposed interim discount rate creates further uncertainty for the Government and insurers in creating adequate reserves against present and potential future claims – a claim settlement of c.£9m would now translate into c.£26 million – and emphasises the issue of potential overcompensation to many plaintiffs ad resultant ramifications for public funds. The new rate will not resolve the uncertainty as it is rightly viewed by defendant as being an interim rate that will be replaced by a long-term rate. This situation needs to be resolved speedily.	See comments above in relation to a rate set under the proposed new framework compared to a rate set under the current framework.
	One safeguard against overcompensation would be to ensure cases are settled by means of a Periodic Payment Order with as many Heads of Claim as possible being paid on an annual basis thus reducing the need for a lump sum payment calculated using multipliers and discount rates.	A court already has the power under section 2(1) of the Damages Act 1996 to make a periodical payments order without the consent of the parties. Rules of court set out the factors which a court is

		required to take into account when deciding whether to make a periodical payments order. The court will decide what is objectively in the best interest of the claimant.
Medical and Defence Union of Scotland (MDDUS)	Any methodology that suggests that any investor would deliberately invest to achieve a negative return, when positive returns at a reasonable level of risk are available, is flawed to the point of irrationality.	The methodology for setting the rate provided in the Bill does not suggest that an investor would deliberately invest to achieve a negative return. Rather, it is based on a hypothetical investor whose investment objective is to meet the losses and expenses for which the damages have been awarded so that they will be exhausted at the end of the period of the award. The returns available on the types of low-risk investments contained within the notional portfolio will fluctuate over time and thus the rate must be reviewed at least every five years. While in the current financial environment returns are low, they are not negative. The current negative discount rates are a consequence of returns not being sufficiently

	Considers that the statutory methodology is more heavily weighted towards avoiding under-compensation than over-compensation and therefore, on average, is not likely to achieve as close to 100% compensation as possible. Given the difficulty that there seems to have been in producing evidence to help decide on the most appropriate methodology and assumptions it would seem appropriate that claimants who receive awards which have involved the use of the PIDR should be asked to provide regular updates on their investment decisions and outcomes. This information would be of great benefit for setting assumptions at future reviews.	high to counter the effects of inflation. A margin of prudence was also applied by the Lord Chancellor when setting the rate for England and Wales. It would not be appropriate or practicable to require claimants to provide information about their private investment decisions and outcomes. The proposed methodology is based on the available evidence from consultation and advice from GAD.
Confederation of British Industry NI (CBI NI)	Fully supports the overarching commitment to the principle of 100% compensation. Upholding this principle is crucial as it ensures both insurers and claimants are both treated fairly. Accepts that designing a framework to deliver on that principle is not without its challenges. Such a framework needs to be both: **Fair** – one that strikes the balance between adequately compensating claimants whilst avoiding driving up costs or limiting choice for policyholders; and **Flexible** – one that affords a sufficient degree of flexibility to allow the rate setter to avoid overcompensating	The purpose of applying a discount rate is to give effect to the long established legal principle that a lump sum award of damages for future financial losses should fully compensate the claimant, no more and no less.

	The process for setting a new rate comes at a critical time for the NI business community as it navigates through both the implementation of the NI Protocol and recovery from the Covid-19 pandemic. CBI NI wants to ensure that a framework is developed that avoids imposing additional costs on local businesses, consumers and the public purse. It is imperative that the Bill is progressed as soon as reasonably practicable to replace the out-of-date methodology currently used to calculate the rate and to mitigate the potential implications of the adoption of the temporary rate of -1.75%. While the proposed new methodology is a welcome step away from the flawed, existing methodology it is not the most appropriate way of achieving the 100% principle. As set out in the response to the Department's consultation CBI NI would guard against adopting the more rigid and prescriptive approach taken in Scotland with little discretion as to the final rate. As a result, low returns stemming from the Scottish rate risks overcompensation and ultimately additional costs for insurers and compensators, often in the form of public bodies. Would like to have seen a much more fulsome impact assessment from the Department.	The Department remains committed to progressing the Bill as quickly as possible, subject to the Assembly. The Department considers that the proposed methodology is preferable because it is more transparent and certain. See comments above that the outworking of the 100% compensation rule means the consequences for defendants and compensators cannot be taken into account.
Lord Chief Justice on behalf of the judiciary	The review of the personal injury discount rate is overdue. The continued uncertainty has had a negative impact on case progression of personal injury claims at both the High Court and County Court tiers. The overall aim is that the award will neither under-compensate nor over-compensate the injured party and the discount rate forms a vital part of a	The Department remains committed to progressing the Bill as quickly as possible, subject to the Assembly.

	calculation which converts an assumed further stream of income into a present lump sum. The prescribed rate must be taken into account in all cases in which the Court has to determine the return to be expected from the investment of a sum awarded as damages for future financial loss in a personal injury action on or after that date, irrespective of when the injury occurred, the cause of action arose or the proceedings began. The courts in Northern Ireland should not be expected to approve settlements of such actions in which the future damages lump sum award would be regarded as substantially inadequate for the plaintiff. Neither should they be expected to approve settlements which place an undue burden on the tax-payer who ultimately bear the cost of over- compensation if awarded against the Departments defending such actions. On behalf of the judiciary the LCJ asks for an expedited legislative remedy to restore the balance between the interests of plaintiffs and defendants with regular time-bound reviews as soon as possible.	 The Bill provides for regular reviews of the rate.
Law Society of NI	In setting the personal injury discount rate the Society is of the view that the overarching objective should be to ensure that the plaintiff receives full compensation in real terms. The outcome should also be fair to the defendant in not requiring him to over compensate the plaintiff. The Society supports the Department’s intention to give effect to the principle of 100% compensation and favours an approach which offers a plaintiff a ‘full compensation’ position without under or over compensation. The current rate of 2.5% was set in 2001 and the Society has previously voiced concerns that this rate should have been adjusted before now. Failure to do so has been disadvantageous to plaintiffs and has led to a number of high value cases having to be delayed. It is hoped that by setting an interim rate of -1.75% the Department will move to a permanent rate more quickly.	

Institute and Faculty of Actuaries (IFoA)	The needs of the injured parties should be at the centre of any compensation paid and the IFoA supports the principle that settlements should aim to provide 100% compensation, but neither more nor less. Whatever methodology is used to set the discount rate will not ensure 100% compensation, even if the aim is to ensure 100% compensation on average. Individuals will live either longer or shorter than expected which may then lead to under or over compensation. Aiming to assure full compensation to the majority of claimants would require a bias towards over-compensation.	The Department agrees that there are a range of factors that will impact on achieving full compensation in practice, including life expectancy.
Bank of England Prudential Regulation Authority	The proposed methodology and parameters strike a fair balance between claimants and defendants or their insurers.	
Department of Finance	Notes that the Department of Justice advice is that, of the options available, the new statutory methodology to calculate the PIDR is envisaged to be the most appropriate to achieve as close to 100% compensation as possible, which is fair to both claimants and defendants.	
Department for Infrastructure	From the Department of Infrastructure’s perspective changes to the discount rate will have implications in terms of personal injury and property and/or vehicle damage compensation awards and settlements. If the discount rate is set lower the Department will have to settle at a higher amount to ensure the plaintiff receives full compensation. The change is however unlikely to have any major budgetary or resource impact in the 2021/22 financial year.	
Lisburn and Castlereagh City Council	The transparency and clarity offered by the legislation along with the control and oversight are important and valuable advantages of the new framework.	

Road Haulage Association (RHA)	Understands the rationale for reforming the methodology for setting the PIDR in NI given that it is currently out of alignment with the remainder of GB and the RHA fully supports the principle of the changes. It does not however support the change from the previous rate of 2.5% to -1.75% which is out of alignment with Scotland at -1.25% and England and Wales at -0.75% and results in Northern Ireland having the lowest discount rate in the world. This rate will lead to significantly increased insurance premiums for all NI businesses resulting in them having higher operating costs and being less competitive and more expensive to operate. The Department is persisting with an outdated and flawed methodology to calculate the PIDR and its priority should be to set a modern fit-for-purpose discount rate system for NI similar to GB. This would result in NI businesses not having inflated operating costs leaving them at a competitive disadvantage when competing with national and international businesses who have much lower operating costs. The Department should undertake some market research to identify ball park figures of the potential increase in insurance premiums as a consequence of the proposed new rate and publish these to ensure businesses understand the potential costs involved.	 This relates to the current rate rather than the provision made in the Bill. It is anticipated that a rate set under the proposed new legal framework will be higher than a rate set under the current framework.
CLAUSE 1 – ASSUMED RETURN ON INVESTMENT This Clause inserts a new Section C1 into the Damages Act 1996 New Section C1: - Removes the role of the Department in se tting the discount rate - Provides that a court must take into account the rate set by the rate-assessor in deciding the return a claimant is expected to receive from investing a sum awarded as damages for further financial loss – this is the same duty that a court already has under the 1996 Act - Preserves the ability of a court to take into account a different rate if any party can show this is more appropriate in the circumstances of the case - Provides that the rate assessor is the Government Actuary and in the event this office is vacant the deputy		

Government Actuary. The Department also has a power by regulations subject to the draft affirmative procedure, to appoint a different rate-assessor and someone to deputise for that person, subject to their agreement		
MPS	Believes that a model where the decision lies within the elected Minister in the Department of Justice would also be effective in NI and this is the position we took in the August 2020 consultation. The Government Actuary solely being responsible for setting the rate is not our first choice. The need to balance fair, just and reasonable compensation for claimants against the resources available to consumers and taxpayers is a delicate exercise and MPS believes that the decision should rest with an elected official who can properly weigh the broader societal balance which has to be considered. Recommends that the Minister gets input from experts, at a minimum consisting of the Government Actuary, an economist and an investment advisor and possibly wider stakeholders as well.	The Department considers that prescribing how the rate is to be set in legislation is clear, certain and transparent and ensures greater political accountability. This approach means the actual setting of the rate is simply an actuarial exercise, therefore best conducted by the Government Actuary (GA). A discount rate is applied to give effect to the long established legal principle that a person who is injured as a result of the negligence of another is entitled to be fully compensated for any financial losses arising, irrespective of the impact on public and corporate finances. The consultation was predicated on giving better effect to the 100% rule, not on replacing it with a balancing exercise. Under the provision in the Bill, the detail of how the rate is to be set will be prescribed in

		primary legislation and the Department believes that the GA is best placed to set the rate in accordance with the prescribed methodology. It will be open to the GA to obtain whatever advice he deems appropriate.
MDU	The setting of the PIDR is not just a legal decision but is a financial decision with wide ranging consequences – not least for public services. There is a need to both consider and weigh in the balance additional costs to public services and other services (such as insurance and indemnity) which will need to be borne by taxpayers and citizens more widely. Given the potential for the PIDR to have a damaging effect on public services, any change in it must be seen for what it is – a public policy decision. Responsibility for setting the PIDR should remain with the Minister of Justice rather than the Government Actuary. The Minister is accountable to the Assembly and the people of Northern Ireland to a much greater extent than the Government Actuary. Those who make decisions about the PIDR should be required to be transparent about the process, provide a detailed rationale and be capable of being held publicly accountable. MDU does not believe a process that relies on the Government Actuary alone to make such an important policy decision has all these necessary safeguards. The responsibility should, therefore, remain with the Department of Justice.	See comments above in regard to the outworking of the legal principle of 100% compensation. Under the framework proposed in the Bill, the Government Actuary (GA) will be required to set the rate in accordance with the detailed methodology prescribed in primary legislation. The Department considers that setting out the detail of the notional portfolio and adjustments to be made on the face of the legislation is more certain and transparent than leaving these matters to the discretion of a Minister. The Northern Ireland Assembly is

		responsible and accountable for setting these detailed parameters, and any subsequent changes would have to be made by the Minister of Justice by secondary legislation requiring the approval of the Assembly. Once the detailed parameters for setting the rate are set by the legislature in this way, the actual setting of the rate is simply an actuarial exercise which the GA is, therefore, best placed to carry out. In addition, the GA will publish a report of his review and determination of the rate.
	A proper impact assessment should be built into the legislation that requires the Government, before a rate review comes up, to build a full picture across departments and particularly for the Department of Health and to lay the impact assessment before the Assembly so that Members can see in advance the possible ramifications of a discount rate of x, y or z. In oral evidence the MDU representative stated that the assumptions are very hard to test and setting the rate is not a perfect science. Without broad oversight and consultation and engagement with a wide range of stakeholders the best and most accurate possible rate will not be delivered.	The purpose of the discount rate is to take into account the return on investment of a lump sum award of damages for future financial losses so as to give effect to the established legal principle of 100% compensation. Consequently, it is neither relevant nor appropriate to conduct an assessment of the wider impacts of a change in the rate.

MDDUS	Given the methodology set out in the Bill the Government Actuary will have relatively limited discretion when setting the PIDR. Most of the assumptions are set out in the legislation and can only be changed by regulations by the Department. The Government Actuary is left with deciding on the investment returns to assume. This is an appropriate transfer of technical responsibility as this is part of the typical actuarial skill set and the Government Actuary will be required to comply with professional guidance and standards. MDDUS considers that there should still remain political oversight of the PIDR given the impact that changes in this may have on public, corporate and individual finances. Therefore the PIDR should be set by the Northern Ireland Executive collectively rather than either the Government Actuary – as what is involved is a matter of public policy judgement as well as a technical calculation – or by any individual Minister as there are important cross-sectoral assessments that should be made, especially in relation to the impact on health financing which seem to have been ignored in the decision-making process undertaken thus far.	See comments above in regard to political accountability. The Department is committed to giving best effect to the 100% principle. This precludes taking account of the impact on defendants, including the health service. If we were to legislate to move away from the 100% principle it would mean accepting that those suffering serious physical and mental injury through no fault of their own should not necessarily be fully compensated to meet their future needs and who would then have to rely on publicly funded services. Maintaining the 100% principle means the calculation is an actuarial exercise rather than a political one in which a Minister would be encouraged to take into account matters other than the actual loss to a personal injury victim.

