Northern Ireland Assembly

Committee for Justice

Report on the Damages (Return on Investment) Bill

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Report: NIA 122/17-22 Committee for Justice.

Contents

Powers and Membership

Powers

The Committee for Justice is a Statutory Departmental Committee established in accordance with paragraphs 8 and 9 of the Belfast Agreement, Section 29 of the Northern Ireland Act 1998 and under Standing Order 48. The Committee has a scrutiny, policy development and consultation role with respect to the Department of Justice and has a role in the initiation of legislation.

The Committee has power to:

- consider and advise on Departmental budgets and annual plans in the context of the overall budget allocation;
- approve relevant secondary legislation and take the Committee Stage of primary legislation;
- call for persons and papers;
- initiate inquiries and make reports; and
- consider and advise on matters brought to the Committee by the Minister of Justice.

Membership

The Committee has 9 members, including a Chairperson and Deputy Chairperson, and a quorum of five members. The membership of the Committee is as follows

- Mr Mervyn Storey MLA (Chairperson)[1]

[1] With effect from 14 June 2021, Mr Mervyn Storey replaced Mr Paul Givan as Chairperson

- Ms Sinéad Ennis MLA (Deputy Chairperson)[2]
- Mr Doug Beattie MLA
- Ms Sinéad Bradley MLA[3]
- Ms Jemma Dolan MLA[4]
- Mr Robin Newton MLA[5]
- Ms Emma Rogan MLA[6],[7]
- Mr Peter Weir MLA[8]
- Ms Rachel Woods MLA

[2] With effect from 2 August 2021, Ms Sinéad Ennis replaced Ms Linda Dillon as Deputy Chairperson
[3] With effect from 26 May 2020, Ms Sinéad Bradley replaced Mr Patsy McGlone
[4] With effect from 16 March 2020, Ms Jemma Dolan replaced Mr Pat Sheehan
[5] With effect from 21 June 2021, Mr Robin Newton was appointed as a Member of the Committee
[6] With effect from 17 February 2020, Ms Martina Anderson replaced Mr Raymond McCartney
[7] With effect from 9 March 2020, Ms Emma Rogan replaced Ms Martina Anderson
[8] With effect from 21 June 2021, Mr Peter Weir replaced Mr Paul Frew

List of Abbreviations and Acronyms used in the Report

Abbreviation/Acronym	Full explanation of Abbreviation/Acronym
ABI	Association of British Insurers
APIL	Association of Personal Injury Lawyers
BIBA	British Insurance Brokers' Association
BIICL	British Institute of International and Comparative Law (BIICL)
BMA (NIGPC)	British Medical Association Northern Ireland General Practitioners Committee
CBI NI	Confederation of British Industry Northern Ireland
CPI	Consumer Price Index
CPIH	Consumer Price Index with Housing
FOCIS	Forum of Complex Injury Solicitors
FOIL NI	Forum of Insurance Lawyers Northern Ireland
FSCS	Financial Services Compensation Scheme
GA	Government Actuary
GAD	Government Actuary's Department
GMS	General Medical Services
GP	General Practitioner
HSCNI	Health and Social Care Northern Ireland
IFoA	Institute and Faculty of Actuaries
ILGs	Index-Linked Gilts
IUA	International Underwriting Association of London
LCJ	Lord Chief Justice
MDDUS	Medical and Dental Defence Union of Scotland
MDU	Medical Defence Union
MIB	Motor Insurance Bureau

Abbreviation/Acronym	Full explanation of Abbreviation/Acronym
MPS	Medical Protection Society
NI	Northern Ireland
NICTS	Northern Ireland Courts and Tribunals Service
PIDR	Personal Injury Discount Rate
PPO	Periodical Payment Order
RHA	Road Haulage Association
RoI	Republic of Ireland
RPI	Retail Price Index
UK	United Kingdom

Executive Summary

1. This report sets out the Committee for Justice's consideration of the Damages (Return on Investment) Bill.

2. The Damages (Return on Investment) Bill consists of six Clauses and one Schedule and its purpose is to introduce a new statutory methodology for calculating the personal injury discount rate (PIDR), which is an adjustment made to an award of damages for wrongfully inflicted personal injury. Such awards are often in the form of a lump sum and should put the injured person in the same financial position had they not been injured, including loss of earnings and future care costs, without over- or under-compensating them (known as the 100% rule.) The PIDR is used to adjust the lump sum to reflect interest that may be earned from investing the lump sum as well as the effect of tax, expenses and inflation on these returns to reflect the 100% rule.

3. The Bill will also ensure that the rate is regularly reviewed at least every five years and will transfer the responsibility for setting the rate from the Department of Justice to the Government Actuary.

4. The Committee requested evidence from interested organisations and individuals as well as the Department of Justice as part of its deliberations on the Bill.

5. In doing so the Committee identified a range of key issues on which views would be particularly welcome. They included:

- Whether the new statutory methodology to calculate the personal injury discount rate was the most appropriate to achieve as close to 100% compensation as possible
- Whether the new methodology had the potential to veer towards over compensation and if so how this could be rectified
- Whether the new methodology had the potential to veer towards under compensation and if so how this could be rectified
- Whether the new statutory methodology better reflects how a claimant would be advised to invest their award
- What the likely effects of using an investment period of 43 years rather than 30 years in the model are and whether respondents agreed with this approach
- What the advantages or disadvantages of transferring responsibility for setting the rate from the Department of Justice to the Government Actuary are and whether there is an appropriate level of accountability in the new statutory methodology

6. Thirty-one written submissions were received and the Committee held seven oral evidence sessions with organisations as well as exploring the issues raised in the written and oral evidence with the Department of Justice both in writing and in oral briefings. The Committee also sought information from the Minister of Health and the Minister of Finance on the cost implications of changes to the PIDR and the position regarding funding and commissioned a research paper on the wider impacts of changes to the discount rate in England and Wales and in Scotland.

7. The Committee sought advice from the Examiner of Statutory Rules in relation to the range of powers within the Bill to make subordinate legislation. The Examiner considered the Bill and Delegated Powers Memorandum and was satisfied with the rule making powers provided for in the Bill.

8. The Committee considered the provisions of the Bill and related issues at 13 meetings.

Key Issues Relating to the Clauses and Schedule in the Bill

9. At its meeting on 7 October 2021, the Committee undertook its formal clause by clause consideration and agreed the Clauses and Schedule in the Bill as drafted.

10. The evidence received on the Bill was set within the context of the Department of Justice bringing forward secondary legislation to change the PIDR from 2.5% to -1.75% from 31 May 2021. The new rate had been calculated in accordance with the legal principles established by the House of Lords in *Wells v Wells* that personal injury claimants are to be treated as very risk averse and the rate should be set with reference to returns on Index-Linked Gilts (ILGs).

11. The Department advised that the impact of the change of the rate on business, charities and voluntary bodies and the public sector would be to increase the amount of damages for future financial loss that may be payable in any personal injury action to which they are a party and it may have an effect on the cost of insurance.

12. The main areas covered in the evidence received by the Committee included:

- to what extent, if any, the social and economic impact of the PIDR could be taken into account when setting the framework

- whether responsibility for setting the PIDR should remain with the Minister of Justice rather than transfer to the Government Actuary
- the provision of 5-yearly reviews of the rate
- the use of an assumed investment period of 43 years
- whether the proposed standard adjustments to take account of the impact of taxation and the costs of investment advice and management and as a further margin to recognise that there is a risk inherent in even the most carefully advised and invested portfolio are necessary and are set at an appropriate level to avoid over-compensation or under-compensation
- the composition of the notional investment portfolio
- the description of the hypothetical investor.

13. While not specifically covered in the Bill, the use of periodical payment orders (PPOs) was also raised.

General Comments on the Bill

14. All the organisations who submitted evidence supported and were committed to the 100% compensation principle to ensure a person is fully compensated for their losses but no more or no less. There was however distinctly differing views on whether the new framework for setting the PIDR in the Bill is the most appropriate approach to adopt.

15. While some respondents to the call for evidence supported the proposed new framework set out in the Bill others, who represent or support claimants, are of the view that the current *Wells v Wells* methodology should be retained. Organisations who represent businesses, insurance companies and public sector bodies who are the defendants in such claims do want the

methodology changed but are of the view that the framework veers towards over-compensation and adjustments are needed.

16. As a result of the PIDR changing from 2.5% to -1.75% at the end of May 2021 many of the organisations who are defendants in personal injury claims that involve the use of the PIDR wanted the legislation to be completed by the Assembly as soon as possible given the rate under the new framework is likely to be somewhat higher than -1.75%

17. The Committee appreciates the need for a stable, longer-term PIDR to be set in Northern Ireland, with provision for it to be reviewed at regular intervals, to replace the current -1.75% rate, particularly given the uncertainty there has been in recent times and the reported negative impact on progressing cases under the previous and current rate.

18. Whilst noting that those organisations representing claimants view *Wells v Wells* as the best and most appropriate methodology the Committee is of the view that it no longer reflects how a claimant would be advised to invest their lump sum and therefore a new framework for setting the PIDR is needed.

19. The Committee understands the difficulties with the current rate in relation to potential over-compensation in many cases and the resultant economic and social ramifications. During the oral evidence session with departmental officials on 9 September the current rate was discussed and officials advised that the Department has no power to change the rate except under the *Wells v Wells* criteria until such times as a new framework is introduced by legislation. While they had no way of knowing what the new rate would be using the new framework contained in the Bill given when the rate is set plays a part in determining what it is, officials expected that the rate would go up on the basis that it would be calculated on a portfolio that allows for

investments in other products which should provide a better rate of return rather than solely on ILGs.

20. The Committee is committed to assisting the progression of the legislation through the Assembly as quickly as possible without compromising on the scrutiny that needs to take place.

Clause 1 – Assumed return on investment

21. Clause 1 inserts a new Section C1 into the Damages Act 1996. New Section C1:

- Removes the role of the Department in setting the discount rate
- Provides that a court must take into account the rate of return set by the rate-assessor in determining the return a claimant is expected to receive from investing a sum awarded as damages for future 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 of return if any party can show this 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 will be the rate-assessor. The Department of Justice also has a power by regulations, subject to the draft affirmative procedure, to appoint a person other than the Government Actuary to be the rate-assessor and someone to deputise for that person, subject to their agreement.

22. In the evidence received in relation to Clause 1 the key issue raised was whether it is more appropriate to transfer responsibility for setting the rate to the Government Actuary or whether responsibility should remain with the Minister of Justice. Opinion was divided on the matter with concerns raised by those who are not supportive of the proposed change regarding the lack

of flexibility and discretion in the model and a lack of political accountability. The need for Clause 1(1) subsection (2) was also questioned by the International Underwriting Association of London (IUA) who does not believe it is necessary.

23. A number of organisations support the transfer of responsibility for setting the rate to the Government Actuary as provided for in the legislation stating that the setting of the rate is an actuarial exercise and there is no need for political involvement once the methodology has been agreed.

24. Other organisations did not support the proposed model citing a lack of flexibility, discretion and political accountability and indicating that it is more appropriate for the responsibility for setting the rate to continue to reside with the Minister of Justice. One organisation expressed the view that the PIDR should be set by the Executive collectively as there are important cross-sectoral assessments to be made. Many of these organisations stated that there is a need to consider and weigh in the balance fair and just compensation for claimants with the additional costs that would be borne by taxpayers and citizens more widely by the setting of a very low rate.

25. The Committee took the opportunity to explore the issues raised in more detail during the oral evidence sessions with organisations and in writing and during oral evidence sessions with Department of Justice officials. The Committee also commissioned a research paper on any wider impacts observed in England and Wales and Scotland following the changes to the legislative framework and the resultant PIDR in those jurisdictions and any relevant information available from other jurisdictions.

26. Having considered the research paper, which highlighted that the Justice Select Committee that undertook pre-legislative scrutiny of the Civil Liability Bill in Westminster noted a report by the British Institute of International and Comparative Law (BIICL) that observed that the setting of the discount rate

in other countries was “often not a neutral application of figures” but represents “a balance between competing considerations” the Committee sought further clarification from the Department of Justice regarding why the wider economic and societal impacts of changes to the rate cannot be considered, whether those parameters apply in other jurisdictions and, if not, why not.

27. The Department responded advising that the position that wider impacts cannot be taken into account in setting the rate stems from the established legal principle that the purpose of an award of damages for future financial loss is to provide full compensation - no more no less - i.e. the 100% rule, applies in all the UK jurisdictions and dates back as far as a nineteenth century House of Lords case. The House of Lords *Wells v Wells* judgement in 1999 affirmed the principle. The Department also stated that the same legal principle applies in the RoI and highlighted that, in a case in the Irish Court of Appeal in 2015, the Judge observed that the outworking of the principle is that the economic consequences for the defendant or society are not relevant in the calculation of the amount of damages payable.

28. The Department stated that taking into account wider societal or economic factors such as the impact on the health service would have the effect that a person who suffered serious injuries due to the actions/negligence of another person would only be entitled to be compensated to the extent that society is able or willing to pay and this would be a fundamental departure from the 100% principle.

29. The Department recognised that the Assembly may consider legislating so that the 100% principle no longer applied and the amount of compensation payable to a personal injury claimant is instead determined by factors outside the loss they have suffered but it suggested that such a significant change could not be properly addressed in this Bill. In its view it would require specific consultation with stakeholders including personal injury

claimants and, as it would be a change to substantive civil law, would be a matter for the Department of Finance.

30. Subsequently, during an oral evidence session on 9 September 2021, the officials reiterated the Department's position that, once the parameters are laid out in the legislation, the setting of the discount rate is an actuarial exercise and there is no role for political judgement. Political accountability is still in place however as the portfolio and deductions are prescribed in the Bill and subject to review before any rate is set. This provides the Minister and the Assembly with the necessary oversight of and accountability for the framework but removes the opportunity for attempts to influence the outcome.

31. The Committee also explored whether the proposed framework provides sufficient flexibility to change the portfolio or make adjustments quickly if circumstances warranted this and the rationale and necessity for Clause 1(1) subsection (2).

32. The Committee fully supports the application of the 100% compensation principle for those who have been injured as a result of the negligence of another person and, noting the information and rationale provided by the Department, respects the position that wider economic and societal impacts should not be taken into account when considering the framework to set the personal injury discount rate.

33. The Committee noted that the Scottish Government produced a Financial Memorandum in which it provided information on the possible impact of a change in the discount rate together with illustrative figures even though the Bill itself did not change the discount rate and therefore the illustrations were not direct costs or savings arising from the Bill. While the impact and implications of changes to the PIDR cannot be taken into account when considering the framework for setting it, the Committee does believe that

information should be available so that the potential consequences and costs are fully understood and necessary mitigations and actions can be considered by Government and the relevant organisations in preparation for a new rate coming in. The Committee therefore recommends that the Department should publish an impact assessment setting out the potential implications of different rates on Departments and businesses when a review is due to take place.

34. Having considered the issues raised in the evidence, the Department of Justice’s response and the further clarification it provided regarding the accountability arrangements, the flexibility to review and change the framework if circumstances necessitated this and the rationale for retaining Clause (1) subsection (2) the Committee agreed that it is content with Clause 1 as drafted.

35. The Committee also expressed the view that it may be useful for the Department to clarify the position regarding Clause (1) subsection (2) in the Explanatory and Financial Memorandum to the Bill.

Clause 2 – Process for Setting the Rate of Return and Schedule C1

36. Clause 2 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.

37. A number of issues were raised regarding the Schedule to the Bill in the evidence received. These largely related to the timing of reviews of the rate, the provision of a 43-year assumed investment period for the notional portfolio, the adjustment to the rate to take account of inflation, the provision of standard adjustments to take account of the impact of taxation and costs

of investment advice and management and for a further margin and the actual percentages, the composition of the notional portfolio and the description of the hypothetical investor.

Schedule C1 Paragraphs 1 to 3

38. Paragraphs 1 to 3 of the Schedule obliges the rate-assessor to review the discount rate and deals with the timing of reviews:

- The 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
- A 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

39. There was support for regular reviews of the rate amongst those organisations that commented on the review arrangements with all but one of the organisations agreeing that a five-year cycle is appropriate.

40. The Committee discussed the rationale for preferring a three-year review period with the organisation and also sought the views of departmental officials on the advantages and the challenges if a three-yearly review period was to be adopted.

41. The Committee supports regular reviews of the rate and considers these necessary to avoid a situation where the PIDR could be out of kilter for a substantial period of time. The Committee views the five-year cycle of

reviews provided for in the Bill as an appropriate approach particularly as an additional review can be carried out if considered necessary.

Schedule C1 Paragraphs 4 to 6

42. Paragraph 4 provides an overview of the rate-setting process, Paragraph 5 provides that a review will determine whether the rate is to remain the same or be changed and Paragraph 6 provides that the rate-assessor must have regard to the views of any person the rate-assessor chooses to consult, or whose advice has been sought, provided these are received within a reasonable time.

43. There were no issues raised in the evidence received by the Committee on Paragraphs 4 to 6 of Schedule C1.

Schedule C1 Paragraphs 7 and 8

44. Paragraph 7 sets out the basis upon which the rate-assessor is to determine the rate of return. Subject to standard adjustments and rounding of figures it provides that the rate should reflect the rate of return for the notional portfolio (provided for in Paragraph 12) over a 43-year period. Paragraph 8 gives the Department a power, by regulations subject to the draft affirmative procedure, to change the period of 43 years.

45. There was widespread support for the use of a 43-year period amongst organisations representing defendants and others who highlighted that it is based on evidence unlike the 30-year period used in the Scottish model. However, organisations who represent claimants in cases raised some issues and concerns about the length of the period.

46. The Committee sought further information on the likely effect of adopting a 43-year investment period rather than a 30-year investment period from the Department of Justice and was advised that the Government Actuary had indicated that, in practice, the difference between an assumed investment period of 30 years and one of 43 years is likely to make only a very small difference of 0.1% or 0.2% in the rate calculation, if everything else is equal. Officials outlined that, since the discount rate is rounded to the nearest 0.25%, the material effect on the rate will be nil or 0.25% and provided examples to illustrate this.

47. Whilst there is evidence to support the use of a 43-year investment period for setting the discount rate, and it would therefore appear to be a more appropriate approach to adopt, the Committee is of the view that it must be considered in the round with the other parts of the Schedule that provide the composition of the notional portfolio and the adjustments to take account of inflation, the impact of taxation and costs of investment advice and management and the further margin to ensure, as far as possible, that the model will deliver the 100% compensation principle and does not veer too far towards either over-compensation or under-compensation.

Schedule C1 Paragraph 9

48. 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.

