Department of
Justice
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The personal injury discount rate: How should it be set?

A consultation

June 2020

Foreword

It is an established principle of our law that when someone is wrongfully injured as a result of the negligence of another party, they should be paid damages that fully compensate them for the losses and costs resulting from those injuries. While the courts must therefore seek to award sums of damages that will meet all the losses arising, they also need to ensure that they do not award sums that provide more compensation than required. This is the '100% rule', and I am entirely committed to maintaining this principle and providing a framework that is fair to both claimants (those who have been injured and are claiming compensation) and defendants (those against whom the claim is made, the cost for whom is often borne by insurance). Under-compensation is not fair on claimants, who may be unable to meet all their needs. Over-compensation is not fair on defendants and the effect of this is felt more widely than the individual defendant: 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.

The courts have a difficult task in arriving at a sum that neither over-compensates nor under-compensates. One of the factors that must be taken into account when doing this is the rate of return that a claimant can receive by investing a lump sum award of damages. If too low a rate of return is assumed, then claimants will be over-compensated; if too high a rate of return is assumed, then they will be under-compensated. This consultation is about how we should set the personal injury discount rate in Northern Ireland in such a way that balances the risks of both over- and under-compensation and is fair to both claimants and defendants.

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Minister of Justice

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1. Introduction

1.1 This consultation seeks views on whether or not the legal framework for setting the personal injury discount rate in Northern Ireland should be changed and, if so, what the new legal framework should be. It is not concerned with questions around setting the rate under the current legal framework.

1.2 Respondents are asked to answer the consultation questions that appear in bold throughout the paper, and which are consolidated in a separate questionnaire document.

1.3 The best way to respond to this consultation is online via Citizen Space on the nidirect web site at: https://consultations.nidirect.gov.uk/doj-corporate-secretariat/personal-injury-discount-rate-how-should-it-be-set. There is also a questionnaire on the Department's website (www.justice-ni.gov.uk/consultations/consultation-personal-injury-discount-rate-how-should-it-be-set) which can be emailed to AtoJ.Consultation@justice-ni.x.gsi.gov.uk. Due to current working arrangements in response to the ongoing pandemic, we are not able to receive hard-copy responses by mail.

1.4 The consultation is open for eight weeks. The closing date for receipt of responses is 5.00pm on 14 August 2020. Please note that it is unlikely that we will be able to consider responses received after this date.

1.5 If it would help you to have this document in a different format, such as Braille or large print, or in a language other than English, please contact us at AtoJ.Consultation@justice-ni.x.gsi.gov.uk.

Privacy notice

1.6 We intend to publish a summary of the responses to this consultation on our web site. Any contact details that identify a respondent as a private individual will be removed prior to publication. All information will be handled in accordance with the General Data Protection Regulation 2018. Respondents should also be aware that the Department's obligations under the Freedom of

Information Act 2000 may require that any responses not subject to specific exemptions under the Act may be disclosed to other parties on request.

Complaints

1.7 If you have any concerns about the way that this consultation process is being or has been handled, please contact us at standardsunit@justice-ni.x.gsi.gov.uk.

2. Background

Awards of damages and the personal injury discount rate

2.1 The civil legal remedy for wrongfully inflicted personal injury is usually an award of damages. The award will be to cover pain and suffering and all the losses flowing from the injury, whether they be past, present or future, certain or contingent. Examples of damages for future loss or expense include compensation for loss of earnings, care costs and medical expenses. These future losses and expenses may, in some cases, run for many years into the future. The award for these losses and expenses often takes the form of a lump sum. A lump sum award should be sufficient to meet all the losses and expenses as they arise in full and should be exhausted at the end of the period for which it is given. The overall aim as stated by the House of Lords in the case of *Wells v Wells*, is that the award will neither under-compensate nor over-compensate the claimant ('the 100% rule').[1]

2.2 The assessment of damages in relation to future loss cannot, however, be an exact science, as it relies on predictions that are inevitably based on assumptions as to what may happen in the future. Some of these assumptions relate to investment of the lump sum by the claimant, who is assumed to invest the award to protect against inflation and other risks. It is therefore assumed that a lump sum award of compensation for future losses or expenses will be invested until those losses or expenses are incurred, which as noted above, could be many years in the future, during which time the claimant will earn a return. Without any adjustment being made for this investment, the claimant may not be appropriately compensated, contrary to the 100% rule. The court therefore makes an allowance for this by applying the personal injury discount rate.

2.3 The discount rate is an assumed rate of return on investment which, in Northern Ireland, is set by the Department of Justice in consultation with the Government Actuary and the Department of Finance under section 1 of the Damages Act 1996. This is a single rate applied in all cases as setting a

[1] [1999] 1 AC 345.

different rate in each individual case would require detailed and expensive expert evidence and advice, which would delay the settlement of cases.[2] The effect of the rate on different sizes of awards in different circumstances and for different periods of times is calculated and presented in the Ogden Tables, which greatly simplifies the task of the courts.[3]

2.4 Although the discount rate may be a relatively small percentage figure, when applied to the total cost of care in cases that cover long periods, it can mean very significant differences in the amount of the award. For examples, see Table 1.[4]

Table 1: Effect of different discount rates on an award covering annual care costs of £100,000 for the rest of the claimant's life in two scenarios.

	Total award	
Discount rate	40-year-old male with normal life expectancy	10-year-old female with normal life expectancy
2.5%	£2,652,000	£3,475,000
1%	£3,611,000	£5,557,000
–0.25%	£4,876,000	£9,128,000
–0.75%	£5,566,000	£11,470,000
–2%	£8,005,000	£21,931,000

2.5 Courts do have the power, under section 1(2) of the Damages Act, to apply a different rate if any party to the proceedings can show that it is more appropriate in the case in question. There is case law, however, that constrains the use of this power and we are not aware that it has been much, if ever, relied upon. There is also power under the Damages Act for compensation to be made by way of periodical payments instead of a lump sum, which would avoid the issue of the discount rate.