APIL	There is no legitimate reason or necessity for political involvement in setting the discount rate. It is an actuarial task and not a political one. APIL supports the decision to transfer the responsibility for setting the rate to the Government Actuary. It is however important to recognise that the Department of Justice will still retain overall responsibility for the methodology to set the rate. If at any point it becomes apparent that the methodology is no longer appropriate the Department of Justice will be able to change either the notional portfolio or the entire methodology.	See comments above in regard to political accountability. Moreover any changes that the Department proposes to the methodology for setting the rate will require the approval of the Assembly.
FOCIS	The method of calculating the discount rate should be depoliticised. It is clear that on each occasion that a discount rate adjustment has been contemplated in Northern Ireland (or Scotland and England and Wales) the relevant Minister has been reliant on the Government Actuary to calculate what that rate should be. Taking the responsibility away from the Department of Justice is preferred. Having a formula pre-determined by legislation and empowering Government Actuaries to review and implement the revised rate creates transparency, which is important for all personal injury plaintiffs in NI.	Under the provision in the Bill, the Government Actuary will set the rate according to the detailed methodology prescribed in primary legislation and any changes to this are a matter for the Department requiring the approval of the Assembly. This ensures there is still full political accountability. The Department has adopted the Scottish model for its greater transparency as to how the rate is to be set.
Health and Social Care NI	The England and Wales approach is that the rate is set by the Lord Chancellor and it emphasises political accountability. The Scottish approach is independent and dealt with by the Rate Assessor (the Government Actuary) but the courts also retain the discretion to take a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question. The process is free from any political influence or interference.	The Department considers that there is more, rather than less, political accountability in adopting the Scottish model because the detail of how the rate is to be set is prescribed in legislation and any changes will require the approval of the

	The disadvantage of using the Government Actuary is a lack of political accountability as it does not take into account wider social and economic factors such as the impact on the health budget. In England and Wales they have that level of accountability and it is subject to parliamentary scrutiny. In Scotland it is an exercise independent of political input or scrutiny. Of the two approaches, while some see political 'interference' as a negative, it is a positive as it opens the rate setting process to consideration of other important factors. HSC recommends that the England and Wales model is adopted with parliamentary scrutiny, but to build in consultation with experts. All parties involved in litigation and affected by the discount rate should be invited to participate in any subsequent review including the Department of Health and the Health and Social Care Sector in NI.	Assembly. The Government Actuary is required to set the rate in accordance with the detailed methodology determined by the Assembly. See also comments above in regard to the purpose of applying a discount rate and the legal principle of 100% compensation.
ABI	The Bill removes Ministerial responsibility and accountability from the process of setting the PIDR. The framework for Scotland is significantly more rigid and inflexible than the framework for England and Wales. Under the Scottish framework the rate-setter's discretion as to the final rate is very limited. There must be political accountability for the decision to set a rate. The Justice Minister should have the power to exercise their judgement over the investment portfolio and any adjustments but the Minister should be required by law to consult on these matters with an expert group. The group should include economists, financial advisers and representatives for claimants and compensators in order that consideration is given to: - The current and future economic environment; - Investment options and advice available to claimants; and - How claimants actually invest their damages. ABI recommends that NI should go further than the requirement in England and Wales where the expert panel consists of the Government Actuary, another actuary, an economist, a person with experience of managing investments, and a person with experience in consumer matters as relating to investments.	See comments above in regard to political accountability under the model provided for in the Bill.

CBI NI	The proposed approach leaves little discretion to the rate setter and removes ministerial responsibility. It is the view of the CBI NI that the new framework is a matter of public policy and should incorporate ministerial responsibility over the investment portfolio and any adjustments. Such powers should be carefully balanced with a statutory obligation on the Minister to consult with and have due regard to the views of an independent expert advisory body comprising business groups, economic experts, financial advisers and representatives for claimants and compensators. Such a framework would be consistent with our stated aspiration of having a structure in place that is both fair and flexible.	See comments above in relation to political accountability.
NFU Mutual	The Government Actuary is well placed to determine the appropriate discount rate considering the investment return data and following consultation with an appointed expert panel. However, there must be political accountability for the decision to set the rate. We therefore consider that in consultation with an expert group, made up of the Government Actuary, economists, financial advisers and representatives for claimants and compensators, the Justice Minister should have the power to exercise their judgement over the final decision on the PIDR taking into consideration investment portfolio and any adjustments.	See comments above in relation to political accountability.
Aviva	Transferring responsibility for setting the rate to the Government Actuary reduces political accountability for setting the rate and creates a more rigid and inflexible approach to the process. The investment market and decisions a claimant will be making are the same UK wide and, as such, we recommend that the framework for England and Wales be followed or mirrored with the advantage that political accountability can be maintained in Northern Ireland at the same time as gaining the insight of periodic reviews that will come from the England and Wales expert panel.	See comments above in relation to political accountability.
Zurich	Due to the wide-ranging and considerable impact of any change in the PIDR we believe that there should be political accountability for any decision to set or review the rate. We therefore believe that it is appropriate that the Justice Minister	See comments above in relation to political accountability.

	should be responsible to exercise judgement in relation to the nature of the investment portfolio and any adjustment factors and to do so in consultation with a group of experts which should include economists, financial advisers, persons with links to the financial services market as well as representatives from both compensators and claimants with a view to understanding the impact of the following important aspects during any given period of review: - The current and future economic environment - Investment options and advice available to claimants - How claimants actually invest their damages	
AXA	This methodology will likely be in place for many years to come and have an ongoing financial impact for claimants, defendants, the taxpayer, NHS, the public and business alike. It would seem imperative that there is accountability and flexibility (should circumstances change). The propose model falls short on both these fronts. The decision to set the discount rate should lie with the Minister who is able to consider and assess economic realities and the views of all stakeholders and other interested parties. To ensure political accountability the decision to set the rate should not lie with an unelected official. Short-term issues which may have arisen regarding conflicts of interest should not be used as a reason to transfer responsibility for this Bill which has by its nature very long-term implications. The Minister, person or body responsible should be legally obliged to consult with a panel chaired by the Government Actuary and which includes someone with actuarial experience, investment management experience, an economist and someone with experience of consumer investment practice. Such oversight would give increased confidence to all stakeholders but particularly the Minister, the Department and the Government Actuary.	See comments above in relation to political accountability. The Bill provides for a five-yearly review of the rate and for reviews in-cycle if required. In anticipation of each such review, the Bill (paragraph 16 of the Schedule) requires the Department to review the suitability of the notional portfolio.

FOIL NI & BIBA	The arguments put forward for appointing the Government Actuary as the rate assessor are that in doing so the exercise of determining the PIDR is removed from the political arena and therefore in some way cocooned from external pressures. In prescribing the list and composition of investments within the notional portfolio in the legislation it is argued that the Government Actuary's role is purely an actuarial one. The new methodology will set the parameters for the Government Actuary to calculate the appropriate rate and then report to the Department of Justice. The final say however on the rate will lie with the Government Actuary.	
	It is questionable if the Government Actuary can carry out its role devoid of any other considerations or parameters, other than those prescribed in the legislation. For example, economic performance and volatility of investment markets are key issues. The Government Actuary in the "Personal Injury Discount Rate – Review and Determination of the rate in Scotland" acknowledged that the Scottish framework, upon which the new methodology is largely based, set out many material parameters for his assessment of the PIDR but added "… it is still necessary for me to make a number of other assumptions in relation to the returns that I have modelled on the notional portfolio". He went on to list the assumptions and discussed the "sensitivity" of the rate which is produced by reference to those assumptions. In choosing what other assumptions to make, other than those material parameters which are set out in the legislation, the Government Actuary acknowledged that he would be looking both in-house and to other publicly available views of other investment managers and advisors. Therefore, while GAD might be seen to be completely constrained by the parameters set out in the legislation and carrying out an actuarial exercise, the Actuary has acknowledged that it is still necessary for him to make other assumptions such as economic assumptions (to cover simulations of future inflations) and "asset class interpretation (to "best represent and model" those assets which are prescribed in	The Department considers that the Government Actuary is best placed to calculate the rate in accordance with the detailed methodology set out in legislation and professional guidance and standards. The technical assumptions that he requires to make in doing so – about investment returns, asset classes and investment approach – are actuarial assumptions, informed by expert advice as necessary, and he will publish a report of his review and determination of the rate.

	the notional portfolio. In addition, in considering the "approach to investment" the Government Actuary acknowledged that it was assumed that asset allocation would remain constant over the entire investment period, that it will be "passive" and not "active" and the investment objective would remain unaltered. In a superficial way the Scottish model presents a purely actuarial exercise. However, the Government Actuary would accept and acknowledges that it has to make judgement calls and exercise a degree of discretion even with the prescription within that notional mode. And will call on outside expertise as well.	
	In the English model, the same Government Actuary in advising the Lord Chancellor may consider the same "other assumptions". The Scottish model might be viewed initially as somehow different to the English model in that the Government Actuary's role is an actuarial (or objective) exercise when in fact both models are likely to be at least in part influenced by similar assumptions or factors which are not expressly referenced within either statutory framework. Arguably therefore GAD's exercise in striking the PIDR will require a range of considerations and decisions – are those decisions and choices an exercise of actuarial expertise and experience or an exercise of discretion by the Government Actuary without immediate political oversight or accountability given the rate comes into effect the day after the report is laid in the Assembly and published. The political oversight and/or accountability therefore comes into effect after implementation of the rate.	As noted above, in adopting the Scottish model, political accountability is provided for by prescribing the detail of how the rate is to be set in primary legislation, with any subsequent changes being a matter for the Department, subject to the approval of the Assembly.
	The disadvantage of the new methodology is the lack of flexibility which is caused by the more prescriptive approach – both in terms of the composition of the investment portfolio and the prescription of the further margin to be applied. In times of economic uncertainty and market volatility consideration needs to be given to whether decisions around the PIDR should rest with the Government Actuary or with the Department of Justice.	The Department does not accept that there is a lack of flexibility since there is the power to amend the methodology by secondary legislation and a duty on the Department to review the suitability of the notional

		portfolio in advance of each five-yearly review of the rate. In the event of disruptive economic circumstances, there is also the power (paragraph 2 of the Schedule) for the Department to order an extra review.
BLM	In our response to the Department's consultation in 2020 we said: *"In our view the setting of a PIDR should properly be regarded as a political issue. It is something in which the interests of a wide range of stakeholders need to be taken into account because of the economic importance of the decision for claimants and public or private sector compensators, the long-term nature of the award derived using the PIDR and, importantly, the need to achieve as far as possible 100% compensation and in so doing avoid putting in place a system which is inherently biased to over or under compensation across the board."* This is not the system proposed in the legislation which follows Scotland and in effect 'front-loads' the detail of rate setting into the Bill rather than leaving it as subject to Ministerial discretion. The key concerns with this alternative approach are that (a) the details are addressed in a balanced and appropriate way in the wording of the Bill and (b) it provides sufficient flexibility (as there would be in the case of Ministerial discretion) to change particular elements if circumstances necessitate doing so. Notes that the regulation-making powers in the bill should be largely adequate in respect of providing flexibility to change elements if necessary.	See comments above in relation to political accountability and the legal principle of 100% compensation. See comments above in relation to flexibility.

IUA	The model in England and Wales has resulted in the Lord Chancellor making the ultimate decision on the discount rate. IUA believes that it would be more appropriate for the Minister of Justice in Northern Ireland to make the decision had the model in England and Wales been adopted and it has previously supported the decision being taken by a Minister, following advice from an independent panel of experts, stating that it is important that a politically accountable Minister is ultimately responsible for balancing the needs of claimants, defendants and society as a whole. Whilst we maintain that political accountability is important we acknowledge that within the proposed new methodology the process to set the discount rate is, broadly, an actuarial exercise and it follows that it is appropriate for the Government Actuary to make the discount rate decision. Clause 1(1) subsection (2) should be removed as we do not believe that it is necessary to include the provision. Allowing courts to set rates in individual circumstances could produce legal arguments over the appropriate rate to use, as well as introduce a level of unpredictability in respect of rate setting. This could add costs, uncertainty and delays. A single rate being set would mean consistency could be applied across all courts, in all cases. This would better reflect overall economic circumstances, rather than be influenced in circumstances of one individual case. The discount rate should be set by the rate assessor.	See comments above in relation to political accountability and the legal principle of 100% compensation. This power for a court to take a different rate into account if any party can show that it is more appropriate in the circumstances of the case is already in the Damages Act 1996 and there is case law that constrains its use. As far as the Department is aware, the power has not been much, if ever, invoked.
Institute and Faculty of Actuaries (IFoA)	Supports the principle of transferring responsibility for setting the rate to the Government Actuary on the grounds of transparency. The Government Actuary could seek independent consultations for future changes and their work should be subject to peer review. The transfer of responsibility should also mean that setting the rate should be free of political pressure.	Under the Bill, the Government Actuary will be required to set the rate in accordance with the detailed methodology prescribed in legislation. Changes to the notional

		portfolio are a matter for the Department to consider, having consulted with appropriate parties, in anticipation of each five-yearly review of the rate, and will require secondary legislation to be affirmed by the Assembly.
Bank of England Prudential Regulation Authority	The most appropriate arrangements for accountability is essentially a political decision.	
Law Society of NI	The method of setting the discount rate should be such that the process is free from political influence or interference. This will provide certainty for insurers as well as for plaintiffs.	
Department of Finance	The Government Actuary is now responsible for setting the rate for Scotland and has an in-depth knowledge, understanding and overview of the appropriate level of personal injury discount rate across the UK. In transferring this responsibility, the Government Actuary can set the rate as they see fit in conjunction with how rate levels are performing in England and Wales and Scotland. While accountability for the setting of the rate will rest with the Government Actuary, the Department of Justice will retain the power by regulations to amend the adjustments and the notional portfolio and the appropriateness of these must be reviewed every five years.	As noted above, the Government Actuary will be required to set the rate in accordance with the detailed methodology prescribed in legislation.
Lisburn and Castlereagh City Council	The Council appreciates the advantage of removing the Department's current role in setting the rate. Once the parameters for how the rate is to be set are detailed in the legislation setting the rate will be an actuarial exercise rather than a political one and will be determined by the Government Actuary.	

<table>
<tr><td></td><td>It is important for the Department to have the power to change, by secondary legislation, the parameters within which the Government Actuary is to calculate the rate, including a power to change the assumed period of investment of 43 years, a power to change the amount of the standard adjustments and a power to make changes to the notional portfolio. This ensures political accountability for how the rate is set.</td><td>The Bill provides for the Department to have this power and any changes must be approved by the Assembly.</td></tr>
<tr><td colspan="3">CLAUSE 2 – PROCESS FOR SETTING THE RATE OF RETURN

This Clause inserts a new Schedule C1 into the 1996 Act as set out in the Schedule to the Bill. The Schedule sets out the detail about how the Government Actuary is to approach the task of reviewing and setting the discount rate</td></tr>
<tr><td colspan="3">CLAUSE 3 – MAKES ANCILLIARY PROVISION

This Clause provides a power for the Department by regulations to make ancillary provision. Any such regulations which amend primary legislation are subject to the draft affirmative procedure</td></tr>
<tr><td colspan="3">CLAUSE 4 – INTERPRETATION

This Clause is an interpretation provision</td></tr>
<tr><td colspan="3">CLAUSE 5 – COMMENCEMENT

This Clause provides for the commencement of clauses 3 to 6 on the day after the Bill receives Royal Assent. It also allows for the remaining clauses to be commenced by order made by the Department</td></tr>
<tr><td colspan="3">CLAUSE 6 – SHORT TITLE

This Clause describes the short title of the Bill</td></tr>
<tr><td colspan="3">SCHEDULE C1</td></tr>
</table>

This Schedule contains 34 paragraphs and details how the rate-assessor is to approach the task of reviewing and setting the discount rate		
Schedule C1 Paragraphs 1 to 3 Obliges the rate-assessor to review the discount rate and deals with the timing of reviews First review is a review of the discount rate set under existing section 1 of the 1996 Act as it applied immediately before the provisions of the Schedule are brought into operation and is to start on the date on which the Schedule is brought into operation Subsequent review to start on 1 July 2024 (to align Northern Ireland with the cycle of regular reviews of the rate in Scotland) Thereafter establishes a five-year cycle of regular reviews Requires reviews to be concluded within a 90-day period beginning on the day on which it must be started		
APIL	The rate should be reviewed on a regular basis.	The Bill provides for the rate to be reviewed on a five-yearly basis (once NI comes into line with the review cycle in Scotland). The first review after the rate is set will be in July 2024. There is also provision to have an in-cycle review if required.
IUA	Agrees that the review period should be 5 years – this is frequent enough so that the discount rate should not become significantly out of line with investment returns. Also it is not too frequent that it could distort settlements in the lead up to a discount rate review. It also introduces a level of predictability and thus certainty for those impacted by discount rate changes.	
MPS	Believes it would be better for the review of the discount rate to take place every	The Department considers that,

	three years rather than five years in order to ensure that any rate changes would be relatively minor each time. Quite significant changes can be seen over a five-year period. There should be a regular and predictable point at which the rate is reviewed in order to avoid sudden and dramatic changes.	ordinarily, five years is an appropriate interval between reviews and that a three-yearly interval may encourage a culture of parties to litigation seeking to delay settlements in anticipation of a new discount rate that is expected to be more favourable to one side or the other; whereas a five-year interval allows for a period of stability, while also ensuring that the discount rate does not diverge substantially from changing market conditions for any significant length of time. The Department will have the power to order an in-cycle review if economic circumstances require this.
Health and Social Care NI	A five-year review is the preferred option as these cases can take up to five years to settle and a three-year cycle would open the door to either party delaying settlement to potentially manipulate the system if they thought a review would be advantageous to their case.	The Bill provides for reviews every five years, although the first review after the new rate is set will be in July 2024 to align with the Scottish cycle.
Lisburn and Castlereagh City Council	The introduction of regular reviews at least every five years is welcomed. This provides the Assembly with an appropriate level of accountability and will ensure that, in future, the rate will not become out of touch with the changing financial environment. The flexibility for the rate to be adjusted to respond to sudden and unexpected changes in the market is an important tool.	See comments above on the review cycle.