49. There was a mix of views received regarding the adjustment to take account of inflation by reference to the retail price index from those organisations that commented on this aspect of the Schedule with one believing the Retail

Price Index (RPI) is the appropriate inflation measure to use to calculate the PIDR and another stating it is now regarded as unsuitable for official purposes. Forum of Complex Injury Solicitors (FOCIS) stated that 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 therefore the minimum acceptable inflationary adjustment and if the alternative of the Consumer Price Index (CPI) were to be contemplated it would require an adjustment of at least 1% to rebalance the position.

50. Having sought assurances from the Department that there is provision to change the inflation measure if necessary the Committee considers that provision for an adjustment to the rate of return to take account of inflation by reference to the Retail Price Index is an appropriate approach to adopt.

Schedule C1 Paragraphs 10 and 11

51. Paragraph 10 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.
- also 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)

52. Paragraph 11 provides that 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.

Unlike the rate ultimately set by the rate-assessor these numbers are not limited to being expressed in steps of a quarter percentage point.

53. There were contrasting views expressed in the evidence received on the Bill in relation to the adjustments provided for in Paragraph 10 of the Schedule.

54. Those organisations supporting claimants welcome the inclusion of the 0.5 % further margin adjustment but do not think it goes far enough and are also of the view that the 0.75% adjustment to take account of the impact of taxation and the costs of investment advice and management is too low. On the other hand all the organisations who represent defendants strongly believe that the inclusion of the 0.5% further margin adjustment will lead to over-compensation, particularly if the notional portfolio remains the same as provided for at Paragraph 12 of the Schedule, and should be removed from the Bill otherwise it 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 be, an outcome that will veer towards over-compensation. Some organisations also questioned the 0.75% adjustment for tax and investment advice.

55. The Committee appreciates the significant concerns a wide range of organisations and respondents have in relation to the inclusion of the standard further margin adjustment of 0.5% and therefore spent some considerable time discussing this provision during the oral evidence sessions with key stakeholders and with the departmental officials and considering the information and clarification provided by the Department on the need for it, whether its inclusion is, in effect, double counting the risk of under-compensation and the potential ramifications if it was removed from the Bill.

56. The Committee also sought additional clarification from the Department on whether it had moved from its position regarding achieving as close to 100%

compensation as possible but no more or no less and what level of over-compensation, if any, the Department believes is acceptable.

57. The Committee acknowledges that the setting of the methodology for calculating the PIDR is not an exact science and it is an exercise in informed judgement based on expert advice. While the risk that a claimant will be under-compensated cannot be entirely eliminated given a range of factors could lead to this situation e.g. the claimant's needs are wrongly calculated, the investments do not perform as expected, inflation increases more than projected or the person lives longer than expected, the Committee notes that the inclusion of a further margin of adjustment of 0.5% recognises that the risk of under-compensation exists and moves the balance slightly in favour of the claimant from a position of 50:50 risk of over/under compensation to a position of 35:65.

58. The Committee is of the view that the inclusion of the 0.5% further margin adjustment and the 0.75% adjustment to take account of the impact of taxation and the costs of investment advice and management must be considered in conjunction with the other parts of the Schedule that provide the composition of the notional portfolio and the 43-year investment period for setting the discount rate to ensure, as far as possible, that the model in its entirety does not veer towards over-compensation and will deliver, as close as possible, the 100% compensation principle.

Schedule C1 Paragraphs 12 to 15

59. Paragraph 12 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. Paragraph 13 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. Paragraph 14 provides that the Department may make regulations, subject to

the draft affirmative procedure, to define any of the types of investment. Paragraph 15 provides that the Department may make regulations to make changes to both the list of investments and the percentage holdings.

60. There were again distinctly different views expressed in the evidence received on the Bill regarding the notional portfolio. While some organisations support the proposed composition, others believe the notional portfolio is too cautious or, contrastingly, that it poses unacceptable levels of risk. The lack of evidence on how claimants actually invest their lump-sum award was also highlighted.

61. The Committee recognises that the composition of the notional portfolio in terms of the types of investments and percentage holdings is one of the key elements of the new framework. Noting the issues raised in the evidence received and the Department's written response the Committee took the opportunity to explore a number of issues further during the oral evidence session with departmental officials including the difference between the notional portfolio in the Bill and that used in England and Wales, whether the longer investment period of 43 years was taken into account when the Government Actuary Department reviewed the notional portfolio and if so, were any adjustments made.

62. The Committee is of the view that the notional portfolio provided for in the Bill, and whether its composition is appropriate to achieve as close to 100% compensation as possible or is either too cautious or too risky, must be considered in conjunction with the other key elements of the framework including the 0.5% further margin rather than in isolation.

Schedule C1 Paragraph 16

63. 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).

64. The Committee noted the Department's written and oral responses to the issues raised regarding a lack of clarity around if and how the investment portfolio is to be reviewed each time a new rate is to be set and the fact that the legislation does not define 'with whom' the Department must consult when carrying out the mandatory review.

Schedule C1 Paragraph 17

65. 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

66. The main issue raised in relation to Paragraph 17 was the lack of available data on how claimants actually invest their compensation awards. Reference was also made to the fact that the notional portfolio makes assumptions that may not properly reflect investment behaviour.

67. The Committee discussed the potential for the Department to commission research to gather evidence of actual claimant investment behavior at its meeting on 23 September. The departmental official outlined that the evidence available to date had been provided by financial advisers indicating how they believe that claimants are advised to invest rather than first-hand knowledge from claimants and indicated that it would be hard to see how an obligation could be placed on a person to provide that information.

68. While the Committee appreciates it may be difficult to obtain such information, it does believe there are benefits in doing so to inform future consideration of the framework to set the PIDR, and therefore recommends that the Department undertakes an assessment of the potential options to gather evidence of actual claimant investment behaviour.

Schedule C1 Paragraph 18

69. 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.

70. There were no issues raised in the evidence received by the Committee on Paragraph 18 of Schedule C1.

Schedule C1 Paragraphs 19 and 20

71. Paragraph 19 provides that the rate will be set as a percentage figure, whether a whole number of percentage points or multiple of a quarter percentage point. It can be expressed in quarter percentage points and rounded to the nearest whole number or quarter percentage point. Paragraph 20 provides for the rounding of the figure so as to comply with that requirement.

72. The Committee noted the comments of the IUA that paragraph 20(2) is agreeable only if it applies in the unlikely event that two permitted figures are equally near when rounding. While acknowledging that in such circumstances the nature of the rounding provision will result in an increased chance of over-compensation IUA understands that in all other circumstances the rate will be rounded to the nearest 0.25 percentage points.

Schedule C1 Paragraphs 21 and 22

73. Paragraph 21 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, a review is to be carried out separately for each rate of return. Under Paragraph 22 such 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.

74. One organisation commented on this part of the Schedule indicating that while it agreed with the provision allowing a dual discount rate approach to be considered, if it 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.

75. The Committee noted the confirmation provided by the Department in its oral evidence that it has no plans to set a dual rate in the near future but it may wish to consult at some point on whether a dual rate would be a better model.

Schedule C1 Paragraphs 23 to 26

76. Under Paragraph 23 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. Under Paragraph 24 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. Paragraph 25 provides that the rate will come into effect on the day after the report is laid. Paragraph 26 provides for the Department to reimburse the rate-assessor for costs incurred in connection with a review.

77. While only two organisations commented on these paragraphs they expressed conflicting views. One stated that, 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.

78. The other believed the framework should rule out any retrospective effect and any new discount rate should only apply to compensation awards relating to incidents that took place after the change in rate.

79. The Committee noted that the purpose of the discount rate is to reflect the return on investment of a lump sum 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 the funds regardless of the date of incident or date of issue of proceedings.

Schedule C1 Paragraphs 27 to 34

80. 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

81. Paragraph 31 deals with regulations made under the Schedule. Sub-paragraph (1) allows regulations to make different provision for different purposes. Sub-paragraph (3) provides that regulations made under the Schedule will be subject to the draft affirmative resolution procedure.

82. Paragraphs 32 to 34 are interpretation provisions for the purposes of the Schedule.

83. There were no issues raised in the evidence received by the Committee on Paragraphs 27 to 34 of Schedule C1.

Committee Position on Schedule C1

84. The Committee appreciates and understands the significant concerns a wide range of organisations have in relation to whether the new framework provided for in Schedule C1 to set the PIDR will deliver, as far as possible, the 100% compensation principle, whether it is those organisations representing claimants who are concerned about under-compensation or those organisations who defend personal injury claims and are concerned about over-compensation.

85. Any new framework will set the PIDR for the foreseeable future; therefore, it was important for the Committee to ensure that claimants receive the compensation they are entitled to while being satisfied as far as possible, recognising that achieving 100% compensation is not an exact science and assumptions have to be made about the future, that the model being adopted will not over-compensate with the ramifications of that for Government Departments including the Health Service, businesses, insurers etc.

86. The key elements that make up the framework are the assumed investment period, the composition of the notional portfolio and the standard adjustments for inflation, the impact of taxation and the costs of investment advice and management and a further margin to recognise that there is risk inherent in even the most carefully advised and invested portfolio. While the Committee considered each of the elements of the Schedule, when coming to a view on it the Committee considered the elements in conjunction rather than in isolation to ensure an overall view was taken of the likely effect they would have together on the potential for achieving close to 100% compensation or providing for over or under-compensation.

87. Given the specific concerns raised that the inclusion of the 0.5% further margin would lead to over-compensation, particularly when considered in

conjunction with the composition of the notional portfolio, the Committee spent some time discussing this aspect and seeking clarification from officials on it.

88. The Committee noted the information provided by the Department that the inclusion of the 0.5% further margin shifted the balance of risk between under and over-compensation more towards the defendant and away from individual claimants while still aiming for the principle of 100% compensation and Members indicated that they supported this approach.

89. Having considered all the elements of the new framework in the round the Committee agreed that it was content with Clause 2 and Schedule C1 as drafted.

90. In doing so the Committee noted that the Department can order an in-cycle review if necessary and expects the Department to exercise this power if circumstances require it.

Clauses 3 to 6 – Ancillary Provision, Interpretation, Commencement and the Short Title

91. Clause 3 provides a power for the Department of Justice by regulations to make ancillary provision. Any such regulations which amend primary legislation are subject to the draft affirmative procedure.

92. Clause 4 is an interpretation provision.

93. Clause 5 provides for the commencement of Clauses 3 to 6 of the Bill on the day after it receives Royal Assent. It also allows for the remaining Clauses to be commenced by order made by the Department.

94. Clause 6 describes the short title of the Act.

95. The Committee agreed that it is content with Clauses 3, 4, 5 and 6 as drafted.

Other issues raised in the consideration of the Bill

96. The evidence received by the Committee also highlighted the potential impact changes to the PIDR, both those introduced by the Department on 31 May 2021 and under the proposed new framework, would have in relation to health and social care provision in Northern Ireland in terms of costs of settlement, subscription costs for healthcare professionals including GP indemnity costs and the potential knock-on effect on the stability of the health and social care workforce and the implications for insurance premiums in Northern Ireland. In addition, the promotion of PPOs as an alternative to a lump sum payment was also raised.

Promotion of periodical payment orders

97. The Minister of Health and a number of organisations commented on the use of PPOs and the reasons why there was a low-uptake. Views where expressed that PPOs may result in a degree of greater certainty and fairness to both plaintiffs and compensators given they obviate reliance on estimates of future returns and inflation rates and can also help mitigate the risk of over or under-compensation. The role of the court in relation to PPOs together

with the need for the court and the plaintiff to be satisfied that the defendant is in a position to meet the payments going forward and what legal protections are in place in that regard were also issues covered.

98. To assist its consideration of the comments and suggestions made regarding the use and promotion of PPOs the Committee requested the views of the Department regarding the potential to make PPOs compulsory, particularly in cases involving government backed bodies, by bringing forward a policy on this, or if necessary, legislative changes and any information or analysis on why the use of PPOs was so low.

99. The Committee also discussed with the Department at its meeting on 23 September how the court system operated in relation to PPOs, whether any action had been taken to promote the use of them, particularly for vulnerable claimants who may rely on the goodwill of others to protect their long-term investments, and whether there is sufficient awareness of the PPO option.

100. The Committee noted the information provided by the Department setting out the requirements placed on the court by the Damages Act 1996 that outlined that, as well as enabling the court to make a PPO without the consent of the parties, the 1996 Act requires the court to consider whether or not to make a PPO. Under the associated Court Rules, which are made by the Court of Judicature Rules Committee with the Department's approval, claimants must state in the documents used to initiate legal proceedings whether they consider a PPO or a lump sum to be the most appropriate form of award therefore they have to actively consider the option of a PPO and their legal representative will advise them in this regard. Defendants who admit liability also must state which form of award they consider to be appropriate. Both parties also need to explain their preferred form of award.

101. The Committee also noted that the Department considered the existing legislative provision to be sufficient and that it would not be appropriate, or

practical, to require a court to make a PPO in a particular type of case, without any consideration of all the relevant circumstances, and whether or not this form of order best meets the claimant's needs and the information provided in relation to the position in the other UK jurisdictions.

102. The Committee discussed the suggestion by the Department that the Committee may wish to recommend that the Rules Committee considers adding to those factors that could help to increase uptake of PPOs. The Department also proposed that the Committee may consider it helpful to invite the Lady Chief Justice to consider a judicial studies training event around PPOs.

103. At its meeting on 7 October 2021 the Committee agreed to write to the Lady Chief Justice, in her capacity as Chair of the Court of Judicature Rules Committee, to recommend that the Rules Committee considers adding to those factors that a court is required to take into account when considering whether or not to make a PPO to include, as an example, consideration of the inherent risk that a lump sum award may not best deliver full compensation consistent with the 100% principle, or other factors that could help to increase uptake of PPOs.

104. The Committee also agreed to invite the Lady Chief Justice to consider a judicial studies training event around PPOs and the challenges with securing 100% compensation on investing a lump sum, perhaps in conjunction with the Bar and the Law Society.

Consequences of changing the rate on GP practices and Health and Social Care Northern Ireland (HSCNI)

105. The Minister of Health, Health and Social Care NI, the British Medical Association Northern Ireland General Practitioners Committee (BMA

NIGPC), the Medical Defence Union (MDU), the Medical Protection Society (MPS) and a range of other organisations all highlighted their concerns about the impact and implications of the recent sharp reduction to the PIDR on the provision of health and social care in Northern Ireland including the cost of indemnity provision for GPs and the likely consequences of this.

106. In a letter to the Committee the Minister of Health set out in detail the likely negative impact of the current -1.75% PIDR and the significant impact on GPs of a significant long-term reduction in the PIDR from the previous 2.5%. The Minister did note that the legislation is expected to increase the PIDR and will therefore partially reverse the impact that the current rate is having on the cost of settlements, however the extent of this will depend on the eventual rate determined.

107. The Minister of Health also advised that the Department of Health is considering the issue of future GP indemnity arrangements in Northern Ireland and future options for GP indemnity provision are under active review. He did however highlight that, irrespective of the mechanism by which indemnity provision is secured for GPs, the impact of a rise in the cost of settling clinical negligence cases as a result of a significant change to the PIDR places a significant additional financial burden on the health and social care system which is already facing a range of challenges exacerbated by the impact of Covid-19.

108. To assist its consideration, the Committee commissioned a research paper on a range of issues relating to the PIDR including what types of government-backed indemnity schemes for GPs are in place in other jurisdictions. The Committee noted that the Department of Health and Social Care had recently introduced two state indemnity schemes in England and Wales while in Scotland there is no state backed indemnity scheme however indemnity costs are lower.

109. In the expectation that payments to individuals in Northern Ireland would increase given the changes to the PIDR, the Committee had already sought information from the Minister of Finance on whether any request had been made to HM Treasury for the same approach to apply in Northern Ireland as had applied in England and Wales and in Scotland when the PIDR changed in those jurisdictions. The Committee understood that the Treasury made some allocation to the budgets of those Departments/Agencies affected to recognise that there would be an increase in the payments made to individuals. The Committee had welcomed the confirmation from the Minister of Finance that he had highlighted the issue to the Chief Secretary of the Treasury and advised that if the legislation is brought forward, access to the Reserve would be sought in line with that afforded to Whitehall departments and other devolved administrations.

110. Following receipt of the response from the Minister of Health the Committee again wrote to the Minister of Finance regarding the position in relation to whether funding would be available from the Treasury to cover some or all of the costs of a state-backed GP indemnity scheme. In response the Finance Minister outlined that the Executive will have received Barnett consequentials on all changes to the Department of Health and Social Care DEL budget including that associated with the introduction of the new state-backed GP Indemnity Scheme and indicated that Treasury have confirmed that no further funding would be provided; therefore, if the Minister of Health wishes to introduce a state-backed GP indemnity scheme, the costs will have to be funded from the Department of Health budget settlement.

111. The Committee also requested information on funding pressures that have been highlighted by other Departments, and in particular the Department of Health, and whether these have been reflected in the discussions with Treasury to secure additional funding and the Department of Finance confirmed that it is in discussions with Treasury to secure funding for the 2021/22 pressures. It also indicated that from 2022/23 onwards no additional funding will be provided by Treasury to offset any pressures

arising from the change in the PIDR and this will require the Executive to manage the cost increase through the normal budgetary process.

112. The Committee appreciates that the issue of indemnity costs for GPs is a matter for the Department of Health but is concerned about the ramifications if the issue is not addressed satisfactorily. The Committee also expects the Department of Finance to continue its discussions with Treasury to secure funding to address the pressures identified as a result of the change in the PIDR.

Implications on insurance premiums

113. The Association of British Insurers (ABI), the IUA, AXA, Zurich and Aviva highlighted that the PIDR is a key component for underwriters calculating insurance premiums and set out the pressures placed on insurers' claims costs the lower the rate is set. They outlined the impact the current rate of -1.75% will have on the cost of motor insurance, employer's liability insurance and public liability insurance and the level of liability cover a business would need to purchase. The lack of a detailed impact assessment accompanying the Bill was also raised.

114. In contrast FOCIS stated that the incidence of lifelong disabling injuries that result in calculations that significantly engage the discount rate is low. In its view 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 likelihood it will fall back on the state to support them and hence fall back on taxpayers.

115. The research paper commissioned by the Committee covered any impacts observed in England and Wales and in Scotland on the cost of insurance following the changes to the legislative framework resulting in changes to the PIDR in those jurisdictions and how insurance costs in Northern Ireland compare with other jurisdictions.

116. In considering the paper, the Committee noted that research across the United Kingdom (UK) in 2018 on the cost of insurance found that claims tend to be greater in Northern Ireland given the nature of the roads, the market is not as competitive as a number of UK insurers do not offer cover in NI and the NI courts tend to make higher serious injury awards in a legal market which is different to England and Wales.

