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**Parameters for the 2024 review of the personal injury discount rate for Northern Ireland**

**Response to consultation and next steps**

**April 2024**

# 1. Introduction

1. The personal injury discount rate is applied by courts to adjust a lump sum award of damages for future financial loss, to reflect the return that can be earned from investing it. This is to give effect to the legal principle that a claimant should be fully compensated but neither more nor less.
2. The Damages (Return on Investment) Act (Northern Ireland) 2022 amended the Damages Act 1996 to provide for a statutory methodology for setting the rate, a timeframe for regular reviews, and to assign the task of reviewing and setting the rate to the Government Actuary. The current discount rate for Northern Ireland of –1.5% was set in March 2022, the first time the rate had been set under the new statutory methodology. The Act requires the Government Actuary to begin the next review of the rate no later than 1 July 2024, which will align reviews in Northern Ireland with the cycle of regular five-yearly reviews in Scotland.
3. The methodology prescribed in the Act, which the Government Actuary must use when reviewing and determining the rate, has a number of features:
   * The rate must reflect the expected return on investment by the hypothetical claimant investor (as defined in the Act) in the prescribed notional portfolio of assets over a prescribed period – currently 43 years;
   * It must allow for the impact of inflation by reference to the retail prices index (RPI) or some other published information relating to costs, earnings or other monetary factors prescribed in regulations made by the Department (to date no other such information has been prescribed);
   * Two standard adjustments must be made:
   * one to take into account the impact of taxation and the costs of investment advice and management – currently 0.75%; and
   * a further margin – currently 0.5%.
4. The Act also allows the Department to require that more than one discount rate is set.
5. In anticipation of the forthcoming review of the rate by the Government Actuary, the Department wrote to stakeholders in May 2023 seeking views, supported by evidence, on the need or otherwise to adjust any of the above parameters, or to require more than one rate to be set. The Department also commissioned the Government Actuary’s Department (GAD) to provide advice. The consultation responses were provided for GAD’s information.
6. We received twenty-three responses to the consultation. These are published, as well as GAD’s advice, alongside this report.
7. Since the Minister of Justice has a perceived conflict of interest in the personal injury discount arising from her husband’s membership of a medical defence union, she delegated the final policy decisions on whether or not the statutory methodology requires amendment to the Permanent Secretary.

# 2. Consideration

1. Having considered all the information provided by consultees and the advice from GAD, the Department has reached the conclusions set out below.

**Notional portfolio**

1. Stakeholder views on this issue were largely divided between those representing claimants and those representing defendants. The former considered that the notional portfolio contains too much risk and that claimants would hold more cash for expenses, while the latter considered that the portfolio should include a higher proportion of equities. The updated analysis by GAD of the funds from which the notional portfolio was derived showed no significant evidence of systemic change that would suggest the notional portfolio is no longer appropriate.
2. The Department’s conclusion is that, in the absence of any clear evidence pointing to the need for change, the notional portfolio remains suitable for investment in by the hypothetical claimant investor.

**Investment period**

1. Again, stakeholder views were divided between those representing claimants and those representing defendants. The former considered that the assumed investment period should be reduced to 30 years, to give more protection to claimants with awards covering shorter time horizons, while those representing defendants considered that the 43-year period remains appropriate. GAD advised that, in the absence of any new evidence, if the Department’s policy intention is still to reflect the median claimant’s life expectancy, then the 43-year period remains appropriate.
2. In the absence of any new evidence, the Department has concluded that the prescribed investment period of 43 years remains appropriate.