Schedule C1 Paragraphs 4 to 6 Provides an overview of the rate-setting process, that a review will determine whether the rate is to remain the same or be changed and provides that the rate-assessor must have regard to the views of any person the rate-assessor choses to consult, or whose advice has been sought, provided these are received within a reasonable time		
Schedule C1 Paragraphs 7 and 8 Sets out the basis upon which the rate-assessor is to determine the rate of return. Subject to standard adjustments and rounding of figures provides that the rate should reflect the rate of return for the notional portfolio (provided for in paragraph 12) over a 43-year period. Gives the Department a power, by regulations subject to the draft affirmative procedure, to change the period of 43 years		
FOCIS	Every case varies as to its facts including in relation to life expectancy and the investment advisor and their client must plan for outliving the impaired life expectancy or run the risk of the compensation running out before the end of the plaintiff's life. 43 years is a considerable period of time to assume as applicable to an average plaintiff and the evidential basis and rationale for this surprisingly high figure is unclear. It would clearly be unapplicable to any plaintiff who was already over 45 or whose life expectancy has been significantly compromised by severely disabling injuries. Given the uncertainties of the market and the boom and bust economy experienced since the 1990s the plaintiff is likely to experience both scenarios during the lifetime of their investment. Whilst a notional period of 30 or 43 years might on the face of it be workable it would not be applicable to all plaintiffs. The key point is that each client deserves full compensation and this should not be based on a set rate that leaves a cohort of plaintiffs under-compensated. There would be a significant minority of plaintiffs with life expectancy of less than 30 years and the rate should not undercompensate them.	The evidence available to the Department, which was provided to the Ministry of Justice's Call for Evidence, suggested an average investment period for claimants of 40–45 years, which was the basis of the Lord Chancellor's decision to assume a 43-year investment period for the setting of the discount rate for England and Wales in 2019, and for the assumed investment period specified in

	As there are readily available and highly credible statistics concerning longevity, we contend that GAD should factor them into any further analysis and modelling. By incorporating the longevity risk the final model portfolio and resultant discount rate could then be determined to ensure there would not be under-compensation for more than 5 – 10% of plaintiffs. Alternatively, recognising that calculating the impact of longevity has complexities, we propose that a further contingency adjustment of 0.5% is applied to the discount rate to mitigate the risk of various real variable factors, such as longevity and the risk that funds are required in a different manner than when the award was granted. For the avoidance of doubt, this is in addition to the further margin adjustment of 0.5% to 'mitigate the broader risk of under-compensation.' If the Department is contemplating changing the period of 43 years by regulations there ought to be a requirement for the appointment of a panel similar to the one that was appointed by the Ministry of Justice in 2015 which should include at least an economist, an investment adviser and an actuary. In oral evidence the FOCIS representative indicated that he was skeptical about the evidence about the 43 years and indicated that it was out of kilter with their experience especially on claims involving the most serious injuries. However, the difference between 30 and 43 years does not materially change the discount rate and is not nearly as important as the composition of the portfolio, the under-compensation adjustments and inflation.	the Bill. There is no evidence for the 30-year period assumed in Scotland. By its nature, a single discount rate cannot reflect the investment period of each and every claimant, and thus the use of an average period is appropriate. The Department considers that the proposed further margin is sufficient to safeguard against the risk of under-compensation. The Department will seek such expert advice or other evidence as may be required to inform a decision whether to change the assumed period of investment.
APIL	The figure is based on the average life expectancy and it seems like a significant period for people with serious catastrophic injuries, whose injuries will develop into additional complications some of which are unforeseen. In oral evidence the APIL representative indicated that she was not clear why	See comments above on the investment period. The 30-year period specified in

	Scotland adopted 30 years and it may have been that they assumed that that was the lowest rate of survival as opposed to an average.	the Scottish legislation is not specifically evidence-based, but was chosen as a period that was considered neither too short nor too long to cover a broad range of cases with awards of different durations.
MPS	Using a longer investment period gives the possibility for claimants being able to invest in areas which would be deemed too risky in the shorter term and offer a higher rate of return in the longer term, for example equity investments. This would mean the possibility of a higher return being achieved on the portfolio. If anything, a longer investment period should result in a higher PIDR, reflecting the ability to hold a wider range of assets that contain illiquidity and volatility premia. The 43-year period is based on actual data and it makes more sense to use that period than an arbitrary 30 years.	
MDDUS	According to the analysis published by the Government Actuary's Department the likelihood of over or under compensation is sensitive to the investment period assumed in setting the PIDR and how this compares to the actual investment period of the claimant. The 43-year assumption is based on the responses to the call for evidence published by the Ministry of Justice. It will not necessarily be the case that the same period would be applicable to claimants in Northern Ireland and this is another area where it would be useful to gather data specific to NI. As the investment period of 43 years differs from the period of 30 years used in	The Department is not aware of any evidence or reason to assume that the average investment period of claimants in Northern Ireland is likely to differ significantly from that of claimants in England and Wales. As noted above, the reason for

	Scotland, this could lead to different PIDR rates in NI compared to Scotland even though the proposal is to follow the Scottish model. Ministers need to be mindful of possible reactions if the use of 43 years gave rise to a materially different PIDR compared to using 30 years as used elsewhere.	adopting an assumed investment period of 43 years is that it is evidence based.
ABI	In 2017 we provided the Ministry of Justice with an analysis of more than 2,500 settlements which shows the average investment period for a PIDR award is 46 years. Agrees with the use of an investment period of 43 years as it reflects evidence of how seriously injured people invest their settlements and gives a longer period to smooth out investment performance. An investment period of 30 years is not based on evidence, does not reflect the real-world investment environment for low risk investors, and would significantly reduce the period of investment to achieve the returns sought, which would result in a lower PIDR than necessary.	
NFU Mutual	Considers that by using a longer investment period a more realistic model will be reached as this is more reflective of how seriously injured people invest their settlements.	
Aviva	Agrees that using an investment period of 43 years is an objective one, backed up by evidence in the form of analysis from the Association of British Insurers that concluded that the average investment period (form 2,500 settlements) was 46 years – therefore 43 years errs on the side of caution.	
Zurich	Firmly believes that 30 years is not a reasonable overall average projection period and would lead to over-compensation in these high value cases. 43 years is a more appropriate period taking account of actual claimant life expectancy where 78% of claimants have a life expectancy of more than 30 years. Highlights that for settlement awards between £1m and £3m the average life	

	expectancy was 47 years with 80% having a life expectancy of more than 30 years. For settlement awards over £3m the average life expectancy was 50 years with 88% having a life expectancy of more than 30 years.	
AXA	Refers to the findings of the ABI settlement review that the average length of time for investment of a PIDR award is 46 years. Strongly agrees that it is prudent to assume a longer investment period to ensure a more stable return for added certainty and to the benefit of both the injured claimant and paying defendant.	
FOIL NI and BIBA	The amendment to the Scottish based framework to use a longer assumed investment period of 43 years (rather than 30 years) would more accurately reflect the average or typical investment period for a lump sum award of damages. The ABI submission to the Scottish Government's call for evidence around changes to the PIDR in Scotland indicated that the average life expectancy following a serious personal injury claim (were damages were in excess of £2.5m) was in fact 46 years. The use of a longer notional investment period of 43 years would also have the potential to increase returns on investment and as a consequence lower the likelihood of under- compensation. Although the 43-year period is also presently used in England and Wales since 2019 the difference is that this period will be prescribed in the legislation and it will therefore not be within the discretion of the Minister of Justice to consider altering it as would be the case for the English model. The Department will however have the power to change the period of 43 years by regulations.	
BLM	The period is the same as in England and Wales and is based on the Government Actuary Department's analysis of evidence and its modelling carried out in 2019. The longer period is likely to produce higher rates of return and, all	

	things being equal, a slightly higher discount rate.	
IUA	Agrees with utilising a 43-year model rather than a 30-year model noting that feedback in the England and Wales consultation stated that the average duration of lump sum settlements was significantly higher than 30 years.	
IFoA	Supports the use of the longer investment period of 43 years instead of 30 years in determining the discount rate. It is not uncommon for a lump sum settlement to be provided to claimants in their 20s and 30s, with a corresponding need for care for the rest of their lives. In these circumstances a 30-year term would be insufficient. We note that the longer investment period may be more likely to under-compensate individuals with shorter life expectancy.	
CBI NI	Understands that the ABI provided the Ministry of Justice with an analysis which showed that the average investment period for a PIDR award is 46 years. An investment period of 43 years is a more realistic, evidence based and accurate investment period than 30 years and is to be welcomed. As a result of this amendment to the Scottish model the methodology is more likely to achieve a result closer to the 100% principle.	
Bank of England Prudential Regulation Authority	The figure of 43 years was adjudged by the Government Actuary in an impartial review to be appropriate given the typical age profile of clients. The likely effect is therefore to represent the typical investment term. To use 30 years instead would currently be beneficial to victims, since 30-year returns are currently marginally lower, though only if the difference were sufficient to reduce the rounded rate by one 0.25% step. This would move away from the balance between claimants and defendants. We therefore agree with the proposed approach however note that the investment period may need to be changed over time.	

Department of Finance	Understands that the Department of Justice consulted with the Government Actuary's Department as to the most appropriate period and following this consultation concluded that 43 years is more appropriate as this is understood to be the average investment period for a lump-sum award of damages based on evidence collected by the Ministry of Justice. The Permanent Secretary is therefore content that appropriate consultation has taken place to determine the most appropriate investment period.	
Health and Social Care NI	Agrees that the 43 year investment period is objective and is backed up by evidence from the ABI.	
Lisburn and Castlereagh City Council	The investment period of 43 years rather than the Scottish model of 30 years is a more realistic approach based on evidence that 43 years reflects the average period over which claimants invest. It is important for the Department to have the power to change the parameters within which the Government Actuary is to calculate the rate, including a power to change the assumed period of investment of 43 years.	The Bill provides the Department with the power to amend the assumed period of investment by regulations, subject to affirmative resolution of the Assembly.
Schedule C1 Paragraph 9 Provides for an adjustment to the rate of return to take account of inflation by reference to the retail prices index or to an alternative source of information as prescribed by the Department in regulations subject to the draft affirmative procedure.		
ABI	Believes that the retail prices index (RPI) is the appropriate inflation measure to use in calculating the PIDR, on the basis it is accepted that RPI takes account of wages and owner occupied housing inflation as these are important factors in PIDR calculations. Notes that the UK Government has announced its intention to replace the RPI with	The Bill provides for the RPI as the measure of inflation to be used. However, the Department has a power to change this (subject to the approval of the Assembly) and

	the consumer price index with housing (CPIH) by 2030 which would require the DoJ to amend this legislation (if passed) by that point. Would like to know how the Department plans to respond to this intended change.	will keep this under review.
FOCIS	Some plaintiffs have been effectively forced to take investment risk because the cost of meeting their needs increased beyond the basis on which their claim was settled or their damages awarded by the Court. This could happen by the effect of real earnings growth, and/or inflation for disability-related items that due to the specialist nature of the market do not necessarily increase consistently with RPI (or CPI). In most injury claims, particularly those with injuries of the utmost severity, damages for care and case management account for 50% or more of the damages. Once loss of earnings claims and medical/therapeutic cost claims are factored in the proportion of damages that are subject to earnings related inflation typically rises to 70% or more. It is well established and recognised by the periodical payment regime that earnings inflation in the long term rises at an average of at least 1.5% more than prices inflation. The proposed RPI provision is the minimum acceptable inflationary adjustment and if the alternative of CPI were to be contemplated it would then require an adjustment of at least 1% to rebalance the position.	
BLM	The RPI is used in Scotland but the Consumer Price Index (CPI) is used in England and Wales. The RPI is now generally regarded as unsuitable for official purposes (see ONS commentary on the shortcomings of RPI).	The inflation measure used in England and Wales was CPI+1%, which resulted in a rate of inflation being applied that was the same as RPI. RPI is a closer measure to damages inflation than CPI.
Schedule C1 Paragraphs 10 and 11 Provides for standard adjustments to the rate of return arrived at. The rate-assessor is to:		

deduct 0.75 of a percentage point to take account of the impact of taxation and the costs of investment advice and management. deduct 0.5 of a percentage point as a further margin (which recognises that there is risk inherent in even the most carefully advised and invested portfolio) The adjustment figures may be changed by the Department by regulations subject to the draft affirmative procedure. The resulting figures may be zero or a positive number. They cannot be a negative number (so the adjustments can never raise the rate of return). They do not need to be whole numbers but can include a decimal fraction and are not limited to being expressed in steps of a quarter percentage point		
APIL	The standard adjustments included in the Schedule will add transparency to the setting of the discount rate. APIL is concerned however that the standard adjustment of 0.75 per cent for the impact of taxation and the cost of investment advice and management is too low and could lead to under-compensation. Has consulted an independent financial adviser who said: "with regard to investment costs, financial advice … is made up of financial planning advice and investment management. Suitable independent advice and investment management will incur a charge of between 1.5 per cent and 2 per cent per annum. As a result the impact of advice costs has been materially under-estimated". In independent briefing for APIL at the time the legislation was going through the Scottish Parliament the same financial adviser said that "the impact of taxation is impossible to estimate accurately in advance as it depends on many factors, all which change over time, and some of which change day by day." On that basis he said the allowance for investment advice and tax "is almost certainly bound to be too little".	The Government Actuary (GA) advised the Lord Chancellor in 2019 that it would be reasonable to assume that claimants would incur expenses and tax charges of between 0.6% and 1.7% p.a., and that 0.75% would be a reasonable allowance to make.[1] This included allowance for taxation, financial adviser fees, fund management fees and other costs, such as platform fees (fees charged by investment platforms that allow different funds to be monitored in one place).

