Department of Justice | An Roinn Dlí agus Cirt | Männystrie O tha Laa

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

Summary of consultation responses and next steps

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1. Introduction

1.1 This paper provides a summary of responses received by the Department of Justice to a public consultation 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 was not concerned with questions around setting the rate under the current legal framework.

1.2 The consultation opened on 17 June 2020. A consultation paper, a screening for impact assessment and a regulatory impact assessment were published on the Department's web site, as well as on Citizen Space on the nidirect web site.[1] The consultation closed on 14 August 2020, although one organisation submitted a response after that date. Twenty-eight responses were received, two of which were from individuals. A group of three individual experts each separately submitted the same joint response, but this has been treated as a single response. A list of the organisations that responded is at Annex A.

1.3 A number of respondents took the opportunity to comment on the ongoing review of the rate under the existing legal framework, but this was outside the scope of the consultation.

1.4 The Minister of Justice has declared an interest in the personal injury discount arising from her husband's membership of a medical defence union. Accordingly, she has delegated key policy decisions to the Permanent Secretary, including those outlined in the next steps outlined in section 3 of this paper

1.5 The Department is grateful to all respondents for their interest in this consultation.

1.6 The responses were collated and carefully considered. This paper summarises the responses and outlines the next steps.

[1] Available at https://www.justice-ni.gov.uk/consultations/consultation-personal-injury-discount-rate-how-should-it-be-set.

2. Summary of consultation responses

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.

Eighteen agreed.
One disagreed.
Five did not know.
Four did not specifically answer.

2.1 Of those who specifically responded to the question, eighteen agreed that investment decisions by claimants in Northern Ireland were likely to be similar to those made by claimants in other UK jurisdictions and that there was no evidence to suggest otherwise.

2.2 In support of this view, it was noted by several respondents that the UK operates as one financial market with the same investment vehicles, institutions and advice applying UK-wide. Therefore, given the same prevailing macro-economic conditions, it is reasonable to assume that the same financial advice in relation to investment and risk would be given. It was further noted that there is not any major difference in life expectancy in Northern Ireland compared to the rest of the UK, which may have affected investment strategies had there been.

2.3 A group of independent experts, however, noted that the applied personal injury discount rate in each of the UK jurisdictions would also impact on investment decisions.

2.4 One respondent, representing the interests of claimants, disagreed that claimants in Northern Ireland would invest their lump sum in a similar manner to claimants in the rest of the UK. They suggested that the significant population differentials between Northern Ireland and the rest of the UK meant

that there was a relatively small market size, which resulted in a corresponding reduction in the availability of access to financial services. The respondent made reference to the Financial Conduct Authority's Financial Lives Survey 2017, which indicated that people in Northern Ireland were more risk adverse and less confident in their financial capabilities than those in the rest of the UK. They, therefore, concluded that this may make them less likely to take investment risks with compensation monies.

2.5 Five defendant organisations advised that they would not know if claimants across the UK would make similar decisions as there has not been relevant research and they do not have information on post-resolution investment decisions made by claimants. It was suggested that this resulted in policy being based on guesswork. One respondent further added that there may be a different level of risk appetite in Northern Ireland than the rest of the UK due to the different cultural and economic environment, and that Northern Ireland claimants may be influenced by the behaviour of claimants in the Republic of Ireland.

2.6 Several respondents considered, in the interests of fairness and transparency, that an independent centralised source of investment data in relation to personal injury claimants should be created and that this data should be used to inform the setting of an appropriate discount rate. Alternatively, several suggested the commissioning of research into the investment choices of claimants who have received lump-sum compensation awards that include a component of future losses quantification, and which are, therefore, directly impacted by the current discount rate. The purpose of the research would be to establish how claimants invest their awards and how their investments are performing given that the real-life position is considered crucial to future reviews of the discount rate.

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.

Twenty-one agreed

Four disagreed

Three did not specifically answer

2.7 The large majority of respondents agreed that the legal framework should be changed so that it is no longer tied to *Wells v Wells*. Most who agreed were understood to be representative of the interests of defendants, while the three respondents who represented the interests of claimants all disagreed. Of four who were not clearly aligned to the interests either of defendants or claimants, three favoured change.