How the personal injury discount rate is currently set

2.6 The discount rate must be set in accordance with legal principles set out in case law, particularly *Wells v Wells*. In this case, as well as stating the general

[2] There is power under the Damages Act to prescribe different rates of return for different *classes of* case, but this has never been used.
[3] Available at https://www.gov.uk/government/publications/ogden-tables-actuarial-compensation-tables-for-injury-and-death.
[4] Table 1 is based on the 7th edition of the Ogden Tables.

principles noted in paragraph 2.1 above, the House of Lords decided that claimants in personal injury cases are not in the same position as ordinary investors because they cannot leave the ability to pay for essential services to the risk of the fluctuations of the investment market; and therefore that the rate should be set on the basis that personal injury claimants are to be assumed to be very risk averse. Lord Hope took the view that:

> … the plaintiff who is receiving the amount of his future loss in the form of a lump sum payment is not an ordinary investor. … So in his case the only form of investment which could be described as a prudent investment is one which will as nearly as possible guarantee the availability of the money as and when it is required. He cannot afford to wait until the market moves in his favour or to sustain the loss of capital which would result if he were forced to sell at a price which did not match the inflation rate. In any event the discount rate is to be selected not by forecasting what the plaintiff will actually do with the money but by identifying the return which the market will give for forgoing the use of the capital. The availability of ILGS provides the best guide to what is required. It is the best tool for this exercise which is available.[5]

2.7 The current rate in Northern Ireland is 2.5%. This is a real rate, meaning that it represents a rate of return over and above inflation. This rate was set by the Lord Chancellor in 2001 by applying the legal principles under *Wells v Wells* and consequently based on assumed returns on ILGs.[6] The power to set the rate in Northern Ireland was devolved to the Department of Justice in 2010.

Developments since 2001

2.8 The Lord Chancellor also set the rate for England and Wales under *Wells v Wells* at 2.5% in 2001, and Scottish Ministers did the same for Scotland in 2002, meaning that there was a uniform rate across the whole of the UK.

2.9 In 2012, there was a joint UK-wide consultation on reviewing the rate in each jurisdiction under the *Wells v Wells* framework. This was followed by the joint commissioning of a report by an expert panel to advise on how the rate should be set under that framework, but that did not reach any clear consensus.

2.10 In 2013, all three jurisdictions published a joint consultation on reviewing the legal framework for setting the rate, but diverging views were expressed and

[5] *Wells v Wells* [1999] 1 AC 345, p. 34.

[6] The assumed future rate of return on ILGs was based on previous performance.

again no consensus emerged.[7] A majority of respondents, largely representing insurers and defendants, felt that the legal parameters should be changed. Those who disagreed primarily represented claimant lawyers. Most of those supporting change argued that the parameters should be based on what claimants actually do with their awards (rather than what a hypothetical claimant might do). Those opposed to change felt that investment in ILGs by claimants remained an appropriate assumption. A response to the consultation was published by the Ministry of Justice in 2017.[8]

2.11 In 2017 the rates in England and Wales and in Scotland were reduced to –0.75%. The significant drop from 2.5% to –0.75% was due to changes in market conditions since 2001 and consequently a much lower assumed rate of return on ILGs than in 2001.

2.12 In Northern Ireland, in the absence of a Minister after March 2017, the rate remained unchanged. From this point on, the rate in Northern Ireland has been at considerable divergence from the rates in the other UK jurisdictions.

2.13 Also in 2017, there was a further joint consultation by the Ministry of Justice and the Scottish Government on how the rate should be set in future.[9] (The Department, in the continuing absence of a Minister, did not participate.) Following this, both England and Wales and Scotland decided to move away from *Wells v Wells* and adopted new legal frameworks in 2018 and 2019. These are discussed in detail in section 4.

2.14 In 2019, under its new framework, the Lord Chancellor set a new rate of –0.25% for England and Wales, while in Scotland, following a review of the rate under its new framework, the rate remained at –0.75%.

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[7] Ministry of Justice, Scottish Government and Department of Justice (2013), *Damages Act 1996: Review of the Legal Framework*. Available at: https://consult.justice.gov.uk/digital-communications/damages-act-1996-the-discount-rate-review-of-the/supporting_documents/damagesact1996discountrateconsultation.pdf.
[8] Ministry of Justice (2017), *Damages Act 1996: The Discount Rate. Review of the Legal Framework*. Available at https://consult.justice.gov.uk/digital-communications/damages-act-1996-the-discount-rate-review-of-the/results/response-to-discount-rate-consultation.pdf.
[9] Ministry of Justice and Scottish Government (2017), *The Personal Injury Discount Rate: How It Should Be Set in Future*. Available at: https://consult.justice.gov.uk/digital-communications/personal-injury-discount-rate/supporting_documents/discountrateconsultationpaper.pdf.

2.15 Following a settled position being reached in relation to the rates in the rest of the UK and the appointment of a new Minister of Justice in January 2020, the Department gave further consideration to reviewing the discount rate in Northern Ireland under the *Wells v Wells* framework. The outcome of this was a proposed rate of –1.75%. As required under the Damages Act, the Department consulted the Government Actuary and the Department of Finance on the proposed rate on 26 February, and communicated this to stakeholders on 27 February. At the time of publication of this paper, the Department had not yet concluded this review.

2.16 Figure 1 summarises developments in all three UK jurisdictions and the Republic of Ireland since 2001. Note that in the Republic of Ireland, while there is a statutory power to set the discount rate, this has never been used and the rate is set by the courts, which have taken *Wells v Wells* into account when reviewing it. The Irish Government is currently consulting on whether or not the power to set the rate ought to be exercised by the relevant Minister and, if so, what the legal framework for doing so ought to be.

Table 1: Personal injury discount rate in Northern Ireland, England and Wales, Scotland and the Republic of Ireland, 2001 to date.

Year	Northern Ireland	England and Wales	Scotland	Republic of Ireland
2001	2.5%	2.5%		
2002			2.5%	
2003				3%
2014				1.5% and 1%[10]
2017		–0.75%	–0.75%	
2019		–0.25%	–0.75%	

Code

	Statutory rate based on *Wells v Wells* (assumed very low-risk investor)
	Statutory rate based on new legal framework (assumed low-risk investor)
	Statutory rate based on new legal framework (assumed mixed portfolio)
	Non-statutory rate

[10] 1.5% for future pecuniary loss generally and 1% for future care costs.

3. The case for change

3.1 The 2017 joint consultation by the Ministry of Justice and Scottish Government was taken forward in response to increasing calls for change in how the rate was set. The consultation, among other things, sought evidence of how claimants actually invest their awards and invited views on what, if anything, should be done to make the system of setting the rate better and fairer.

3.2 The paper noted the costs to the public and private sectors of compensation awards, and how the impact of the discount rate can significantly increase (or decrease) these costs. This is because, for businesses and consumers, the cost of insurance against personal injury claims increases when the discount rate reduces, and for the public sector the direct cost to the taxpayer of paying compensation increases, particularly in respect of medical negligence claims against the health service.

3.3 A clear majority of respondents to the 2017 consultation said that the law on the discount rate should be changed in some way. Roughly two thirds of those respondents believed that the methodology for setting the rate was wrong. Others identified the need for regular review or suggested that the rate should be set independently of Ministers.[11]

3.4 Those who argued that the current methodology was flawed said that it did not reflect how claimants actually invest, that ILGs are not used in practice, and that calculating the rate with reference to ILGs results in over-compensation. Some argued, however, that claimants were making higher-risk investments in practice only because the previous rate of 2.5% was under-compensating and thus requiring a higher return than would have been possible from ILGs.