117. While the Committee respects the position that wider economic and societal impacts should not be taken into account when considering the framework to set the personal injury rate and this is covered in detail at paragraphs 257-272 of the report it did press the Department on why it had not provided more detailed costings. The Committee also sought an explanation for the higher awards for damages for pain and suffering in Northern Ireland compared to other UK jurisdictions and whether the Department intended to consider any legislative reforms similar to those in England and Wales and the Republic of Ireland designed to lower claim costs and assist consumers.

118. As highlighted earlier the Committee believes that information should be available so that the potential consequences and costs related to the PIDR are fully understood and recommends that the Department should publish an impact assessment setting out the potential implications of different rates on Departments and businesses when a review is due to take place.

119. At its meeting on 21 October 2021 the Committee agreed its report on the Damages (Return on Investment) Bill and ordered that it should be published.

Introduction

Background to the Bill

120. The Damages (Return on Investment) Bill was introduced to the Northern Ireland Assembly on 1 March 2021 and was referred to the Committee for Justice for consideration in accordance with Standing Order 33(1) on completion of the Second Stage of the Bill on 9 March 2021.

121. At introduction the Minister of Justice made the following statement under Section 9 of the Northern Ireland Act 1998:

"In my view the Damages (Return on Investment) Bill would be within the legislative competence of the Northern Ireland Assembly."

122. The purpose of the Bill is to introduce a new statutory methodology for calculating the PIDR, which is an adjustment made to an award of damages for wrongfully inflicted personal injury. Such awards are often in the form of a lump sum and should put the injured person in the same financial position had they not been injured, including loss of earnings and future care costs, without over- or under-compensating them (known as the "100% rule.") The PIDR is used to adjust the lump sum to reflect interest that may be earned from investing the lump sum as well as the effect of tax, expenses and inflation on these returns to reflect the 100% rule.

123. The Bill will also ensure that the rate is regularly reviewed at least every five years and will transfer the responsibility for setting the rate from the Department of Justice to the Government Actuary.

124. The Bill contains six Clauses and one Schedule.

Committee Approach

125. The Committee had engaged with the Department of Justice on the policy proposals behind the Bill in advance of its introduction. Departmental officials provided an oral briefing on 22 October 2020 on the results of a consultation on whether the legal framework for setting the PIDR should be changed and the proposed way forward. Officials outlined that the intention was to introduce a new legal framework that assumes that claimants invest their lump sums in a mixed portfolio of low-risk investments. It was also proposed that the PIDR should be set by the Government Actuary's Department, with reference to a notional portfolio and standard adjustments, as prescribed in the model used in Scotland, and that the interval between statutory reviews of the PIDR should be five years.

126. The officials advised that the Minister of Justice intended to seek the agreement of the Executive to bring forward legislation to give effect to these policy changes and indicated that, if approved, the Minister would also seek approval to bring forward the Bill under the accelerated passage procedure.

127. The Committee was also informed that the Minister had declared an interest in this matter due to her husband's membership of a medical defence union, which indemnifies their members against claims of negligence in private practice and has an interest in the level of the discount rate. Key policy decisions on the discount rate had therefore been delegated to the Department of Justice Permanent Secretary.

128. The Committee sought further information in writing following the evidence session to assist its consideration of the policy proposals and the Permanent Secretary was invited to attend the meeting on 3 December 2020 to discuss the proposals, the decision to base a new framework on the Scottish model given that the majority of consultation responses supported

the model adopted in England and Wales, and the basis for the Minister recusing herself from the policymaking process.

129. Following the evidence session with the Permanent Secretary, the Committee advised the Department that, although it recognised the case for changing the legal framework, it would require further engagement with key stakeholders and departmental officials before reaching a decision on whether it supported the Department's approach of adopting an adapted Scottish model as the best way forward to achieve the principle of 100% compensation without either over- or under-compensating injured parties. The Committee also advised the Department that it was not persuaded by the information that had been provided that the legislation to introduce a new legal framework for setting the personal injury discount rate should proceed by way of accelerated passage, but it was willing to engage and discuss the legislative timeline with the Department to progress the legislation before the end of the mandate.

130. The Minister subsequently asked to attend the Committee on 28 January to explain her reasons for requesting accelerated passage for the Bill. On completion of the evidence session with the Minister and her officials, the Committee discussed the information provided. Although fully supportive of the need to change the legal framework, Members in general indicated that they did not have enough information to properly and fully assess if the legal framework proposed by the Department would achieve its objective of 100% compensation and were therefore not in a position to indicate support for the case for accelerated passage, which would be a decision for the Assembly.

131. Following the Bill’s referral to the Committee for consideration, the Committee published a media signposting notice in the Belfast Telegraph, the Irish News and the Newsletter seeking written evidence on the Bill and wrote to a wide range of stakeholders inviting views. In response to its call for evidence the Committee received 31 written submissions. A list of the written submissions received is included at Appendix 3.

132. During the period covered by this report the Committee considered the Bill and related issues at 13 meetings. The Minutes of Proceedings are included at Appendix 1.

133. The Committee had before it the Damages (Return on Investment) Bill [NIA Bill 16/17-22] and the Explanatory and Financial Memorandum that accompanied the Bill.

134. At its meeting on 11 March, the Committee discussed the timescale that was likely to be needed to undertake the Committee Stage of the Bill taking into account the volume of other legislation that the Committee was considering, other work priorities that would have to be completed, the need for flexibility to deal with other issues that may arise unexpectedly and the level of available resources. The Committee agreed a motion to extend the Committee Stage of the Bill to 28 October 2021 at its meeting on 18 March 2021. The motion to extend was supported by the Assembly on 19 April 2021.

135. The Committee held seven oral evidence sessions with a range of key stakeholders including Health and Social Care Northern Ireland, the Confederation of British industry NI and representatives from medical, insurance and legal organisations. The Minutes of Evidence are included at Appendix 2 and a list of witnesses who gave evidence is at Appendix 7.

136. The Committee would like to place on record its thanks to all the organisations who responded in writing and provided oral evidence.

137. The key issues highlighted in the evidence received included:

- to what extent, if any, the social and economic impact of the PIDR could be taken into account when setting the framework

- whether responsibility for setting the PIDR should remain with the Minister of Justice rather than transfer to the Government Actuary
- the provision of 5-yearly reviews of the rate
- the use of an assumed investment period of 43 years
- whether the proposed standard adjustments to take account of the impact of taxation and the costs of investment advice and management and as a further margin to recognise that there is a risk inherent in even the most carefully advised and invested portfolio are necessary and are set at an appropriate level to avoid over-compensation or under-compensation
- the composition of the notional investment portfolio
- the description of the hypothetical investor.

138. While not specifically covered in the Bill, the use of periodical payment orders (PPOs) was also raised.

139. The Committee explored the issues with the Department both in writing and in oral evidence sessions. Memoranda and papers from the Department of Justice on the provisions of the Bill are at Appendix 4.

140. The Committee sought advice from the Examiner of Statutory Rules in relation to the range of powers within the Bill to make subordinate legislation. The Examiner considered the Bill and Delegated Powers Memorandum and was satisfied with the rule making powers provided for in the Bill.

141. To assist its consideration of specific issues highlighted in the evidence, the Committee commissioned a research paper on the wider impacts of changes to the discount rate in England and Wales and Scotland and how insurance costs in Northern Ireland compare with other jurisdictions and

what type of government-backed indemnity schemes are in place in other jurisdictions. The research paper is at Appendix 6.

142. The Committee also engaged with the Minister of Health and the Minister of Finance regarding the cost implications of changes to the PIDR and what additional funding would be available from HM Treasury in respect of increased costs and the potential for a state-backed indemnity scheme for GP's in Northern Ireland similar to that introduced in England and Wales when the PIDR rate changed in 2019. Correspondence from the Ministers is included at Appendix 5.

143. The Committee carried out its informal deliberations on the Clauses of the Bill and the Schedule at its meeting on 23 September 2021 and undertook its formal Clause by Clause scrutiny of the Bill on 7 October 2021.

144. At its meeting on 21 October 2021 the Committee agreed its report on the Damages (Return on Investment) Bill and ordered that it should be published.

Consideration of the Provisions of the Bill

145. The Damages (Return on Investment) Bill contains six Clauses and one Schedule.

Personal Injury Discount Rate

146. When a person has suffered a serious life changing personal injury as a result of the negligence of another, the compensation settlement will include damages for any future financial losses e.g. loss of earnings, cost of future care and support and the provision of specialist equipment. Where the compensation is paid to an individual in a lump sum he/she is expected to invest the money with the aim of ensuring that it lasts for the rest of his/her life.

147. The PIDR is a mechanism which aims to ensure that a person is fully compensated for their losses but no more or no less i.e. the 100% compensation rule where the award should be sufficient to meet all the losses as they arise and should be used up at the end of the period for which it is given. The Court applies the rate to adjust the lump sum to take account of the return that may be earned from investing it.

148. The effect of the rate depends on the size of the award and the period of time to which it relates – the larger the award and the longer the period of time the greater the effect the discount rate has. It can therefore make significant differences to the amount of the award.

149. The PIDR in the main applies to claims arising from medical negligence, road traffic accidents and industrial accidents.

150. The power to set the rate currently sits with the Department of Justice, in consultation with the Government Actuary and the Department of Finance, under the Damages Act 1996.

Context of the Legislation

151. Until 30 May 2021 the discount rate in Northern Ireland was 2.5% as set by the Lord Chancellor in 2001, prior to the devolution of justice.

152. The Damages Act 1996 does not specify how the discount rate should be set therefore to date it has been set in accordance with legal principles established by the House of Lords in *Wells v Wells.* As well as setting out the object of an award of damages as being "… to place the injured party as nearly as possible in the same financial position he or she would have been in but for the accident …." *Wells v Wells* also specified that claimants in personal injury cases should be treated as very risk adverse investors reflecting that they may largely be financially dependent on the lump sum awarded, often for the duration of their lives. This resulted in the PIDR being based on an investment portfolio that contained 100% ILGs as offering the least risk.

153. In 2017, the Ministry of Justice and the Scottish Government issued a joint consultation on how their discount rates should be set in the future. Both jurisdictions consequently decided to move away from *Wells v Wells* and adopted new legal frameworks for setting their rates in 2018 and 2019 respectively.

154. In England and Wales, the 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. While the rate continues to be set by the Lord Chancellor, he/she must consult an expert panel, which includes

the Government Actuary and the Treasury and the rate must be reviewed at least every five years. Under the new framework, the Lord Chancellor set a new rate of -0.25% for England and Wales in 2019.

155. In Scotland the rate is now set with reference to projected returns on a notional portfolio of ‘cautious’ investments with a downward adjustment of 1.25 percentage points to reduce the likelihood of under-compensation. The notional portfolio is prescribed in the legislation and specifies different types of investment products and what percentage of the portfolio they represent. Responsibility for setting the rate was transferred from Scottish Ministers to the Government Actuary and a minimum review period of five years was introduced. In Scotland, following a review of the rate under its new framework, the rate remained at -0.75%.

156. In February 2020 the Department of Justice advised the Committee for Justice that it was taking forward the statutory consultation required under the Damages Act 2006 with the Government Actuary and the Department of Finance on a proposal to change the discount rate from 2.5% to -1.75%.

157. The Department subsequently advised the Committee in June 2020 that it intended to consult on whether the legal framework for setting the personal injury discount rate should be changed and if so, how. The consultation document set out a number of assumptions which the Department believed should be made in relation to setting the rate and sought views on which of the frameworks that apply in England and Wales and in Scotland would be most appropriate for Northern Ireland or proposals for an alternative framework.

158. Following the consultation, the Department decided to bring forward legislation to provide for a new statutory methodology for calculating the discount rate based on the Scottish model but with the use of an assumed investment period of 43 years rather than 30 years, provide that the task of

reviewing and setting the rate should fall to the Government Actuary and establish a timeframe for review of the rate. The Department also indicated that it had decided not to change the current PIDR at this time in view of its decision to legislate for a new legal framework which it hoped would be in place by autumn 2021 and under which a new rate could then be set.

159. On 24 March 2021 the Department advised the Committee that, now it was anticipated that it would be 2022 before a personal injury discount rate could be set under the new framework provided for in the Damages (Return on Investment) Bill, the Permanent Secretary had reviewed his previous decision not to change the rate until the new framework was in place. In his view, the time until a rate could be set under the new framework was longer than would be reasonable to wait and he had therefore decided that the Department should bring forward secondary legislation, the purpose of which was to amend the personal injury discount rate to -1.75%. This rate had been calculated in accordance with the legal principles established by the House of Lords in *Wells v Wells* that personal injury claimants are to be treated as very risk averse and the rate should be set with reference to returns on ILGs.

160. The Department advised that the impact of the change on business, charities and voluntary bodies and the public sector would be to increase the amount of damages for future financial loss that may be payable in any personal injury action to which they are a party. This may have an effect on the cost of insurance. A regulatory impact assessment had not however been carried out as these impacts could not be taken into account in applying the legal principles that govern the setting of the rate.

161. The Statutory Rule was laid in the Assembly on 29 April 2021 and the new rate came into effect on 31 May 2021.

Response to the Call for Evidence

162. The Committee identified a range of key issues to consider when scrutinising the Bill and in the call for evidence indicated that views on these would be particularly welcome. They included:

- Whether the new statutory methodology to calculate the personal injury discount rate was the most appropriate to achieve as close to 100% compensation as possible
- Whether the new methodology had the potential to veer towards over compensation and if so how this could be rectified
- Whether the new methodology had the potential to veer towards under compensation and if so how this could be rectified
- Whether the new statutory methodology better reflects how a claimant would be advised to invest their award
- What the likely effects of using an investment period of 43 years rather than 30 years in the model are and whether respondents agreed with this approach
- What the advantages or disadvantages of transferring responsibility for setting the rate from the Department of Justice to the Government Actuary are and whether there is an appropriate level of accountability in the new statutory methodology

163. Thirty-one written submissions were received from a range of organisations in response to the Committee's call for evidence. The Committee appreciates the time and effort that was taken to submit the evidence which covered a range of different views relating to the proposed new framework to set the PIDR. The Committee also held eight oral evidence sessions to explore the key issues in further detail with a number of the organisations and with departmental officials and sought further information from the Minister of Health and the Minister of Finance. The evidence received was

used by the Committee to undertake detailed scrutiny and consideration of the provisions in the Bill.

164. All the organisations who submitted evidence supported and were committed to the 100% compensation principle to ensure a person is fully compensated for their losses but no more or no less and most of them were of the view that reform of the formula by which the PIDR is set is long overdue. However, while some respondents to the call for evidence supported the proposed new framework set out in the Bill others, who represent or support applicants, were of the view that the current *Wells v Wells* methodology should be retained and organisations who represent businesses, insurance companies and public sector bodies who are the defendants in such claims were of the view that the framework veered towards over-compensation and adjustments were needed. A number of these organisations also wanted the responsibility to take the decision on the PIDR to remain with an elected representative such as the Minister of Justice rather than residing with the Government Actuary as provided for in the legislation.

165. As a result of the PIDR changing from 2.5% to -1.75% at the end of May 2021 many of the organisations who are defendants in personal injury claims that involve the use of the PIDR wanted the legislation to be completed by the Assembly as soon as possible given the rate under the new framework is likely to be somewhat higher than -1.75%.

166. The evidence received also highlighted the potential impact changes to the PIDR, both those introduced by the Department on 31 May 2021 and under the proposed new framework, would have in relation to health and social care provision in Northern Ireland in terms of costs of settlement, subscription costs for healthcare professionals including GP indemnity costs and the potential knock-on effect on the stability of the health and social care workforce and the implications for insurance premiums in Northern

Ireland. In addition, the promotion of PPOs as an alternative to a lump sum payment was also raised.

General Support for the legislation

167. The Lord Chief Justice (LCJ) advised that the review of the personal injury discount rate is overdue and the continued uncertainty has had a negative impact on case progression of personal injury claims at both the High Court and County Court tiers.

168. The LCJ outlined that the overall aim is that the award for personal injuries will neither under-compensate nor over-compensate the injured party and the discount rate forms a vital part of a 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. He stated that 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 bears the cost of over- compensation if awarded against the Departments defending such actions.

169. On behalf of the judiciary the LCJ requested an expedited legislative remedy to restore the balance between the interests of plaintiffs and defendants with regular time-bound reviews as soon as possible.

170. The LCJ also referred to 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. The report focused on the jurisdictions of Australian States, Canadian Provinces, France, Germany, Hong Kong, Ireland, Spain and South Africa and showed 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 also 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.

171. The Minister of Health stated that 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. He did however highlight the implications for the health and social care sector.

172. The Department of Finance noted that the advice from the Department of Justice 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.

173. The Law Society expressed the view that, in setting the PIDR, 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 that offers a plaintiff a ‘full compensation’ position without under- or over-compensation.

174. The Society had previously voiced concerns that the rate of 2.5%, which was set in 2001, 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. The Society hopes that, by setting an interim rate of -1.75%, the Department of Justice will move to a permanent rate more quickly.

175. The Bank of England Prudential Regulation Authority is of the opinion that the methodology and parameters strike a fair balance between claimants and defendants or their insurers.

176. Lisburn and Castlereagh City Council highlighted that the transparency and clarity offered by the legislation along with the control and oversight are important and valuable advantages of the new framework.

177. The Institute and Faculty of Actuaries (IFoA) believes that the needs of the injured parties should be at the centre of any compensation paid and supports the principle that settlements should aim to provide 100% compensation, but neither more nor less. The IFoA did however state that 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. In its view, aiming to assure full compensation to the majority of claimants would require a bias towards over-compensation.

178. The IUA 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. It is also broadly supportive of the legislation and stated that it

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.

179. The IUA highlighted 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.

Concerns that the new framework will lead to under-compensation

180. The Association of Personal Injury Lawyers (APIL) pointed out that the PIDR is vital to ensure that compensation does what it is required to do - return the injured person to the position in which he/she would have been if it were not for the injury - no more, no less. It stated that 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.

181. The APIL believes that 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. It noted however that the Department of Justice has 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, in the view of the APIL, make it preferable to the system implemented in England and Wales.

182. FOCIS also views the *Wells v Wells* formula as the best and most appropriate way to ensure full compensation, stating that it is the only methodology that avoids plaintiffs being exposed to both investment and inflation risk.

183. FOCIS stated that the debates about fixing the discount rate in England and Wales, Scotland and now in 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.

Concerns that the new framework will lead to over-compensation and a lack of Ministerial accountability

184. The ABI welcomed the legislation stating that 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 and plaintiffs and defendants need to see a more stable and fairer method for setting the PIDR. Urgent reform is required as the NI rate will swing from one extreme to the other under the current *Wells v Wells* methodology. This provides limited incentive for one party to settle at either extreme, is not fair or equitable and requires reform urgently.