2.8 Six broad arguments were made in favour of change. The most commonly made argument, put forward by fourteen respondents, was that the assumption under *Wells v Wells* that claimants invest solely in index-linked gilts does not reflect reality. One medical defence organisation noted that there was no robust evidence to support such an assumption. Another questioned whether or not a claimant might reasonably be expected to invest 100% in ILGs, whether or not 100% ILG portfolios are used in practice, and if legal and financial professionals would be acting in accordance with their regulatory obligations if they were to advise claimants to invest in that way. An insurance company argued that a claimant who elected for a lump-sum payment over the greater certainty of a periodical payment order was by definition demonstrating a willingness to take risk and therefore disproving the assumption in *Wells v Wells* that claimants are very risk averse. Another referred to the annual accounts for 2018–19 of the Court Funds Office (which looks after damages awarded to minors and persons under disability), which refers to gilt holdings being sold and re-invested in a balanced portfolio and argued that this was evidence of a significant move away from ILG

investments for those recipients of damages. An organisation representing insurance brokers said that the code of conduct of the Association of Personal Injury Lawyers (who represent claimants for damages) advises clients to seek advice on investment and that it was extremely unlikely that professional investment advice would be to invest solely in ILGs. The consensus among respondents making this argument was that, in reality, claimants invest in a diversified low-risk portfolio of investments and not wholly in ILGs.

2.9 Related to this, and mentioned by twelve respondents, was the need to take into account the wider impact on society that, it is argued, results from *Wells v Wells* because of its tendency to over-compensation. The Department of Health noted 'serious consequences' for health and social care by virtue of increased expenditure on clinical negligence claims, and the cost of indemnity of GPs possibly becoming unaffordable, with resulting implications for recruitment and retention. An insurance company described *Wells v Wells* as 'over-compensation of the few to the detriment of society as a whole' and argued that it would mean increased insurance premiums and could result in the contraction of general insurance providers from the Northern Ireland market. A legal firm that represents defendants in personal injury claims suggested that retaining *Wells v Wells* could lead to 'forum shopping' whereby claimants seek to issue legal proceedings in Northern Ireland rather than elsewhere in the UK or in the Republic of Ireland; and this firm, an insurance company and an organisation representing insurance brokers all argued that awards or settlements could start to breach the limits on public and employers' liability insurance policies, leaving defendants personally liable for the excess and facing potential insolvency. An insurance company mentioned wider negative effects on investment in and growth of the Northern Ireland economy. An organisation representing businesses in Northern Ireland was concerned about additional costs to doing business in Northern Ireland at a time when firms have neither the financial nor human resources to absorb them.

2.10 Also related, and mentioned by nine respondents, that *Wells v Wells* does not satisfy the '100% rule' by providing compensation for the loss and harm caused by injury 'no more and no less' because it over-compensates

claimants. One insurance company said that the current legal framework resulted in ‘systemic over-compensation’. A number of respondents referred to the 2017 exercise carried out by the Government Actuary’s Department to simulate realistic low-risk investment strategies under different discount rates and different economic scenarios, which was cited in the consultation paper, and noted that it found that over-compensation was likely to result in most scenarios.

2.11 Six respondents made the argument that Northern Ireland was out of step with the other UK jurisdictions, both of which have diverged from *Wells v Wells* in recent years.

2.12 Five respondents argued that ILGs did not represent the near-risk-free investment that is assumed in *Wells v Wells*. The organisation of defendant lawyers, referring again to HM Treasury, noted its view that, while ILGs may protect against the risk of inflation, they do not protect against market risks unless they are held to the date of maturity. Since the timing of claimants’ needs cannot be predicted with certainty, it is difficult to construct a portfolio of ILGs the maturity profile of which will match the claimant’s expected needs over time, and therefore probable that the claimant will need to access the capital before its maturity date, meaning the claimant is unable to access his or capital in full when needed. An insurance company noted that there have been and are gaps in maturity dates for ILGs between 2013–16 and 2042–47, meaning they cannot be appropriate investment vehicle for a lump-sum award that is needed to provide an annual income stream. Two insurance companies said that claimants who want a no-risk strategy can seek a periodic payment order rather than a lump sum. An organisation representing insurance companies said that equity investments offer less risk than ILGs because of their ability to recover from short-term volatility in financial markets, such as that experienced during the 2008 financial crisis and the current pandemic.