3.5 Following the consultation, the Ministry of Justice asked the Government Actuary's Department (GAD) to illustrate what the outcomes would be for

[11] Ministry of Justice (2017), *The Personal Injury Discount Rate: How It Should Be Set in Future – Summary of Responses.* Available at: https://consult.justice.gov.uk/digital-communications/personal-injury-discount-rate/results/discount-rate-response-consultation-print.pdf.

claimants under different illustrative discount rates, based on investments that reflect how awards might be invested in reality (according to information provided by investment advisers and wealth managers during the consultation).[12] GAD simulated two different low-risk 30-year investment strategies under 1,000 economic scenarios and found that, for the investment portfolios considered, most discount rates resulted in a considerable likelihood of claimants being over-compensated.

3.6 Table 10 from GAD's 2017 report (reproduced on page 17) illustrated the results for each of the illustrative discount rates and for the two investment strategies considered (Portfolio A and Portfolio B). For each fifth-percentile of scenarios, the green figures represent the level of over-compensation and the red figures represent the level of under-compensation. At the median level (the 50th percentile), both investment strategies resulted in over-compensation from every illustrative discount rate.[13]

3.7 In response to this consultation, the Ministry of Justice concluded (also taking into account the research undertaken by GAD noted above) that, while claimants should be treated as more risk averse than ordinary prudent investors, in reality they invest in low-risk diversified portfolios rather than very low risk investments, such as ILGs alone. Accordingly, it stated that the present law on setting the rate did not properly reflect investment practice and led to over-compensation of claimants and additional cost to taxpayers and consumers. It also accepted that there ought to be time limits within which reviews of the rate must be held.

3.8 Following some further consultation on draft clauses,[14] legislation to put these changes into effect was subsequently enacted as Part 2 of the Civil Liability

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[12] Government Actuary's Department (2017), *Ministry of Justice: Personal Injury Discount Rate Analysis*. Available at: https://consult.justice.gov.uk/digital-communications/personal-injury-discount-rate/results/gad-analysis.pdf.

[13] The 2017 report shows results based on (i) market conditions at 31 December 2016; and (ii) illustrative portfolios A and B. Further, it considered claimant outcomes over a 30-year period. The Government Actuary's 2019 advice to inform the Lord Chancellor's determination of the personal injury discount rate updated this analysis to market conditions at 31 December 2018. It also showed claimant outcomes over a 43-year investment period and updated investment portfolios, both of which were informed by an updated call for evidence. The 2019 report still shows significant likelihood of claimants being over-compensated when setting lower discount rates.

[14] See:

Act 2018, which received Royal Assent and came into effect on 20 December 2018.

3.9 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.

3.10 The Scottish Government also concluded that it was appropriate to move away from the approach of setting the rate by reference to returns on ILGs because it was 'clear that this can lead to the chance of significant levels of over-compensation.'[15] Accordingly, the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 provided a new methodology for setting the rate. It also transferred responsibility for setting the rate from Scottish Ministers to the Government Actuary, on the basis that determining the rate is primarily an actuarial exercise, in which there should be no need to exercise political judgment, and provided for a five-yearly review.

3.11 In Scotland, the rate is now set with reference to projected returns on a notional portfolio of 'cautious' investments, over a 30-year period, but with an adjustment of 1.25 percentage points (0.75 to take account of expenses and 0.5 to reduce the likelihood of under-compensation). The notional portfolio specifies different types of investment products and what percentage of the portfolio they represent.

3.12 Northern Ireland, therefore, remains the only UK jurisdiction in which the discount rate still has to be set under an unamended Damages Act and in accordance with the principles in *Wells v Wells*.

- Ministry of Justice (2017), *The Personal Injury Discount Rate: How It Should Be Set in Future: Draft Legislation.* Available at https://consult.justice.gov.uk/digital-communications/personal-injury-discount-rate/results/personal-injury-discount-rate-command-paper-web.pdf.
- House of Commons Justice Committee (2017), *Pre-legislative scrutiny: draft personal injury discount rate clause: Third Report of Session 2017–19.* Available at https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/374/374.pdf.
- Ministry of Justice (2018), *Personal Injury Discount Rate: Response to the Report of the Justice Select Committee: Draft Clause.* Available at https://consult.justice.gov.uk/digital-communications/personal-injury-discount-rate/results/personal-injury-discount-rate-jsc-govt-response-print.pdf.

[15] Scottish Government (2018), *Damages (Investment Returns and Periodical Payments) (Scotland) Bill: Policy Memorandum*. Available at: https://www.parliament.scot/S5_Bills/Damages%20(Investment%20Returns%20and%20Periodical%20Payments)%20(Scotland)%20Bill/SPBill35PMS052018.pdf.

3.13 The Department of Justice notes in particular the evidence that has been provided by independent wealth advisers and managers. We do not think there is any reason to believe that the investment decisions of claimants in Northern Ireland are likely to be significantly different from those made by claimants in other jurisdictions. The Department therefore considers that, while claimants in Northern Ireland should continue to be assumed to be more risk averse than ordinary investors, the discount rate in this jurisdiction should also now be set to reflect more closely how they invest in reality, so as to better protect against the risk of over-compensation, and any potential unfair financial burden on public bodies, businesses and consumers.

CONSULTATION QUESTION 1

Do you agree that investment decisions by claimants in Northern Ireland are likely to be similar to those made by claimants in other jurisdictions? If not, please explain.

3.14 The Department also considers that there should be regular review of the rate, to ensure that the rate remains realistic and is adjusted as market conditions change.

3.15 Accordingly, the Department of Justice is proposing that the legal framework for setting the rate in Northern Ireland should be changed. Options for change are discussed in section 4 of this paper.

CONSULTATION QUESTION 2

Do you agree that the legal framework for setting the personal injury discount rate in Northern Ireland should be changed so that it is no longer tied to *Wells v Wells*? Please explain.