185. While the ABI shares the commitment to the principle of 100% compensation which means both claimant and defendant are treated fairly in a settlement, it does not support the decision to use the methodology based on the Scottish Act as, in its view, this does not meet the principle of 100% compensation. It believes the Bill as introduced will 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 HSCNI. It noted that the Justice Minister had 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*."

186. The NFU Mutual Insurance Society Limited (NFU), Aviva, Zurich Insurance and AXA all share the commitment to the 100% rule of compensation and welcomed a revision to the PIDR methodology which best achieves this overriding principle. That said, they all have concerns about the new proposed methodology.

187. The NFU stated that 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 and which factors in sufficient caution to ensure the 100% rule is consistently attained whilst also addressing the interests of justice for all parties. It does not believe that the new methodology is the most appropriate to achieve the desired result and highlighted that in the Department of Justice consultation on a new methodology it supported the 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.

188. Aviva stated that 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. It believes that further consideration should be given to adopting or mirroring the methodology from England and Wales to achieve a fairer outcome. Aviva stated that the framework used in Scotland is based on a policy decision taken by Scottish Ministers to over-compensate claimants which has the consequence of generating additional costs for compensators including HSCNI and other public bodies as well as insurers.

189. Zurich Insurance also does not believe that the proposed methodology to calculate the PIDR is the most appropriate to achieve as close to 100%

compensation as possible and highlighted that the recent interim discount rate of -1.75% will lead to over-compensation in approximately 90% of cases.

190. AXA does not support the use of the methodology based on the Scottish model stating it 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.

191. AXA 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. It also stated that the new rate of -1.75% is too low and is the lowest in all of the UK jurisdictions as well as the Republic of Ireland and will result in over-compensation with significant implications for consumers, business, key professions and the wider Northern Ireland economy and its competitiveness.

192. The Forum of Insurance Lawyers Northern Ireland (FOIL NI) and the British Insurance Brokers' Association (BIBA) acknowledged 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. They stated that 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 did not seek at this time to argue that a model based on the English framework would be preferable but if the passage of the Bill were to be delayed further they would wish to return with further submissions around the efficacy of a

methodology for calculating the PIDR using the English model and referred to the content of their original submission to the Department's consultation.

193. The Confederation of British Industry NI (CBI NI) fully supports the overarching commitment to the principle of 100% compensation and pointed out that upholding it is crucial as it ensures both insurers and claimants are treated fairly. It accepts that designing a framework to deliver on that principle is not without its challenges and indicated that 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

194. CBI NI noted that 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. It wants to ensure that a framework is developed that avoids imposing additional costs on local businesses, consumers and the public purse and stated that 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%. It would however have liked to have seen a much more fulsome impact assessment from the Department.

195. While the proposed new methodology is a welcome step away from the flawed, existing methodology the CBI NI does not accept it is the most appropriate way of achieving the 100% principle and guards against adopting the more rigid and prescriptive approach taken in Scotland with little discretion as to the final rate stating that low returns stemming from the

Scottish rate risks over-compensation and ultimately additional costs for insurers and compensators, often in the form of public bodies.

196. The Department of Infrastructure highlighted that changes to the discount rate will have implications for it 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.

197. BLM Law also agreed that the legal framework for setting the PIDR should no longer be tied to *Wells v Wells* because the principles of that case are no longer fit for purpose. While favouring 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 BLM acknowledges that the Department has set out its reasons for selecting the Scottish model.

198. BLM stated that 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 future 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. 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.

199. It highlighted that 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 over-compensated and half were under-compensated. Although finding the median point would simply be a question of statistical analysis, as a policy choice BLM acknowledges that it may be unattractive as it is implicit in it that half of the claimants will be under-compensated and it noted that 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."

200. While BLM expressed the view that 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.

201. In respect of the new statutory rate of -1.75% BLM indicated that it could be described as 'veering' inevitably towards guaranteed over-compensation, the adverse effects of which have been clearly set out by the Department:

> "*if claimants receive higher returns than are assumed under the discount rate, they will be over-compensated. 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".

202. BLM views this rate as 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.

203. The MPS outlined that 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. While it is important that there is reasonable compensation for patients who are harmed due to clinical negligence 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.

204. The BMA (NIGPC) also acknowledged the need to ensure claimants are appropriately rewarded for claims and should receive 100% compensation but stated that the issue cannot be considered in a vacuum. It also believed that 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.

205. The BMA (NIGPC) stated that the introduction of an interim rate using an outdated method by the Department in May 2021 was particularly unhelpful

and was likely to 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. While it had concerns about the potential impact of the legislation on general practice, the HSC and the public purse in NI, the BMA (NIGPC) was of the view that it is necessary to avoid having the interim rate in place for a protracted period of time and therefore it is imperative that the legislation is progressed as quickly as possible to mitigate the negative impacts of the interim rate.

206. The MDU stated that the setting of the personal injury discount rate was 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 and 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, the MDU views it as certainly a matter for government. The MDU advised that it had experience of the sizeable effect on public services of a large drop in the PIDR and outlined that 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.

207. HSCNI stated that 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 and noted that 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. HSCNI highlighted that 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 it emphasised the issue of potential over-compensation to many plaintiffs with the resultant ramifications for public funds. HSCNI advised that the new rate would not resolve the uncertainty as it is rightly viewed by defendants as being an interim rate that will be replaced by a long-term rate. The situation therefore needs to be resolved speedily.

208. HSCNI indicated that one safeguard against over-compensation 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.

209. The Medical and Dental Defence Union of Scotland (MDDUS) stated that 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. It considers that the statutory methodology is more heavily weighted towards avoiding under-compensation than avoiding 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 MDDUS suggested that 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.

210. The 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 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 -0.75% % and England and Wales at -0.25% and results in Northern Ireland having the lowest discount rate in the world. It pointed out that 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. In its view, 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. RHA suggested that 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.

Committee Consideration of the General Comments

211. **The Committee appreciates the need for a stable, longer-term PIDR to be set in Northern Ireland, with provision for it to be reviewed at regular intervals, to replace the current --1.75% rate, particularly given the uncertainty there has been in recent times and the reported negative impact on progressing cases under the previous and current rate.**

212. **Whilst noting that those organisations representing claimants view *Wells v Wells* as the best and most appropriate methodology the Committee is of the view that it no longer reflects how a claimant would be advised to invest their lump sum and therefore a new framework for setting the PIDR is needed for Northern Ireland.**

213. The Committee understands the difficulties with the current rate in relation to potential over-compensation in many cases and the resultant economic and social ramifications. During the oral evidence session with departmental officials on 9 September the current rate was discussed and officials advised that the Department has no power to change the rate except under the *Wells v Wells* criteria until such times as a new framework is introduced by legislation. Officials indicated that if the Department was to fix another rate under the *Wells v Wells* methodology it could go even lower. While they had no way of knowing what the new rate would be using the new framework contained in the Bill given when the rate is set plays a part in determining what it is, they expected that the rate would go up on the basis that it would be calculated on a portfolio that allows for investments in other products which should provide a better rate of return rather than solely on index-linked gilts.

214. The Committee also sought information on how many cases had been settled since the new rate was introduced given issues had been raised about it. In response officials advised that the Department does not have an insight into or knowledge of cases that are settled or close to being settled but the impression from the Lord Chief Justice's evidence to the Committee is that cases are being delayed in the expectation that a different rate will be set.

215. The Committee is committed to assisting the progression of the legislation through the Assembly as quickly as possible without compromising on the scrutiny that needs to take place.

216. The Committee consideration of the range of detailed issues raised in the evidence received is covered in the rest of the report.

Clause 1 – Assumed return on investment

217. This Clause inserts a new Section C1 into the Damages Act 1996. New Section C1:

- Removes the role of the Department in setting the discount rate
- Provides that a court must take into account the rate of return set by the rate-assessor in determining the return a claimant is expected to receive from investing a sum awarded as damages for future 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 of return if any party can show this 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 will be the rate-assessor. The Department of Justice also has a power by regulations, subject to the draft affirmative procedure, to appoint a person other than the Government Actuary to be the rate-assessor and someone to deputise for that person, subject to their agreement

218. In the evidence received in relation to Clause 1 the key issue raised was whether it is more appropriate to transfer responsibility for setting the rate to the Government Actuary or whether responsibility should remain with the Minister of Justice. Opinion was divided on the matter with concerns raised by those who are not supportive of the proposed change regarding the lack of flexibility and discretion in the model and a lack of political accountability. The Bank of England Prudential Regulation Authority expressed the view that the most appropriate arrangements for accountability is essentially a political decision. The need for Clause 1(1) subsection (2) was also questioned by the IUA who does not believe it is necessary.

Transfer of responsibility for setting the PIDR to the Government Actuary

219. A number of organisations support the transfer of responsibility for setting the rate to the Government Actuary as provided for in the legislation stating that the setting of the rate is an actuarial exercise and there is no need for political involvement once the methodology has been agreed.

220. APIL stated that there is no legitimate reason or necessity for political involvement in setting the discount rate. It views it as an actuarial task and not a political one and supports the decision to transfer responsibility for setting the rate to the Government Actuary. APIL also points out that the Department of Justice will still retain overall responsibility for the methodology to set the rate and if, at any point, it becomes apparent that the methodology is no longer appropriate the Department will be able to change either the notional portfolio or the entire methodology.

221. FOCIS also believes that the method of calculating the discount rate should be depoliticised and taking the responsibility away from the Department of Justice is the preferred way forward. It said that 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. FOCIS is of the view that 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 Northern Ireland.

222. The IFoA also supports the principle of transferring responsibility for setting the rate to the Government Actuary on the grounds of transparency and stated that it should also mean that setting the rate should be free of political pressure. It noted that the Government Actuary could seek independent

consultations for future changes and indicated that its work should be subject to peer review.

223. The Department of Finance noted that 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 in Scotland. While accountability for the setting of the rate will rest with the Government Actuary, the Department of Finance noted that 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.

224. The Law Society is of the view that the method of setting the discount rate should be such that the process is free from political influence or interference and this will provide certainty for insurers as well as for plaintiffs.

225. Lisburn and Castlereagh City Council advised that it appreciates the advantage of removing the Department’s current role in setting the rate and noted that 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. The Council believes that providing the Department of Justice with 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, ensures political accountability for how the rate is set.

226. A range of other organisations do not however support the proposed model citing a lack of flexibility, discretion and political accountability and indicating that it is more appropriate for the responsibility for setting the rate to

continue to reside with the Minister of Justice. One organisation expressed the view that the PIDR should be set by the Executive collectively as there are important cross-sectoral assessments to be made.

227. FOIL NI and BIBA stated that, under the proposed new methodology, the final say on the rate will lie with the Government Actuary. It notes that 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 and that, in prescribing the list and composition of investments within the notional portfolio in the legislation, the Government Actuary's role is purely an actuarial one.

228. FOIL NI and BIBA question whether the Government Actuary can carry out its role devoid of any considerations or parameters other than those prescribed in the legislation and suggested that economic performance and volatility of investment markets are key issues. It highlighted that 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"*. The Government Actuary 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.

229. It is the view of FOIL NI and BIBA that, while the Government Actuary's Department (GAD) might be seen to be completely constrained by the

parameters set out in the legislation and simply carrying out an actuarial exercise, the Government 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 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. While in a superficial way the Scottish model presents a purely actuarial exercise the Government Actuary would accept and acknowledge that it has to make judgement calls and exercise a degree of discretion even with the prescription within that notional model and will call on outside expertise as well.

230. FOIL NI and BIBA stated that, while 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, 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. Given GAD’s exercise in striking the PIDR will require a range of considerations and decisions it questions whether those decisions and choices are 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. According to FOIL NI and BIBA the disadvantage of the new methodology is also 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 - and it states that, 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.

231. ABI stated that the framework for Scotland is significantly more rigid and inflexible than the framework for England and Wales and under the Scottish framework the rate-setter's discretion as to the final rate is very limited.

232. ABI believes that there must be political accountability for the decision to set a rate. In its view 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 Northern Ireland 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.

233. Zurich also believes that, given the wide-ranging and considerable impact of any change in the PIDR, there should be political accountability for any decision to set or review the rate and the Justice Minister should exercise their judgement in relation to the nature of the investment portfolio and any adjustment factors in consultation with a similar group of experts and giving consideration to the same issues as outlined by the ABI.

234. It is also 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 the aspiration of having a structure in place that is both fair and flexible.

235. According to the 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. There must however be political accountability for the decision to set the rate and therefore it also prefers a model where the Justice Minister has the power to exercise their judgement over the final decision on the PIDR taking into consideration the investment portfolio and any adjustments in consultation with an expert group, made up of the Government Actuary, economists, financial advisers and representatives for claimants and compensators.

236. Aviva believes that 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, it recommends 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.

237. AXA highlighted that the methodology will likely be in place for many years to come and have an ongoing financial impact for claimants, defendants, the taxpayer, the NHS, the public and business alike therefore it would seem imperative that there is accountability and flexibility (should circumstances change). In its view the proposed model falls short on both these fronts and, to ensure political accountability, 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 and not 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 in this Bill which has by its nature very long-term implications.

238. AXA is also of the view that 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.

239. BLM outlined that in its response to the Department of Justice consultation in 2020 it 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."

240. The key concerns of BLM with the approach provided for in the legislation 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. It notes that the regulation-making powers in the Bill should be largely adequate in respect of providing flexibility to change elements if necessary.

241. IUA noted that the model in England and Wales has resulted in the Lord Chancellor making the ultimate decision on the discount rate. It 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 had 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 maintaining that political accountability is important the IUA acknowledges 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.

242. HSCNI expressed the view that the England and Wales approach in which the rate is set by the Lord Chancellor emphasises political accountability whereas the Scottish approach is independent and dealt with by the Government Actuary. 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, there is that level of accountability and it is subject to parliamentary scrutiny. Of the two approaches, while some see political ‘interference’ as a negative, HSCNI states that it is a positive as it opens the rate setting process to consideration of other important factors.

243. HSCNI recommends that the England and Wales model is adopted with parliamentary scrutiny, but 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.

244. The MPS also took the position in the Department of Justice consultation in August 2020 that a model where the decision lies within the elected Minister in the Department of Justice would be effective in Northern Ireland and the Government Actuary solely being responsible for setting the rate is not its 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. Similar to other organisations, the MPS 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.

245. The MDU believes that 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 - and 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 - and therefore responsibility for setting the PIDR should remain with the Minister of Justice rather than the Government Actuary as the Minister is accountable to the Assembly and the people of Northern Ireland to a much greater extent than the Government Actuary.

246. According to the MDU 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. The 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. 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 MDU recommends that 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 different discount rates.

247. The MDDUS states that most of the assumptions are set out in the legislation and can only be changed by regulations by the Department therefore the Government Actuary will have relatively limited discretion when setting the PIDR - it is left with deciding on the investment returns to assume. MDDUS views this as 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. However, it 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 and 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.

248. In response to the views expressed that transferring responsibility for setting the rate to the Government Actuary reduces political accountability the Department of Justice stated that it considers that there is more, rather than less, political accountability in adopting the Scottish model.

249. The Department pointed out that under the provision in the Bill, the Government Actuary will set the rate according to the detailed methodology prescribed in primary legislation. The Northern Ireland Assembly is responsible and accountable for setting these detailed parameters, and any subsequent changes will be made by the Minister of Justice by way of secondary legislation requiring the approval of the Assembly. This ensures that there is still full political accountability.

250. Once the detailed parameters for setting the rate are determined in this way, the Department views the setting of the rate as simply an actuarial exercise which the Government Actuary is, therefore, best placed to carry out. Under the framework proposed in the Bill, the Government Actuary will be required to set 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.

251. 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, clear and transparent than leaving these matters to the discretion of a Minister and this also ensures greater political accountability.

252. The Department does not accept that there is a lack of flexibility in the model since there is the power to amend the methodology by secondary legislation, provision for a five-yearly review of the rate and a duty on the Department to review the suitability of the notional portfolio in advance of each five-yearly review. There is also provision for the Department to order an extra review in-cycle if required e.g. in the event of disruptive economic circumstances.

253. The Department responded to the views expressed that, in setting the rate there is a need to consider and weigh in the balance potential costs to public services, particularly the Health Service, businesses, insurers etc. therefore responsibility for setting the rate should sit with the Minister of Justice, by pointing out that 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 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. This precludes taking account of the impact on defendants, including the health service.

254. The Department stated that, if it was to legislate to move away from the 100% principle by setting a rate that takes into account factors other than those relating to investment returns and associated costs, 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.

Necessity of Clause 1(1) subsection (2)

255. The IUA does not believe that Clause 1(1) subsection (2) is necessary and recommends that it should be removed from the Bill. It indicated that 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 which 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 IUA is of the view that the discount rate should be set by the rate assessor.

256. In response the Department of Justice highlighted that 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.

Committee Consideration of Clause 1

257. The Committee took the opportunity to explore the issues raised regarding whether there is a lack of flexibility in the new statutory framework, whether there is an appropriate level of accountability and the potential impact on public services, particularly the Health Service, businesses, insurers etc. in more detail during the oral evidence sessions with ABI, APIL and FOCIS, FOIL and CBI NI, HSCNI, MDU, MPS and BMA (GPCNI),

258. The Committee also commissioned a research paper on any wider impacts observed in England and Wales and Scotland following the changes to the legislative framework and the resultant PIDR in those jurisdictions and any relevant information available from other jurisdictions. Having considered the research paper, which highlighted that the Justice Select Committee that undertook pre-legislative scrutiny of the Civil Liability Bill in Westminster noted a report by the BIICL that observed that the setting of the discount rate in other countries was “often not a neutral application of figures” but represents “a balance between competing considerations” the Committee sought further clarification from the Department of Justice regarding why the wider economic and societal impacts of changes to the rate cannot be considered, whether those parameters apply in other jurisdictions and, if not, why not.

259. The Department responded advising that the position that wider impacts cannot be taken into account in setting the rate stems from the established legal principle that the purpose of an award of damages for future financial loss is to provide full compensation - no more no less - i.e. the 100% rule, applies in all the UK jurisdictions and dates back as far as a nineteenth

century House of Lords case. The House of Lords *Wells v Wells* judgement in 1999 affirmed the principle. The Department also stated that the same legal principle applies in the RoI and highlighted that, in a case in the Irish Court of Appeal in 2015, the Judge observed that the outworking of the principle is that the economic consequences for the defendant or society are not relevant in the calculation of the amount of damages payable.