2.13 Four respondents argued that the principles in *Wells v Wells* were decided in 1999 in a financial, economic and legal climate that no longer obtains and is therefore outdated. One insurance company said that, at the time of *Wells v Wells*, claimants did routinely invest in cash investments that included ILGs,

but that ILGs were yielding returns of *circa* 2.6% which are much higher than recent and current yields. The same company also noted that periodic payment orders, which now provide a no-risk option for damages awards, were not available in 1999. An organisation representing lawyers who advise defendants referred to the response by HM Treasury to a consultation on the discount rate in England and Wales in 2017, which said that economic and financial developments in the UK since 2001 required a reconsideration of the range and balance of instruments used to calculate it. It noted three changes in the ILG market since *Wells v Wells*: (i) the significant decline in yields (particularly since 2008), (ii) increased market risks since 2008, in particular higher price volatility, and (iii) the entry into the market of a new range of investments offering inflation-based returns.

2.14 The main argument made by those who opposed changing the legal framework was the need for certainty and security of investment for the victim, which ought to mean that claimants' awards should not be exposed to risk. An organisation representing claimant lawyers argued that worrying about what might happen if their care was lost has a psychological bearing on claimants' willingness to risk their awards, and pointed out that seriously injured people are not investors, but people who have been given a sum of money which they must protect and 'eke out' for the rest of their life.

2.15 In respect of the wider financial impact of the discount rate, two respondents made the point that the consumer also pays for under-compensation, because the health service ends up paying for the injured person's care in the event that compensation runs out.

2.16 A legal firm that represents personal injury claimants said that over-compensation can only arise when someone dies prematurely as a result of their injury or sooner than could have predicted at the time of award, and that the idea that somehow the family of this deceased victim, who may receive the remains of their compensation, have somehow had a windfall is disingenuous. The organisation representing claimant lawyers said that forcing the claimant to expose a lump sum award to market risk will lead to under-compensation.

2.17 The same firm also argued that the examples given in the consultation paper (Table 1) of the effect of different discount rates on damages awards were extreme scenarios because victims presenting a future loss claim usually have more limited life expectancy, and that nobody should be influenced to make changes based upon such 'deranged extrapolations'.

2.18 An organisation representing the interests of consumers in the justice system said that, where there is doubt, and given that the process to set the discount rate relies on assumptions, the needs of injured persons should be paramount.

2.19 Finally, an individual respondent, who preferred setting a discount rate on a case-by-case basis, argued that certainty and predictability of the law should not be at the expense of individualised justice.

2.20 A group of three individual experts each submitted a joint response, which has been treated as a single response for the purposes of this analysis. They did not expressly answer this consultation question, but made a number of points. They noted that, while redemption yields of ILGs have fallen dramatically since 2008, the discount rate in the UK was not altered to reflect this. Accordingly, they argue, this means that claimants would have had to adopt a higher-risk investment strategy if they were ever going to achieve returns that were sufficient to meet their needs. Much of the data on claimants' investment behaviour, therefore, would have been gathered during a period when they would have been investing in higher-risk products than might otherwise have been the case if the discount rate had been lower. They strongly made the point that observed investment decisions should not drive the rate and argued that there is no empirical evidence, therefore, of how claimants invest in the risk-free environment envisaged in *Wells v Wells*. Accordingly, claimant behaviour and assumed over-compensation should not be a justification for moving to 'risk-sharing' with the claimant, which would be a retreat from the 100% rule. Rather, the argument for departing from *Wells v Wells* to a risk-sharing methodology should be the public interest case of 'the expense to the taxpayer and on the price of insurance required in providing extreme risk-reduction to the claimant when set against the opportunity cost of public

service provision in health care, social care and education and of uninsured drivers and companies', which are legitimate concerns to weigh against the 100% principle. The group's view is that too much investment risk is transferred to the claimant under the frameworks in the other jurisdictions, but that, if a political decision is taken to abandon the full-compensation principle, adopting the other UK approaches is the only reasonable alternative.

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.