**Inflation**

1. In practice, different elements of an award of damages for future financial loss will be subject to different inflationary pressures. For the purpose of the discount rate, the impact of inflation has to date been taken into account by reference to RPI. In 2020, however, the UK Statistics Authority and the UK Government confirmed that RPI would be reformulated and aligned with CPIH (the consumer prices index including owner-occupiers’ housing costs) from 2030. Stakeholders were broadly in agreement that this means RPI is no longer appropriate for the purpose of taking inflation into account when setting the discount rate. This was also GAD’s advice. Stakeholders mainly suggested that CPI should be used instead of RPI, although most recommended an adjustment to the index and views differed on what any appropriate adjustment should be. Stakeholders representing claimants generally contended that more heads of loss are subject to earnings inflation and that many costs claimants face, e.g. for specialist medical equipment, are not for the types of goods used to calculate CPI. Respondents representing defendants on the other hand, argued that due to lower earnings inflation, damages would inflate at a lower rate than previously assumed, and therefore that a figure around CPI+0.5% would better represent damages inflation.
2. Under the legislation, however, any alternative measure to be prescribed must be a single, unadjusted index and not an adjustment to an index. In the absence of any bespoke measure in relation to damages inflation, this means choosing either an existing prices-related or an existing earnings-related index. The Department considers that there is merit in the points made by consultees representing claimants about the nature of the losses and expenses incurred by claimants in high-value personal injury cases and the types of inflationary pressures to which these would be subject; so on balance this points to opting for an earnings-based measure.
3. There are two possible earnings-based indices that could be prescribed: annual weekly earnings (AWE) and the annual survey of hours and earnings (ASHE). GAD advises that long-term projections of both are broadly expected to align. Within ASHE, there are two measures that might be used: ‘ASHE 6115’ (which reflects care workers’ earnings) and ‘ASHE All’ (which reflects all earnings). Since the range of costs and losses for which damages are awarded is wider than care costs, the Department is of the view that ASHE All would be the more appropriate of the two.
4. Although AWE is earnings data for Great Britain only, while ASHE is UK-wide data, GAD advises that Northern Ireland’s relatively small population compared to the UK as a whole means that there is unlikely to be any material difference between a GB-wide and a UK-wide sample. Further, the methodology used to calculate ASHE has changed over time, meaning that it is less reliable than AWE for long-term projections, which utilise analysis of historical data. On balance, then, the Department has decided that AWE should be prescribed as the alternative measure of inflation to RPI.
5. Looking beyond the immediate needs for this year’s review of the discount rate, the Department intends, before the end of the current mandate, to review how the legislation makes provision for the impact of inflation to be taken into account, to consider the scope for providing more flexibility. Any amendment of this provision, if considered appropriate, would require primary legislation.

**Taxation and investment advice and management**

1. As before, the views of stakeholders differed between those representing claimants and those representing defendants. The latter were broadly content with the current figure of 0.75%, or considered it should be lower. The former argued that it is too low due to claimants having to pay more tax in future years and needing an actively managed investment portfolio. GAD, having updated and repeated the original analysis that informed the current adjustment of 0.75%, advises that the expected tax drag has increased due to higher expected returns and changes in tax rates, and that while investment costs are largely unchanged, there are some indications of higher costs. For taxation, GAD now recommends a range of 0.25% to 0.75%, and for the costs of investment advice and management, a range of 0.75% to 1.75%. A figure within the overall range of 1.0% to 1.75% is now recommended, with GAD concluding that a 0.5% increase would not be unreasonable.
2. The Department has therefore concluded that it would be appropriate to provide for a total deduction of 1.25%, representing an increase of 0.5%. This is to reflect the estimated increase in the tax burden of the average claimant of around 0.5% since the original analysis, and the likelihood that increases to investment costs are not significant for the hypothetical claimant investor, who is assumed to adopt a passive investment strategy that requires less advice and management, and thus costs at the lowest end of the range.

**Further margin**

1. Once again, the views of consultees differed between those representing claimants, who support the further margin, with some suggesting it should be higher, and those representing defendants who argued for its reduction. GAD’s previous analysis – that a margin of 0.5% results in broadly a 30–35% chance of under-compensation – remains unchanged. As the Department considers that this remains an appropriate level of prudence, no change to the further margin is proposed.

**Dual or multiple rates**

1. A single rate has the benefit of providing transparency and certainty and being straightforward for parties and the courts to calculate. While setting more than one rate might provide benefits (by allowing, for example, different expected investment returns to be taken into account for different periods of award, or different rates of inflation for different heads of loss), stakeholders representing both claimants and defendants appeared unconvinced that such benefits would outweigh the practical disadvantages that would accompany a move to more than one rate. Some of the disadvantages highlighted include the cost of implementation, additional complexity in negotiations, and the possibility of loss of trust in the system. Having regard to the concerns of stakeholders about complexity and the need for further evidence and analysis, GAD’s advice was that a single rate remains appropriate. The Department therefore proposes to continue with a single rate.

# 3. Next steps

**Secondary legislation**

1. Based on the policy decisions made by the Permanent Secretary and outlined above, the Minister now intends to lay before the Assembly draft regulations that will:
   * prescribe annual weekly earnings as an alternative measure of inflation to RPI, and
   * modify the standard adjustment for taxation and the costs of investment advice and management from 0.75% to 1.25%.
2. The Minister will then bring a motion before the Assembly for their approval.
3. Subject to the Assembly approving the proposed regulations, they will be made and come into operation on or before 1 July 2024, in time for the Government’s Actuary’s review of the discount rate.

**Review of provision to allow for the impact of inflation**

1. Before the end of the current Assembly mandate, the Department will carry out a review of how the legislation provides for the impact of inflation to be taken into account (paragraph 9 of Schedule C1 to the Damages Act 1996) to consider the scope for providing more flexibility.