260. The Department stated that taking into account wider societal or economic factors such as the impact on the health service would have the effect that a person who suffered serious injuries due to the actions/negligence of another person would only be entitled to be compensated to the extent that society is able or willing to pay and this would be a fundamental departure from the 100% principle.

261. The Department recognised that the Assembly may consider legislating so that the 100% principle no longer applied and the amount of compensation payable to a personal injury claimant is instead determined by factors outside the loss they have suffered but it suggested that such a significant change could not be properly addressed in this Bill. In its view, it would require specific consultation with stakeholders including personal injury claimants and, as it would be a change to substantive civil law, would be a matter for the Department of Finance.

262. Having considered the written and oral evidence received in respect of these issues and the additional information provided by the Department the Committee took the opportunity to discuss them and the necessity for Clause 1(1) subsection (2) when departmental officials attended the meeting on 9 September 2021.

263. In response to questions on why most of the organisations that represent defendants would prefer to see the England and Wales model introduced even though both it and the Scottish model are intended to deliver the 100%

compensation principle, the officials expressed the view that defendants may think there could be more scope for influencing the outcome of that model and making representations to the Minister. There is a lot more room for the exercise of discretion whereas there is no scope for that in the Scottish model because the portfolio and the deductions to be made are prescribed in the Bill. Providing discretion could result in the Minister being lobbied or placed under pressure to adopt a more risky portfolio or change the adjustments. The officials also outlined that an expert panel is involved in the England and Wales Scheme which results in extending the time taken to fix the rate and highlighted that previous experience of such panels, in the context of the statutory discount rate, have not been helpful as the experts cannot agree.

264. The officials reiterated the Department's position that, once the parameters are laid out in the legislation, the setting of the discount rate is an actuarial exercise and there is no role for political judgement. Political accountability is still in place however as the portfolio and deductions are prescribed in the Bill and subject to review before any rate is set. This provides the Minister and the Assembly with the necessary oversight of and accountability for the framework but removes the opportunity for attempts to influence the outcome.

265. The Committee sought clarification from the Department regarding whether the proposed framework provides sufficient flexibility to change the portfolio or make adjustments quickly if circumstances warranted this given secondary legislation is needed to do so. The Department indicated that it believes that there is sufficient flexibility and highlighted that there will be a review of the portfolio before any new rate is set with the first review, after the initial rate is set under the new framework, due in July 2024. There is also provision for an extra review to take place within the 5-year period if circumstances merit it. The Department also highlighted that the secondary legislation requirement gives the Assembly oversight.

266. The Committee also explored the need for and purpose of Clause 1(1) subsection (2), particularly given the Department had indicated that, as far as it is aware, the power has not been much, if ever, invoked.

267. The officials outlined that Clause C1(2) allows the court to take a different rate into account if it shows that it is more appropriate but clarified that the power is heavily restricted by Court of Appeal in England and Wales case law so it is only possible for the court to apply a different rate where the party to the proceedings can show that the particular circumstances of their case were not considered or dealt with in the context of setting the statutory discount rate. Officials could not envisage what such circumstances would be and were not aware of the courts in Northern Ireland ever setting a different rate from the prescribed discount rate.

268. When pressed as to the rationale for having the provision the officials stated that it was already provided for in the Damages Act 1996 and it was therefore simply being retained, there was no harm in having the power and it is useful to have in the event that there is a case where the court would find the power helpful.

269. **The Committee fully supports the application of the 100% compensation principle for those who have been injured as a result of the negligence of another person and, noting the information and rationale provided by the Department, respects the position that wider economic and societal impacts should not be taken into account when considering the framework to set the personal injury discount rate.**

270. **The Committee noted that the Scottish Government produced a Financial Memorandum in which it provided information on the possible impact of a change in the discount rate together with illustrative figures even though the**

Bill itself did not change the discount rate and therefore the illustrations were not direct costs or savings arising from the Bill. While the impact and implications of changes to the PIDR cannot be taken into account when considering the framework for setting it, the Committee does believe that information should be available so that the potential consequences and costs are fully understood and necessary mitigations and actions can be considered by Government and the relevant organisations in preparation for a new rate coming in. The Committee therefore recommends that the Department should publish an impact assessment setting out the potential implications of different rates on Departments and businesses when a review is due to take place.

271. **Having considered the issues raised in the evidence, the Department of Justice's response and the further clarification it provided regarding the accountability arrangements, the flexibility to review and change the framework if circumstances necessitated this and the rationale for retaining Clause (1) subsection (2) the Committee agreed that it is content with Clause 1 as drafted.**

272. **The Committee also expressed the view that it may be useful for the Department to clarify the position regarding Clause (1) subsection (2) in the Explanatory and Financial Memorandum to the Bill.**

Clause 2 – Process for Setting the Rate of Return and Schedule C1

273. Clause 2 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.

274. A number of issues where raised regarding the Schedule to the Bill in the evidence received. These largely related to the timing of reviews of the rate,

the provision of a 43-year assumed investment period for the notional portfolio, the adjustment to the rate to take account of inflation, the provision of standard adjustments to take account of the impact of taxation and costs of investment advice and management and for a further margin and the actual percentages, the composition of the notional portfolio and the description of the hypothetical investor.

Schedule C1 Paragraphs 1 to 3

275. Paragraphs 1 to 3 of the Schedule obliges the rate-assessor to review the discount rate and deals with the timing of reviews:

- The 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
- A 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

276. There was support for regular reviews of the rate amongst those organisations that commented on the review arrangements with all but one of the organisations agreeing that a five-year cycle is appropriate.

277. APIL stated that the rate should be reviewed on a regular basis and both IUA and HSCNI supported a review period of 5 years. HSCNI highlighted that cases involving the discount rate 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.

278. IUA indicated that 5 years is frequent enough so that the discount rate should not become significantly out of line with investment returns but not too frequent that it could distort settlements in the lead up to a discount rate review. Having in-built reviews also introduces a level of predictability and thus certainty for those impacted by discount rate changes.

279. Lisburn and Castlereagh City Council also welcomed the introduction of regular reviews at least every five years stating that 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 Council views the ability for the Department to require the rate-assessor to conduct a review starting earlier than the next regular review as an important tool in providing flexibility for the rate to be adjusted to respond to sudden and unexpected changes in the market.

280. The MPS, in its written evidence, stated that there should be a regular and predictable point at which the rate is reviewed in order to avoid sudden and dramatic changes. It believed that it would be better for the review of the discount rate to take place every three years rather than five years in order to ensure that any rate changes would be relatively minor each time as quite significant changes can be seen over a five-year period.

281. The Department confirmed that the Bill provides for the rate to be reviewed on a five-yearly basis (once Northern Ireland comes into line with the review cycle in Scotland) and the first review after the rate is set will be in July 2024. It considers that, 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.

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 also have the power to order an in-cycle review if economic circumstances require this.

Committee Consideration of Schedule C1 Paragraphs 1 to 3

282. The Committee discussed the rationale for preferring a three-year review period with MPS during the oral evidence session on 3 June and noted that, while MPS viewed three-yearly reviews of the discount rate as the optimal position, given there can be quite significant changes over a 5-year period it recognised that there could be operational challenges with the shorter review period and accepted there was a balance to be achieved.

283. The Committee also questioned departmental officials on how the proposed review periods align with the cycle in England and Wales and noted that, while there is a similar cycle of regular reviews in that jurisdiction, the review periods provided for in the Bill align with the Scottish cycle which could provide efficiencies for both the Department and the Government Actuary when it carries out the exercise given the model for Northern Ireland is very similar to the Scottish model.

284. When deliberating on paragraphs 1 to 3 of the Schedule at its meeting on 23 September the Committee sought clarification from the departmental official regarding the advantages and the challenges if a three-yearly review period was adopted. The official outlined that a 3-year period would provide for the rate to be reviewed sooner and, if circumstances required, it could be changed but did point out that there is already provision in the legislation for an extra review to be undertaken if deemed necessary. The downside was that the shorter review period may encourage parties to 'game the system' by delaying settlements if they felt that the review may change the rate in

their favour. The five-year review period was viewed as the optimum period to reduce the opportunity for parties to delay settlements but provide regular reviews of the rate.

285. **The Committee supports regular reviews of the rate and considers these necessary to avoid a situation where the PIDR could be out of kilter for a substantial period of time. The Committee views the five-year cycle of reviews provided for in the Bill as an appropriate approach particularly as an additional review can be carried out if considered necessary.**

Schedule C1 Paragraphs 4 to 6

286. Paragraph 4 provides an overview of the rate-setting process, Paragraph 5 provides that a review will determine whether the rate is to remain the same or be changed and Paragraph 6 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.

287. There were no issues raised in the evidence received by the Committee on Paragraphs 4 to 6 of Schedule C1

Schedule C1 Paragraphs 7 and 8

288. Paragraph 7 sets out the basis upon which the rate-assessor is to determine the rate of return. Subject to standard adjustments and rounding of figures it provides that the rate should reflect the rate of return for the notional portfolio (provided for in Paragraph 12) over a 43-year period. Paragraph 8 gives the Department a power, by regulations subject to the draft affirmative procedure, to change the period of 43 years.

289. There was widespread support for the use of a 43-year period amongst organisations representing defendants and others who highlighted that it is based on evidence unlike the 30-year period used in the Scottish model. However, FOCIS and APIL who represent claimants in cases, raised some issues and concerns about the length of the period.

290. In its written submission APIL outlined that the figure is based on the average life expectancy and it does seem like a significant period for people with serious catastrophic injuries, whose injuries will develop into additional complications some of which are unforeseen. When asked during the oral evidence session the APIL representative indicated that she was not clear why Scotland adopted a 30-year period and it may have been that they assumed that that was the lowest rate of survival as opposed to an average.

291. FOCIS highlighted that 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. In its view 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. During the oral evidence session, the representative indicated that it was out of kilter with their experience especially on claims involving the most serious injuries and the period would clearly be inapplicable to any plaintiff who was already over 45 or whose life expectancy has been significantly compromised by severely disabling injuries.

292. FOCIS also highlighted that, 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 under-compensate them. As there are

readily available and highly credible statistics concerning longevity, FOCIS contends 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.

293. As an alternative, recognising that calculating the impact of longevity has complexities, FOCIS proposed 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. This is in addition to the further margin adjustment of 0.5% to mitigate the broader risk of under-compensation. 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.

294. FOCIS also believes that, 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.

295. In the oral evidence session, the FOCIS representative stated that the issue of the 43-year period was not as important as the composition of the portfolio, the under-compensation adjustments and the inflation adjustment.

296. MDDUS noted that, according to the analysis published by GAD, 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. It stated that 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 it would be useful to gather NI specific data. As the investment period of 43 years differs from the period

of 30 years used in Scotland, this could lead to different PIDR rates in NI compared to Scotland even though the proposal is to follow the Scottish model and MDDUS believes that 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.

297. The ABI outlined that, in 2017, it 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. ABI therefore 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. It stated that 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.

298. Both HSCNI and Aviva agree that using an investment period of 43 years is an objective one, backed up by evidence in the form of the analysis from the ABI that concluded that the average investment period was 46 years. Aviva noted that the 43-year period errs on the side of caution.

299. AXA also referred to the findings of the ABI analysis and 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.

300. In the view of FOIL NI and BIBA, the amendment to the Scottish based framework to use a longer assumed investment period of 43 years as provided for in the Bill (rather than 30 years) more accurately reflects the average or typical investment period for a lump sum award of damages and also references the ABI analysis.

301. FOIL NI and BIBA stated that 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. It also noted that, 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. It noted however that the Department does have the power to change the period of 43 years by regulations.

302. CBI NI again referenced the ABI analysis and stated that 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 in its view the methodology is more likely to achieve a result closer to the 100% principle.

303. The MPS highlighted that 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. It noted that 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. In its view the 43-year period is based on actual data and it makes more sense to use that period than an arbitrary 30 years.

304. 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. It is of the opinion that 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. It also 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.

305. NFU Mutual also 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.

306. BLM noted that 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.

307. 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.

308. The Bank of England Prudential Regulation Authority highlighted that 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 and the likely effect is therefore to represent the typical investment term. It stated that 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. The Bank of England Prudential Regulation Authority therefore agrees with the proposed approach however notes that the investment period may need to be changed over time.

309. The Permanent Secretary of the Department of Finance noted that the Department of Justice had 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. She was therefore content that appropriate consultation had taken place to determine the most appropriate investment period.

310. Lisburn and Castlereagh City Council also believed that the proposed 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 but noted that 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.

311. The IFoA supports the use of the longer investment period of 43 years instead of 30 years in determining the discount rate stating that 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. The IFoA did however note that the longer investment period may be more likely to under-compensate individuals with shorter life expectancy.

312. In response to the assertion by FOCIS that the rationale and evidential basis for the 43-year period was unclear, the Department outlined that the evidence available to it, 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 the Bill. The 30-year period specified in 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. The Department also responded to the views expressed by MDDUS that the same period may not be applicable to claimants in Northern Ireland by indicating that it 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.

313. In relation to the contention by FOCIS that GAD should factor in longevity statistics into any further analysis and modelling, the Department indicated that, 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.

314. In response to the proposal by FOCIS 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 the Department stated that, in its view, the proposed further margin already included is sufficient to safeguard against the risk of under-compensation. It also confirmed that it would seek such expert advice or other evidence as may be required to inform a decision whether to change the assumed period of investment.

Committee Consideration of Schedule C1 Paragraphs 7 and 8

315. The Committee sought further information on the likely effect of adopting a 43-year investment period rather than a 30-year investment period when officials attended to give oral evidence on 9 September 2021.

316. The officials advised that the Government Actuary had indicated that, in practice, the difference between an assumed investment period of 30 years

and one of 43 years is likely to make only a very small difference of 0.1% or 0.2% in the rate calculation, if everything else is equal. They outlined that, since the discount rate is rounded to the nearest 0.25% the material effect on the rate will be nil or 0.25% and provided examples to illustrate this.

317. The Committee also asked if the Department intended to gather data on the average investment period for claimants in Northern Ireland to inform any further consideration or to find out whether any change to the assumed period of investment is required. In response the officials outlined that data gathering is very difficult as it would require asking individuals to provide information on how they invested the lump sum they received and over what period of time. This could be seen as intrusive and, given it would require a huge exercise and resources but have questionable value, the Department had no plans to undertake it.

318. At the meeting on 23 September when it was deliberating on the provisions in the Bill the Committee sought clarification from the departmental official of the reason for deciding on a 43-year period as opposed to a 30 -year period and the official confirmed that the Department believed it was better to use the evidence-based period of 43 years rather than the 30-year period which is essentially an arbitrary figure used in Scotland.

319. **While there is evidence to support the use of a 43-year investment period for setting the discount rate, and it would therefore appear to be a more appropriate approach to adopt, the Committee is of the view that it must be considered in the round with the other parts of the Schedule that provide the composition of the notional portfolio and the adjustments to take account of inflation, the impact of taxation and costs of investment advice and management and the further margin to ensure, as far as possible, that the model will deliver the 100% compensation principle and does not veer too far towards either over-compensation or under-compensation.**

Schedule C1 Paragraph 9

320. 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.

321. There was a mix of views received regarding the adjustment to take account of inflation by reference to the retail price index (RPI).

322. The ABI believes that the 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 which are important factors in PIDR calculations. It notes that the UK Government has announced its intention to replace the RPI with the Consumer Price Index with Housing (CPIH) by 2030 which would require the Department of Justice to amend this legislation (assuming it passes) by that point and wanted to know how the Department plans to respond to this intended change.

323. In contrast BLM stated that the RPI is now generally regarded as unsuitable for official purposes and referred to the commentary by the Office for National Statistics on the shortcomings of the RPI.

324. FOCIS outlined that 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. FOCIS stated that 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 therefore the minimum acceptable inflationary adjustment and if the alternative of CPI were to be contemplated it would require an adjustment of at least 1% to rebalance the position.

325. The Department outlined that 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 and stated that RPI, which is the measure of inflation provided for in the Bill, is a closer measure to damages inflation than CPI. It also highlighted that the Bill provides the Department with the power to change it (subject to the approval of the Assembly) and it will be kept under review.

Committee Consideration of Schedule C1 Paragraph 9

326. **Having sought assurances from the Department that there is provision to change the inflation measure if necessary the Committee considers that provision for an adjustment to the rate of return to take account of inflation by reference to the Retail Price Index is an appropriate approach to adopt.**

Schedule C1 Paragraphs 10 and 11

327. Paragraph 10 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.

- also 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)

328. Paragraph 11 provides that 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. Unlike the rate ultimately set by the rate-assessor these numbers are not limited to being expressed in steps of a quarter percentage point.

329. There were contrasting views expressed in the evidence received on the Bill in relation to the adjustments provided for in Paragraph 10 of the Schedule.

330. Those organisations supporting claimants welcome the inclusion of the 0.5 % further margin adjustment but do not think it goes far enough and are also of the view that the 0.75% adjustment to take account of the impact of taxation and the costs of investment advice and management is too low. On the other hand, all the organisations who represent defendants strongly believe that the inclusion of the 0.5% further margin adjustment will lead to over-compensation, particularly if the notional portfolio remains the same as provided for at Paragraph 12 of the Schedule, and should be removed from the Bill. Some organisations also questioned the 0.75% adjustment for tax and investment advice.

331. The Bank of England Prudential Regulation Authority noted 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 and regards it as reasonable either to include the margin (slightly favouring claimants) or to omit it (for strict balance) and does not offer a preference viewing it as a political decision for the NI Assembly.

332. Whilst believing that the standard adjustments included in the Schedule will add transparency to the setting of the discount rate, APIL is concerned 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. APIL 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".*

333. APIL proposes 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 to ensure injured people are not under-compensated.

334. FOCIS also stated that 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. It 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 its 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. It highlighted that further enquiries within FOCIS and the investment professionals who work with 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 also 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.

335. FOCIS understands from experts 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. It therefore views the 0.75% adjustment as 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.

336. While welcoming the 0.5% further margin adjustment to moderate under-compensation FOCIS believes that it does not go far enough, noting that 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.

337. In contrast, in its written evidence, the ABI stated that the Department of Justice has not provided any evidence to show that the further adjustment of 0.5%, which has been adopted from the Scottish legislation, is required in

order to achieve 100% compensation. It believes that including it in the Bill exceeds the target of 100% compensation and it should be removed.

338. The ABI highlighted that 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" and 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." In ABI's view 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 claimant and therefore beyond the 100% compensation principle. It stated that the notional portfolio adopted from the Scottish legislation is already over-cautious and risks departing from the principle of 100% compensation. The further margin adjustment is therefore unnecessary, fundamentally undermines this principle and should be removed.

339. In its oral evidence the ABI indicated that it absolutely 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 Northern Ireland are any different.