[1] *Setting the Personal Injury Discount Rate: Government Actuary's advice to the Lord Chancellor* (Government Actuary's Department, 2019), p. 52. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/817236/Setting_the_Personal_Injury_Discount_Rate__web_.pdf.

	To ensure injured people are not under-compensated APIL propose that the Bill should be amended to change the adjustment to take account of the impact of taxation and the costs of investment advice and management from 0.75 per cent to 1.5 per cent.	Assumed taxation cost was based on an assumed 'tax drag' of 0.0% to 0.5% on assumed returns on mixed investments of £100k, £1m and £3m.[2] The GA noted that an adjustment towards the lower end of this range would be supported by the fact that his calculations were based on the initial size of the award which would reduce in time as withdrawals were made. Financial adviser fees were assumed to range from 0.25% to 0.5%, fund manager fees from 0.25% to 0.5% and platform fees from 0.1% to 0.2%. This was based on an assumption of passive fund management but noting that active fund management, while incurring higher fees, would also be more likely to result in higher returns that would offset the higher fees. In GAD's 2018 advice to the Scottish Government, a range of 0.5 to 2.0% was considered reasonable but an allowance

[2] Ibid., p. 48.

		towards the lower end of this was recommended based on assumptions that claimants would shop around for competitive fees; claimants would invest in passive funds; income yields are currently low, reducing tax liability; and there are further prudence reductions elsewhere in the discount rate.[3]
FOCIS	The proposed standard adjustment of 0.75% to reflect the impact of taxation and the cost of investment advice is too low and would lead to under-compensation. FOCIS sought data from its members and professional deputies and trustees of personal injury trusts concerning investment charges incurred in relation to the investments for their clients as part of our 2019 response to the Ministry of Justice call for evidence on the discount rate for England and Wales. The data illustrated the investment portfolios of 389 clients with settlements between £67,336 and £7,450,000. The average total charge incurred across all the cases was 1.58%. For settlements known to be up to £1.5m the average charge was 1.77% with a range between 1.66% and 1.93%. 58 portfolios with a known value of over £1.5 m had a slightly lower average investment management charge of 1.53% but it is likely that these portfolios would incur higher levels of Capital Gains Tax and Income Tax so that the combined reduction on the investment return is likely to be similar to the portfolios of less than £1.5m. Our own enquiries within FOCIS and the investment professionals who work with	See comments in response to APIL's evidence above.

[3] *Scottish Government: Personal Injury Discount Rate Analysis* (Government Actuary's Department, 2018), p. 30.

	their clients suggests that the primary aim of investment advisers is almost always to devise an investment strategy based on meeting the client's needs for their life-time and this requires regular review and reappraisal. Some funds may have an element of 'active' management in so far as a professional may need to review the portfolio bi-annually or annually, at a cost, and undertake any necessary re-alignment. It is our understanding having spoken to experts in this field that investment advice is likely to be charged at 1.5% - 2% per annum and the costs of investment advice is likely to be higher the lower the sum of compensation is. We believe that the 0.75% adjustment is too low and should be replaced by a 1.5% adjustment to represent the impact of taxation and the cost of investment advice and management and avoid under-compensation. While the 0.5% further margin adjustment to moderate under-compensation is welcome it does not go far enough. The Government Actuary in its advice suggested that the Lord Chancellor consider a margin adjustment between 0.25% and 0.75% to mitigate the incidence of under-compensation. The Government Actuary report provided a graph that showed that even with the 0.5% adjustment about a third of plaintiffs would still run out of their compensation before the end of their lifetime under the rate set and 22% would suffer a shortfall of 10% or more.	By its nature, a single discount rate cannot ensure 100% compensation for every claimant. The further margin reflects the risk that is inherent in any investment and the sensitivity of the rate to the prescribed parameters. It shifts the balance of risk between under and over-compensation towards defendants/compensators. The latter tend to be corporate organisations, who are in a better position to bear that risk than individuals who will be dependent on their damages

		award to meet their needs. 0.5% is the margin that was deemed appropriate by the Scottish Parliament and also the level of the margin of prudence applied in 2019 by the Lord Chancellor to the rate for England and Wales. In the Government Actuary's advice to the Scottish Government in 2018, he estimated that a margin of 0.5% would reduce the probability of under-compensation from 50% to 30% (and, therefore, a corresponding 70% likelihood of full compensation or over-compensation). In his advice to the Lord Chancellor in 2019, he noted that a margin of 0.25% would result in a 60% likelihood of claimants' needs being met in full or more (i.e. full compensation or over-compensation) and a 40% likelihood of under-compensation, and a 70% likelihood of claimants being able to meet at least 90% of their needs; while a margin of 0.75% would result in a 70% such likelihood (and 30% of

		under-compensation) and an 85% likelihood of meeting 90% of needs. The margin of 0.5% that was subsequently applied by the Lord Chancellor, therefore, was considered to result in a likelihood of full compensation or over-compensation of somewhere around 65% and of under-compensation of somewhere around 35%, and around a 75–80% likelihood of meeting 90% of needs. The Department considers that a margin of more than 0.5% would shift the balance too much in favour of claimants and be too much of a departure from the aim of overall 100% compensation. The option of a periodical payments order is available for claimants who are unwilling to bear this amount of risk.
ABI	The Bill adopts the further margin of error from the Scottish legislation that would reduce the PIDR recommendation from the Government Actuary by a further 0.5%. The Department has not provided any evidence to show this further adjustment is required in order to achieve 100% compensation. Including it in the Bill exceeds the target of 100% compensation and it should be removed.	See comments on the further margin above. The Department considers that an adjustment to reduce the risk of under-

	The Scottish legislation's financial memorandum noted *"this is intended to recognise that a seriously harmed pursuer is unlikely to be able to meet their needs if they are under compensated. The corollary is that there will inevitably be a probability of over- compensation but it will be less than if the rate were set by reference to ILGs".* The Scottish Government policy memorandum in support of its legislation stated *"in changing the methodology away from a rate based on ILGS, the Scottish Government has made provision for a portfolio constructed on the basis of portfolios described as cautious and which the Scottish Government believes would meet the needs of an individual in the position of the hypothetical investor who is described in the legislation.*" If a cautious portfolio is appropriate to meet the needs of the hypothetical investor, then this additional 0.5% adjustment downwards by definition goes beyond the needs of the pursuer and therefore beyond the 100% compensation principle.	compensation is justified on the basis that defendants/compensators are likely to be in a better position to bear the risk of over-compensation than individual claimants (who are likely to be dependent on their damages award to meet their needs).
	The notional portfolio adopted from the Scottish legislation is already over-cautious and the portfolio itself already risks departing from the principle of 100% compensation. The further margin adjustment is unnecessary and fundamentally undermines this principle. There is no evidence in the Bill or supporting documents to support this policy decision. To adhere to the 100% compensation principle, the further margin of adjustment of 0.5% should be removed from the legislation. In oral evidence the ABI indicated that it fundamentally disagreed with the proposed amendment by the APIL to increase the adjustment for tax and investment charges to 1.5% and highlighted that under the current systems there is a 0.75% adjustment for such charges in England and Wales and in Scotland and it had not seen any evidence that tax and investment charges in NI are any different.	The Department does not agree that the notional portfolio is over-cautious. The portfolio is intended to meet the specific needs of the hypothetical claimant described in the Bill and has been reviewed by the Government Actuary's Department who have confirmed that it remains appropriate.
NFU Mutual	The further margin of 0.5% will inevitably lead to compensation in excess of 100%. This level of overcompensation shall on balance be of significant financial	See comments above in respect of the further margin.

	terms given the nature of the damages awards which include an element of further loss compensations impacted by the application of the PIDR. The level of overcompensation shall be disproportionate to the level of “risk” of not achieving 100% compensation the additional 0.5% reduction applied in the Scottish model seeks to achieve. If it is removed it will rectify some of the risk of over compensation.	
Aviva	The 0.5% adjustment for further margin guarantees that the discount rate will deliver over-compensation to claimants. This adjustment was a conscious decision by Scottish Ministers to over compensate claimants and goes well beyond the aim of achieving as close to 100% compensation as possible. There is no evidence in the Bill or supporting documents to support such a policy decision for Northern Ireland. The costs associated with paying more than 100% compensation will ultimately fall on NI consumers, businesses and taxpayers to fund.	See comments above in respect of the further margin. The policy memorandum for the Scottish Bill noted that it did nothing to disturb the 100% compensation principle. However, Scottish Ministers recognised that assessment of a lump sum award of damages for future financial losses can never be an exact science and there will inevitably be levels of under- and over- compensation because of a range of factors. The further margin was included in recognition of the fact that any investment, however carefully advised, may fail to meet a claimant’s needs and that any losses are likely to be material to a claimant’s ability to meet their needs. It was acknowledged

		that the corollary of reducing the likelihood of under-compensation is that there would inevitably be a probability of over-compensation, although less than if the rate were set by reference to Index-linked Gilts. The Lord Chancellor applied the same further margin in England and Wales because he considered that not doing so would 'give rise to too great a risk that the representative claimant will be under-compensated'.
Zurich	There was no evidence to support the inclusion of an arbitrary margin of adjustment of 0.5% in the Scottish legislation and there has been no subsequent evidence to justify its inclusion in this legislation. It will undoubtedly lead to consistent over-compensation if incorporated.	See comments above in respect of the further margin.
AXA	Challenges the 0.75% deduction as we are not aware of any factual evidence having been supplied to support a standard adjustment for taxation and investment advice. The figure should not be accepted at face value just because another jurisdiction might use similar figures. If the investment portfolio is already prescribed in the Bill investment advice and subsequently the cost of this would not be necessary. Applying a flat rate adjustment to the discount rate is a broad-brush approach and unfairly inflates all heads of damage for further losses when such actual	See comments above in respect of the adjustment for taxation and investment advice.

	costs might be incurred on an intermittent basis only, if at all. A better option would be for these standard adjustments to be removed from the Bill but allow defendants to consider paying for the reasonable cost of future financial advice as a separate head of claim through negotiation or award at the time of settlement – we already pay in similar fashion for the cost of case managers who organise claimant's on-going/future care). The 0.5% further margin adjustment completely contradicts the principle and objective of 100% compensation, undermines certainty and fairness in the process and should be removed. Even a very small % movement in the rate such as this can have a very significant and detrimental financial impact. The adjustment appears unduly artificial, inflexible and likely to promote over-compensation. We understand the reasoning behind the further margin adjustment is to remove inherent risk. Claimants who want to avoid risk totally can however avail of PPOs which will compensate them for the remainder of their lives and which completely avoids the need for extra margins. In addition, the notional portfolio is already cautious making the extra margin unnecessary. There is good evidence to support the removal of both standard adjustments as these appear to be a major contributor to potential over-compensation. We would also point to the Annual Accounts of the Courts Funds Office and a consultation into management of funds held on behalf of minors and patients. The NICTS issued its conclusions in December 2019 and stated *"currently, where appropriate, funds held in court are invested on the recommendation of a contracted investment manager. The investments are monitored by the Judicial Liaison Group, which includes independent individuals with investment expertise. The returns on the invested funds have consistently exceeded targets and benchmarks; NICTS does not believe that there is any reason to alter these*	 See comments above in respect of the further margin.

	arrangements.' It is evident from the information published that the funds for these claimants are carefully managed and protected with investment returns made. We would therefore suggest that in any claims where damages are managed by the court, the 0.75% investment charges should not apply, the 0.5% extra margin should not apply and the assumed notional investment portfolio should represent being "no worse" than the basket of investments currently used by the Courts Funds Office. Over-compensation would therefore be avoided in these examples.	 Damages invested and managed by the court are subject to management costs and risks in the same way as other damages.
FOIL NI and BIBA	The use of a further margin or margin of prudence adjustment of 0.5% provides for a significant potential for over-compensation. It is clearly a policy device with the express objective of guarding against the risks of under-compensation and is a blunt instrument at best. If the composition of a mixed portfolio has the goal of achieving 100% compensation to the injured plaintiff why is there any need to use such a method to apply an additional adjustment downward of the gross rate of return by 0.5%. In the Policy Memorandum which accompanied the Scottish Act it was expressly acknowledged that the application of the "further margin" would inevitably lead to a *probability* of over-compensation rather than a *possibility* of over-compensation. The Scottish Government's position was that the further margin was needed in order to recognise that "any investment, however carefully advised and invested, may fail to meet the injured plaintiff's needs". Consideration should be given to removing the 0.5% further margin adjustment in its entirety. If there is not agreement to remove the adjustment completely consideration should be when setting the rate by reference to quarter percentage point, to rounding it up rather than down. Under the proposed methodology both the standard adjustment and the further margin will be prescribed at 0.75% and 0.5% respectively and will be maintained at	See comments above in respect of the further margin.

	these levels unless the Department brings forward regulations to change them. Under the English model whether or not there is any "further margin" applied and if so, how much, is totally at the discretion of the Lord Chancellor. The Lord Chancellor must take into account the standard adjustment for taxation/expenses but the amount of that discount is at his discretion, subject to consultation. When striking the rate in England and Wales if the Lord Chancellor had simply accepted the GAD advice which took into account the adjustment for the cost of taxation and investment advice, the rate would have been a positive rate – 0.25%. The Lord Chancellor asked GAD to do further projections and the rate became -0.25% - in setting that rate the Lord Chancellor accepted there was a risk of over-compensation but it will not be as much as if the *Wells v Wells* methodology had been retained.	
BLM	The 0.75% adjustment to take account of the impact of taxation and the costs of investment advice and management is prescribed in the Scottish legislation and was also selected as a matter of discretion by the Lord Chancellor in England and Wales following advice from the GAD. The 0.5% further margin is prescribed in the Scottish legislation and was also selected as a matter of discretion by the Lord Chancellor in England and Wales in order to move away from median compensation and to protect against the risk of under-compensation. Using a notional portfolio that is more conservative from an investment risk perspective and thus different from that in England and Wales and then making the same 0.5% further margin adjustment for the risk of under-compensation appears to be allowing for the same risk twice – i.e. double counting the risk of under-compensation and rendering the resultant PIDR lower than it should otherwise be, an outcome that will tend towards over-compensation. It seems logical that the risk should be allowed for only once. It may be that reducing the further margin to 0.25% could be a reasonable way to proceed as a	See comments above in respect of the adjustment for taxation and management advice. See comments above in respect of the further margin.

	rough rule of thumb and in the absence of specific evidence on the point.	
IUA	The inclusion of an explicit 0.5% additional margin when calculating the rate will result in systemic over-compensation. The former Lord Chancellor incorporated an additional 0.5% margin when setting the rate in England and Wales in order to put the balance in favour of over-compensation. In Scotland an explicit 0.5% further margin was allowed for in setting the rate to reduce the risk of investment underperformance. This margin should be removed in order to achieve the 100% compensation principle. If it is removed the methodology will result in a discount rate enabling claimants to receive close to !00% compensation.	See comments above in respect of the further margin.
IFoA	We are not in a position to comment on the effectiveness of the proposed additional 0.5% deduction in reducing the likelihood of under-compensation.	
Bank of England Prudential Regulation Authority	Notes that the Bill includes the 0.5% prudent margin adopted in Scotland that was left to the discretion of the expert panel in England and Wales. Regards this as reasonable either to include this margin (slightly favouring claimants) or to omit it (for strict balance) and does not offer a preference as this is essentially a political decision for the NI Assembly.	
MDDUS	The further margin percentage should be reduced to reduce the potential for over compensation.	See comments above in respect of the further margin.
CBI NI	The Scottish portfolio is described as “cautious” or “very cautious” as compared with the “low risk” notional investor model in England and Wales. If the starting point is a “cautious” or “very cautious” low risk investor, it begs the question why a further downward adjustment of 0.5% is incorporated in the model in the Bill. This downward adjustment should be removed as it conflicts with the 100% principle.	The Department considers that the notional portfolio prescribed in the Bill is one that is suitable for investment in by the hypothetical claimant

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The Scottish policy paper also stated that the 0.5% further margin “will inevitably lead to over-compensation”.</td><td>described. It is the same as the notional portfolio in the Scottish legislation which was constructed by the Government Actuary’s Department and based on investments that were categorized as ‘low risk’ by Morningstar (an investment research company). The portfolio has been reviewed by GAD who confirmed that it remains appropriate.