Table 10 – Percentile distribution of over/under-compensation

	Award basis	Percentile of over/under-compensation for a claimant with a 30 year award																		
		5th	10th	15th	20th	25th	30th	35th	40th	45th	50th	55th	60th	65th	70th	75th	80th	85th	90th	95th
Portfolio A	RPI-1.75%	16%	25%	31%	36%	41%	45%	49%	53%	56%	59%	63%	68%	72%	75%	80%	86%	93%	104%	118%
	RPI-0.75%	-1%	6%	12%	15%	20%	23%	27%	30%	32%	35%	39%	43%	46%	49%	53%	58%	64%	74%	86%
	RPI-0.5%	-5%	2%	7%	11%	15%	19%	22%	25%	27%	30%	34%	37%	40%	43%	47%	52%	58%	67%	79%
	RPI+0%	-12%	-5%	0%	3%	7%	10%	13%	16%	18%	21%	24%	27%	30%	33%	37%	41%	46%	55%	66%
	RPI+0.5%	-18%	-12%	-7%	-4%	-1%	2%	5%	8%	10%	12%	15%	18%	21%	23%	27%	31%	36%	44%	54%
	RPI+1%	-24%	-18%	-14%	-11%	-8%	-5%	-2%	0%	2%	4%	7%	10%	12%	15%	18%	22%	26%	34%	43%
Portfolio B	RPI-1.75%	6%	17%	28%	35%	44%	50%	57%	64%	69%	75%	83%	92%	99%	106%	116%	129%	141%	157%	183%
	RPI-0.75%	-9%	0%	9%	15%	23%	28%	34%	39%	44%	49%	56%	64%	69%	75%	84%	95%	105%	119%	141%
	RPI-0.5%	-13%	-4%	5%	11%	18%	23%	29%	34%	38%	44%	50%	57%	63%	69%	77%	87%	97%	110%	132%
	RPI+0%	-19%	-11%	-3%	3%	9%	14%	19%	24%	28%	33%	39%	46%	51%	56%	64%	73%	83%	95%	115%
	RPI+0.5%	-25%	-17%	-10%	-5%	1%	6%	11%	15%	19%	24%	29%	36%	40%	45%	52%	61%	70%	81%	99%
	RPI+1%	-30%	-23%	-16%	-11%	-6%	-2%	3%	7%	11%	15%	20%	26%	30%	35%	42%	50%	58%	68%	86%

4. Options

4.1 The two obvious precedents for a new legal framework for setting the rate in Northern Ireland are the frameworks for England and Wales and for Scotland.

4.2 The framework for setting the rate for England and Wales is provided in section A1 of and Schedule A1 to the Damages Act 1996 (as inserted by the Civil Liability Act 2018) (see Appendix 1).

4.3 The framework for setting the rate for Scotland is provided in section B1 of and Schedule B1 to the Damages Act 1996 (as inserted by the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019) (see Appendix 2).

How should the rate be set

4.4 The Department considers that, in setting the rate for Northern Ireland, it must be assumed that the recipient of damages will invest a lump sum for the purpose of meeting all losses and costs for the entire period for which they have been awarded; that the lump sum will be exhausted at the end of this period; and that it should be set with reference to low-risk rather than very-low-risk investments.

4.5 The Department considers that either of the legislative frameworks in England and Wales or Scotland would meet those objectives and is not inclined to think that a third model is required, although views on that are invited.

England and Wales

4.6 The rate for England and Wales is prescribed in secondary legislation, but a court may take a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question. Different rates of return may be prescribed for different classes of case, e.g. for different types of pecuniary loss, different periods during which the loss is expected to occur, and different times when the loss is expected to occur. Schedule A1 to the Damages Act 1996 contains the detail of the framework that determines how the rate is set.

4.7 The rate must be that which a recipient of damages could reasonably be expected to achieve if he or she invested for the purpose of meeting the losses and costs for which they are awarded at the time or times they fall to be met, and that so that they would be exhausted at the end of the period for which they are awarded.

4.8 It must be assumed that the damages are paid as a lump sum, the recipient has been properly advised, the recipient invests the damages in a diversified portfolio of investments with an investment risk that is more than very low, but less than would ordinarily be accepted by a prudent and properly advised investor who has different financial aims.

4.9 In setting the rate, the Lord Chancellor must have regard to the actual returns that are available to investors and the actual investments made by investors of damages, and must make appropriate allowances for taxation, inflation and investment management costs.

Scotland

4.10 Courts in Scotland must have regard to the rate set by the rate-assessor (the Government Actuary), but a court may take a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question. Schedule B1 to the Damages Act 1996 contains the detail of the framework that determines how the rate is set.

4.11 The rate must reflect the rate of return for a notional portfolio of investments over a 30-year period, making allowance for inflation. The notional portfolio is as shown in the table below.

cash or equivalents	10%
nominal gilts	15%
index-linked gilts	10%
UK equities	7.5%
overseas equities	12.5%
high-yield bonds	5%
investment-grade credit	30%
property (heritable or moveable)	5%
other types (e.g. infrastructure, commodities, hedge funds and absolute return funds)	5%

4.12 Two standard adjustments are then made to the rate of return on the notional portfolio: a deduction of 0.75 of a percentage point to take account of the impact of taxation and the cost of investment advice and management; and a further 0.5 of a percentage point in recognition of the risk inherent in even the most carefully advised and invested portfolio.

4.13 In advance of each review, Scottish Ministers must be satisfied that the notional portfolio remains suitable for investment by a hypothetical investor. If they conclude that it does not, the detail of the portfolio and the standard adjustments can be amended by regulations. A hypothetical investor is someone in receipt of damages and who will invest the damages as properly advised; who is reliant on the damages to meet the full cost of the losses and expenses for which they have been awarded; and whose objectives are that the damages will meet all those losses and expenses and be exhausted at the end of the period for which they were awarded.

4.14 It is presumed that there will be a single discount rate but Scottish Ministers may make regulations to require that more than one rate should be set, specifying the circumstances to which each rate is to relate. If there is more than one rate, a separate review is conducted to determine each rate.

Summary

4.15 The key differences between the two models are that the assumed portfolio of investments – and the adjustments to be made for taxation and management costs – are prescribed in Scotland, but are left to judgment in England and Wales.

4.16 The Department welcomes views on which of the two models would be most appropriate for Northern Ireland or on suggestions for an alternative model.

CONSULTATION QUESTION 3

Which of the following frameworks for setting the personal injury discount rate in Northern Ireland should be adopted?

a) the framework used in England and Wales
b) the framework used in Scotland
c) another framework (please describe).

Please give reasons for your answer.

Who should set the rate?

4.17 In England and Wales, the Lord Chancellor prescribes the rate in secondary legislation, having consulted an expert panel and the Treasury.

4.18 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.

4.19 In Scotland, the Government Actuary sets the rate. He or she may consult or seek advice, and must have regard to the views of those whose views have been sought. The rate is not brought into operation by secondary legislation, but by the Government Actuary's report being laid by Scottish Ministers before the Scottish Parliament.

4.20 In Northern Ireland, following the model for England and Wales would mean that the Department of Justice would set the rate, having consulted the

Government Actuary, or an expert panel including the Government Actuary, and the Department of Finance. Following the model for Scotland would mean that the Government Actuary would set the rate, and the Department of Justice would lay his report before the Northern Ireland Assembly.