Seventeen in favour of England and Wales's framework
Four in favour of Scotland's framework
Four in favour of another framework
Three did not specifically answer

2.21 The majority (seventeen) preferred the framework used in England and Wales, but four preferred the Scottish framework and four were in favour of a distinct framework for Northern Ireland. Of the nineteen respondents representing the interests of defendants, fifteen favoured England and Wales, none favoured Scotland, three favoured a bespoke Northern Ireland model, and one expressed no preference. The support of one of these, however, was conditional upon information about the actual investments of claimants being available, in the absence of which there would be an inclination towards Scotland; and one that preferred a bespoke Northern Ireland model gave England and Wales as its second preference. Of the three respondents representing the interests of claimants, two preferred Scotland and one England and Wales. Of the six respondents representing neither, two preferred Scotland, one preferred England and Wales, one a unique Northern Ireland framework, and two expressed no preference.

2.22 The most common argument in favour of the England and Wales framework, made by eleven respondents, was that, by not prescribing a notional portfolio, it provided greater flexibility. A medical defence organisation said that this

flexibility meant the experts had a more meaningful level of input and were better able to respond to changing circumstances. A legal firm that represents defendants described the approach in England and Wales as providing a delicate balance between a Minister having a degree of flexibility to set a rate reflecting both the underlying economic conditions and the reality of investment behaviours while at the same time being required to take detailed expert advice on relevant technical issues. Another such firm said that flexibility was needed to accommodate changing economic circumstances. An organisation of defendant-lawyers argued that prescribing a portfolio in legislation, as in Scotland, would be a straitjacket that could only be changed by further primary legislation. An organisation of insurance companies noted as an example that the notional portfolio in the Scottish framework was based on returns over a thirty-year period, but the flexibility of the model for England and Wales allowed the rate there to be set with reference to a longer duration based on the latest information available.

2.23 Seven respondents cited political accountability as a reason for favouring the England and Wales framework. A legal firm that represents defendants said that setting the rate is a political matter because of the economic importance of the decision. An organisation of defendant-lawyers preferred a framework with a mechanism to adjust or ameliorate a rate once determined actuarially.

2.24 Seven respondents said that the model for England and Wales was more likely to achieve 100% compensation. An insurance company felt that the statutory adjustments in Scotland for tax and expenses and to reduce the likelihood of under-compensation were overstated and arbitrary, and combined with the assumed thirty-year investment period for the notional portfolio, was likely to lead to over-compensation. An insurance company and an organisation of insurance companies said that the framework in Scotland, and specifically the statutory adjustments, was based on a policy decision by Scottish Ministers to over-compensate claimants.

2.25 Five respondents cited the provision for an expert panel as a reason for favouring England and Wales. Health and Social Care NI preferred England

and Wales's combination of political accountability with input from experts and consultation with all interested parties.

2.26 Two respondents preferred the England and Wales framework because it has regard to the actual investments made by claimants. Finally, one respondent cited the low-risk investment assumption of the England and Wales framework.

2.27 Some respondents who supported the England and Wales model also made comments on how the detail of it might be amended. An organisation of defendant-lawyers and a business organisation wanted the membership of the expert panel to be expanded to include representatives of stakeholder associations representing claimants and compensators, and in addition the latter wanted business groups included. An organisation representing insurance companies said that the ability to include a margin for prudence should be removed. Another respondent suggested a power for the rate to be set in the absence of a sitting Northern Ireland Assembly.

2.28 Of the arguments favouring the Scottish framework, the most common was that it depoliticised the decision on setting the rate. An organisation of claimant lawyers said that there was no legitimate reason or necessity for political involvement as setting the rate should be an actuarial task and not a political one. This view was shared by the Bar Council. One respondent suggested that the recent political situation in Northern Ireland that led to a period in which there were no Ministers suggested that the decision should move to the Government Actuary.

2.29 Another argument in favour of Scotland, made by one respondent, was that the notional portfolio provided transparency. A third argument for Scotland, also made by one respondent, was that it does not rely on assumptions about investment behaviour and it is critical that the portfolio used should generate as low a risk as possible for injured people.

