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FROM: DAVID GRAHAM
DATE: 17 APRIL 2024
TO: CAROLINE PERRY

SL1 – PROPOSED REGULATIONS TO AMEND THE STATUTORY PARAMETERS IN THE DAMAGES ACT 1996 BY WHICH THE GOVERNMENT ACTUARY SETS THE PERSONAL INJURY DISCOUNT RATE

Summary

Business Area: Civil Justice and Judicial Policy Division.

Issue: SL1 – Title to be confirmed.

Restrictions: None.

Action Required: The Department invites the Committee to note the intention to make these Regulations and welcomes any views which the Committee may have.

Officials Attending: N/A – This is a written briefing.

BACKGROUND

The Department of Justice proposes to make a Statutory Rule (title to be confirmed) under powers conferred by paragraphs 9(2)(b) and 11(1) of Schedule C1 to the Damages Act 1996. The Statutory Rule is subject to draft affirmative resolution procedure before the Assembly.

Purpose of the Statutory Rule

The Statutory Rule will make changes to the statutory methodology (prescribed in Schedule C1 to the Damages Act 1996, inserted by the Damages (Return on Investment) Act (Northern Ireland) 2022), by which the Government Actuary has to set the personal injury discount rate for Northern Ireland. The changes to be made will:

- (i) prescribe annual weekly earnings (AWE) instead of the retail prices index (RPI) as the measure to be used in allowing for the impact of inflation; and
- (ii) modify the standard adjustment for the impact of taxation and the costs of investment advice and management from 0.75% to 1.25%.

Consultation

The Department wrote to stakeholders in May 2023 seeking views, supported by evidence, on whether the following factors, making up the methodology for setting the personal injury discount rate, require any adjustment prior to the next review of the rate by the Government Actuary, due to commence on 1 July 2024: the make-up of the prescribed notional portfolio; the assumed period of investment; the measure by reference to which the impact of inflation is taken into account; the standard adjustments for the impact of taxation and the costs of investment advice and management and for the further margin. Stakeholders were also asked for their views, supported by evidence, on whether there should be a single rate or multiple discount rates. Twenty-three responses were received.

The Department also commissioned the Government Actuary's Department (GAD) to provide professional advice on the above. GAD's advice was received on 27 March 2024.

Stakeholder views were mostly divided between those representing the interests of claimants and those representing the interests of defendants.

- On the notional portfolio, claimant stakeholders felt that the existing portfolio contains too much risk, while defendant stakeholders suggested the portfolio should include more risk (similar to the portfolio used by the Lord Chancellor in 2019 to determine the discount rate in England and Wales). GAD advised that the prescribed portfolio remains suitable.
- Claimant stakeholders considered the assumed investment period should be reduced to 30 years, while defendant stakeholders wished to retain the 43-year period. GAD advised that, if the policy intention remains to reflect the median claimant's life expectancy, 43 years remains appropriate.
- There was broad agreement that RPI is no longer appropriate, with most stakeholders suggesting that CPI ought to be used, but with an adjustment. GAD advised that RPI is no longer suitable, noting that the legislation requires a single, unadjusted, published index to be prescribed and therefore a choice between a prices based and an earnings based index.
- Defendant stakeholders were broadly content to retain the adjustment for taxation and investment advice and management costs of 0.75%, while claimant stakeholders argued that it was too low. GAD advised that 0.75% is no longer

appropriate, largely due to the increased tax burden on claimants, and recommended an adjustment within the range of 1.0% to 1.75%.

- Defendant stakeholders contended that the further margin should be reduced, while claimant stakeholders argued for its maintenance at 0.5%. GAD advised that 0.5% is still appropriate if the preferred level of prudence ie. broadly a 30-35% chance of under-compensation, remains the same.
- The majority of stakeholders was not convinced of the benefits of moving away from a single rate, pointing out that practical disadvantages might outweigh any benefits in terms of outcomes. GAD advised that a single rate is still appropriate given the views of stakeholders pending further evidence and analysis.

All the responses to the consultation, along with GAD's advice to the Department, have been published on the Department's website.

Position in Great Britain

The legislative framework for setting the discount rate in Scotland (in the Damages Act 1996) is largely the same as that for Northern Ireland. The Scottish Government consulted stakeholders and GAD as above in parallel with the exercise conducted by the Department.

In England and Wales, the discount rate is set (under the Damages Act 1996) by the Lord Chancellor after consultation with Treasury and an expert panel chaired by the Government Actuary. In setting the rate, the Lord Chancellor is required to have regard to a number of factors set out in the legislation however, the detail e.g. the make-up of the portfolio a claimant is assumed to invest in, the assumed investment period etc. is left to his discretion.

Equality Impact

The proposal to make regulations to modify the methodology for setting the discount rate has been screened for implications for equality of opportunity in compliance with section 75 of the Northern Ireland Act 1998. An equality impact assessment was considered unnecessary as there is no adverse impact for any category of people.

Regulatory Impact

Any future change in the rate as a result of the forthcoming review may affect the cost of insurance policies purchased by businesses, charities, social economy enterprises and voluntary bodies. A regulatory impact assessment of the current methodology for setting the discount rate was conducted in 2020 and concluded that it is not possible to quantify the impact on business, but the new methodology was likely to result in lower cost for businesses in the form of lower insurance premiums or lower financial liability when compared to the previous methodology. The impact on businesses etc, however, is not something that can be taken into account when determining the methodology for setting the rate, as its purpose is to give effect, as far as possible, to the legal principle of 100% compensation i.e. a claimant should be compensated in full for all their future



losses and expenses but no more and no less. The proposal to make regulations to modify the methodology for setting the rate is not a regulation as defined by the guidance on regulatory impact assessment, i.e. a rule or guidance with which failure to comply would result in the regulated entity or person coming into conflict with the law or being ineligible for continued funding, grants and other applied for schemes.

Financial Implications

Any future change in the discount rate resulting from the forthcoming review by the Government Actuary will affect the amount of damages payable to claimants and will, therefore, affect the liabilities of defendants and compensators, including government departments and public bodies, and for the Department of Justice also in relation to criminal injuries compensation payments, which are calculated with reference to the discount rate. However, the financial impact on defendants/compensators is not relevant to how the rate is set as the purpose of the discount rate is to give effect to the legal principle of 100% compensation.

EU Implications

None.

Section 24 of the Northern Ireland Act 1998

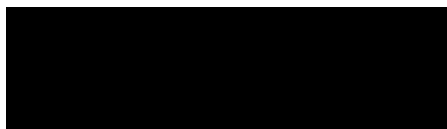
The Department is satisfied no issues arise in relation to section 24 of the Northern Ireland Act 1998.

Operational Date

It is proposed that the rule will come into operation on or before 1 July 2024.

When the draft Rule together with the Explanatory Memorandum has been laid at the Assembly Business Office the Business Office will submit copies to the Committee.

You will wish to bring this matter to the attention of the Justice Departmental Committee.



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cc: NI Human Rights Commission