See comments above in respect of the Scottish policy memorandum.</td></tr>
<tr><td colspan="3">Schedule C1 Paragraphs 12 to 15

Sets out the notional portfolio with the types of investments and percentage holdings on which the rate- assessor is to determine the rate of return.

Provides that if the type of investment is not defined by regulations under paragraph 14 it is to be interpreted by the rate-assessor in the way it is commonly understood in investment contexts.

Provides that the Department may make regulations, subject to the draft affirmative procedure, to define any of the types of investment

Provides that the Department may make regulations, subject to the draft affirmative procedure, to make changes to both the list of investments and the percentage holdings in the notional portfolio</td></tr>
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Minister of Health	The methodology chosen by the Department of Justice must adhere to the principle of fair compensation ensuring full compensation for losses but no more and no less. One safeguard against overcompensation would be to ensure cases are settled by means of a Periodical Payment Order (PPO) with as many Heads of Claim as possible being paid on an annual basis thus reducing the need for a lump sum payment calculated using multipliers and discount rates.	Under the Damages Act 1996, periodical payments orders (PPOs) are an option available to claimants and may be ordered by the court for future pecuniary loss without the need for both parties to consent. PPOs remove the inherent risk associated with a lump sum payment.
APIL	To achieve as close to 100 per cent compensation as possible, the most appropriate methodology to calculate the discount rate is the current method as set out in *Wells v Wells.* Any move away from that methodology risks leaving injured people under- overcompensated. Under the current method injured people are assumed to be very risk averse or "risk free" investors and this is the best hope they have of obtaining full compensation for their catastrophic injuries. Injured people are right to be risk averse. The compensation they are given is all they will ever have, and many live in fear of what will happen if the money runs out. Many survive – rather than actually live – in fear of what will happen if the money runs out. Damages must therefore be calculated on the assumption of risk-free investments and the rate should be reviewed on a regular basis. This is an issue of	The Department considers that, based on the evidence from consultation and the advice of the Government Actuary, a discount rate that assumes investment solely in index-linked gilts does not reflect how a claimant would be advised to invest their lump sum award and, therefore, tends towards over-compensation. An assumed mixed portfolio of low-risk investments is considered more appropriate. For claimants who prefer to avoid the risk of investment, the option of a periodical payments order is available.

	need: the actual needs of people who have been injured through negligence must be met in a fair and just way. Assuming the new framework is adopted including the formula which will be used for calculating the rate provides transparency to the process and will ensure all parties know exactly how the discount rate was decided and could even help predict what a new rate could be ahead of a review.	
FOCIS	The most appropriate way to calculate as close to 100% compensation as possible is on the basis of the *Wells v Wells* formula as this is the only methodology that avoids plaintiffs being exposed to both investment and inflation risk to try and ensure their compensation lasts to meet their assessed future injury related needs.	See comments above in response to APIL.
	The notional portfolio allows for 10% to be invested in cash or equivalents. The experience of solicitors advising plaintiffs with significant injuries is that most will leave a significant amount of their compensation in a bank or building society at least initially. Plaintiffs may also have to use some of the compensation to carry out adaptations to their accommodation before investing the remainder so that the amount ultimately invested for a return can be significantly less than the total amount awarded. A significant proportion of the future damages award will therefore not generate any investment return.	The portfolio has been reviewed by the Government Actuary's Department who has confirmed that it remains appropriate.
	Agrees with the Ministry of Justice Expert Panel, who in their 2015 Report believed that any truly low risk portfolio would require at least 75% investment in ILGS with the remaining 25% invested between UK corporate bonds, global government inflation linked bonds and global equities and that any other asset classes posed unacceptable levels of risk. Is of the view that the 2nd portfolio considered by the Panel of Experts, while still exposing plaintiffs to a risk of under-compensation, represents the lowest level of erosion of the full compensation principle of all the model portfolios thus far considered.	See comments above in relation to the notional portfolio.

	States that requiring an injured person to gamble with a compensation award by investing in higher risk assets places an unacceptable burden on the injured person and removes the responsibility from the wrongdoer of providing adequate compensation.	Any claimant who does not wish to bear the risk of investing a lump sum has the option of seeking a periodical payments order.
MPS	The ABI has obtained information from Pannells Financial Planning, a firm of independent financial advisers, and the notional portfolio Is not deemed to be accurate as there is a larger proportion of fixed investments and a lower proportion in equity investments. The assumed investment period is 43 years and over this period of time equity investments are of lower risk. There is the potential for over compensation due to the notional portfolio being of lower risk that that which a claimant is typically likely to be recommended by a financial planning professional.	The Department does not agree that the notional portfolio is over-cautious. See comments above as to how to how it was arrived at. It is intended to meet the specific needs of the hypothetical claimant investor described in the Bill. The portfolio has been reviewed by the Government Actuary's Department who has confirmed that it remains appropriate, even with a 43-year assumed investment period.
MDU	The new statutory methodology proposed in the legislation is greatly flawed. As in Scotland, decisions on setting the PIDR in NI will not be based on evidence of claimant behaviour and the returns they achieve from investing their compensation awards.	It is difficult to obtain evidence as to how claimants actually invest. Available evidence (submitted in response to MoJ's Call for Evidence in 2019) is about how claimants are typically advised to invest rather than how they have actually invested.

	The framework means that decision makers in government are not required to take account of all relevant factors, such as the fact that an adverse economic climate affects all stakeholders (not just claimants) or the impact of a disastrously low discount rate on funding for public services. Decision-makers in government are not required to consult arms-length bodies or even other Executive departments, so they cannot take into account any factors other than the presumed impact of the PIDR on claimants.	The purpose of the discount rate is to take account of the return on the investment of a lump sum award to give effect to the long established legal principle of 100% compensation. Setting a rate that takes into account factors other than those relating to investment returns and associated costs would depart from this principle. Therefore, the effect of the wider economic climate on defendants and compensators is not a relevant consideration. The financial consequences for defendants and compensators of any change in the discount rate flow from the legal liability to pay 100% compensation.
MDDUS	The combination of assuming a low risk investor and the deduction of a further margin on 0.5% will make it more likely than not that the claimant will be overcompensated. Over compensation means that at the end of the claimant's life there is still part of the compensation remaining which has not been spent. One option would be to require that any such remaining balance is repaid to the party who paid the compensation although this may not be easy in practice.	See comments above in respect of the notional portfolio and further margin. The Department considers that this option would not be practicable. It is open to a party to seek a periodical

	Other options to reduce the potential for over compensation would be to reduce the further margin or to change the notional portfolio to increase the level of investment risk being assumed.	payments order to avoid the risks inherent in a lump sum payment.
Health and Social Care NI	The objective of the new statutory methodology is to enable a discount rate which will result in damages awards that are fair between claimants and defendants in helping to provide 100% compensation, neither more nor less, for the wrongful injuries. Whilst it is agreed that plaintiffs should not be pushed to invest in high risk portfolios in order to deliver fair compensation the method used to calculate the discount rate should reflect a risk profile that is informed by how plaintiffs actually invest their compensation and the returns they are able to achieve. The rate is in essence a rate of return on investments assumed to be made by claimants as a single class. However, the issue remains where plaintiffs adopt a different investment strategy, which has the potential to outperform the low risk free rate, then they have the possibility to place themselves in a better situation financially compared with one where the basis for the claim had not arisen in the first place.	The notional portfolio is intended to meet the specific needs of the hypothetical investor described in the Bill. The discount rate is a single rate designed to be used in all cases so as to avoid the complexity, cost and delay of negotiating an agreed rate in each individual case. By its nature, a single discount rate cannot reflect the investment behaviour of every claimant. Inevitably, some claimants will be over-compensated and some will be under-compensated.
ABI	The ABI and its member firms support the principle of full compensation i.e. 100% compensation – not more and not less. The current law is not working properly to deliver that and the recent decision to introduce an interim PIDR of --1.75% will over- compensate claimants.	

	In our response to the DoJ consultation on how the PIDR should be set we recommended the adoption of the England and Wales methodology as this would be a more equitable model, as did the majority of respondents to the consultation. While the new methodology set out in the legislation is a welcome step away from *Wells v Wells* we do not believe it is the most appropriate to achieve as close to 100% compensation as possible, as its calculations would be based on two positions adopted from the Scottish Act which are designed to exceed the principle of 100% compensation – a further margin adjustment and the notional investment portfolio. The Bill adopts a notional investment portfolio from the Scottish legislation to be used to calculate the anticipated returns on those investments to set the PIDR. This notional investment portfolio is over-cautious and so will lead to a lower PIDR which will exceed the 100% compensation target. The ABI urges the Committee to review the notional investment principle in order to adhere to the principle of 100% compensation. The ABI shared a significant amount of evidence with the Department in its 2020 consultation. The analysis underpinning that evidence is not reflected in the notional portfolio in the Bill. We have also obtained further evidence from Pannells Financial Planning, a firm of independent financial advisers. The report includes details of asset allocation indices from various investment houses, but again these do not reflect the notional portfolio. Pannells' view is that the portfolio is overweight in Fixed investments and underweight in Equity investments. The notional portfolio is over-cautious and a portfolio which has more weighting to Equity investment would be more appropriate if the 100% compensation principle is to be upheld. Pannells highlight that Equity investments provide protection against inflation over the longer term. The longer the investment period of the portfolio the greater capacity there is for the portfolio to smooth out the effects of short-term changes in the performance of equity	 See comments above in respect of the notional portfolio and the further margin. There is no basis for saying that the Scottish model is more likely to lead to over-compensation than the England and Wales model. The notional portfolio was constructed by the Government's Actuary Department and based on investments that were categorised as 'low risk' by Morningstar (an investment research company).

	investments. The Department of Justice should be asked to demonstrate the evidence for its policy decisions on the notional investment portfolio given the costs associated with paying people more than 100% compensation would fall ultimately on NI's consumers and taxpayers. The ABI recommends following the framework for England and Wales under which the PIDR rate is now set with reference to assumed returns from a diversified portfolio of low-risk investments, having regard to the actual investments made by claimants. This is better than the "cautious" investment approach and the statutory adjustments in the framework for Scotland which leads to over compensation and the resultant additional costs borne by defendants including public bodies, taxpayers and ultimately consumers as well as insurers. Recommends that the Department increases the size of the portfolio of equities within the overall portfolio.	
NFU Mutual	The notional investment portfolio is over-cautious and will lead to a lower PIDR which will exceed the 100% compensation target. If a cautious portfolio is appropriate to meet the needs of the hypothetical investor, then the additional 0.5% adjustment downwards by definition goes beyond the needs of the plaintiff and therefore beyond the 100% compensation principle. If the 0.5% is removed it will rectify some of the risk of over compensation.	See comments above in respect of the notional portfolio and the further margin.
Aviva	The Bill adopts a notional investment portfolio from the Scottish legislation that is over- cautious and so will lead to a lower discount rate which will then lead to over compensation rather than achieving the aim of as close to 100% compensation as possible. Further consideration should be given to adopting or mirroring the methodology form	See comments above in respect of the notional portfolio and the further margin.

	England and Wales to achieve a fairer outcome. Alternatively, the adjustment of 0.5% for further margin should be removed from the Bill as it will lead directly to over compensation and further consideration should be given to the over-cautious nature of the notional portfolio. These changes would still not veer towards an outcome of under-compensation.	
Zurich	The notional investment portfolio to be used is overly cautious and not reflective of the investment portfolios which will be arranged. Utilising such a notional portfolio will provide an undervalued representation of the returns which will be achieved and will subsequently result in the PIDR being set too low which will, in turn, lead to excessive over-compensation. The notional investment portfolio needs to be reflective of real-life practice. The AI submitted evidence to the Department's consultation including analysis showing that the proposed notional investment portfolio is overly cautious and not consistent with independent financial analysis. The Government Actuary's advice to the Lord Chancellor on the PIDR in June 2019 highlighted the risk of over and under-compensation when assessing the PIDR. This assessment was based on a more realistic investment portfolio rather than the more cautious portfolio in the legislation so the likelihood of over-compensation may be further exacerbated. Taking the proposed notional portfolio in tandem with the proposed 0.5% further margin adjustment will magnify the over-compensation impact.	See comments above in respect of the notional portfolio and the further margin.
FOIL NI and BIBA	The composition of the notional portfolio is overly cautious and light in equities. It is not one that an adviser would advise for an injured claimant. The Bill uses the same set of investments and percentage holdings as was used in the Scottish legislation. Due to the type of investment and the percentage	See comments above in respect of the notional portfolio and the further margin.

	holdings prescribed a more conservative and risk-averse model has been produced when compared to the portfolio that was used by the Government Actuary Department when it advised the Lord Chancellor in England and Wales. A *lower* gross rate of return may therefore be produced, which is a factor that will influence the possibility or likelihood of over-compensation. In the English methodology the details of the investment portfolio are left to the discretion of the Lord Chancellor subject to certain assumptions that the plaintiff will invest in a diversified portfolio and be willing to take more risk than "very low risk" but less risk than a prudent investor who is properly advised. In its advice to the UK Government, GAD recommended a midpoint of the portfolios that had been proposed by the respondents to the consultation. By taking that approach and formulating advice to the Lord Chancellor a *slightly higher* risk was assumed than that in the notional portfolio in the Bill. In evidence to the Scottish Economy, Energy and Fair Work Committee the Minister acknowledged that the composition and makeup of the notional portfolio chosen for Scotland reflected a *"very cautious"* but low risk portfolio. The difference in composition and selection of investments within the notional portfolios is one of the key differences between the methodologies used in England and Wales and in Scotland leading to the notional *"lower risk investor"* in England and Wales and the *"cautious investor"* in Scotland. The composition of the notional portfolio will dictate, to a large extent, the outcome i.e. what the rate turns out to be By choosing a new methodology based largely on the Scottish model (save for the 43- year duration of the notional investment portfolio) the factors that have an influence on the PIDR and on the balance between under and over-compensation have come pre- prepared and mainly borrowed from the Scottish experience and the question is are they 'oven ready'.	
BLM	The selected portfolio is identical to that used in Scotland. It is however more	See comments above in

	conservative that the portfolio in England and Wales and therefore delivers a lower rate of return. The methodology set out in the Bill will most likely – if the various rate-setting procedures were conducted at the same time in all three jurisdictions – deliver a PIDR for NI which would be lower than that in England and Wales because the investment portfolio is more conservative but higher than that in Scotland because of the longer investment period.	respect of the notional portfolio. It is not known what portfolio of investments would be assumed if the England and Wales model was adopted in Northern Ireland (or the amount of any adjustments) as this would be a matter for the Minister's discretion.
	Using a notional portfolio that is more conservative from an investment risk perspective and thus different from that in England and Wales and then making the same 0.5% further margin adjustment for the risk of under-compensation appears to be allowing for the same risk twice – i.e. double counting the risk of under-compensation and rendering the resultant PIDR lower than it should otherwise be, an outcome that will tend towards over-compensation. It seems logical that the risk should be allowed for only once.	The notional portfolio is intended to meet the specific needs of the hypothetical investor described in the Bill. However, there is risk in any investment and the further margin is intended to mitigate the risk of the claimant being under-compensated by shifting the balance of risk of under- or over-compensation towards defendants/compensators. This does not represent double-counting. It is not known what portfolio of investments would be assumed or the amount of the adjustments that would be made if the England and