2.30 The association of claimant lawyers that supported the Scottish framework noted that it requires an allowance to be made for the impact on inflation as measured by the retail price index (RPI) (in the absence of any other measure

prescribed by Scottish Ministers), but that HM Treasury is currently consulting on reforming RPI so that it aligns with the consumer prices index including owner occupiers' housing costs (CPIH). It pointed out that, since CPIH has, since 2010, been one percentage point lower than RPI, this would result in a lower deduction for inflation and thus a higher discount rate than in Scotland at present.

2.31 Six different bespoke Northern Ireland frameworks were suggested. Two respondents argued for a 'blending' of the models for England and Wales and Scotland in the form of a 'purely mathematical exercise' carried out by the Government Actuary without any additional downward adjustments, but with the Minister then having an overriding discretion to vary the rate following consultation.

2.32 The other five models, each suggested by a single respondent, were as follows:

- a requirement to take into account all relevant factors, such as the effect of the economic climate on stakeholders other than claimants; combined with a requirement to consult other government bodies (balancing the need to compensate claimants with the interests of wider society);
- the application of a new discount rate only to damages awards in respect of incidents that took place after the change in the rate;
- allowing for different discount rates for different durations of expected loss (with a higher discount for losses of longer durations), recognising the benefit to the claimant of being able to achieve higher rates of return through longer term investments;
- as above (different rates for different durations of loss) plus the removal of any allowance for a 'margin of prudence' (which is explicit in the Scottish legislation and was made as an exercise of discretion in England and Wales); and
- whatever framework insurers use to provide a guaranteed rate of return.

2.33 Two of the respondents preferring a distinct Northern Ireland framework repeated the suggestion noted above that there should be a power to set the rate in the absence of a sitting Assembly.

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.

Twelve agreed
Four disagreed
Twelve did not specifically answer

2.34 Twelve respondents agreed that adopting the England and Wales model would mean that setting the rate should be a decision for the Department of Justice, while adopting the Scottish model would mean it was a decision for the Government Actuary. Four disagreed.

2.35 Two respondents gave reasons for disagreeing. One said that the adoption of one or other model should not preclude the inclusion of additional aspects or amendments to it, in order to improve the model for claimants in Northern Ireland. The other argued that the final decision effectively lies with ministers in both models, though only implicitly in Scotland (because Scottish Ministers can change the parameters within which the Government Actuary calculates the rate).

2.36 Two respondents commented on the need for a fall-back position in the event that the England and Wales framework were adopted to allow the power to set the rate to be exercised in the absence of a sitting Assembly.

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?

Twenty-four considered there should be a panel, particularly if the England and Wales model was adopted

Four did not specifically answer

2.37 Given that the majority of respondents was in favour of adopting the framework used in England and Wales, it was unsurprising that the most commonly held view was that the Department should consult with an expert panel similar to that in England and Wales, with the Government Actuary chairing the panel. Several respondents noted that this would provide a sufficiently broad, independent consultation with subject experts to achieve a reliable outcome and minimise the risks of over- or under-compensation.

2.38 One respondent suggested that the involvement of the Government Actuary was essential given the perceived lack of the necessary technical expertise and experience in market investment practices, returns and modelling in Northern Ireland.

2.39 One respondent was in favour of the approach taken in England and Wales with regards to the initial and subsequent reviews of the discount rate under the new legal framework (i.e. consultation with the Government Actuary and Treasury for the first review and the expert panel for subsequent reviews). Another respondent, however, was of the view that the expert panel should be consulted as part of the first review.

2.40 While there was broad support for a panel similar to that in the England and Wales model, fourteen respondents suggested that any panel in Northern Ireland should be made up of a wider range of stakeholders than is the case in England and Wales. It was considered that this would ensure an appropriate balance, cross-breadth of relevant knowledge and real-life experience in practical application. Parties that were suggested included:

- all parties involved in litigation and affected by the discount rate;
- a panel along the lines of the Odgen Tables inter-disciplinary working party, e.g. actuaries, lawyers, accountants and insurers;
- all relevant Government departments and bodies, and in particular the Department of Health as the largest public-sector compensator, so that the person or body setting the rate was aware of the impact of the rate level over the preceding period in terms of both damages awarded to claimants and indemnity rates amongst health and social care professionals, especially GPs;
- the health and social care sector;
- Judicial Studies Board, Bar Council and Law Society;
- legal and medical experts;
- a defendant representative focus group;
- a claimant representative focus group;
- someone with experience of claimants who run out of money before their needs cease;
- organisations who provide access to indemnity to healthcare professionals; and
- groups under the section 75 requirement.