4.21 The former option emphasises political accountability, by entrusting the decision to a local Minister by way of secondary legislation laid before the Assembly. The latter regards the setting of the rate as an actuarial exercise and emphasises independent expertise. In reality, the Department already relies to a considerable extent on expert advice.

4.22 It may be that what is arguably a greater degree of discretion inherent in the England and Wales model lends itself more to a Ministerial decision, whereas the greater degree of prescription in the Scottish model lends itself more to an actuarial decision.

CONSULTATION QUESTION 4

Do you agree that adopting the England and Wales model would mean that setting the rate should be a decision for the Department of Justice; and adopting the Scottish model would mean that it should be a decision for the Government Actuary? Please give reasons for your answer.

CONSULTATION QUESTION 5

Should the person or body responsible for setting the rate in Northern Ireland be required to consult any other person or body? If so, who, and why?

How often should the rate be reviewed?

4.23 In England and Wales, there is a five-yearly review. Each review must begin within the five-year period following the conclusion of the last review, and must be completed within 180 days.

4.24 In Scotland, there is also a five-yearly review. Each review must be started immediately after the five-year period since the previous review began, and must be concluded within 90 days.

4.25 The Department is content that a five-yearly review is also appropriate for Northern Ireland, but welcomes views.

CONSULTATION QUESTION 6

Should there be a requirement in Northern Ireland to review the personal injury discount rate on a regular basis?

CONSULTATION QUESTION 7

If so, how often should the rate be reviewed? Please give reasons for your answer.

5. Impact assessments

5.1 The policy proposal to change how the personal injury discount rate is set has been screened for various impacts. A screening document is available at www.justice-ni.gov.uk/consultations/consultation-personal-injury-discount-rate-how-should-it-be-set.

5.2 The conclusion of the screening exercise was that a regulatory impact assessment was required. This assessment is also available at www.justice-ni.gov.uk/consultations/consultation-personal-injury-discount-rate-how-should-it-be-set. It analysed the impact of two options: 'do nothing' (i.e. continue to set the rate solely with reference to ILGs), and changing the legal framework so that it is set with reference to a wider portfolio of low-risk investments. While it was not possible to quantify the costs and benefits of either option, the assessment concluded that changing the legal framework would have fewer costs and more benefits for businesses than maintaining the status quo.

CONSULTATION QUESTION 8

Do you agree with the outcome of the screening exercises and regulatory impact assessment? If not, please explain why.

Appendix 1: Section A1 of and Schedule A1 to the Damages Act 1996

A1 Assumed rate of return on investment of damages: England and Wales

(1) In determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury the court must, subject to and in accordance with rules of court made for the purposes of this section, take into account such rate of return (if any) as may from time to time be prescribed by an order made by the Lord Chancellor.

(2) Subsection (1) does not however prevent the court taking a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question.

(3) An order under subsection (1) may prescribe different rates of return for different classes of case.

(4) An order under subsection (1) may in particular distinguish between classes of case by reference to—

- (a) the description of future pecuniary loss involved;
- (b) the length of the period during which future pecuniary loss is expected to occur;
- (c) the time when future pecuniary loss is expected to occur.

(5) Schedule A1 (which makes provision about determining the rate of return to be prescribed by an order under subsection (1)) has effect.

(6) An order under this section is to be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

Schedule A1

Assumed rate of return on investment of damages: England and Wales

Periodic reviews of the rate of return

1 (1) The Lord Chancellor must review the rate of return periodically in accordance with this paragraph.

(2) The first review of the rate of return must be started within the 90 day period following commencement.

(3) Each subsequent review of the rate of return must be started within the 5 year period following the last review.

(4) It is for the Lord Chancellor to decide—

(a) when, within the 90 day period following commencement, a review under sub-paragraph (2) is to be started;

(b) when, within the 5 year period following the last review, a review under sub-paragraph (3) is to be started.

(5) In this paragraph—

"90 day period following commencement" means the period of 90 days beginning with the day on which this paragraph comes into force;

"5 year period following the last review" means the period of five years beginning with the day on which the last review under this paragraph (whether under sub-paragraph (2) or (3)) is concluded.

(6) For the purposes of this paragraph a review is concluded on the day when the Lord Chancellor makes a determination under paragraph 2 or 3 (as the case may be) as a result of the review.

Conducting the first review

2 (1) This paragraph applies when the Lord Chancellor is required by paragraph 1(2) to conduct a review of the rate of return.

(2) The Lord Chancellor must review the rate of return and determine whether it should be—

(a) changed to a different rate, or

(b) kept unchanged.

(3) The Lord Chancellor must conduct that review and make that determination within the 140 day review period.

(4) In conducting the review, the Lord Chancellor must consult—

(a) the Government Actuary, and

(b) the Treasury.

(5) The consultation of the Government Actuary must start within the period of 20 days beginning with the day on which the 140 day review period starts.

(6) The Government Actuary must respond to the consultation within the period of 80 days beginning with the day on which the Government Actuary's response to the consultation is requested.

(7) The exercise of the power of the Lord Chancellor under this paragraph to determine whether the rate of return should be changed or kept unchanged is subject to paragraph 4.

(8) When deciding what response to give to the Lord Chancellor under this paragraph, the Government Actuary and the Treasury must take into account the duties imposed on the Lord Chancellor by paragraph 4.

(9) During any period when the office of Government Actuary is vacant, a reference in this paragraph to the Government Actuary is to be read as a reference to the Deputy Government Actuary.

(10) In this paragraph "140 day review period" means the period of 140 days beginning with the day which the Lord Chancellor decides (under paragraph 1) should be the day on which the review is to start.

Conducting later reviews

3 (1) This paragraph applies whenever the Lord Chancellor is required by paragraph 1(3) to conduct a review of the rate of return.

(2) The Lord Chancellor must review the rate of return and determine whether it should be—

(a) changed to a different rate, or

(b) kept unchanged.

(3) The Lord Chancellor must conduct that review and make that determination within the 180 day review period.

(4) In conducting the review, the Lord Chancellor must consult—

(a) the expert panel established for the review, and

(b) the Treasury.

(5) The expert panel must respond to the consultation within the period of 90 days beginning with the day on which its response to the consultation is requested.

(6) The exercise of the power of the Lord Chancellor under this paragraph to determine whether the rate of return should be changed or kept unchanged is subject to paragraph 4.

(7) When deciding what response to give to the Lord Chancellor under this paragraph, the expert panel and the Treasury must take into account the duties imposed on the Lord Chancellor by paragraph 4.

(8) In this paragraph "180 day review period" means the period of 180 days beginning with the day which the Lord Chancellor decides (under paragraph 1) should be the day on which the review is to start.

Determining the rate of return

4 (1) The Lord Chancellor must comply with this paragraph when determining under paragraph 2 or 3 whether the rate of return should be changed or kept unchanged ("the rate determination").