340. FOIL NI and BIBA also believe that the use of a further margin or margin of prudence adjustment of 0.5% provides for a significant potential for over-

compensation and stated that 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. They question why, if the composition of a mixed portfolio has the goal of achieving 100% compensation to the injured plaintiff, there is any need to use such a method to apply an additional adjustment downward of the gross rate of return by 0.5%.

341. FOIL NI and BIBA also draw attention to the Policy Memorandum which accompanied the Scottish Act in which 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 and noted that 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". They recommend that 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.

342. FOIL NI and BIBA noted that, 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. 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 of 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 would not be as much as if the *Wells v Wells* methodology had been retained.

343. IUA is also of the opinion that the inclusion of an explicit 0.5% additional margin when calculating the rate will result in systemic over-compensation

and noted that 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.

344. IUA believes the 0.5% further margin should be removed in order to provide a methodology that will result in a discount rate enabling claimants to receive close to 100% compensation.

345. The CBI NI outlined that 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 questions why a further downward adjustment of 0.5% is incorporated in the model in the Bill and states it should be removed as it conflicts with the 100% principle. The CBI NI also highlighted that the Scottish policy paper stated that the 0.5% further margin *“will inevitably lead to over-compensation”.*

346. Aviva also believes that the 0.5% further margin adjustment guarantees that the discount rate will deliver over-compensation to claimants. It states that 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 and the costs associated with paying more than 100% compensation will ultimately fall on NI consumers, businesses and taxpayers to fund.

347. Zurich and the NFU Mutual agree that the 0.5% further margin adjustment will inevitably lead to consistent over-compensation if incorporated. Zurich stated that 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. According to the NFU Mutual the level of over-compensation 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.

348. BLM indicated that 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.

349. It expressed the view that 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. BLM indicated that 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 rough rule of thumb and in the absence of specific evidence on the point.

350. MDDUS also indicated that the further margin percentage should be reduced to reduce the potential for over-compensation.

351. AXA challenged the 0.75% deduction as it was not aware of any factual evidence having been supplied to support a standard adjustment for taxation and investment advice and stated that the figure should not be accepted at face value just because another jurisdiction might use similar figures.

352. In its view 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 costs might be incurred on an intermittent basis only, if at all. AXA suggested that 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 – organisations already pay in similar fashion for the cost of case managers who organise claimant's on-going/future care.

353. AXA stated that it understands the reasoning behind the further margin adjustment is to remove inherent risk but believes it 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. It is also unnecessary as the notional portfolio is already cautious. Claimants who want to avoid risk totally can avail of PPOs which will compensate them for the remainder of their lives and which completely avoids the need for extra margins. AXA believes that there is good evidence to support the removal of both standard adjustments as these appear to be a major contributor to potential over-compensation.

354. AXA also drew attention to the Annual Accounts of the Courts Funds Office and a consultation into management of funds held on behalf of

minors and patients. The Northern Ireland Courts and Tribunals Service (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 arrangements.'* It is evident from the information published that the funds for these claimants are carefully managed and protected with investment returns made. AXA therefore suggested 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.

355. The Department responded to the issues raised regarding the 0.75% adjustment by outlining that the Government Actuary 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.[9] 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). 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.[10] 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

[9] *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***.

[10] Ibid., p. 48.

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 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.[11]

356. The Department also advised that damages invested and managed by the court are subject to management costs and risks in the same way as other damages.

357. In relation to the further margin adjustment of 0.5% the Department indicated that, 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.

358. 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

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

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.

359. The Department believes that an adjustment to reduce the risk of under-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 Department however 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. It also pointed out that the option of a periodical payments order is available for claimants who are unwilling to bear this amount of risk.

360. The Department does not agree that the notional portfolio is over-cautious and considers that it is suitable for investment in by the hypothetical claimant described at Paragraph 17 of the Schedule. 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 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 (the notional portfolio is addressed in more detail in the section covering Paragraph 12 of the Schedule).

361. The Department stated that 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 ILGs. 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'.

Committee Consideration of Schedule C1 Paragraphs 10 and 11

362. The Committee appreciates the significant concerns a wide range of organisations and respondents have in relation to the inclusion of the standard further margin adjustment of 0.5% and therefore spent some considerable time discussing this provision during the oral evidence sessions with key stakeholders and with the departmental officials and considering the information and clarification provided by the Department on the need for it and the potential ramifications if it is removed from the Bill.

363. During the oral evidence session with departmental officials on 9 September 2021 the Committee questioned whether the Department had moved from its position regarding 100% compensation, whether the inclusion of the further margin adjustment was in effect ‘double counting’ and what level of over-compensation the Department believes is acceptable.

364. Officials advised that no level of over-compensation is acceptable in the same way that no level of under-compensation is acceptable but there needed to be realism about what is achievable. Under-compensation or over-compensation can apply in any case if a claimant died shortly after receiving their lump sum settlement or long outlived their life expectancy. They outlined that in Scotland and in England and Wales a margin of 0.5% was applied in order to reduce the risk of under-compensation to 30 or 35%. That still means that some people will be under-compensated, others will be fully compensated and a few may be over-compensated. In the Department’s view the 0.5% margin provides a reasonable balance between under-compensation and over-compensation. If a claimant is concerned about under-compensation they can consider a PPO as an alternative to a lump sum. They also highlighted that there was an argument that the discount for the cost of management advice and tax should be higher than 0.75% and, in setting that discount at 0.75% some regard was given to the provision of the further margin deduction of 0.5%.

365. The Committee returned to the issue of the 0.5% further margin adjustment during its deliberations on the Bill on 23 September 2021 and again sought further clarification from the Department on the necessity of this discount and the implications if it was removed from the Bill.

366. The Department outlined that the exercise of setting the framework and the notional portfolio is based on expert advice and informed assessments of how investments might perform in the future and there is an inherent risk attached to it. The purpose of the further margin – which the Lord Chancellor

described as a “margin of prudence” when setting the rate in England and Wales – is to move the position from a 50:50 risk of over-compensation and under-compensation so that the risk is slightly more in favour of the claimant rather than the defendant. The Department noted that generally the defendant is a large corporate organisation backed by large financial resources and in a better position to bear the risk than an individual claimant. According to the experts, the inclusion of the margin tips the balance of risk slightly in favour of the claimant and the probability of under-compensation is 35% and over-compensation 65%.

367. **The Committee acknowledges that the setting of the methodology for calculating the PIDR is not an exact science and it is an exercise in informed judgement based on expert advice. While the risk that a claimant will be under-compensated cannot be entirely eliminated given that a range of factors could lead to this situation - e.g. the claimant’s needs are wrongly calculated, the investments do not perform as expected, inflation increases more than projected or the person lives longer than expected – the Committee notes that the inclusion of a further margin of adjustment of 0.5% recognises the risk of under-compensation exists and moves the balance slightly in favour of the claimant from a position of 50:50 risk of over/under compensation to a position of 35:65.**

368. **The Committee is of the view that the inclusion of the 0.5% further margin adjustment and the 0.75% adjustment to take account of the impact of taxation and the costs of investment advice and management must be considered in conjunction with the other parts of the Schedule that provide the composition of the notional portfolio and the 43-year investment period for setting the discount rate to ensure, as far as possible, that the model in its entirety does not veer towards over-compensation and will deliver, as close as possible, the 100% compensation principle.**

Schedule C1 Paragraphs 12 to 15

369. Paragraph 12 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. Paragraph 13 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. Paragraph 14 provides that the Department may make regulations, subject to the draft affirmative procedure, to define any of the types of investment. Paragraph 15 provides that the Department may make regulations to make changes to both the list of investments and the percentage holdings.

370. There were again distinctly different views expressed in the evidence received on the Bill regarding the notional portfolio. While some organisations support the proposed composition, others believe the notional portfolio is too cautious or, contrastingly, that it poses unacceptable levels of risk. The lack of evidence on how claimants actually invest their lump-sum award was also highlighted.

371. Lisburn and Castlereagh City Council welcomed 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.

372. The Lord Chief Justice, on behalf of the Judiciary, noted that the difference in the discount rate between Scotland and England & Wales appeared 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 by looking at modelling not just from that date but also from June 2019. The LCJ found it 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 and stated that 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.

373. The Bank of England Prudential Regulatory Authority stated that the new methodology will not veer towards over-compensation in general, other than marginally through the 0.5% prudent margin. It highlighted that it will over-compensate any claimants who successfully follow a risky investment strategy, but this cannot be rectified without under-compensating those who do not. It also stated that the methodology will not veer towards under-compensation in general, especially in light of the 0.5% prudent margin. While it will under-compensate any claimants who follow an extremely conservative investment strategy this cannot be rectified without over-compensating those who do not. To do this would disproportionately increase liability awards and hence insurance premiums.

374. In contrast the ABI believes that the notional investment portfolio is over-cautious, will lead to a lower PIDR which will exceed the 100% compensation target and needs reviewed. The ABI highlighted that it shared a significant amount of evidence with the Department of Justice as part of its 2020 consultation however the analysis underpinning that evidence is not reflected in the notional portfolio in the Bill.

375. The ABI has 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 which 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 therefore 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 investments. The Department of Justice should therefore 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 Northern Ireland consumers and taxpayers.

376. 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, which it views as 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. In relation to the notional portfolio in the Bill ABI recommends that the Department increases the size of the portfolio of equities within the overall portfolio.

377. FOIL NI and BIBA also believe that the composition of the notional portfolio is overly cautious and light in equities and it is not one that an adviser would advise for an injured claimant. They note that 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 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.

378. 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.

379. FOIL NI and BIBA noted that, 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 Scottish 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.

380. FOIL NI and BIBA indicated that 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 they questioned whether they are ‘oven ready’.

381. A number of insurance companies are of the same view that the notional portfolio is over-cautious and will lead to a lower PIDR that will result in over-compensation, particularly if the 0.5% further margin is also retained.

382. NFU Mutual stated that if it is considered that a cautious notional 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. In its view if the 0.5% is removed it will rectify some of the risk of over-compensation.

383. Aviva noted that 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. It recommended that further consideration should be given to adopting or mirroring the methodology from England and Wales to achieve a fairer outcome or alternatively the 0.5% further margin adjustment should be removed from the Bill stating these changes would still not veer towards an outcome of under-compensation.

384. Zurich expressed the view that the notional investment portfolio to be used is overly cautious and not reflective of the investment portfolios which will be arranged. It stated that 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 and the notional investment portfolio needs to be reflective of real-life practice.

385. Zurich referred to the evidence submitted by the ABI to the Department of Justice consultation which showed that the proposed notional investment portfolio is overly cautious and not consistent with independent financial analysis. It also noted that 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. That 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. It was concerned that taking the proposed notional portfolio in tandem with the proposed 0.5% further margin adjustment would magnify the over-compensation impact.

386. The MPS referred to the information obtained by the ABI from Pannells Financial Planning and stated that 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. MPS noted that the assumed investment period is 43 years and over this period of time equity investments are of lower risk and stated that there is the potential for over-compensation due to the notional portfolio being of lower risk than that which a claimant is typically likely to be recommended by a financial planning professional.

387. The IUA indicated that 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. It also 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 and includes 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.

388. HSCNI stated that 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.

389. The CBI NI noted that the portfolio is described as “cautious” or “very cautious” as compared to the “low risk” notional investor model in England and Wales. It would like to see a clear evidence base for the notional

portfolio to ensure it is appropriate and fit for purpose and supports an independent review of the underlying notional portfolio to determine whether it adheres to the 100% principle.

390. The MDDUS stated that the combination of assuming a low risk investor and the deduction of a further margin of 0.5% will make it more likely than not that the claimant will be over-compensated which means that at the end of the claimant's life there is still part of the compensation remaining which has not been spent. MDDUS suggested that one option would be to require that any such remaining balance is repaid to the party who paid the compensation although it recognised that this may not be easy in practice. Other options to reduce the potential for over-compensation proposed by the MDDUS was to reduce the further margin or to change the notional portfolio to increase the level of investment risk being assumed.

391. BLM noted that the selected portfolio is identical to that used in Scotland. It is however more conservative than the portfolio in England and Wales and therefore delivers a lower rate of return. According to BLM 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 Northern Ireland 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.

392. BLM indicated that 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. In its view it would seem logical that the risk should be allowed for only once.

393. APIL expressed a different view from those organisations that believe the notional portfolio is over cautious stating that 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* and any move away from that methodology risks leaving injured people under-compensated. 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. APIL outlined that injured people are right to be risk averse. The compensation they are given is all they will ever have. Many survive – rather than actually live – in fear of what will happen if the money runs out. According to APIL damages must therefore be calculated on the assumption of risk-free investments and the actual needs of people who have been injured through negligence must be met in a fair and just way.

394. APIL acknowledged that, assuming the new framework is adopted including the formula which will be used for calculating the rate, it will provide transparency to the process, 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.

395. FOCIS also believes that 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. It noted that the notional portfolio allows for 10% to be invested in cash or equivalents and outlined that 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.

396. FOCIS 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. It views the second 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. FOCIS stated 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.

397. The IFoA noted that the proposed methodology assumes a personal injury claimant invests a lump sum compensation in a mixed portfolio of low-risk investments and outlined that, in its view, 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. It outlined that 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.

398. Under Solvency II (the EU-wide insurance regulatory framework) insurers are required to discount PPOs (and other) liabilities at a risk-free rate which according to the IFoA is inconsistent with the discount rate setting methodology proposed.

399. The IFoA indicated that whatever methodology is used to set the discount rate will not ensure 100% compensation, even if that is the aim to achieve 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.

400. The Law Society NI advised that it had responded to the Department of Justice consultation in 2020 and suggested a hybrid Northern Ireland model moulded by blending elements of the English and Scottish models based on 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 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.

401. The Department responded to the issues raised by stating that a discount rate that assumes investment solely in ILGs does not reflect how a claimant would be advised to invest their lump sum award based on the evidence from consultation and the advice of the Government Actuary. It tends towards over-compensation and an assumed mixed portfolio of low-risk investments is considered more appropriate.

402. The Department also does not accept that the portfolio is over-cautious and stated that 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 which has confirmed that it remains appropriate, even with a 43-year assumed investment period. In the

Department's view 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 GAD and based on investments that were categorised as 'low risk' by Morningstar (an investment research company). 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. The Bill provides for a five-yearly review of the rate. In anticipation of each such review the Department is required to review whether the notional portfolio remains appropriate.

403. The Department outlined that 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. In relation to the proposal to require any remaining balance at the end of a claimant's life to be repaid to the party who paid the compensation the Department does not consider this to be a practicable proposition.

404. The Department also highlighted that It is open to a party to seek a periodical payment order to avoid the risks inherent in a lump sum payment.

Committee Consideration of Schedule C1 Paragraphs 12 to 15

405. The Committee recognises that the composition of the notional portfolio in terms of the types of investments and percentage holdings is one of the key elements of the new framework. Noting the issues raised in the evidence received and the Department's written response, the Committee took the opportunity to explore further a number of issues during the oral evidence session with departmental officials including the difference between the notional portfolio in the Bill and that used in England and Wales, whether the

longer investment period of 43 years was taken into account when the Government Actuary Department reviewed the notional portfolio and if so, were any adjustments made.

406. The officials indicated that they thought the England and Wales portfolio may have been slightly more risky but pointed out that there is no assurance that the same portfolio will be used next time the rate is reviewed in England and Wales. They also confirmed that they had asked GAD whether using a 43-year period would change its opinion of the content of the notional portfolio and the Government Actuary had confirmed that it was satisfied that it was a reasonable portfolio to use regardless of whether the investment period was 43 years or 30 years.

407. **The Committee is of the view that the notional portfolio provided for in the Bill, and whether its composition is appropriate to achieve as close to 100% compensation as possible or is either too cautious or too risky, must be considered in conjunction with the other key elements of the framework including the 0.5 % further margin rather than in isolation.**

Schedule C1 Paragraph 16

408. 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).

409. The Bank of England Prudential Regulation Authority noted that the current parameters may become inappropriate over time and at each review expects the Government Actuary to discuss this when reporting. If the report determines that a fair new rate cannot be achieved under the existing

parameters, in its view the NI Assembly should be willing to pass secondary legislation to change them.

410. AXA stated that 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.

411. FOIL NI and BIBA also highlighted that, in carrying out the mandatory review, the legislation does not define 'with whom' the Department must consult but simply states 'it must consult such persons as it considers appropriate'.

412. In its written response, the Department outlined that the Bill places a duty on the Department to ensure, in advance of each review, that the notional portfolio remains appropriate and confirmed that amendments to the portfolio are made by regulations requiring the assent of the Assembly. When considering whether any changes are required to the notional portfolio before each review this is likely to involve in practice the Department seeking expert advice from the Government Actuary. The Department did not believe it is necessary to specify who it should consult.

Committee Consideration of Schedule C1 Paragraph 16

413. **The Committee noted the Department's written responses to the issues raised and took the opportunity during the oral evidence session with officials on 9 September to ascertain whether the Department intended to undertake a public consultation on whether the notional portfolio remains suitable for investment by a hypothetical investor to enable all interested stakeholders to submit views. The officials advised that the next review is required in July 2024 and they could not speak for what a future Minister might do. The likelihood is the Department will want to consult with the GAD and it may wish to take other views.**

Schedule C1 Paragraph 17

414. 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

415. The main issue raised in relation to Paragraph 17 was the lack of available data on how claimants actually invest their compensation awards. Reference was also made to the fact that the notional portfolio makes assumptions that may not properly reflect investment behaviour.

416. The IFoA stated that 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 noted that it could be difficult to access data on actual investment of lump sum awards so it is sensible to consider a notional investment portfolio. The notional portfolio high-level asset allocation in the Bill is identical to that used in setting the discount rate in Scotland. The IFoA believes having consistency in this respect is not unhelpful as it 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.

417. The Bank of England Prudential Regulation Authority indicated that at current investment conditions, the proposed methodology would represent a suitable cautious, though not over-cautious, investment strategy for the bulk of claimants but noted that no two claimants are the same and, for some, alternative strategies may be preferable because of their personal circumstances.

418. The Law Society also highlighted that 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.

419. FOIL NI and BIBA stated that although hard evidence on the point is very difficult to obtain it is likely that the 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. They highlighted that 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".

420. According to FOIL NI and BIBA 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.

421. ABI outlined that the current PIDR is based on an incorrect assumption that a claimant invests all their damages in ILGs. As the evidence it provided to the 2017 Ministry of Justice and Scottish Government consultation on PIDR reform clearly demonstrated, no properly advised investor would invest solely in ILGs or indeed in any other single asset class. ABI stated that it is essential that the PIDR methodology accurately reflects how plaintiffs are advised to invest their awards and it 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.