		Wales model were adopted, as these would be a matter of Ministerial discretion.
IUA	A suitable basis for setting the discount rate is with consideration of long-term average returns achievable by a reasonably prudent investor with a mixed portfolio of low risk investments. Considers that the approach adopted within England and Wales allows a discount rate to be set based on the latest information available and supported by expert opinion. This would also be true for choosing the most appropriate asset class, rather than it being defined and rigid as is the case with the Scottish framework upon which this legislation is based.	See comments above in respect of the notional portfolio. The Bill provides for a five-yearly review of the rate. In anticipation of each such review, the Bill (paragraph 16 of the Schedule) requires the Department to review whether the notional portfolio remains appropriate.
IFoA	The proposed methodology assumes a personal injury claimant invests a lump sum compensation in a mixed portfolio of low-risk investments. Our view is that the discount rate should be derived from a risk-free rate of return, reflecting the risk appetite of a risk- free investor. Lump sum settlements expose claimants to uncertainty over the adequacy of their compensation and using a higher discount rate increases this risk. The variability from investment returns may provide additional assets for some claimants but for other claimants poor outcomes may lead to insufficient assets for the later years of life. Under Solvency II (the EU-wide insurance regulatory framework) insurers are required to discount PPOs (and other) liabilities at a risk-free rate. This is inconsistent with the discount rate setting methodology proposed.	The evidence from consultation and advice from the Government Actuary is that a risk-free approach to investment does not reflect how a claimant would be advised to invest their lump sum payment. Assuming such an approach would, therefore, lead to over-compensation in most cases. The option of seeking a periodical payments order is available to a claimant who prefers not to accept the risk associated with a lump

	Whatever methodology is used to set the discount rate will not ensure 100% compensation, even if the aim is to achieve 100% compensation on average. Individuals will live either longer or shorter than expected, which may then lead to under or over compensation. Aiming for full compensation to the majority of claimants would require a bias towards over-compensation.	sum payment By its nature, a single discount rate cannot ensure 100% compensation for every claimant any more than the original calculation of the lump sum which is based on a number of assumptions as to the future, including life expectancy. Inevitably, some claimants will be over-compensated and some will be under-compensated. A further margin is included in the Bill to reduce the risk of claimants being under-compensated. While the effect of this is to increase the likelihood of over-compensation, defendants/compensators tend to be corporate organisations, which are in a better position to bear that risk than individuals, who are likely to be dependent on their damages award to meet their needs.
Bank of England	The new methodology will not veer towards over-compensation in general, other than marginally through the 0.5% prudent margin. It will over-compensate any	The Department agrees.

Prudential Regulation Authority	claimants who successfully follow a risky investment strategy, but this cannot be rectified without under-compensating those who do not. The methodology will not veer towards under-compensation in general, especially in light of the 0.5% prudent margin. It will not under-compensate any claimants who follow an extremely conservative investment strategy, but this cannot be rectified without over- compensating those who do not. To do this would disproportionately increase liability awards and hence insurance premiums.	
CBI NI	Notes that the portfolio is described as "cautious" or "very cautious" as compared to the "low risk" notional investor model in England and Wales. Would like to see a clear evidence base for the notional portfolio to ensure it is appropriate and fit for purpose. Supports an independent review of the underlying notional portfolio to determine whether it adheres to the 100% principle.	See comments above in respect of the notional portfolio. The Government Actuary's Department was asked by the Scottish Government to construct a' low-risk' portfolio. The basis for the notional portfolio was published by the GAD.[4] The portfolio has been reviewed by GAD for the purposes of the Bill who confirmed that it remains appropriate.
Lord Chief Justice on behalf of the judiciary	The difference in the discount rate between Scotland and England & Wales appears to relate largely to a different composition of the investment portfolio, the assumed duration of loss and the date at which the economic modelling was run in each instance. The England and Wales discount rate was based on conditions prevailing in December 2018 alone whereas the Scottish rate has been arrived at	The Department agrees with this analysis of the differences in the rates in England and Wales and Scotland respectively.

[4] *Scottish Government: Personal Injury Discount Rate Analysis* (Government Actuary's Department, 2018).

	by looking a modelling not just from that date but also from June 2019. It is striking how much the economic conditions had deteriorated with a difference on the Scottish modelling of almost 0.38% over just that six-month period. The fact that the rate can change that much in only six months exposes the uncertainties that claimants face in managing their investment over many decades. References documents published by the Ministry of Justice when considering the discount rate and a research report commissioned by the British Institute of International and Comparative Law (BIICL) in 2017 to examine the issue of the discount rate applying to quantum in personal injury cases from a comparative law perspective. It focused on the jurisdictions of Australian States, Canadian Provinces, France, Germany, Hong Kong, Ireland, Spain and South Africa. The research shows that there are a wide variety of rates and approaches to its setting in the jurisdictions considered, but all give effect to the principle of full compensation and, where relevant, give the claimant the benefit of a defensive investment strategy. The BIICL noted a broad range of rates (at that time) from 6% in the Australian State of Victoria for motor vehicle and workplace accident victims, to 3.5% in Spain. No jurisdiction with a single discount rate had a negative rate as currently is the case in the UK.	
Law Society of NI	The Society responded to the Department's consultation in 2020 and suggested the following hybrid model: 'A NI model moulded by blending elements of the English and Scottish models. A mathematical exercise carried out by the Government Actuary (having fully consulted with all interested parties) with the Minister of Justice having overriding discretion to approve or vary the rate (again only after having consulted on any proposed variation away from the rate proposed by the Government Actuary). Such a model should be subject to the following caveats: - The power for the rate to be set in the absence of a sitting Assembly; and	The Department believes that the Scottish model – under which the detailed parameters for setting the rate are determined by the Assembly, and the actuarial exercise of calculating the rate is done by the Government Actuary – is the best model for Northern Ireland, as it provides both political accountability, certainty and transparency in regard to how the rate is set.

	The courts retaining a discretion to take a different rate of return into account if any party in the proceedings shows that it is more appropriate in the case in question.	Clause 1 of the Bill retains the power for a court to take a different rate into account where a party shows that is more appropriate.
Lisburn and Castlereagh City Council	The current discount rate of 2.5% set in accordance with legal principles established by the House of Lords in *Wells v Wells* does not take into account changes in the market since 2001 and seriously risks undercompensating claimants. Welcomes the new methodology based on a diversified portfolio of low risk investments over 43 years to provide the claimant a better return on investment than solely investing in index-linked gilts as a more appropriate calculation to achieve the 100% rule.	
Schedule C1 Paragraph 16 Provides that, before any review of the rate of return, the Department must consider whether it is necessary to make regulations (under paragraphs 14 and 15) to ensure that the notional portfolio remains suitable for investment by a hypothetical investor. In considering this the Department must consult such persons as it considers appropriate (no such consideration is required before an extra review)		
FOIL NI and BIBA	In carrying out this mandatory review the legislation does not define 'with whom' the Department must consult but simply states it 'it must consult such persons as it considers appropriate'.	The Department is content that it is not necessary to specify whom it should consult.
AXA	It is not clear *if* and *how* the investment portfolio is to be reviewed each time a new rate is to be set to ensure both investment practice and returns are taken into consideration in future years.	Paragraph 16(1) places a duty on the Department to consider whether any changes are required to the notional portfolio before each review.

		In practice, this is likely to involve the Department seeking expert advice from the Government Actuary.
Bank of England Prudential Regulation Authority	The current parameters may become inappropriate over time. At each review we expect the Government Actuary to discuss this when reporting. If the report determines that a fair new rate cannot be achieved under the existing parameters, the NI Assembly should be willing to pass secondary legislation to change them.	The Bill places a duty on the Department to ensure, in advance of each review, that the notional portfolio remains appropriate. Amendments to the portfolio are made by regulations requiring the assent of the Assembly.
Schedule C1 Paragraph 17 Describes the hypothetical investor as: □ A recipient of damages □ Who will invest the damages as properly advised □ Who has no financial resources apart from the damages that can be used to meet the losses and expenses for which the damages are awarded and will make withdrawals from the investment fund deriving from investment of the damages □ Whose objectives are to secure that the damages will meet the losses and expenses for which they are awarded and be exhausted at the end of the period of the award		
APIL	The Bill's EFM refers to evidence which found that "while claimants should be treated as more risk averse than ordinary prudent investors, in reality they would be advised to invest in a low-risk diversified portfolio rather than very low-risk index-linked gilts alone". Any analysis of claimant investment behaviour carried out under the current 2.5 per cent discount rate is however highly misleading as claimants have often been forced into having either to take chances with their compensation by putting it in higher risk investments or struggling to make ends meet. An article for the Journal of Personal Injury Law by a financial adviser revealed the scale of	The evidence from the consultation and advice from the Government is Actuary is that a claimant would not be advised to invest in Index-linked Gilts alone, even with a negative discount rate. The option of a periodical

	the challenges faced by injured people stating that “under the 2.5 per cent discount rate, taking into account inflation, charges and tax, an injured person would have had to have made a profit on the investment of between 6.9 per cent and 12.5 per cent a year to ensure the compensation payment reflected what was originally awarded by the court.” Injured people, by their very nature, are not canny investors. They should not be hedging risks. They are not investing to make a gain but rather to make sure their compensation lasts for the period it is supposed to last and puts them, as much as possible, in the financial position they would have been in had the accident not occurred.	payments order is available for claimants who prefer not to accept the risk of investing a lump sum. This is reflected in the definition of the hypothetical investor and the notional portfolio accordingly assumes low-risk investments. The option of a periodical payments order is available for claimants who are prefer not to accept the risk of investing a lump sum.
FOCIS	Believes that referring to any evidence of historic plaintiffs’ investment behaviour when the rate was 2.5% is unreliable. For some considerable time plaintiffs have been severely under-compensated and have therefore had to consider investing in higher risk investments to achieve the assumed rate of return underlying the 2.5% discount rate. How plaintiffs have invested in the past and whether or not they have made risky or non- risky investments should be irrelevant as to how compensation is calculated. Injured people should not be forced to take risks to reduce the wrong doer’s responsibility to compensate appropriately. If the wrong doer does not compensate adequately the responsibility shifts to the injured person or the state to make up the shortfall. Insurers are in a much better position to aggregate their funds and hedge their exposure to fluctuations in the financial markets than individual plaintiffs. In the experience of FOCIS plaintiffs do not invest in risk assets with the aim	See comments above in relation to the rationale for moving away from *Wells v Wells* and in respect of the notional portfolio. The prescribed portfolio is intended to meet the needs of the hypothetical investor as defined in the Bill and is someone who, being properly advised, will seek to meet the needs for which the damages have been awarded and not to profit from the investment of

	of maximising returns in order to generate over-compensation that they can spend on 'wants' rather than 'needs' and they sometimes accept risk in order to facilitate the maintenance of their needs over time, often having also looked at family support to create a saving on care costs, state support and compromising or foregoing needs. This position is further complicated by any plaintiff who did not recover compensation on a full liability basis.	their lump sum.
MPS	We believe while claimants are reported to maintain an overall low level of risk, they are not in practice following a very low risk investment approach – this is the most appropriate assumption given the research compiled for the UK Ministry of Justice in 2013 which found that claimants who sought independent financial advice following settlement would typically invest in a mixed portfolio (including fixed-interest accounts, property, equities, commodities, hedge funds, gilts and notional savings) rather than investing solely in ILGS. Therefore, whilst claimants are reported to maintain an overall low level of risk it seems they are not in practice following a very low risk investment approach. A move to using the Scottish methodology whereby a notional investment portfolio is used moves the assumption closer to reality. However, the notional portfolio may be too cautious.	The notional portfolio represents a low-risk investment strategy. See also comments above in respect of the notional portfolio.
MDU	Decisions on setting the PIDR in NI will not be based on evidence of claimant behaviour and the returns they achieve from investing their compensation awards. Currently no one knows what happens in practice with those investments. Research is urgently needed into how compensation awards are invested and what returns are achieved and it should be this that informs government policy. It should not be informed by a methodology that relies on unsubstantiated guesswork about investment returns. The Department of Justice should be under a duty to gather evidence of actual claimant investment behaviour.	It is difficult to obtain evidence as to how claimants actually invest. Available evidence (submitted in response to MoJ's Call for Evidence in 2019) is about how claimants are typically advised to invest rather than how they have actually invested. The notional portfolio was not based on unsubstantiated guesswork

		but on informed analysis by the Government Actuary based on low-risk investments as identified by Morningstar.
Health and Social Care NI	The current approach assumes that all plaintiffs will adopt a similar investment strategy “at low risk” which produces over-compensation based on research into actual investment practices. Most personal injury claimants in receipt of significant sums have expert investment advisors (sometimes arms of the legal firm which acted in their claim, and costs are included within their compensation). Plaintiffs will therefore be over- compensated on cases where their investment risk portfolio was higher than that of a “low risk” approach. In terms of rectifying the issues that arise: In England and Wales models have been discussed how Government defendants could provide claimants with an investment product which guarantees a rate of return of inflation or above, thus removing the perceived need for a highly conservative (currently negative) discount rate; and Promotion of Periodical Payment Orders – one safeguard against over/under compensation is the use of PPOs with as many Heads of Claim being paid on an annual basis thus reducing the need for a lump sum payment calculated using multipliers and discount rates (PPOs are covered in detail in a separate section of this table)	By its nature, a single discount rate cannot reflect how every claimant will invest. The notional portfolio is designed to meet the specific needs of the hypothetical claimant investor as defined in the Bill.
MDDUS	Further evidence should be obtained that shows how claimants invest their award. It is also important that such evidence is gathered in future to inform later reviews.	It is difficult to obtain evidence as to how claimants actually invest. Available evidence (submitted in response to MoJ’s Call for Evidence in

		2019) is about how claimants are typically advised to invest rather than how they have actually invested.
ABI	The current PIDR is based on an incorrect assumption that a claimant invests all their damages in Index Linked Government Securities. As the evidence the ABI provided to the 2017 Ministry of Justice and Scottish Government consultation on PIDR reform clearly demonstrates, no properly advised investor would invest solely in ILGS or indeed in any other single asset class. It is essential that the PIDR methodology accurately reflects how plaintiffs are advised to invest their awards. The ABI has seen no evidence that claimants in NI invest their compensation awards in a different way or adopt different investment strategies to claimants in other UK jurisdictions. There is a lack of evidence on how claimants invest their compensation settlements and, in response to the Department's 2020 consultation, we encouraged the Department to commission research on the investment choices of claimants who have received compensation awards calculated using the PIDR to establish how they invest their lump sums and, if possible, how those investments have performed. The ABI would expect claimant solicitors to be able to assist with this on behalf of their clients, as after a settlement is reached and an award is made insurers have no further contact with claimants or insight into how they invest.	See comments on evidence as to how claimants invest above.
NFU Mutual	It is recognised that a properly advised claimant would invest their award in a low risk portfolio however there is little research on how these are invested and how these investments perform. Research on this, via consultation with claimant solicitors, could provide insight which can be used in future to assist in the methodology for setting the PIDR to enable this to reflect the actual investment	See comments on evidence as to how claimants invest above.