(2) The Lord Chancellor must make the rate determination on the basis that the rate of return should be the rate that, in the opinion of the Lord Chancellor, a recipient of relevant damages could reasonably be expected to achieve if the recipient invested the relevant damages for the purpose of securing that—

(a) the relevant damages would meet the losses and costs for which they are awarded;

(b) the relevant damages would meet those losses and costs at the time or times when they fall to be met by the relevant damages; and

(c) the relevant damages would be exhausted at the end of the period for which they are awarded.

(3) In making the rate determination as required by sub-paragraph (2), the Lord Chancellor must make the following assumptions—

(a) the assumption that the relevant damages are payable in a lump sum (rather than under an order for periodical payments);

(b) the assumption that the recipient of the relevant damages is properly advised on the investment of the relevant damages;

(c) the assumption that the recipient of the relevant damages invests the relevant damages in a diversified portfolio of investments;

(d) the assumption that the relevant damages are invested using an approach that involves—

(i) more risk than a very low level of risk, but

(ii) less risk than would ordinarily be accepted by a prudent and properly advised individual investor who has different financial aims.

(4) That does not limit the assumptions which the Lord Chancellor may make.

(5) In making the rate determination as required by sub-paragraph (2), the Lord Chancellor must—

(a) have regard to the actual returns that are available to investors;

(b) have regard to the actual investments made by investors of relevant damages; and

(c) make such allowances for taxation, inflation and investment management costs as the Lord Chancellor thinks appropriate.

(6) That does not limit the factors which may inform the Lord Chancellor when making the rate determination.

(7) In this paragraph "relevant damages" means a sum awarded as damages for future pecuniary loss in an action for personal injury.

Determination

5 When the Lord Chancellor makes a rate determination, the Lord Chancellor must—

(a) give reasons for the rate determination made, and

(b) publish such information as the Lord Chancellor thinks appropriate about—

(i) the response of the expert panel established for the review, or

(ii) in the case of a review required by paragraph 1(2), the response of the Government Actuary or the Deputy Government Actuary (as the case may be).

Expert panel

6 (1) For each review of a rate of return required by paragraph 1(3), the Lord Chancellor is to establish a panel (referred to in this Schedule as an "expert panel") consisting of—

(a) the Government Actuary, who is to chair the panel; and

(b) four other members appointed by the Lord Chancellor.

(2) The Lord Chancellor must exercise the power to appoint the appointed members to secure that—

(a) one appointed member has experience as an actuary;

(b) one appointed member has experience of managing investments;

(c) one appointed member has experience as an economist;

(d) one appointed member has experience in consumer matters as relating to investments.

(3) An expert panel established for a review of a rate of return ceases to exist once it has responded to the consultation relating to the review.

(4) A person may be a member of more than one expert panel at any one time.

(5) A person may not become an appointed member if the person is ineligible for membership.

(6) A person who is an appointed member ceases to be a member if the person becomes ineligible for membership.

(7) The Lord Chancellor may end an appointed member's membership of the panel if the Lord Chancellor is satisfied that—

(a) the person is unable or unwilling to take part in the panel's activities on a review conducted under paragraph 1;

(b) it is no longer appropriate for the person to be a member of the panel because of gross misconduct or impropriety;

(c) the person has become bankrupt, a debt relief order (under Part 7A of the Insolvency Act 1986) has been made in respect of the person, the person's estate has been sequestrated or the person has made an arrangement with or granted a trust deed for creditors.

(8) During any period when the office of Government Actuary is vacant the Deputy Government Actuary is to be a member of the panel and is to chair it.

(9) A person is "ineligible for membership" of an expert panel if the person is—

(a) a Minister of the Crown, or

(b) a person serving in a government department in employment in respect of which remuneration is payable out of money provided by Parliament.

(10) In this paragraph "appointed member" means a person appointed by the Lord Chancellor to be a member of an expert panel.

Proceedings, powers and funding of an expert panel

7 (1) The quorum of an expert panel is four members, one of whom must be the Government Actuary (or the Deputy Government Actuary when the office of Government Actuary is vacant).

(2) In the event of a tied vote on any decision, the person chairing the panel is to have a second casting vote.

(3) The panel may—

(a) invite other persons to attend, or to attend and speak at, any meeting of the panel;

(b) when exercising any function, take into account information submitted by, or obtained from, any other person (whether or not the production of the information has been commissioned by the panel).

(4) The Lord Chancellor must make arrangements for an expert panel to be provided with the resources which the Lord Chancellor considers to be appropriate for the panel to exercise its functions.

(5) The Government Actuary's Department, or any other government department, may enter into arrangements made by the Lord Chancellor under sub-paragraph (4).

(6) The Lord Chancellor must make arrangements for the appointed members of an expert panel to be paid any remuneration and expenses which the Lord Chancellor considers to be appropriate.

Application of this Schedule where there are several rates of return

8 (1) This paragraph applies if two or more rates of return are prescribed under section A1.

(2) The requirements—

(a) under paragraph 1 for a review to be conducted, and

(b) under paragraph 2 or 3 relating to how a review is conducted,

apply separately in relation to each rate of return.

(3) As respects a review relating to a particular rate of return, a reference in this Schedule to the last review conducted under a particular provision is to be read as a reference to the last review relating to that rate of return.

Interpretation

9 (1) In this Schedule—

"expert panel" means a panel established in accordance with paragraph 6;

"rate determination" has the meaning given by paragraph 4;

"rate of return" means a rate of return for the purposes of section A1.

(2) A provision of this Schedule that refers to the rate of return being changed is to be read as also referring to—

(a) the existing rate of return being replaced with no rate;

(b) a rate of return being introduced where there is no existing rate;

(c) the existing rate of return for a particular class of case being replaced with no rate;

(d) a rate of return being introduced for a particular class of case for which there is no existing rate.

(3) A provision of this Schedule that refers to the rate of return being kept unchanged is to be read as also referring to—

(a) the position that there is no rate of return being kept unchanged;

(b) the position that there is no rate of return for a particular class of case being kept unchanged.

(4) A provision of this Schedule that refers to a review of the rate of return is to be read as also referring to—

(a) a review of the position that no rate of return is prescribed;

(b) a review of the position that no rate of return is prescribed for a particular class of case.

Appendix 2: Section B1 of and Schedule B1 to the Damages Act 1996

B1 Assumed rate of return on damages invested: Scotland

(1) In determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury, a court must take into account the rate of return set by the official rate-assessor.

(2) However—

(a) the court is to do so subject to and in accordance with rules of court (if any) made for the purpose of subsection (1),

(b) the court may take a different rate of return into account if a party to the action shows that the different rate is more appropriate in the circumstances of the case.