422. ABI highlighted that there is a lack of evidence on how claimants invest their compensation settlements and, in response to the Department's 2020 consultation, it 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.

423. MDDUS believes that further evidence should be obtained that shows how claimants invest their award and it is also important that such evidence is gathered in future to inform later reviews.

424. MDU stated that 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 as currently no one knows what happens in practice with those investments. It agrees that research is urgently needed

into how compensation awards are invested and what returns are achieved and it should be this that informs government policy rather than a methodology that relies on unsubstantiated guesswork about investment returns. In its view the Department of Justice should be under a duty to gather evidence of actual claimant investment behaviour.

425. NFU Mutual stated that 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. It also believes that research on this, via consultation with claimant solicitors, could provide insight which could be used in future to assist in the methodology for setting the PIDR to enable this to reflect the actual investment choices and outcomes and thus lead to a PIDR which satisfies the 100% requirement.

426. Aviva agreed that the proposed methodology does represent how a low risk investor would be advised, with the caveat that it believed the portfolio to be more cautious than a claimant would ordinarily be advised. It also highlighted there is a lack of evidence on how claimants invest their compensation settlements.

427. Zurich indicated that, 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. In its view 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”.

428. Zurich noted 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 and believes that this is a fundamental aspect to inform the Department in relation to the real-life advice and actions of such investors. Clear and open responses should be provided from lawyers and independent financial advisers acting on behalf of plaintiffs.

429. AXA advised that it is not a party to the decision-making process for plaintiffs' investing a lump sum payment but can see how funds are invested by the Courts Funds Office on behalf of minors, patients and those without capacity.

430. BLM stated that the new methodology may be said to reflect how claimants might be advised to invest and it reproduces the approach in Scotland; however, it believes it is somewhat more conservative when compared to the approach in England and Wales.

431. 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.

432. HSCNI noted that the current approach assumes that all plaintiffs will adopt a similar investment strategy "at low risk" and this 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 the HSCNI noted that 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. Promotion of PPOs would also be a safeguard against over/under compensation 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.

433. APIL noted that 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". In its view any analysis of claimant investment behaviour carried out under the recent 2.5% 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 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."

434. APIL indicated that injured people, by their very nature, are not canny investors and 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.

435. FOCIS also believes that referring to any evidence of historic plaintiffs' investment behaviour when the rate was 2.5% is unreliable. It stated that, 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.

436. FOCIS agrees with APIL that 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 its experience plaintiffs do not invest in risk assets with the aim 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.

437. The Department responded to the issues raised by highlighting that the evidence from the consultation and advice from the Government Actuary is that a claimant would not be advised to invest in ILGs alone, even with a negative discount rate. This is reflected in the definition of the hypothetical investor and the notional portfolio accordingly assumes low-risk investments. 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 their lump sum.

438. The Department acknowledged that it is difficult to obtain evidence as to how claimants actually invest. Available evidence (submitted in response to the Ministry of Justice's Call for Evidence in 2019) is about how claimants are typically advised to invest rather than how they have actually invested. It considers it reasonable to assume that claimants would make passive

investments and outlined that 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.

439. The Department also highlighted that the option of a PPO is available for claimants who prefer not to accept the risk of investing a lump sum.

Committee Consideration of Schedule C1 Paragraph 17

440. The Committee discussed the potential for the Department to commission research to gather evidence of actual claimant investment behavior at its meeting on 23 September. The departmental official outlined that the evidence available to date had been provided by financial advisers indicating how they believe that claimants are advised to invest rather than first-hand knowledge from claimants and indicated that it would be hard to see how an obligation could be placed on a person to provide that information.

441. **While the Committee appreciates it may be difficult to obtain such information, it does believe there are benefits in doing so to inform future consideration of the framework to set the PIDR, and therefore recommends that the Department undertakes an assessment of the potential options to gather evidence of actual claimant investment behaviour.**

Schedule C1 Paragraph 18

442. 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.

443. There were no issues raised in the evidence received by the Committee on Paragraph 18 of Schedule C1.

Schedule C1 Paragraphs 19 and 20

444. Paragraph 19 provides that the rate will be set as a percentage figure, whether a whole number of percentage points or multiple of a quarter percentage point. It can be expressed in quarter percentage points and rounded to the nearest whole number or quarter percentage point. Paragraph 20 provides for the rounding of the figure so as to comply with that requirement.

445. The IUA commented that paragraph 20(2) is agreeable only if it applies in the unlikely event that two permitted figures are equally near when rounding. While acknowledging that in such circumstances the nature of the rounding provision will result in an increased chance of over-compensation, IUA understands that in all other circumstances the rate will be rounded to the nearest 0.25 percentage points.

446. **The Committee noted the comments of the IUA.**

Schedule C1 Paragraphs 21 and 22

447. Paragraph 21 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, a review is to be carried out

separately for each rate of return. Under Paragraph 22 such 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.

448. The IUA agrees with the provision allowing a dual discount rate approach to be considered noting that 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, it states that if a dual rate approach is 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 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.

449. The IUA highlighted 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 however 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.

450. **The Committee noted the confirmation provided by the Department in its oral evidence that it has no plans to set a dual rate in the near future but it may wish to consult at some point on whether a dual rate would be a better model.**

Schedule C1 Paragraphs 23 to 26

451. Under Paragraph 23 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. Under Paragraph 24 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. Paragraph 25 provides that the rate will come into effect on the day after the report is laid. Paragraph 26 provides for the Department to reimburse the rate-assessor for costs incurred in connection with a review.

452. The MPS stated that, 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. MPS noted that there can be a huge delay between an incident occurring and a claim being brought and 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 it is calculated, 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.

453. In contrast, the MDU believes the framework should rule out any retrospective effect and any new discount rate should only apply to compensation awards relating to incidents that took place after the change in rate. According to the MDU this is particularly important with clinical negligence claims as 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 apparent, especially in young persons, and also issues such as causation are rarely straightforward. It highlighted that 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.

454. The Department outlined that the purpose of the discount rate is to reflect the return on investment of a lump sum 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 the funds. 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.

455. **The Committee noted that the discount rate will be applied at the time the damages are awarded regardless of the date of incident or date of issue of proceedings.**

Schedule C1 Paragraphs 27 to 30

456. 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

457. There were no issues raised in the evidence received by the Committee on Paragraphs 27 to 30 of Schedule C1.

Schedule C1 Paragraph 31

458. Paragraph 31 deals with regulations made under the Schedule. Sub-paragraph (1) allows regulations to make different provision for different purposes. Sub-paragraph (3) provides that regulations made under the Schedule will be subject to the draft affirmative resolution procedure.

459. There were no issues raised in the evidence received by the Committee on Paragraph 31 of Schedule C1.

Schedule C1 Paragraphs 32 to 34

460. Paragraphs 32 to 34 are interpretation provisions for the purposes of the Schedule.

461. There were no issues raised in the evidence received by the Committee on Paragraphs 32 to 34 of Schedule C1.

Committee Position on Schedule C1

462. **The Committee appreciates and understands the significant concerns a wide range of organisations have in relation to whether the new framework provided for in Schedule C1 to set the PIDR will deliver, as far as possible, the 100% compensation principle, whether it is those organisations representing claimants who are concerned about under-compensation or those organisations who defend personal injury claims and are concerned about over-compensation.**

463. **Any new framework will set the PIDR for the foreseeable future therefore it was important for the Committee to ensure that claimants receive the compensation they are entitled to while being satisfied as far as possible,**

recognising that achieving 100% compensation is not an exact science and assumptions have to be made about the future, that the model being adopted will not over-compensate with the ramifications of that for Government Departments including the Health Service, businesses, insurers etc.

464. The key elements that make up the framework are the assumed investment period, the composition of the notional portfolio and the standard adjustments for inflation, the impact of taxation and the costs of investment advice and management and a further margin to recognise that there is risk inherent in even the most carefully advised and invested portfolio. While the Committee considered each of the elements of the Schedule, when coming to a view on it the Committee considered the elements in conjunction rather than in isolation to ensure an overall view was taken of the likely effect they would have together on the potential for achieving close to 100% compensation or providing for over or under- compensation.

465. Given the specific concerns raised that the inclusion of the 0.5% further margin would lead to over-compensation, particularly when considered in conjunction with the composition of the notional portfolio, the Committee spent some time discussing this aspect and seeking clarification from officials on it.

466. The Committee noted the information provided by the Department that the inclusion of the 0.5% further margin shifted the balance of risk between under and over-compensation more towards the defendant and away from individual claimants while still aiming for the principle of 100% compensation and Members indicated that they supported this approach.

467. Having considered all the elements of the new framework in the round the Committee agreed that it was content with Clause 2 and Schedule C1 as drafted.

468. **In doing so the Committee noted that the Department can order an in-cycle review if necessary and expects the Department to exercise this power if circumstances require it.**

Clause 3 – Ancillary Provision

469. Clause 3 provides a power for the Department of Justice by regulations to make ancillary provision. Any such regulations which amend primary legislation are subject to the draft affirmative procedure.

470. **The Committee agreed that it is content with Clause 3 as drafted.**

Clause 4 – Interpretation

471. Clause 4 is an interpretation provision.

472. **The Committee agreed that it is content with Clause 4 as drafted.**

Clause 5 – Commencement

473. Clause 5 provides for the commencement of Clauses 3 to 6 of the Bill on the day after it receives Royal Assent. It also allows for the remaining Clauses to be commenced by order made by the Department.

474. **The Committee agreed that it is content with Clause 5 as drafted.**

Clause 6 – Short title

475. Clause 6 describes the short title of the Act.

476. **The Committee agreed that it is content with Clause 6 as drafted.**

Other issues raised in the evidence received by the Committee on the Bill

477. Several other issues were raised in the evidence received by the Committee that, while relevant, do not relate directly to the Clauses and Schedule of the Bill.

Promotion of periodical payment orders

478. The Minister of Health advised the Committee that one safeguard against under-compensation would be to ensure cases are settled by PPOs with as many Heads of Claims as possible being paid on an annual basis. This would reduce 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 payments of large values made by the Trust.

479. The HSCNI is of a similar view with regard to the use of PPOs as a safeguard against over- or under- compensation. Heads of claims such as earnings, care and other therapies, which often have large costs, can be placed into a PPO and would allow the claimant to manage a large settlement amount spanning many years, providing them with the assurance of a continuous annual income for the remainder of their life. This contrasts with a lump sum award where the claimant takes on the responsibility for managing the money and for its investment to ensure it lasts for their lifetime.

480. The HSC believes that PPOs also create fairness and balance. Should a plaintiff who has been awarded a lump sum die sooner than expected, any remainder of the lump sum goes to their estate, which is not what it is intended for. There is also a risk of under-compensation if the lump 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. NHS Trusts, being government-backed, are able to offer PPOs in all suitable claims, however the HSC did acknowledge that there would be challenges in assuring plaintiffs that private bodies would be able to continue to make payments under a PPO in the future.

481. The HSC also suggested that it may be the case that 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 that could be charged for investment. It was also its view that, with the negative discount rate, further resistance to using PPOs may arise (outside the Care and Case Management Components).

482. 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 and advised of legislation in Scotland[12] giving the courts power to order PPOs. They suggested that there may be a discussion to be had about how this matter could be tackled in Northern Ireland.

483. HSCNI believes it would be prudent for the Department of Justice to legislate in respect of 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' but would obviously depend on plaintiffs and the courts being satisfied that the defendant will be in a position to meet future payments. HSCNI pointed out

[12] *https://www.parliament.scot/bills-and-laws/bills/damages-investment-returns-and-periodical-payments-scotland-bill*

that, in this jurisdiction, the vast majority of high value personal injury 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. Enforcing settlement of future loss claims by way of PPOs would remove the uncertainty around future investment returns.

484. The Law Society also supported consideration being given to an extension of the legislation governing PPOs in high value catastrophic injury cases. In its view this may result in a degree of greater certainty and fairness to both plaintiffs and compensators given PPOs obviate reliance on estimates of future returns and inflation rates. PPOs can also help mitigate the risk of over or under-compensation. This approach would rely upon the court and plaintiff being satisfied that the defendant is in a position to meet the payments going forward.

485. Zurich Insurance highlighted that 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 and indicated that it had experience from a very recent case in Northern Ireland where the impact of the 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.

486. The MDU outlined in its oral evidence that defence organisations are not insurers but will 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 PPO 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. MDU referred to the NHS Resolution Scheme in England and Wales which deals with periodic payments in mixed cases with both GP and secondary care involvement.

487. The ABI confirmed that 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. It stated that, 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.

488. The ABI also highlighted that there is legislation in Scotland that provides for the courts to impose or enforce a PPO but it has not yet been implemented.

489. FOIL NI noted that PPOs have been available since April 2005 but there has not been as great a take-up as might have been expected. It also confirmed that an amendment to the 1996 Damages Act by the 2003 Courts Act provides legal protections for PPOs. 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 (FSCS). 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.

490. FOCIS stated that the overwhelming experience of its members is that most insurers (not all) are 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 than 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. FOCIS expressed the view that 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 provided in the Bill.

491. APIL also agreed that the use of PPOs is very rare stating that 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. APIL also noted that 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 and, while in the majority of cases the FSA will step in and protect the payment, there will be the odd case where that does not happen and that person may be left without compensation.

492. APIL also highlighted that 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.

493. In response to evidence on the use of PPOs the Department of Justice acknowledged that the use of PPOs can avoid the risks inherent in receiving damages as a lump sum payment but pointed out that courts in Northern

Ireland already have the power under Section 2(1) of the Damages Act 1996 to make PPOs without the consent of the parties, similar to the courts in England and Wales. The Rules of Court set out the factors that a court has to take into account in deciding whether to make a PPO. It is the Department's view that the court will act in the objective interest of the claimant and 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.

494. The Department also indicated that the issue of a state scheme to support GPs is a matter for the Department of Health.

Committee Consideration of the Use and Promotion of PPOs

495. To assist its consideration of the comments and suggestions made regarding the use and promotion of PPOs the Committee wrote to the Department of Justice to request its view regarding the potential to make PPOs compulsory, particularly in cases involving government backed bodies, by bringing forward a policy on this, or if necessary, legislative changes.

496. The Department responded outlining that under Section 2(1) of the Damages Act 1996, a court already has the power to make a PPO for future pecuniary loss without the consent of the parties and is required to consider whether or not to make one. Also a court cannot make a PPO unless the continuity of payment under the order is reasonably secure. Court Rules specify certain matters that a court must take into account when considering whether or not to make a PPO and provide that the court shall have regard to all the circumstances of the case and, in particular, the form of award that best meets the claimant's needs, having regard to the following: the scale of the annual payments taking into account any deduction for contributory

negligence; the form of award preferred by the claimant, including the reasons for their preference and the nature of any financial advice they received when considering the form of the award; and the form of award preferred by the defendant, including the reasons for the defendant's preference.

497. The Department indicated that it considered that the existing legislative provision is sufficient and that it would not be appropriate, or practical, to require a court to make a PPO in a particular type of case, without any consideration of all the relevant circumstances, and whether or not this form of order best meets the claimant's needs and noted that the court will act in the objective interest of the claimant.

498. In relation to the position in the other UK jurisdictions, the Department outlined that the Damages Act makes the same provision for England and Wales in relation to PPOs as it does for Northern Ireland. The Scottish legislation that changed how the discount rate is set in Scotland included provision (still to be brought into operation) giving a court the power to make a PPO for future financial losses without the consent of the parties, and was intended to bring Scotland into line with the rest of the UK.

499. The Committee asked departmental officials whether they had any information or analysis on why the use of PPOs was so low when they attended on 9 September. Officials noted that both defendants and claimants appear to have their own reasons for not entering into a PPO and seemed to attribute the difficulties to the other side. They referred again to the fact that a court can impose a PPO without the agreement of the parties but they did not think this happened very often. They also outlined that, where there are injury at birth cases, there may be more PPOs and also mixed orders of periodical payments combined with lump sums.

500. The Committee returned to the issue of PPOs at its meeting on 23 September when it discussed at some length how the court system operated in practice in relation to PPOs, whether any action had been taken to promote the use of them, particularly for vulnerable claimants who may rely on the goodwill of others to protect their long-term investments, and whether there is sufficient awareness of the PPO option.

501. On 6 October the Department wrote to the Committee setting out the requirements placed on the court by the Damages Act 1996 and highlighting that, as well as enabling the court to make a PPO without the consent of the parties, the 1996 Act requires the court to consider whether or not to make a PPO. Under the associated Court Rules claimants must state in the documents used to initiate legal proceedings whether they consider a PPO or a lump sum to be the most appropriate form of award therefore they have to actively consider the option of a PPO and their legal representative will advise them in this regard. Defendants who admit liability also must state which form of award they consider to be appropriate. Both parties also need to explain their preferred form of award.

502. The Department expressed the view that, in an individual case, it is a matter for the parties, based on legal and financial advice on their specific circumstances, to assess whether or not a PPO is preferable to a lump sum and ultimately, where a case proceeds to a hearing, it is a matter for the court.

503. The Department highlighted that the Court Rules, which are made by the Court of Judicature Rules Committee with the Department's approval, require the court to take into account certain factors when considering whether or not to make a PPO and suggested that the Committee may wish to recommend that the Rules Committee considers adding to those factors that could help to increase uptake of PPOs. The Department also proposed

that the Committee may consider it helpful to invite the Lady Chief Justice to consider a judicial studies training event around PPOs.

504. **At its meeting on 7 October 2021 the Committee agreed to write to the Lady Chief Justice, in her capacity as Chair of the Court of Judicature Rules Committee, to recommend that the Rules Committee considers adding to those factors that a court is required to take into account when considering whether or not to make a PPO to include, as an example, consideration of the inherent risk that a lump sum award may not best deliver full compensation consistent with the 100% principle, or other factors that could help to increase uptake of PPOs.**

505. **The Committee also agreed to invite the Lady Chief Justice to consider a judicial studies training event around PPOs and the challenges with securing 100% compensation on investing a lump sum, perhaps in conjunction with the Bar and the Law Society.**

Consequences of changing the rate on GP practices and the HSCNI

506. The Minister of Health outlined his continuing concerns about the potential impact of a sharp reduction to the PIDR in relation to health and social care provision in NI. While recognising 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 he believed that it was 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.

507. The Minister stated that he was aware that the impact of this Bill is likely to increase the recently introduced rate of -1.75% and therefore it was important for the Bill to pass into law as soon as possible to minimise the potential impacts of that rate on the Health Service. The Minister also stated that the potential impact on health and social care provision in Northern Ireland should be borne in mind during the Committee's consideration of the proposed methodology for calculating the PIDR.