	choices and outcomes and thus lead to a PIDR which satisfies the 100% requirement.	
Aviva	The proposed methodology does represent how a low risk investor would be advised, with the caveat that we believe the portfolio to be more cautious than a claimant would ordinarily be advised. There is a lack of evidence on how claimants invest their compensation settlements.	See comments above in respect of the notional portfolio.
Zurich	Historically insurers and other compensators have not had any visibility in relation to how a plaintiff will ultimately invest the proceeds of any substantive damages award. It is reasonable to expect that independent financial and investment advice would be recommended to and arranged for plaintiffs in relation to high value damages awards particularly where future loss elements are incorporated. It is also reasonable to assume that such plaintiffs would be regarded as “low-risk investors”. Notes that the APIL responded to the 2017 Ministry of Justice consultation indicating that 60% of firms offered investment advice with the majority of the remaining firms strongly recommending that the claimant obtain independent financial and investment advice. Believes that this is a fundamental aspect to inform the Department in relation to the real-life advice and actions of such investors and clear and open responses should be provided from lawyers and independent financial advisers acting on behalf of plaintiffs.	
AXA	We are not a party to the decision-making process for plaintiffs’ investing a lump sum payment but we can see how funds are invested by the Courts Funds Office on behalf of minors, patients and those without capacity.	
FOIL NI and	Although hard evidence on the point is very difficult to obtain it is likely that the	See comments above in

BIBA	notional portfolio represents a more conservative investment strategy than that which plaintiffs would be advised to pursue. It is however a better reflection than the current methodology based on investing in ILGs alone. The Scottish Government's Policy Memorandum which accompanied the Damages (Investment Returns and Periodical Payments) (Scotland) Act cited the difficulties in attempting to set a rate based on how plaintiffs have actually been investing and that data was either not available or was largely historical and therefore arguably not reliable. The Scottish Government accepted that by adopting the notional portfolio approach it would "reflect responses to the consultation that investing in a mixed portfolio of assets provides flexibility and it is the best way of managing risk". The notional investment portfolio makes a number of assumptions which might not properly reflect investment behaviour. It assumes "passive returns" on investment from a set asset allocation and also with a constant (i.e. unchanging) investment objective. The fixed, prescribed nature of the notional portfolio in the Bill does not allow for the asset allocation to alter over time which might otherwise occur in a real-life investment. By assuming passive or benchmark returns under each asset type, the exposure to the possibility of greater returns on the investment is reduced.	respect of the notional portfolio. We consider it reasonable to assume that claimants would make passive investments. If the portfolio were to be based on an assumption of active investments requiring active management, a greater deduction would accordingly be required to reflect the higher management fees associated with active investment. See further comments above in respect of the notional portfolio.
BLM	The new methodology may be said to reflect how claimants might be advised to invest and it reproduces the approach in Scotland. We believe it is somewhat more conservative when compared to the approach in England and Wales.	
IUA	Fully supports the intention to break the link to the *Wells v Wells* case and	

	acknowledges that while claimants should be treated as more risk averse than ordinary prudent investors, in reality they would be advised to invest in a low-risk diversified portfolio rather than very low-risk ILGS alone.	
IFoA	It is important to recognise that individuals have differing appetites to risk. Low or very low risk for one individual may mean something different to someone else, and such differences in appetite will result in different investment decisions. It could be difficult to access data on actual investment of lump sum awards and so it is sensible to consider a notional investment portfolio. The notional portfolio high-level asset allocation is identical to that used in setting the discount rate in Scotland. Having consistency in this respect is not unhelpful as we would not expect investment decisions by personal injury claimants in NI to differ materially from those made by claimants in Scotland (or England and Wales). Claimants in NI are exposed to a similar investment market in terms of asset types, scale, access to financial advice and expenses as well as sharing a common currency.	By its nature, a single discount rate cannot ensure 100% compensation for every claimant. Inevitably, some claimants will be over-compensated and some will be under-compensated. A further margin is included in the Bill to shift the burden of risk towards defendants, who tend to be corporate organisations that are in a better position than individuals to bear that risk.
Bank of England Prudential Regulation Authority	At current investment conditions, the proposed methodology would represent a suitable cautious, though not over-cautious, investment strategy for the bulk of claimants. However, no two claimants are the same and for some alternative strategies may be preferable because of their personal circumstances.	
Law Society NI	The investment needs of injured parties – and their attitude to risk- may differ from those of the wider population as a result of suffering a life-changing injury.	The notional portfolio is constructed to meet the needs of the hypothetical investor described in the Bill.

Schedule C1 Paragraph 18 Clarifies that, for the purposes of paragraphs 16 and 17, the damages are damages for future pecuniary loss in an action for personal injury and are paid in a lump sum		
Schedule C1 Paragraphs 19 and 20 Provides that the rate will be set as a percentage figure which can be expressed in quarter percentage points and rounded to the nearest whole number or quarter percentage point.		
IUA	20(2) is agreeable if it only applies in the unlikely event that two permitted figures are equally near when rounding. We acknowledge that in such circumstances the nature of the rounding provision will result in an increased chance of over compensation but understand that in all other circumstances the rate will be rounded to the nearest 0.25 percentage points.	
Schedule C1 Paragraphs 21 and 22 Provides that there will be single rate of return which will apply to all cases unless regulations provide otherwise. Where the Department sets out in regulations, subject to the draft affirmative resolution procedure, that there should be more than one rate and review is to be carried out separately for each rate of return. The regulations must set out the circumstances in which each rate is to apply and require the rate-assessor to report separately on each rate of return.		
IUA	Agrees with the provision allowing a dual discount rate approach to be considered. Investments in the short term e.g. 1 to 10 years often produce very different returns than investments held over more than 10 years. However, if a dual rate approach was adopted there should be absolute certainty that two rates should apply to a claimant with a life expectancy longer than the period beyond which a different rate applies. For example, if the threshold beyond which the second rate applied was decided at 10 years, the discount rates applicable to a claimant with a life expectancy of 15 years would be one rate for the first 10 years and a different rate for the next 5 years. This approach differs from the Jersey model in which the entire	This is a matter for future consideration.

<table>
<tr><td></td><td>period will be subject to the upper rate if the life expectancy threshold e.g. 10 years were surpassed. IUA does not believe the latter approach is appropriate since a claimant with a longer life expectancy, all other things being equal, can be left with lower compensation.

Highlights that there is significantly more stability in long-term investments and, therefore, it would be a simpler process to set an equitable long-term discount rate and there would be less requirement for this long-term discount rate to be subject to regular review.

A dual discount rate would be fairer for compensating individuals with different life expectancies, such as a 5-year life expectancy and a 50-year life expectancy. This is not possible with a single discount rate.</td><td></td></tr>
<tr><td colspan="3">Schedule C1 Paragraphs 23 to 26

Provides that the rate-assessor must send a report to the Department when the review has concluded and no later than the last day of the 90-day period for carrying out the review.

The report must be dated and contain the rate determination and a summary of how the rate is calculated.

The Department must lay the report before the NI Assembly as soon as practicable after it has been received and on the same day the rate-assessor must publish the report.

The rate will come into effect on the day after the report is laid.

Provides for the Department to reimburse the rate-assessor for costs incurred in connection with a review.</td></tr>
<tr><td>MDU</td><td>The framework should rule out any retrospective effect. Any new discount rate should only apply to compensation awards relating to incidents that took place after the change in rate. This is particularly important with clinical negligence claims as</td><td>The purpose of the discount rate is to reflect the return on investment of a lump sum</td></tr>
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	they have a long tail; it is not immediately apparent there may have been negligence. Such claims are generally not notified until 3-5 years after the incident and sometime much longer and claims are often clinically complex and so some claims then take three years or more after notification to reach a settlement. This is partly because it takes time for the extent of the damage to become apparently, especially in young persons and also issues such as causation are rarely straightforward. If the retrospective effect is not ruled out it will fall to practising GPs of the future and today to pick up the shortfall if compensation awards rise.	award. By definition, it is applied at the time the damages are awarded, which is the point after which the claimant has the opportunity to invest them. Using the most up-to-date rate of return maximises the chances of achieving 100% compensation and using an out-of-date rate perhaps from several years previous, when the claimant would not have been in possession of the funds to invest them, would not be appropriate.
MPS	For consistency and fairness, the legislation should ensure that any new discount rate set as a result of the review applies to all settlements, regardless of incident date or date of issue of proceedings to avoid arguments on the appropriate discount rate to be applied based on retrospectivity. It should be the date of the resolution of a court case or the settlement date and not the date of the incident or the date of the issue of proceedings There can be a huge delay between an incident occurring and a claim being brought. It is right that the legislation that is used to set the compensation is based on the money that a claimant would currently need to pay for their care, however you choose to calculate it, rather than going back in time to when the claimant was injured which would not make sense from a fairness or claimant point of view.	See comments on retrospective effect above.
Schedule C1 Paragraphs 27 to 30		

Make provision for transitional arrangements so that the rate of return currently prescribed under section 1 of the 1996 Act will continue to apply until such times as a rate is set under the provision in the Bill when enacted		
Schedule C1 Paragraph 31 Deals with regulations made under the Schedule and allows regulations to make different provision for different purposes. Provides that regulations made under the Schedule will be subject to the draft affirmative resolution procedure		
Schedule C1 Paragraphs 32 to 34 Are interpretation provisions for the purposes of the Schedule		
OTHER ISSUES RAISED IN THE EVIDENCE		
Consequences of Changing the Rate on GP Practices and the HSC		
Minister of Health	Has continuing concerns about the potential impact of a sharp reduction to the PIDR in relation to health and social care provision in NI. Recognises that other jurisdictions have adopted revised legal frameworks which set the PIDR with reference to an investment strategy with a higher expected return and not solely reliant on ILGS investments, accepts this position is reasonable and is supportive of the need to strive to honour the 100% rule of fair compensation to the claimant. However, it is important to note that any decision to significantly reduce the PIDR will likely have substantial implications in terms of costs of settlement, subscription costs for healthcare professionals and a potential knock-on effect on the stability of the health and social care workforce which has already faced an extremely challenging year due to the impact of Covid-19. Is aware that the impact of this legislation is likely to increase the recently introduced rate of -1.75% and it will be important for the Bill to pass into law as soon as possible to minimise the potential impacts of this rate on Health.	The costs for public sector defendants of a discount rate set under the proposed new methodology flow from a legal liability to pay full compensation for injuries and losses caused by negligence for which they are responsible and the financial implications are a matter for them to consider and plan for. It is anticipated that a discount rate set under the proposed new methodology would be

	The potential impact on health and social care provision in NI should be borne in mind during the Committee's consideration of the proposed methodology for calculating the PIDR.	higher than one set under the current methodology and will, therefore, reduce the overall costs for defendants. The Department remains committed to the Bill being enacted as soon as possible, subject to the Assembly.
Health and Social Care NI	One of the defendants most impacted by a reduction in the rate is the health service. While it is incredibly difficult to forecast accurately the financial impact of the recent reduction in the rate to -1.75% we estimate that the value of additional compensation in current claims to be anywhere in the region of £40m to £136m. This emphasises the potential over-compensation to many plaintiffs and the resultant ramifications for public funds of the PIDR. The premiums for indemnity provision for GPs could as much as double, if not more, for GP practices under the new rate which will be incredibly challenging from a financial perspective for them.	See comments above on impact on public sector. This relates to the current rate rather than the Bill. It is anticipated that a rate set under the proposed new framework would be higher. See comments made above in respect of the comments made by the Minister of Health.
British Medical Association NI General Practitioners Committee	GPs in Northern Ireland are now the only doctors within the UK NHA or HSC who are responsible for providing their own indemnity. This is a substantial outlay for doctors on an annual basis amounting to between £8k and £12k for a full time equivalent. A long term reduction in the discount rate is likely to increase these costs over the next number of years and could make indemnity insurance unaffordable for GPs to purchase. In turn this would make general practice untenable as without indemnity GPs cannot practice. In England the rate changed from 2.5% to -0.25% and the estimated impact on GP indemnity was that it would increase from around £13k per GP per annum to over £30k per GP per annum.	The implications for GP indemnity costs of a discount rate set under the proposed new framework is a matter for the profession and the Department of Health. As the BMA has acknowledged, this is not a matter that can be taken into account in setting the rate.

	Any increases in the costs associated with being a GP will inevitably be a chill factor for the recruitment of junior and further doctors into general practice. This impact will be replicated on the ability to recruit GPs to Northern Ireland from the rest of the UK, Ireland or further afield. This is particularly worrying when we consider the age profile of GPs and the number who are expected to retire in the next five years and comes at a time when we cannot afford to lose GPs. It would bring additional pressure into a system that is already working under immense pressure. Another significant concern is that, due to the change in the discount rate, medical defence organisations may feel that they have no alternative but to call in debt to cover future liabilities. This would result in individual GPs facing huge bills and having financial demands of repayment they are unable to meet. This could result in bankruptcy and the closure of practices. The consequence of this would be that not all communities would have access to local GP services, and this would have a knock-on effect on the wider HSC system. The reduction in the discount rate in England triggered the introduction of a state backed indemnity scheme which now covers most of their GP indemnity. An indemnity scheme that reimburses costs must be introduced as a result of a reduction in the rate to mitigate the impact on GPs and enable them to continue practising. Our preference is the establishment of a compensation scheme for increased indemnity costs. Such a scheme would mitigate the impact on GPs and general practice and would allow continued practice on the same basis as we currently operate. The other option is to piggyback on the England and Wales GP resolution scheme which may require primary legislation. We acknowledge that the Department of Justice cannot take the impact of the discount rate on indemnity insurance and general practice into the reasoning for the methodology that is chosen to strike the rate however it is essential that it works with the Department of Health to ensure that the effects of the change to the rate	

	are not crippling to general practice and the wider health service in Northern Ireland.	
MPS	Changes to the PIDR will have a profound consequence on the cost of clinical negligence which in turn will have an impact on healthcare professionals and the costs for the Department of Health via health and social care. The wider impact on and the additional costs that may be faced by HSC have to be taken into account however the rate is set - it is not just a simple, actuarial, mathematical formula. In oral evidence the MPS representative referred to a paper produced by the British Institute of International and Comparative Law that looked at countries that set PID rates. In some countries the PIDR is quite positive – it can be as high as +6% or +3.5%. While they could not speculate as to the motives for setting those higher discount rates the inference could be drawn that the impact on society is one of the things that may be taken into account by some countries when setting the rate.	The purpose of applying a discount rate is to give effect to the long established legal principle that the purpose of an award of damages for future financial loss is to put the claimant in the position they would have been in if they had not been injured, i.e. full compensation, no more and no less. The costs for defendants, including public sector defendants, of a discount rate set under the proposed new methodology flows from the legal liability to fully compensate a claimant for injuries and losses caused by negligence. The principle of 100% compensation is the basis of the current law in all the UK jurisdictions and in the Republic of Ireland and means that the impact on society cannot be taken into account. We are not aware of any other jurisdiction in which 100% compensation is not the legal

		basis of an award of damages for future financial loss caused by negligence or of the discount rate. It may be the case that some jurisdictions have not reviewed their discount rate and that political factors have influenced this. We consider that this demonstrates the importance of introducing a minimum review period and ensuring certainty and transparency in regard to how the rate is set.
MDU	The recent change in the PIDR to -1.75% will have a dramatic impact on HSC funding and on GPs across NI. GPs fund their own indemnity arrangements and are already struggling with the highest indemnity costs in any part of the UK. They now face marked increases in their indemnity subscriptions because of this decision which will have a severe and adverse effect on them. Also any money that goes on compensation awards comes out of front-line patient care. Even before the change to the discount rate indemnity costs were becoming a very unaffordable burden for GPs and they have been cited as a significant factor in early retirements, in our members dropping their sessions and even in the recruitment of new doctors into primary care. In England and Wales there was a similar effect which was largely addressed by the introduction of state indemnity for GPs. Removing the indemnity for NHS clinical negligence claims from English and Welsh GPs had the effect of pushing the average indemnity cost down from around £8k - £10k per individual GP to under £1k.	This relates to the current discount rate rather than the provision in the Bill. It is anticipated that a rate set under the proposed new framework would be higher than the current rate.