(3) Schedule B1 contains provision about setting the rate of return for the purpose of subsection (1).

(4) In subsection (1), the reference to the official rate-assessor is to—

(a) if no regulations under paragraph (b) are in force, the Government Actuary (but, when that office is vacant, the Deputy Government Actuary), or

(b) a person appointed in place of the Government Actuary (including the Deputy as referred to in paragraph (a)) by regulations made by the Scottish Ministers.

(5) Regulations under subsection (4)(b) may provide for a person to deputise for the person appointed in place of the Government Actuary.

(6) Before making regulations under subsection (4)(b), the Scottish Ministers must obtain the agreement of—

(a) as respects appointment in place of the Government Actuary, the person to be appointed,

(b) as respects deputising as mentioned in subsection (5), the person who is to deputise as provided for.

(7) Regulations under subsection (4)(b) are subject to the affirmative procedure.

Schedule B1

Setting the rate for section B1(1): Scotland

Regular review of rates of return

1 (1) The rate-assessor must review any original rate of return.

(2) A review under sub-paragraph (1) must be started by the rate-assessor on the appointed day.

(3) For the purpose of this paragraph—

(a) an original rate of return is—

(i) a rate of return to which paragraph 27(1) applies, or

(ii) the position of there being no rate of return to which paragraph 27(1) applies,

(b) the appointed day is 1 July 2019.

2 (1) The rate-assessor must review every subsequent rate of return.

(2) A review under sub-paragraph (1) must be started by the rate-assessor—

(a) on the day after the last day of the 5-year period, or

(b) earlier within the 5-year period as is required by the Scottish Ministers.

(3) Where a review under sub-paragraph (1) is started earlier by virtue of sub-paragraph (2)(b), it is to be treated as an extra review that does not affect the running of the 5-year period in relation to the previous review (and no 5-year period runs under sub-paragraph (2)(a) in relation to the extra review).

(4) For the purpose of this paragraph—

(a) a subsequent rate of return is a rate of return that is set—

(i) for the time being (including by reason of an extra review as mentioned in sub-paragraph (3)), and

(ii) subsequently to an original rate of return as described in paragraph 1(3)(a) (including as a result of a review under sub-paragraph (1) conducted from time to time by virtue of the continuing operation of sub-paragraph (2)(a) and (b)),

(b) the 5-year period is the period of 5 years beginning with the day on which the previous review of a rate of return must be started (ignoring an extra review as mentioned in sub-paragraph (3)).

3 (1) A review of a rate of return under paragraph 1(1) or 2(1) must be concluded by the rate-assessor within the 90-day period.

(2) For the purpose of this paragraph, the 90-day period is the period of 90 days beginning with the day on which the review must be started by the rate-assessor.

Overview as to rate-setting

4 (1) The conduct by the rate-assessor of a review of a rate of return under paragraph 1(1) or 2(1) is governed by—

(a) paragraphs 5 to 7,

(b) paragraphs 9 and 10,

(c) paragraphs 12 and 13,

(d) paragraphs 19 to 21.

(2) A rate of return is to be set as a result of a review under paragraph 1(1) or 2(1) accordingly (plus see paragraph 23 as to reporting afterwards on the conduct of such a review).

5 In a review under paragraph 1(1) or 2(1), the rate-assessor must determine whether a rate of return to be set is to be—

(a) different from the rate of return with which the review is concerned, or

(b) the same as the rate of return with which the review is concerned.

6 In a review under paragraph 1(1) or 2(1), the rate-assessor must have regard to views—

(a) of any person whom the rate-assessor chooses to consult, and

(b) of any person whose advice the rate-assessor chooses to seek,

where received by the rate-assessor timeously in connection with the review.

Returns-based assessment

7 (1) The basis on which the rate-assessor is to make a rate determination in a review under paragraph 1(1) or 2(1) is as narrated in sub-paragraph (2).

(2) A rate of return should reflect the return that could reasonably be expected to be achieved by a person who invests—

(a) in the notional portfolio, and

(b) for a period of 30 years.

(3) This is without prejudice to paragraphs 10 and 20 (with paragraph 10 to be met before paragraph 20 is met).

(4) For the notional portfolio, see the table in paragraph 12(3).

8 The Scottish Ministers may by regulations modify a period mentioned in paragraph 7(2).

9 (1) Allowance must be made by the rate-assessor for the impact of inflation on the value of the return or investment to which paragraph 7(2) relates.

(2) The impact of inflation is to be allowed for by reference to, whether indicating an upward or downward trend—

(a) the retail prices index within the meaning of section 833(2) of the Income and Corporation Taxes Act 1988, or

(b) some published information relating to costs, earnings or other monetary factors as is, for use instead of the retail prices index, prescribed in regulations made by the Scottish Ministers.

Standard adjustments

10 (1) The standard adjustments must be made by the rate-assessor to a rate of return that would be arrived at but for this paragraph.

(2) The standard adjustments are the deduction of—

(a) 0.75 of a percentage point, to represent—

(i) the impact of taxation, and

(ii) the costs of investment advice and management, and

(b) 0.5 of a percentage point, as the further margin involved in relation to the rate of return.

11 (1) The Scottish Ministers may by regulations modify a figure appearing in paragraph 10(2)(a) or (b) (and update the adjacent text so that percentage points are referred to correctly in the singular or plural).

(2) A figure as so modified—

(a) may be zero or a positive number,

(b) if not a whole number (including zero), may comprise or incorporate a decimal fraction.

Notional investment portfolio

12 (1) As for the basis on which the rate-assessor is to proceed by virtue of paragraph 7(1), the notional portfolio is a combination of various types of things for investment in.

(2) In the table—

(a) the first column shows the types of things that the portfolio is composed of,

(b) the second column shows the percentage that each of the types of things is of the portfolio.

(3) Here is the table—

cash or equivalents	10%
nominal gilts	15%
index-linked gilts	10%
UK equities	7.5%
overseas equities	12.5%
high-yield bonds	5%
investment-grade credit	30%
property (heritable or moveable)	5%
other types (see the examples)	5%

(4) Examples of other types as mentioned at the bottom of the first column of the table are infrastructure, commodities, hedge funds and absolute return funds.

13 So far as necessary, if—

(a) an entry in the first column of the table is not ascribed meaning by regulations under paragraph 14, or

(b) any associated examples are not ascribed meaning by regulations under paragraph 14,

the entry is or (as the case may be) examples are to be interpreted by the rate-assessor as appropriate by bringing to bear professional knowledge of what the relevant terminology is commonly understood to mean in investment contexts.

Details within portfolio

14 The Scottish Ministers may by regulations ascribe meaning to—

(a) an entry in the first column of the table in paragraph 12(3),

(b) any associated examples.

