FROM THE OFFICE OF THE JUSTICE MINISTER

Department of Justice
An Roinn Dlí agus Cirt
Männystrie O tha Laa
www.justice-ni.gov.uk

Minister's Office
Castle Buildings Block B
Stormont Estate
Ballymiscaw
Belfast
[redacted]

Caroline Perry
Clerk to the Committee for Justice
Room 242
Parliament Buildings
Ballymiscaw
Stormont
Belfast BT4 3XX

22 May 24

Dear Caroline,

SL1 – THE DAMAGES (PROCESS FOR SETTING RATE OF RETURN) REGULATIONS (NORTHERN IRELAND) 2024

Thank for you for your correspondence dated 17 May 2024 in relation to the above, in which you ask for further information about the proposed modification of the standard adjustment for taxation and the costs of investment advice and management, and about the previous Committee's recommendation in relation to an impact assessment. I have addressed these separately below.

Standard adjustment for taxation and the costs of investment advice and management

The reason for proposing an increase in this adjustment from 0.75% to 1.25% is because the future tax costs of personal-injury claimants (i.e. the tax paid on the returns earned on the investment of his or her lump sum) are expected to be 0.5% higher on average than the legislation currently provides for. If this increase in tax costs is not taken into account in the setting of the rate, there is a risk claimants will be under-compensated, and therefore the rate will not give effect to the legal principle of 100% compensation.

The proposed increase is based on analysis and advice from the Government Actuary's Department as explained below.

It is to be noted that the consultation responses from stakeholders were divided on this point. While stakeholders representing defendants were broadly content with the existing deduction, or considered it should be lower, stakeholders representing claimants argued that it should be increased to around 2%.

The detailed advice upon which the proposed increase in the adjustment to 1.25% is based, is at pp. 22–30 of the Government Actuary's Department's (GAD's) report (appended again for the Committee's convenience). GAD conducted an analysis of the impact of tax on a claimant investing a lump sum award of damages based on current actuarial assumptions about taxation and future investment returns. GAD's assessment is that an overall adjustment within the range of 1.00% to 1.75% would be reasonable. The Department has concluded that the adjustment should be 1.25%, which is towards the lower end of that range. This reflects GAD's view that ***'changes in investment yields and tax rates have increased the tax burden on plaintiffs by around 0.5% on average'***, and that ***'a 0.5% increase to the current standard adjustment … would not be unreasonable'*** (p. 23).

In terms of investment advice and management costs, GAD noted evidence of increased costs, but that these would be likely to impact investors with more actively managed investment portfolios. Since it is assumed that a personal-injury claimant is a low-risk investor with a passive investment strategy, the Department concluded that no increase in the adjustment in regard to advice and management costs is required.

The Scottish Government has proposed the same increase in this adjustment from 0.75% to 1.25%. Therefore, subject to the Northern Ireland Assembly and the Scottish Parliament both affirming the respective draft regulations, Northern Ireland and Scotland will be aligned. In the event, however, that the Scottish Parliament affirms the Scottish draft regulations but the Assembly does not approve the Northern Ireland proposed regulations, the rate in Northern Ireland would continue to be out of step with Scotland.

Department of Justice
An Roinn Dlí agus Cirt
Männystrie O tha Laa
www.justice-ni.gov.uk

Impact assessment of the potential implications of different rates on Departments and businesses

We note the previous Committee's recommendation 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'.

The Department did not consider that such an impact assessment would be appropriate. The discount rate represents the rate of return on investing a lump sum award of damages and is applied to give effect to the legal principle of 100% compensation. This means that when considering the appropriate parameters for the setting of the rate by the Government Actuary, the impact for defendants is not relevant. The costs for defendants and compensators arising from any changes in the discount rate flow from their legal liability to pay 100% compensation.

Since the result of such an assessment would not be relevant to how the rate is to be set, we do not consider that it would be a worthwhile use of resources to conduct or commission such a complex exercise, particularly when the actual discount rate will not be known until the Government Actuary completes her review of the rate later this year.

Individual departments, such as the Department of Health (in relation to clinical negligence claims), will wish to consider the potential implications for them of any future change in the discount rate once the review is complete. It is not for the Department of Justice to attempt to pre-judge the outcome of the review.

I hope this information is of assistance.

[redacted]

DAVID GRAHAM
DALO

Northern Ireland Assembly
Committee for Justice

David Graham
DALO
Department of Justice
Castle Buildings
Stormont Estate
Belfast
BT4 3SQ

17 May 2024

Dear David

SL1 - The Damages (Process for Setting Rate of Return) Regulations (Northern Ireland) 2024

Officials attended the Committee for Justice meeting on 16 May to give oral evidence on the proposed Statutory Rule that will make changes to the statutory methodology by which the Government Actuary sets the personal injury discount rate for Northern Ireland.

The Committee fully supports the application of the 100% compensation principle. Nonetheless, following the briefing, the Committee continues to have concerns regarding the proposal and agreed to write to the Department regarding these.

Members would like further information to better understand the modification of the standard adjustment for the impact of taxation and the costs of investment advice and management from 0.75% to 1.25%, including clear information on how and why this figure was reached.

The report[1] of the predecessor Committee on the Damages (Return on Investment) Bill noted that it respected the position that wider economic and societal impacts cannot be taken into account when considering the framework to set the personal injury discount rate.

However, the Committee report recommended that the Department should publish an impact assessment setting out the potential implications of different rates for Departments and businesses when a review is due to take place. The Committee thought that this would ensure that the potential consequences and costs are fully

[1] https://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/justice/reports/damages-bill/report-on-the-damages-return-on-investment-bill-committee-for-justice.pdf

Room 345, Parliament Buildings, Ballymiscaw, Stormont, Belfast, BT4 3XX
Telephone: (028) 9052 1033
E-mail: committee.justice@niassembly.gov.uk

understood so that necessary mitigations can be considered by the relevant organisations in preparation for the new rate coming in.

The current Committee would like to follow up on this recommendation and asks whether an impact assessment has taken place, and if not, whether it can be carried out. Members would like information on the potential implications of the changes for organisations including Health and Social Care Trusts.

The Committee is seeking an urgent response in view of the Department's planned time frame for this Statutory Rule.

Yours sincerely

Caroline Perry

Caroline Perry
Clerk to the Committee for Justice