ABI	The Health Service in NI is one of the biggest compensators for settlements involving the Discount Rate, usually in clinical or medical negligence cases. Changing the rate to a negative number will increase compensation costs for the HSCNI and the amount of funds it would need to reserve against future claims. GPs and other medical professionals could also see the cost of their indemnity insurance premiums rise. Adopting the Scottish model is likely to cost public bodies in NI significantly more. The financial memorandum for the Scottish Bill noted that a difference of 1% between the discount rate in England and Wales and Scotland could result in an additional cost of up to £20m per annum for public bodies in Scotland. The Scottish Government is required to meet any deficit from its own reserves with no additional funding under the Barnett formula from HM Treasury.	It is anticipated that a discount rate set under the proposed new methodology will be higher than a rate set under the current methodology (so the costs for defendants and compensators will be less). It cannot be assumed that a discount rate set using the Scottish model would be lower than a rate set using the England and Wales model.
Aviva	The framework used in Scotland is based on a policy decision taken by Scottish Ministers to over-compensate claimants. This has the consequence of generating additional costs for compensators including HSCNI and other public bodies.	The policy memorandum for the Scottish Bill that led to their legislation stated that it did nothing to disturb the 100% compensation principle but that the Scottish Government recognised that the assessment of a lump sum award of damages for future loss can never be an exact science and that there will inevitably be levels of under- and over-compensation.

IUA	Wider societal implications such as the cost to the NHS arising from its role in clinical negligence claims and the direct impact of this on taxpayers must be considered when setting the discount rate.	The purpose of applying a discount rate is to give effect to the long established legal principle of 100% compensation.
Implications on Insurance Premiums		
ABI	PIDR is a key component for underwriters calculating insurance premiums. The lower the PIDR is set, the more pressure this places on insurers' claims costs and, as a result, puts significant inflationary pressure on motor insurance premiums in NI which are already higher than other parts of the UK due to specific local factors such as the costs involved in the civil justice system in NI and higher road traffic accident rates. The potential cost of a serious injury claim is incorporated into every motor insurance policy, so a very low discount rate in NI would put inflationary pressure on motor insurance premiums, in particular for young drivers who are at greater risk of being involved in an accident. Businesses in NI are required by law to take out Employer's Liability insurance and many also take out Public Liability insurance to cover the cost of liability claims against them. A lower PIDR would put significant inflationary pressure on business insurance premiums at a time when NI businesses are facing the additional costs generated by Covid-19 and Brexit. In addition, a lower PIDR would also increase the level of liability cover a responsible business would seek to purchase. Businesses have previously bought around £2m worth of cover to meet the potential cost of a liability claim on the basis of a PIDR of 2.5%. A lower PIDR would push up the cost of compensation settlements and businesses would therefore need to consider taking out a higher level of insurance cover or risk meeting the additional compensation costs from their own revenues.	It is anticipated that a discount rate set under the proposed new framework will be higher than a rate set under the current framework and, therefore, the costs for defendants and compensators will be less.

	The lack of a detailed impact assessment accompanying this Bill is in contrast to the impact assessment provided by the Ministry of Justice in its equivalent legislation to reform the PIDR. The MoJ impact assessment noted that setting the PIDR for England and Wales at -0.75% estimated an increase of £50 - £75 on average comprehensive motor insurance policy.	The impact assessment that accompanied the MoJ Bill prior to it becoming legislation, like the regulatory impact assessment in relation to the Department's proposals, assessed the overall impact of the proposals relative to the existing framework - it noted that the rate would not change until the Lord Chancellor conducted the first review under the new framework and so the impact of a rate change had not been quantified.
Aviva	The framework used in Scotland is based on a policy decision taken by Scottish Ministers to over-compensate claimants. This has the consequence of generating additional costs for compensators including insurers.	See comments above about the Scottish policy memorandum.
Zurich	The obvious effect of over-compensation is a significant increase in the cost of the claims involved which inevitably results in an increase in the cost of insurance premiums for all parties within a given jurisdiction whether personal, private enterprise or public sector. There is also concern that where the PIDR is set at a level which promotes over-compensation then there is a significant risk that small businesses and enterprises may struggle to arrange insurance on what should be expected to be standard terms where fixed limits of indemnity may no longer be sufficient to cover the potential increase in the cost of catastrophic claims – where a limit of indemnity is breached then any surplus claims would require to be met by the business itself which may lead to considerable financial difficulties.	The Bill is intended to result in a discount rate that better gives effect to the legal principle of 100% compensation and reduces the risk of over-compensation as compared to a rate set under the current framework.

AXA	Claimants in Northern Ireland already enjoy the benefits of higher damages for pain and suffering than in any other UK jurisdiction e.g. according to the Judicial Studies Board guidelines in the respective areas, a very severe brain injury is valued at £155k - £220k in Scotland, £185k – 265k in England and Wales and £360k to £670k in Northern Ireland. Against this background and with judicial and legislative reforms taking place in England and Wales and in the Republic of Ireland designed to lower claim costs and assist consumers, great care needs taken not to set back Northern Ireland through ever spiralling damages and insurance premiums.	The core legal principle of 100% compensation means that the financial implications for defendants, compensators and wider society are not a relevant consideration when setting the discount rate, rather these flow from a legal liability.
IUA	The -1.75% rate is the lowest discount rate in the world. The implementation of similar rate changes such as in England and Wales from 2.5% to -0.75% has resulted in increases in motor and liability insurance policy premiums. The environment created by such a rate may discourage insurers' participation in the Northern Ireland insurance market in turn impacting upon the availability of insurance products.	The rate of –1.75% was set under the current *Wells v Wells* framework. The purpose of applying a discount rate is to give effect to the legal principle of 100% compensation meaning the impact on insurance premiums is not a factor that can be taken into account.
FOCIS	The incidence of lifelong disabling injuries that result in calculations that significantly engage the discount rate is low. The impact of a fair discount rate on insurance premiums would be spread across all policyholders and, whether they are consumers or businesses, they would hardly notice the difference. Conversely if the discount rate is set too low the adverse impact on those who have wrongly sustained life-changing injuries is profound. There will be impacts on their families and in all	The proposed framework is intended to produce a discount rate that is fair to both claimants and defendants.

	likelihood it will fall back on the state to support them and hence fall back on taxpayers.	
Promotion of Periodical Payment Orders (PPOs)		
Minister of Health	One safeguard against under compensation would be to ensure cases are settled by Periodical Payment Orders (PPOs) with as many Heads of Claims as possible being paid on an annual basis thus reducing the need for a lump sum payment calculated using multipliers and discount rates. The use of PPOs would negate the need to consider the investment advice due to the annualised payment of large values made by the Trust.	Courts already have the power under section 2(1) of the Damages Act 1996 to make PPOs without the consent of the parties and rules of court set out the factors that a court has to take into account in deciding whether to make a PPO.
Health and Social Care NI	One safeguard against over/under compensation is the use of PPOs with as many Heads of Claim being paid on an annual basis thus reducing the need for a lump sum payment calculated using multipliers and discount rates. Heads of claims such as earnings, care and other therapies, which often have large costs, can be placed into a PPO and this will allow the claimant to manage a large settlement amount spanning many years and provides them with the assurance of a continuous annual income being received every year for the remainder of their life. NHS Trusts, being government-backed, are able to offer PPOs in all suitable claims. This contrasts with a lump sum award where the claimant takes on the responsibility for managing the money and for its investment, inflation and longevity to ensure it lasts until they die. There are challenges about how private and public bodies could be distinguished in relation to PPOs and/or how assurances could be given to plaintiffs that private bodies can make those payments in the future.	As noted above, the courts in Northern Ireland (like the courts in England and Wales) already have the power to make periodical payments orders without the consent of the parties.

	HSC representatives highlighted in oral evidence that there was some discussion in England and Wales in recent years about legislating for courts to be able to order PPOs. Prior to the pandemic Scotland had legislation in 2019 which is yet to be passed giving the courts power to order PPOs. Some thoughts have already been given to this issue across the water and there is possibly a regional discussion to be had about how NI can similarly tackle the issue. Some claimant investment advisers have a potential conflict of interest on the question of PPO v lump sum (the larger the lump sum, the higher the fees for investment advice charged by the firm). It is likely that with the negative discount rate further resistance to using PPO's may arise (outside the Care and Case Management Components). The HSC believe it would be prudent for the Department of Justice to legislate to strengthen the provisions in the Damages Act dealing with PPOs so that plaintiffs are required to accept the defendant's offers of PPOs for further loss rather than being able to argue before the Court for lump sums in the highest-value claims. This approach would obviate reliance on estimates of future returns and inflation rates when such estimates will largely be economic and actuarial 'stabs in the dark'. This approach would obviously depend on plaintiffs and the Courts being satisfied that the defendant will be in a position to meet the payments going forward. In this jurisdiction the vast majority of high value personal injuries cases involve Health Trusts as defendants and therefore the solution to this problem should take into account that in most cases the defendants will be a public body who will be in a position to meet future PPO liabilities. The solution to the uncertainty of future investment return and inflation rates involves taking that uncertainty out of the equation and enforcing settlement of future loss claims by way of PPOs. PPOs also create fairness and balance. In a lump sum situation, if the plaintiff sadly dies early, the vast lump sum goes to the estate, which is not what the money was intended for. There is also a risk of under-compensation if the lump	The Scottish legislation (still to be brought into operation) was to bring Scotland into line with England and Wales and Northern Ireland. The Department considers that it would not be appropriate or practical to require a court to make a PPO in certain cases without any consideration of all the relevant circumstances. The court will act in the objective interest of the claimant.

	sum is not invested wisely. A lump sum is limited to prediction of life expectancy whereas PPOs take that risk away. In addition, plaintiffs can exceed their life expectancy and the PPO gives them the security of coverage in such circumstances.	
MDU	In oral evidence MDU outlined that defence organisations are not insurers. They hold a mutual fund from which they can make a payment on behalf of a member. They are not regulated insurers and cannot make a straightforward periodic payments order in the way insurers and government can. A state scheme to support GPs would be needed to be able to provide these periodic payments for GP claims. In England and Wales cases are dealt with wholly by NHS Resolution with GPs and secondary care providing periodic payments across cases.	This is a matter for the Department of Health.
Law Society of NI	Consideration should be given to an extension of the legislation governing PPOs in high value catastrophic injury cases. This may result in a degree of greater certainty and fairness to both plaintiffs and compensators. PPOs obviate reliance on estimates of future returns and inflation rates. This approach would rely upon the Court and plaintiff being satisfied that the defendant is in a position to meet the payments going forward. PPOs can help mitigate the risk of over or under-compensation.	See comments in respect of periodical payments orders above.
Zurich	Plaintiffs have the option to seek a PPO in the event that they have any concerns regarding the adequacy of a lump sum claim settlement. We have experience from a very recent case in Northern Ireland where the impact of a change in the PIDR could have had a dramatic and erroneous impact on the overall settlement value of the claim had it not been for the fact that a considerable number of the Heads of Claim were resolved by way of a PPO.	The Department acknowledges that the use of periodical payments orders can avoid the risks inherent in receiving damages as a lump sum payment.

ABI	There are legal protections for PPOs. The protection extends under the Courts Act 2003 because insurers are regulated financial services companies. The financial services compensation scheme will continue any PPO payments in the highly unlikely event that an insurer goes into administration or is liquidated. From an insurers point of view a PPO is a more complex settlement. With the option of a lump sum settlement the sum is agreed, the insurer pays it and that is it. A PPO means an on-going relationship between the insurer and the plaintiff. If a plaintiff indicates that they would like a PPO, the ABI could not think of any circumstances under which an insurer could realistically decline the request. The issue is that very few plaintiffs' solicitors appear to recommend it to their client. There is legislation in Scotland that provides for the courts to impose or enforce PPO but it has not been implemented yet.	 The Damages Act 1996 already makes this provision for Northern Ireland. See comments on periodical payments orders above.
FOIL	PPOs have been available since April 2005 but there has not been as great a take-up as might have been expected. An amendment to the 1996 Damages Act by the 2003 Courts Act gives protections. Any PPOs funded by a general insurer that is compulsorily insured – in employer's liability cases or motor accident cases – are secure. They are protected under the financial services compensation scheme (FCS). Compulsorily insured matters that give rise to injuries, such as a catastrophic road traffic accident are covered. All drivers must have motor insurance and, in the absence of motor insurance, the Motor Insurance Bureau (MIB) covers it. Employer cases might involve an accident at work, such as someone getting a hand or limb trapped or falling from a height and suffering a serious injury that means they have to go off work to receive care and attention. Those claims are also covered under the FSCS.	

FOCIS	The overwhelming experience of FOCIS members is that most insurers (not all) are really reluctant to offer PPOs and they will often take plaintiffs right to the door of the court before they are willing to switch from a lump-sum offer to a PPO. The reason the majority do not do so is that they know that the long-term cost of taking the investment, inflation and longevity risk is greater that the cost of any of the discount rates that have been discussed. When PPOs are offered, they tend to relate only to one of the many heads of loss, typically care and case management. PPOs are no excuse for setting the discount rate at a level that will result in under-compensation for a third or more of the plaintiffs which would be the result even with the 0.5% under-compensation margin adjustment.	See comments above that refer to the power of courts to make periodical payments orders without the consent of the parties.
APIL	The use of PPOs is very rare. They are very rarely offered and the reason seems to be that the insurers like to have the risk managed and off the books as opposed to having an ongoing situation. They also cost them more. Injured people find the whole court process emotionally draining, exhausting and very stressful. When they get to the end of it they almost like to cut the tie and they do not really want to have their lives managed or to have a connection with something that they found very difficult. They would rather take a lump sum and move on. PPOs are one way of moderating the risk relating to investments but they usually apply only to one head of claim and are not suitable for all claims. In the majority of cases the FSA will step in and protect the payment but there will be the odd case where that does not happen and that person may be left without compensation.	See comments in respect of periodical payments orders above.