2.41 Eight respondents specifically mentioned that representatives for claimants and compensators should be on the panel. It was suggested that it was illogical to disregard the financial effect the discount rate has on public services, especially healthcare, and on other defendants when it may substantially inflate the cost of the services they provide to consumers and the rest of society. In view of this, it was considered that the panel would need to take equal account of the effect on all parties when advising on the discount rate. One respondent, however, was of the view that it was inappropriate to

include stakeholders with a vested interest in the personal injury claims process.

2.42 It was also cautioned that no one group should outweigh the interests of another in the consultation process and that the process should not involve so many interests that it becomes unwieldy. A further respondent suggested that, if it were decided to keep membership of the expert panel in line with that in England and Wales, then the legislation should provide that the panel must invite a representative from both the claimant and compensator communities to attend or speak at any panel meetings, or to seek information from them to take into account when exercising any of its functions.

2.43 Several respondents considered that, if the Minister of Justice were responsible for setting the discount rate, then the legislation should provide that the Department must take an expert panel's advice into account. One respondent, who was in favour of adopting the Scottish model, suggested that this would depoliticise the situation and ensure that decisions were made on sound actuarial, economic and other evidential bases. Another respondent, however, considered that public and political factors should also be taken into consideration, such as the potential impact on taxpayers through public-sector compensation budgets and higher insurance premiums, and the Minister should balance the needs of claimants, defendants and society as a whole.

2.44 One respondent suggested that the composition of the panel should be specified in legislation, while another was of the view that it should not be. Another respondent suggested that the process of appointing the expert panel should be open and transparent, with their details made publicly available following appointment.

2.45 Several respondents considered that a panel should operate within defined parameters and guidelines, and be required to publish its advice. Others suggested that the person or body setting the rate should publish a report, which should include details of who had been consulted, why the particular level of consultation was considered sufficient, the experts' advice on investment returns, the extent to which consultees' views had been taken into account, justification for any decision to depart from the panel's advice and

rationale for the rate set. It was thought that this transparent approach would reassure compensators that any rate change was realistic and would safeguard against any concern that the person or body was unduly influenced by an external source.

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.

Question 6:

Twenty-four agreed

Four did not specifically answer the question

Question 7:

Twenty-two in favour of five years

One in favour of a minimum of five years

One in favour of three years

One in favour of case-by-case reviews

Three did not specifically answer the question

2.46 There was unanimous agreement amongst those who specifically answered Question 6 that the personal injury discount rate should be reviewed on a regular basis. Several respondents noted that it has been nearly twenty years since the discount rate was last changed in Northern Ireland and that, as market rates have changed in this period, the current discount rate is significantly out of line with investment returns. It was stated that regular reviews would prevent this reoccurring and was, therefore, very important in delivering a rate set at an appropriate level. It was considered that regular reviews would also provide clarity, certainty and transparency, and would assist defendants in carrying out the necessary financial planning, for example in setting insurance premiums.

2.47 Twenty-two respondents were in favour of the discount rate being reviewed every five years, primarily as this is the requirement in both England and Wales and Scotland and would, therefore, mean that there would be consistency across the UK.

2.48 One respondent suggested that it would be reasonable for the first review period under the new framework to be shortened so that it becomes synchronised with the five-year review period in either England and Wales or Scotland. Another respondent, who was in favour of adopting the England and Wales model, suggested that the review should be completed within ninety days as is the requirement in Scotland. One respondent suggested that the review should be completed by Westminster if the Northern Ireland Assembly was not sitting.

2.49 Several respondents noted a potential issue created by a fixed-term review was that it may introduce an incentive for one of the parties to delay settlement if a more advantageous discount rate was expected to take effect in the near future. Some said that the shorter the review period, the more destabilising would be the effect, and that, with this in mind, England and Wales had moved from originally proposing three-yearly reviews to providing for reviews every five years. This was considered to strike the right balance between overly frequent periods of uncertainty in the run up to a possible rate change and leaving the rate without a review for too long that it gets out of line with investment returns.

