



Department of
Justice

An Roinn Dlí agus Cirt

Máinnystrie O tha Laa

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FROM THE OFFICE OF THE JUSTICE

MINISTER

Minister's Office Block B,
Castle Buildings Stormont
Estate
Ballymiscaw
Belfast
BT4 3SG

FROM: DALO
DATE: 19 JANUARY 2021
TO: CHRISTINE DARRAH

SUMMARY

Business Area: Access to Justice Directorate.

Issue: Briefing on the content of the Damages (Return on Investment) Bill, for which Executive approval to introduce is being sought, and reasons for seeking accelerated passage.

Restrictions: None.

Action Required: To note.

Officials Attending: To be confirmed.

INTRODUCTION

1. This paper is to advise the Committee about the content of the Damages (Return on Investment) Bill and explain the reasons for seeking accelerated passage.

BACKGROUND

2. The background to this Bill was set out in the written brief to the Committee dated 13 October 2020 and by officials in their oral brief on 22 October.
3. Those briefings advised that, following a public consultation, the Department had concluded that, in the interests of fairness both to claimants and defendants (including the taxpayer, businesses and consumers), a new legal framework for setting the personal injury discount rate should be adopted that assumes a claimant invests a lump sum awarded as damages for future financial loss in a mixed portfolio of low-risk investments. It was noted that setting the rate on this basis will better give effect to the core legal principle of 100% compensation.
4. The Committee was also advised that the Department had decided that its preferred model for a new framework for setting the rate was the Scottish model, on the basis of the transparency and clarity that it provides. The detail of the model is described below.
5. The Executive approved the drafting of a Bill to provide for a new framework based on the Scottish model on 19 November.
6. A Bill has now been drafted and a copy is attached along with a draft explanatory and financial memorandum (**Annexes A and B**). The Minister has issued a paper seeking Executive agreement to introduce the Bill to the Assembly and to accelerated passage. It is anticipated that the Bill will be introduced on 23 February.

CONTENT OF THE BILL

7. The Bill provides for the personal injury discount rate (the assumed rate of return on investment of a lump-sum award of damages for future financial loss in a personal-injury case) to be set by the Government Actuary, based on the return on

8. a specified notional portfolio of low-risk investments over a period of 43 years, allowing for inflation and applying two standard adjustments: a deduction of 0.75% to take into account the impact of taxation and the costs of investment advice and management; and a deduction of 0.5% as a further margin to mitigate against the risk of under-compensation. It requires the current rate to be reviewed as soon as the new framework is in place and for subsequent reviews to bring us in line with the cycle of regular reviews every five years in Scotland, with provision for an extra review within this period, if directed by the Department. The detail of the notional portfolio, the assumed period of investment and the amount of the standard adjustments can be changed by the Department by regulations subject to draft affirmative procedure.
9. A more detailed overview of the key provisions contained within the Bill is provided at **Annex C**.

ACCELERATED PASSAGE

9. Under Assembly standing order 42, the Minister is required, before introduction, to explain to the Committee: (a) the reason or reasons for accelerated passage; (b) the consequences of accelerated passage not being granted; and, if appropriate, (c) any steps she has taken to minimise the future use of the accelerated passage procedure.
10. The reason for seeking accelerated passage is to allow a stable discount rate to be set as soon as possible and thus bring about an end to the ongoing uncertainty and consequent delays to the settlement of personal injury claims.
11. Claimants are already anticipating a downward change to the current discount rate of 2.5%. It is not, therefore, in their financial interests to settle cases until the rate has been reduced. Consequently, cases are being deferred, creating a backlog in

12. the courts. The Department wants a new rate in place as soon as possible to bring an end to these delays and to enable claimants to receive the full amount of compensation to which they are entitled.
13. Whilst recognising that the rate of 2.5% does not reflect the return that a claimant can expect on investment of their damages, the Department has concluded that the current framework for setting the rate, under *Wells v Wells*, does not deliver the core legal principle of 100% compensation. Accordingly, it does not consider it appropriate to set a new rate under this framework at this time. Further, even if the Department were to set a rate under the existing framework (likely to be –1.75% or lower), it would not end the ongoing uncertainty, since it would then be in the financial interests of defendants to defer settlements in anticipation of an increase to the rate under the new framework.
14. Therefore, the current uncertainty will only be ended for all parties when a stable rate is set under a new legislative framework. If accelerated passage is granted, we would be hopeful that the Bill would receive Royal Assent by summer (possibly even sooner depending on the Assembly) and a new rate could be set by early autumn. If accelerated passage is not granted, then we would not expect the Bill to receive Royal Assent until the end of the year, perhaps later, and a new rate would not be in place until at least early 2022. The consequences of this would be that many cases will be deferred for even longer than would otherwise be the case which is not in the interests of personal injury claimants.
15. In terms of steps taken to minimise the future use of the accelerated passage procedure, the Minister has no plans to use the procedure again and would not expect the particular circumstances of this Bill to reoccur.