15 (1) The Scottish Ministers may by regulations—

(a) as respects the first column of the table in paragraph 12(3), add, remove or modify an entry or any associated examples,

(b) as respects the second column of the table—

(i) add or remove a figure,

(ii) modify a figure.

(2) A figure so added, or as so modified—

(a) may be zero or a positive number,

(b) if not a whole number (including zero), may comprise or incorporate a decimal fraction.

Hypothetical investor

16 (1) Before a review under paragraph 2(1) is due to start, the Scottish Ministers must consider whether regulations under paragraph 14 or 15 are necessary for ensuring that the notional portfolio remains suitable for investment in by a hypothetical investor.

(2) In considering the matter, the Scottish Ministers must consult such persons as they consider appropriate.

(3) No consideration of the matter is required ahead of an extra review as mentioned in paragraph 2(3).

(4) For who is a hypothetical investor, see paragraph 17(1).

17 (1) A hypothetical investor is someone who falls within each of sub-paragraphs (2) to (4).

(2) That is, someone who—

(a) is a recipient of damages, and

(b) will—

(i) invest the damages, and

(ii) do so as properly advised.

(3) That is, someone who—

(a) 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

(b) will make withdrawals from the investment fund deriving from investment of the damages.

(4) That is, someone whose objectives are of securing that the damages will—

(a) meet the losses and expenses for which the damages are awarded, and

(b) be exhausted at the end of the period for which the damages are awarded.

18 For the purpose of paragraphs 16 and 17—

(a) a reference to damages is to damages of the kind mentioned in section B1(1), and

(b) the damages are to be assumed to be received in a lump sum (rather than by way of periodical payments).

Expression of rates set

19 (1) A rate of return is to be set by the rate-assessor as a percentage figure.

(2) The figure may be—

(a) zero, or

(b) a negative or positive number.

(3) If the figure is not a whole number (including zero), the number is to comprise or incorporate a decimal fraction of 0.25, 0.5 or 0.75.

20 (1) A rate of return that would be arrived at but for this paragraph is to be rounded up or down by the rate-assessor to the nearest figure permitted, if necessary so as to come to—

(a) a whole number (including zero), or

(b) a number comprising or incorporating a decimal fraction of 0.25, 0.5 or 0.75.

(2) If two permitted figures are equally near when rounding under sub-paragraph (1) arises, rounding is to be to whichever of the figures is reached—

(a) from the positive side of zero, by going towards (or to) zero, or

(b) from the negative side of zero, by going further below zero.

Single or multiple rates

21 (1) Except where the Scottish Ministers by regulations require more than one rate of return to be set by the rate-assessor, a rate of return is to be set so as to have effect for all cases.

(2) Where more than one rate of return is set for the time being by virtue of regulations under sub-paragraph (1), a review under paragraph 1(1) or 2(1) is to be conducted separately in relation to each rate of return (and a reference in paragraph 2(4)(b) to the previous review is to be read as necessary for this).

22 Regulations under paragraph 21(1) must—

(a) specify the circumstances to which each rate of return is to relate,

(b) require the rate-assessor's report under paragraph 23 to cover each rate of return separately.

Reporting and effective date

23 (1) After a review under paragraph 1(1) or 2(1) is concluded, the rate-assessor must send to the Scottish Ministers a report on the conduct of the review.

(2) The report is to be sent to the Scottish Ministers without undue delay (and no later than on the last day of the 90-day period described in paragraph 3(2)).

(3) The report is to—

(a) include—

(i) a rate determination made in the review,

(ii) a summary of the calculation of the rate of return (which may be accompanied by explanatory or supporting material),

(b) state the day on which the report is sent to the Scottish Ministers (and the day on which the review is concluded).

24 (1) The Scottish Ministers must lay the report before the Scottish Parliament as soon as practicable after the day on which they receive the report from the rate-assessor.

(2) The rate-assessor must publish the report on the same day as the report is laid before the Scottish Parliament by the Scottish Ministers.

25 A rate determination comes into effect at the beginning of the day after the day on which the report including the determination is laid before the Scottish Parliament by the Scottish Ministers.

Reimbursement of costs

26 (1) The Scottish Ministers must adequately reimburse the rate-assessor for costs, including as to staff and outlays, incurred by the rate-assessor in exercising the rate-assessor's functions with respect to a review under paragraph 1(1) or 2(1).

(2) No reimbursement is owed under sub-paragraph (1) if the rate-assessor is part of the Scottish Administration.

Transitional arrangements

27 (1) This sub-paragraph applies to a rate of return—

(a) prescribed by an order made under section 1(1) of the Damages Act 1996, and

(b) having effect—

(i) in relation to Scotland, and

(ii) immediately before the appointed day.

(2) A rate of return to which sub-paragraph (1) applies is to be treated from the appointed day as if it were set for the purpose of section B1(1).

(3) For the purpose of this paragraph, the appointed day is 1 July 2019.

28 (1) A review under paragraph 1(1) of the position of there being no rate of return cannot cause the maintaining of that position, so in conducting such a review in relation to that position—

(a) paragraphs 5(a) and 33(5)(a) are to be read as if referring to a rate of return of some sort, and

(b) paragraphs 5(b) and 33(5)(b) are to be ignored.

(2) On the question of a review under paragraph 1(1) of the position of there being no rate of return, see paragraph 1(3)(a)(ii).

29 (1) Paragraph 6 extends to views received, in advance of the appointed day, in anticipation of the starting of a review under paragraph 1(1).

(2) For the purpose of this paragraph, the appointed day is 1 July 2019.

30 (1) Paragraph 26 extends to costs incurred, in advance of the appointed day, in anticipation of the starting of a review under paragraph 1(1).

(2) For the purpose of this paragraph, the appointed day is 1 July 2019.

Procedure for regulations

31 (1) Regulations under this schedule may—

(a) make provision to apply in all cases, or

(b) make different provision for different circumstances.

(2) Regulations under this schedule are subject to the affirmative procedure.

Interpretation of schedule

32 In this schedule, a reference to the rate-assessor is to the official rate-assessor as mentioned in section B1(1).

33 (1) Sub-paragraphs (2) to (5) are also for construing this schedule.

(2) A rate of return is a rate of return for the purpose of section B1(1).

(3) A rate of return is set as a result of a review under paragraph 1(1) or 2(1) on the making in the review of a rate determination by the rate-assessor.

(4) A review of a rate of return under paragraph 1(1) or 2(1) is concluded when the rate-assessor makes a rate determination in the review.

(5) A rate determination is a determination by the rate-assessor that is to be made in a review under paragraph 1(1) or 2(1) of what the new rate of return is, either—

(a) different from the rate of return under review, or

(b) the same as the rate of return under review.