2.50 It was also suggested that a shorter review cycle would risk encouraging a focus on short-term factors at the expense of longer, more stable, factors underpinning the majority of future losses, and that there was a risk that compensation could be based on the market conditions prevailing when a claim is settled rather than an objective assessment over the longer term. It was further suggested that a period of less than five years would be too short given the complex nature of clinical negligence claims.

2.51 It was noted that the legislation in England and Wales and Scotland both provide for reviews to be held more frequently if necessary and it was suggested that similar provision should be made in Northern Ireland. It was

considered that this would ensure that the rate can be varied in the event of a sudden, but sustained, change in economic circumstances. Several respondents, however, cautioned that such reviews should be used sparingly. Several respondents also suggested that the triggers for such *ad hoc* reviews should be defined, with one adding that a ‘deviation’ trigger could be used instead of a set period of time for reviews.

2.52 Another respondent considered that a review every five years was too frequent and would create uncertainty. This respondent, who was in favour of a dual discount rate (one for losses of up to twenty years and another for more than twenty), also suggested that, if this approach were adopted, then dual review periods would be appropriate.

2.53 One respondent recommended that the discount rate should be reviewed every three years to ensure that any changes would be minor each time and avoiding sudden and dramatic impacts. Another suggested that, given the current economic climate, reviews should be on a case-by-case basis until guaranteed rates of return are re-established.

CONSULTATION QUESTION 8

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

Five agreed

Twelve disagreed

Four had commented but neither agreed or disagreed

Seven did not comment

2.54 Five respondents agreed with the outcomes, and twelve disagreed.

2.55 In terms of the screening exercise, two respondents from the health sector disagreed with the conclusion of the screening for health impacts, which suggested that the policy would not have a negative effect on access to healthcare, and that a full health impact assessment was not required. They argued that reducing the discount rate would have a detrimental impact on health services. These comments, however, appear to misunderstand the policy being screened, which was to provide a legal framework for setting the rate that ensures 100% compensation. Accordingly, a new framework based on either the framework for England and Wales or for Scotland would be likely to have a positive effect on health services when compared to the existing framework, by reducing the cost of damages paid by government and medical protection societies than would otherwise be the case. One of these respondents also disagreed with the conclusion of the screening for economic impact, but again this view appears to have been formed in relation to the impact of setting of the actual rate rather than the policy relating to the legal framework for setting that rate.

2.56 A group of independent experts disagreed with the regulatory impact assessment, arguing that the comparison between the policy proposal and the reference position was confused. This criticism is based on the group's view that neither of the proposed frameworks delivers 100% compensation in practice, because they involve risk-sharing with the claimant. The group also

disagreed with the outcome of the equality screening, the group said that it failed to address the impact of the policy on disabled people. It argued that claimants (who are mostly disabled) are negatively impacted (currently) under the Northern Ireland discount rate compared to a (hypothetical) risk-free discount rate and the England and Wales discount rate, and therefore a change to either one of these from the reference point of the Northern Ireland discount rate represents a benefit to claimants, but if the reference point were the implementation of a risk-free discount rate under *Wells v Wells* (which the group argues ought to be –3.0%), then claimants would be negatively impacted. The group makes the same point in relation to the screening exercise for health impacts. These screening exercises, however, related to the impact of a legal framework for setting the discount rate based on assumed low-risk investments compared to the reference point of a discount rate based on assumed very-low-risk investments. The premise of the former was that it would result in a discount rate that would neither over-compensate nor under-compensate, and accordingly it was not considered that it would be likely to have a detrimental impact on claimants.

2.57 Six respondents (represented insurance and wider business interests) disagreed with the conclusions in relation to screening for economic appraisal or economic impact, all arguing that it does not identify the economic impact of a lower discount rate. As above, in relation to health impacts, the comments appear to be premised on a misunderstanding that what was being screened was a policy to set the discount rate under the existing framework. The policy being screened, however, was a policy to adopt a new legal framework to replace *Wells v Wells*.

2.58 One respondent disagreed with the conclusion of the equality screening because it did not agree that the absence of data to indicate impact on particular groups should be assumed to mean that there would be no impact.