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Yours sincerely,

DALO

DAMAGES (RETURN ON INVESTMENT) BILL

This Appendix provides an overview of the draft Bill, which amends the Damages Act 1996 ('the 1996 Act') as it applies to Northern Ireland, to create a new legislative framework for setting the discount rate.

The draft Bill comprises 6 clauses and a schedule and this appendix provides a description of these. For ease of explanation, these are not described in the correct numerical sequence rather the substantive provisions are dealt with first, followed by supplementary provisions.

Clause 1 – Assumed return on investment

This clause **inserts a new section C1 into the Damages Act 1996.**

New section C1:

- 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 future financial loss, which is **the same duty that a court already has under the 1996 Act but the role of the Department in setting the rate is removed.**
- 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.
- Introduces new Schedule C1, which is inserted in the 1996 Act (see below).
- Provides that **the rate assessor is the Government Actuary** and in the event that this office is vacant, the deputy Government Actuary. The Department also has a power by regulations subject to draft affirmative procedure, to appoint a different rate-assessor and someone to deputise for that person, subject to their agreement.

Clause 2 – Process for setting rate of return

This clause **inserts a new Schedule C1 into the 1996 Act** as set out in the Schedule to the Bill, **which sets out the detail about how the Government Actuary is to approach the task of reviewing and setting the discount rate.**

Schedule (new Schedule C1)

Paragraph 1 provides that the first review carried out by the Government Actuary is to be a review of the current rate.

Paragraph 2 deals with the timing of subsequent reviews and requires a review to take place on 1 July 2024 and thereafter **establishes a five-year cycle of regular reviews** aligned with the cycle of reviews of the discount rate in Scotland. The Department has a power to require the Government Actuary to conduct an earlier review but this does not break the timescale for regular reviews.

Paragraph 3 **requires any review of the rate to be concluded within 90 days** of the day on which it must be started.

Paragraphs 4 to 6 give an overview of the rate-setting process. Following a review, the rate will remain the same or be changed. In carrying out a review, the Government Actuary can consult or seek advice from any person and must have regard to their views if received within a reasonable time.

Paragraph 7 sets out the basis on which the Government Actuary is to determine the discount rate and provides that **the rate should reflect the rate of return for the notional portfolio over a 43 period.**

Paragraph 8 gives the Department a power by regulations subject to draft affirmative procedure to change the period of 43 years to another period.

Paragraph 9 requires **an adjustment to the rate to take account of inflation** as measured by the RPI, or such other measure of inflation as may be prescribed by the Department in regulations subject to draft affirmative procedure.

Paragraph 10 requires **standard adjustments** to be made to the rate arrived at on the above basis – **a deduction of 0.75 of a percentage point to take account of the impact of taxation and the cost of investment advice and management and a deduction of 0.5 of a percentage point as a further margin which recognises there is risk inherent in any investment.**

Paragraph 11 provides that **the amount of the standard adjustments may be changed by the Department** by regulations subject to draft affirmative procedure.

Paragraph 12 **sets out the notional portfolio with the types of investments and percentage holdings of each**, while paragraph 13 relates to interpretation of the types of investments included in the notional portfolio.

Paragraph 14 provides for the Department to make regulations, subject to draft affirmative procedure, to define any of the types of investment included in the notional portfolio.

Paragraph 15 provides for **the Department to have a power** by regulations, subject to draft affirmative procedure, **to change the list of investments and percentage holdings in the notional portfolio.**

Paragraph 16 provides that **before a review of the rate is due to start, the Department must consider whether the notional portfolio remains appropriate** with reference to the characteristics and objectives of the hypothetical claimant investing an award of damages, as described in paragraph 17.

Paragraph 18 clarifies that the type of damages in question is a lump sum award of damages for future financial loss.

Paragraphs 19 and 20 provide for the rate to be set as a percentage figure and rounded to the nearest whole number or quarter percentage point.

Paragraph 21 provides for there to be **a single rate which will apply to all cases unless the Department** by regulations subject to draft affirmative procedure **requires more than one rate to be set**. Where more than one rate is set, a review is to be carried out separately for each rate.

Paragraph 22 provides that, where the Department makes regulations requiring more than one rate to be set, these must set out the circumstances in which each rate is to apply.

Paragraph 23 provides for **the Government Actuary to send a report of his review to the Department** and sets out the information which the report must include.

Paragraph 24 requires **the Department to lay the report before the Assembly** as soon as practicable after it is received and for the Government Actuary to publish the report on the same day.

Paragraph 25 provides that **the rate as determined by the Government Actuary will come into effect on the day after the report is laid**.

Paragraph 26 provides for reimbursement by the Department of the Government Actuary's costs.

Paragraph 27 makes transitional provision.

Paragraph 28 sets out the procedure for regulations made by the Department under the powers in the Schedule.

Paragraph 29 is an interpretation provision.

Supplementary provisions

Clause 3 makes ancillary provision.

Clause 4 is an interpretation provision.

Clause 5 deals with commencement.

Clause 6 sets out the short title.