508. HSCNI highlighted that one of the defendants most impacted by a reduction in the rate is the health service and, while it is incredibly difficult to forecast accurately the financial impact of the recent reduction in the rate to -1.75%, HSCNI 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 current PIDR.

509. HSCNI also indicated that 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.

510. The BMA (NIGPC) outlined that GPs in Northern Ireland are now the only doctors within the UK NHS 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.

511. The BMA (NIPGC) outlined that any increases in the costs associated with being a GP will inevitably be a chill factor for the recruitment of junior and other 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. It stated that this is particularly worrying when the age profile of GPs in NI and the number who are expected to retire in the next five years is considered and comes at a time when the system cannot afford to lose GPs as this would bring additional pressure into a system that is already working under immense pressure.

512. Another significant concern highlighted by the BMA (NIPGC) was 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 health and social care system.

513. The BMA (NIPGC) noted that 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 and stated that an indemnity scheme that reimburses costs must be introduced in Northern Ireland as a result of a reduction in the rate to mitigate the impact on GPs. Its preference is the establishment of a compensation scheme for increased indemnity costs to enable them to continue practising on the same basis as they currently operate but the other option is to piggyback on the England and Wales GP Resolution Scheme which may require primary legislation.

514. The BMA (NIPGC) acknowledged that the Department of Justice could not 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 believed that 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.

515. The MDU also highlighted that the recent change in the PIDR to -1.75% will have a dramatic impact on health and social care funding and on GPs across NI. It noted that 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 the decision to change the rate which will have a severe and adverse effect on them. MDU also drew attention to the fact that any money that goes on compensation awards comes out of front-line patient care.

516. The MDU stated that, even before the recent 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 MDU members dropping their sessions and even in the recruitment of new doctors into primary care. It outlined that 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.

517. The MPS also agreed that 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. It expressed the view that the wider impact on and the additional costs that may be faced by HSCNI have to be taken into account however the rate is set - it is not just a simple, actuarial mathematical formula.

518. In oral evidence the MPS representative referred to a paper produced by BIICL 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.

519. The ABI noted that the Health Service in NI is one of the biggest compensators for settlements involving the discount rate, usually in clinical or medical negligence cases, and 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.

520. The ABI claimed that adopting the Scottish model is likely to cost public bodies in Northern Ireland significantly more and highlighted that 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 ABI stated that the Scottish Government is required to meet any deficit from its own reserves with no additional funding under the Barnett formula from HM Treasury.

521. Aviva also claimed that the framework used in Scotland is based on a policy decision taken by Scottish Ministers to over-compensate claimants and this has the consequence of generating additional costs for compensators including HSCNI and other public bodies.

522. The IUA expressed the view that 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.

523. The Department of Justice, in responding to the issues raised, noted that 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 also refuted the view that account must be taken of the societal and economic impact when setting the discount rate stating that 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 and this means that the impact on society cannot be taken into account.

524. The Department stated that the principle of 100% compensation is the basis of the current law in all the UK jurisdictions and in the Republic of Ireland and it was 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. The Department stated that it may be the case that some jurisdictions have not reviewed their discount rate and that political factors have influenced this. The Department considers that this demonstrates the importance of introducing a minimum review period and ensuring certainty and transparency in regard to how the rate is set.

525. The Department indicated that it is anticipated that a discount rate set under the proposed new methodology would be higher than one set under the current methodology and will, therefore, reduce the overall costs for defendants. It also stated that 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 and noted that the BMA (NIPGC)

acknowledged that this is not a matter that can be taken into account in setting the rate.

526. The Department also highlighted that the policy memorandum for the Scottish Bill that led to its 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.

Committee Consideration of the Consequences of Changing the Rate on GP Practices and the HSC

527. To assist its consideration, the Committee commissioned a research paper on a range of issues relating to the PIDR including what types of government-backed indemnity schemes for GPs are in place in other jurisdictions compared to Northern Ireland.

528. The research paper outlined that the Department of Health and Social Care recently introduced two state indemnity schemes in England and Wales. The first one, established in April 2019, is called the Clinical Negligence Scheme for General Practice and covers clinical negligence liabilities arising in general practice in relation to incidents that occurred on or after 1 April 2019. The second called the Existing Liabilities Scheme for General Practice was established in April 2020 to provide indemnity cover for historical NHS clinical negligence claims made against current and former GP members of medical defence organisations in respect of liabilities incurred before 1 April 2019. GPs do not need to pay a subscription and the costs are met centrally. In Scotland there is no state backed indemnity scheme, however indemnity costs are lower. The 2018 General Medical Services Contract in Scotland sets out how the Scottish Government works

with partners, including medical defence organisations, to deliver the best solution for indemnity in Scotland.

529. The Committee also wrote to the Minister of Health seeking further information on the impact the legislation was going to have on the Department of Health and the wider health service, whether he had any plans to offer some kind of indemnity support to GPs in Northern Ireland given the issues highlighted and if a state-backed indemnity scheme is introduced whether funding would be available from the Treasury to cover the costs.

530. The Minister of Health responded setting out in detail the likely negative impact of the current rate of -1.75% which will increase the value of settlements by approximately 50% with an expected additional cost in 2021/22 of £15m - £20m. The Minister did note that the legislation is expected to increase the PIDR and will therefore partially reverse the impact that the current rate is having on the cost of settlements however the extent of this will depend on the eventual rate determined.

531. The Minister also outlined the anticipated impact on GPs from a significant long-term reduction in the PIDR from the previous +2.5% would be a significant rise in the cost of indemnity for GPs. He noted that the immediate response from the medical defence organisations to the -1.75% rate has not been a unilateral increase in subscription costs but understands that this reflects the expectation that the rate is temporary. In the event that the PIDR is calculated significantly lower than the previous long term rate of +2.5% on an on-going basis he outlined a number of very negative and directly related outcomes on the provision of GP services and related health care provision similar to those outlined in the evidence received by the Committee.

532. Regarding the provision of indemnity support the Minister of Health indicated that his Department already provides support to general practice in

meeting indemnity costs through its continued investment in this area and highlighted that the 2019/20 GMS contract provided for up to £2.5m to address demography pressures and indemnity costs. The Minister advised that the Department of Health is considering the issue of future GP indemnity arrangements in Northern Ireland and future options for GP indemnity provision are under active review. He did however highlight that, irrespective of the mechanism by which indemnity provision is secured for GPs, the impact of a rise in the cost of settling clinical negligence cases as a result of a significant change to the PIDR places significant additional financial burden on the health and social care system which is already facing a range of challenges exacerbated by the impact of Covid-19. In relation to whether funding would be available if a state-backed indemnity scheme was introduced the Minister indicated that this would be a matter for the Department of Finance to liaise with the Treasury.

533. In the expectation that payments to individuals in Northern Ireland would increase given the changes to the PIDR the Committee had already sought information from the Minister of Finance on whether any request had been made to HM Treasury for the same approach to apply in Northern Ireland as had applied in England and Wales and in Scotland when the PIDR changed in those jurisdictions. The Committee understood that the Treasury made some allocation to the budgets of those Departments/Agencies affected to recognise that there would be an increase in the payments made to individuals. The Committee subsequently welcomed the confirmation from the Minister of Finance that he had highlighted the issue to the Chief Secretary of the Treasury and advised that if the legislation is brought forward, access to the Reserve would be sought in line with that afforded to Whitehall departments and other devolved administrations.

534. Following receipt of the response from the Minister of Health the Committee wrote to the Minister of Finance regarding the position in relation to whether funding would be available from the Treasury to cover some or all of the costs of a state-backed GP indemnity scheme and whether Northern Ireland

gets any sort of Barnett consequential funding as a result of the state-backed indemnity schemes introduced in England and Wales when the discount rate changed in that jurisdiction.

535. The Minister of Finance replied outlining the Executive will have received Barnett consequentials on all changes to the Department of Health and Social Care DEL budget including that associated with the introduction of the new state-backed GP Indemnity Scheme and indicated that Treasury have confirmed that no further funding would be provided; therefore, if the Minister of Health wishes to introduce a state-backed GP indemnity scheme the costs will have to be funded from the Department of Health budget settlement.

536. The Committee wrote again to the Department of Finance more recently following consideration of further information provided by the Department of Justice on the funding pressures faced in the current financial year, one of which related to the recent change in the PIDR. The Committee requested information on funding pressures that have been highlighted by other Departments, and in particular the Department of Health, and whether these have been reflected in the discussions with Treasury to secure additional funding.

537. The Department of Finance confirmed that the change in the PIDR will have a significant impact for the Department of Justice and the Department of Health and it is in discussions with Treasury to secure funding for the 2021/22 pressures. The Department of Finance also outlined that going forward, should the Bill be enacted, the PIDR is likely to be set at a rate of -0.75% which, while lower that the current rate of -1.75% and will lead to a reduction in the costs for both Departments, will nonetheless represent an increase to the previous rate of 2.5%. The Department of Finance indicated that from 2022/23 onwards no additional funding will be provided by Treasury to offset any pressures arising from the change in the PIDR and

this will require the Executive to manage the cost increase through the normal budgetary process.

538. **The Committee appreciates that the issue of indemnity costs for GPs is a matter for the Department of Health but is concerned about the ramifications if the issue is not addressed satisfactorily. The Committee also expects the Department of Finance to continue its discussions with Treasury to secure funding to address the pressures identified as a result of the change in the PIDR.**

Implications on insurance premiums

539. The ABI outlined that the 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 Northern Ireland 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 would put inflationary pressure on motor insurance premiums, in particular for young drivers who are at greater risk of being involved in an accident.

540. The ABI also indicated that 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.

541. The ABI stated that the lack of a detailed impact assessment accompanying the 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.

542. The IUA stated that the current -1.75% rate is the lowest discount rate in the world and highlighted that 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 in its view may discourage insurers' participation in the Northern Ireland insurance market in turn impacting upon the availability of insurance products.

543. AXA stated that 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, in its view great care needs taken not to set back Northern Ireland through ever spiralling damages and insurance premiums.

544. Zurich stated that 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. It indicated that 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. It highlighted that 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.

545. Aviva expressed the view that the framework used in Scotland is based on a policy decision taken by Scottish Ministers to over-compensate claimants and this has the consequence of generating additional costs for compensators including insurers.

546. In contrast FOCIS stated that the incidence of lifelong disabling injuries that result in calculations that significantly engage the discount rate is low. In its view 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 likelihood it will fall back on the state to support them and hence fall back on taxpayers.

547. In response to the views expressed regarding the implications on insurance premiums the Department repeated its position that 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. It also outlined that 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. It is anticipated that a discount rate set under the proposed new framework will be higher than a rate set under the current framework therefore the costs for defendants and compensators will be less. The proposed framework is also intended to produce a discount rate that is fair to both claimants and defendants

548. The Department also stated that the impact assessment that accompanied the Ministry of Justice 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 and noted that the rate would not change until the Lord Chancellor conducted the first review under the new framework so the impact of a rate change had not been quantified.

Committee Consideration of implications on insurance premiums

549. The research paper commissioned by the Committee covered any impacts observed in England and Wales and in Scotland on the cost of insurance following the changes to the legislative framework resulting in changes to the PIDR in those jurisdictions and how insurance costs in Northern Ireland compare with other jurisdictions.

550. In considering the paper, the Committee noted that research across the UK in 2018 on the cost of insurance found that claims tend to be greater in Northern Ireland given the nature of the roads, the market is not as competitive as a number of UK insurers do not offer cover in NI and the NI courts tend to make higher serious injury awards in a legal market which is different to England and Wales.

551. While the Committee respects the position that wider economic and societal impacts should not be taken into account when considering the framework

to set the personal injury rate and this has been covered earlier in the report at paragraphs 257 to 272 it did press the Department on why it had not provided more detailed costings in the Regulatory Impact Assessment. The Committee also sought an explanation for the higher awards for damages for pain and suffering in Northern Ireland compared to other UK jurisdictions and whether the Department intended to consider any legislative reforms similar to those in England and Wales and the Republic of Ireland designed to lower claim costs and assist consumers.

552. In response officials indicated that all the Regulatory Impact Assessment was able to do was determine the cost under one framework relative to another as it was not known what the rate would be and the data was not available to work out the cost even if the rate was known. The officials also outlined that general damages for pain and suffering are higher in Northern Ireland than England and Wales due to the fact that damages in this jurisdiction were set for longer by juries. Even when juries in civil cases were abolished the courts tended to apply the precedent for the rate of damages that had been set by juries. 'The Green Book' on damages published by the Judicial Studies Board indicates broadly what a person is likely to get for any particular injury however it is a matter for the judge in the case. The officials also outlined the position in the Republic of Ireland where there is a forum for the resolution of personal injury claims and claims only go to court if the outcome is not accepted.

553. **As highlighted earlier in the report the Committee believes that information should be available so that the potential consequences and costs related to the PIDR are fully understood and recommends that the Department should publish an impact assessment setting out the potential implications of different rates on Departments and businesses when a review is due to take place.**

Clause by Clause Consideration of the Bill

554. Having considered the written and oral evidence received, the Committee deliberated on the Clauses of the Bill at its meeting on 23 September 2021 and undertook its formal Clause by Clause consideration at its meeting on 7 October 2021 – see Minutes of Proceedings at Appendix 1 and Minutes of Evidence at Appendix 2.

555. The Department indicated on 23 September that it did not intend to bring forward any amendments to the Bill.

556. Information on the Committee's deliberations on the individual Clauses and Schedule in the Bill can be found in the previous sections of this report.

Clause 1 – Assumed return on investment

557. Agreed: The Committee is content with Clause 1 as drafted.

Clause 2 – Process for setting rate of return

558. Agreed: The Committee is content with Clause 2 as drafted.

Clause 3 – Ancillary Provision

559. Agreed: The Committee is content with Clause 3 as drafted.

Clause 4 – Interpretation

560. Agreed: The Committee is content with Clause 4 as drafted.

Clause 5 – Commencement

561. Agreed: The Committee is content with Clause 5 as drafted.

Clause 6 – Short title

562. Agreed: The Committee is content with Clause 6 as drafted.

Schedule – Schedule C1 to the Damages Act 1996, as inserted

563. Agreed: The Committee is content with the Schedule as drafted.

Long Title

564. Agreed: The Committee is content with the Long Title of the Bill.

List of Appendices

Appendix 1 - Minutes of Proceedings

Appendix 2 - Minutes of Evidence

Date of Meeting	Link to Minutes of Evidence
28 January 2021	Oral Evidence Session with Minister of Justice
27 May 2021	Oral Evidence Session with British Medical Association Northern Ireland
27 May 2021	Oral Evidence Session with the Medical Defence Union
27 May 2021	Oral Evidence Session with Heath and Social Care Northern Ireland
3 June 2021	Oral Evidence Session with the Medical Protection Society
10 June 2021	Oral Evidence Session with the Forum of Complex Injury Solicitors and the Association of Personal Injury Lawyers
10 June 2021	Oral Evidence Session with the Association of British Insurers
10 June 2021	Oral Evidence Session with the Confederation of British Industry Northern Ireland and the Forum of Injury Lawyers
9 September 2021	Oral Evidence Session with Departmental Officials
23 September 2021	Committee Informal Deliberations on the Bill
7 October 2021	Committee Clause by Clause Consideration of the Bill

Appendix 3 - List of Written Submissions

List of links to Written Submissions

- Association of British Insurers
- Association of Personal Injury Lawyers
- Attorney General for Northern Ireland
- Aviva
- AXA
- BLM Law
- British Medical Association NI General Practitioners Committee
- Committee for Communities
- Committee for Health providing a response from the Minister of Health
- Confederation of British Industry
- Department for Communities
- Department of Finance
- Department of Health
- Department for Infrastructure
- Forum of Complex Injury Solicitors
- Forum of Insurance Lawyers and British Insurance Brokers' Association - Joint Submission
- Health & Social Care Northern Ireland including the 5 main Health Trusts
- Institute and Faculty of Actuaries
- International Underwriting Association of London
- Law Society Northern Ireland
- Lisburn and Castlereagh City Council
- Lord Chief Justice
- Medical and Dental Defence Union of Scotland
- Medical Defence Union
- Medical Protection Society
- NFU Mutual Insurance Society Limited
- Personal Injury Bar Association - Specialist Bar Association for Barristers practising in Personal Injury work in England and Wales
- Prudential Regulation Authority (Bank of England)
- Public Prosecution Service
- Road Haulage Association Ltd
- Zurich Insurance

Appendix 4 - Memoranda and papers from the Department of Justice

Date	Departmental Memoranda / Paper
19 January 2021	Department of Justice Briefing Paper
10 February 2021	Minister of Justice correspondence - follow-up to oral evidence session on 28 January 2021
26 March 2021	Department of Justice response to Association of British Insurers Briefing Paper
18 May 2021	Department of Justice response - Department of Finance engagement
4 September 2021	Department of Justice response to issues raised by the Committee
4 September 2021	Department of Justice - Summary of Evidence table
1 October 2021	Department of Justice response – New legislative framework for the Personal Injury Discount Rate
6 October 2021	Department of Justice response – periodical payments orders

Appendix 5 - Other Memoranda and papers from others

Date	Memoranda / Paper
21 April 2021	Correspondence from the Forum of Insurance Lawyers
10 June 2021	Additional Information from the Forum of Complex Injury Lawyers
7 July 2021	Additional Information from the Forum of Insurance Lawyers
13 July 2021	Additional Information from the Institute and Faculty of Actuaries
13 August 2021	Correspondence from the Minister of Health
22 September 2021	Correspondence from the Minister of Finance
22 September 2021	Correspondence from the Association of British Insurers
6 October 2021	Correspondence from the Department of Finance
6 October 2021	Correspondence from the Forum of Insurance Lawyers
6 October 2021	Correspondence from BLM Law

Appendix 6 - Research Papers

List of Links to RaISe papers considered

May 2021 - Personal Injury Discount Rate

Appendix 7 - List of Witnesses

List of Witnesses who gave oral evidence to the Committee

Naomi Long, Minister of Justice
Peter May, Department of Justice
Laurene McAlpine, Department of Justice
Jane Maguire Department of Justice
Martin Moore Department of Justice
Dr Alan Stout, British Medical Association NI General Practitioners Committee
Mark Harvey, Health and Social Care Northern Ireland
Alphy Maginness, Health and Social Care Northern Ireland
Dr Matt Lee, Medical Defence Union
Thomas Reynolds, Medical Defence Union
Tim Jordan, Medical Protection Society
Julian Chamberlayne, Forum of Complex Injury Solicitors
Oonagh McClure, Association of Personal Injury Lawyers
Alastair Ross, Association of British Insurers
Stuart Anderson, Confederation of British Industry NI
Kevin Shevlin, Forum of Injury Lawyers