2.59 A legal firm that specialises in representing claimants did not agree with the assumption in the regulatory impact assessment that *Wells v Wells* tends towards over-compensation, arguing that there was no empirical evidence to

support this. It also said that any cost to consumers of increased insurance premiums was likely to be immaterial.

2.60 An individual respondent was critical of the absence of empirical evidence in the regulatory impact assessment and provided a detailed analysis based on various sources of proxy data. She concluded that the impact of changes in the discount rate in Northern Ireland were likely to be of most relevance to claims for medical negligence, and therefore to health service costs, rather than to the cost of insurance premiums.

2.61 While not expressly stating that they disagreed, two respondents still noted areas of disagreement. An insurance company wanted a full economic appraisal to be carried out to provide clarity on the cost implications for public bodies and the taxpayer. An organisation representing claimant lawyers felt that, in respect of equality of opportunity, departing from *Wells v Wells* would have a detrimental effect on those with protected characteristics.

2.62 A legal firm that represents defendants suggested that it would be helpful if the regulatory impact assessment were to clarify that the ‘do nothing’ option involves changing the rate under the existing legal framework.

3. Next steps

3.1 A large majority of respondents agreed with the proposal that the legal framework for setting the personal injury discount rate should be changed so that it is no longer tied to *Wells v Wells*. As might have been expected, most of those who agreed represented the interests of defendants against personal injury claims, while most of those who disagreed represented the interests of personal injury claimants. Of those respondents who were aligned neither to defendants nor claimants, however, a majority, albeit a small one, was supportive of change.

3.2 The main case for changing the framework articulated in the consultation paper was that the requirement under *Wells v Wells* to assume that claimants invest their lump-sum awards in very-low-risk investments (index-linked gilts) did not reflect reality and, consequently, a rate set under *Wells v Wells* was likely to lead to over-compensation, which is contrary to the principle of 100% compensation. This is because the returns available from other low-risk investments are greater than those available from ILGs. If claimants receive higher returns than are assumed under the discount rate, they will be over-compensated. Over-compensation means that compensators, including insurance companies and the public sector (most significantly, the health service) pay more than is necessary to compensate people for personal injuries. This may increase the cost of insurance to businesses and consumers, and is likely to reduce the amount of funds available for direct spending on health and other public services.

3.3 The consultation paper noted the 2017 joint consultation by the Ministry of Justice and Scottish Government, which concluded that, in England and Wales and Scotland, claimants were likely to invest in a mixed portfolio of low-risk investments rather than solely in ILGs. It also noted a 2017 study by the Government Actuary's Department of the likely outcomes for claimants of such a portfolio of investments under different illustrative discount rates (ranging from +1.0% to –1.75%) and different economic scenarios, which

found that most discount rates resulted in a considerable likelihood of over-compensation.

3.4 At the same time, we noted comments made in the consultation responses that the evidence about claimants' investment behaviour is based on a period when the discount rate was not likely to have encouraged very-low-risk investments; but we also note the points made about the unreliable availability and the inflexibility of ILGs, which we do not consider represent a realistic sole investment choice even with a low discount rate, and it seems unlikely that a properly advised claimant would invest all of his or her award in ILGs.

3.5 In our consultation paper, we asked consultees if they agreed that investment decisions by claimants in Northern Ireland were likely to be similar to those made by claimants in the other jurisdictions. A large majority of respondents agreed that this was likely to be the case, with there being no evidence to suggest otherwise.

3.6 The Department remains of the view, therefore, that the investment behaviour of claimants in Northern Ireland is likely to be at least broadly similar to that of claimants elsewhere in the UK or not so different as to lead to significantly different conclusions from those reached in other jurisdictions.

3.7 The Department concludes that, in the interests of fairness both to claimants and defendants (including the taxpayer, businesses and consumers) that *Wells v Wells* is not the best mechanism for setting the discount rate and **a new legal framework should be adopted that assumes that claimants invest their lump sums in a mixed portfolio of low-risk investments**. Additionally, we point to the availability of periodical payment orders as an option for claimants who wish to avoid the inherent risk of investment.

3.8 In the consultation paper, we suggested that either of the legal frameworks used in England and Wales or Scotland would be a suitable model for Northern Ireland, but also asked for suggestions for any other models. While the majority view from the consultation preferred the England and Wales model owing to its flexibility and greater amount of discretion for a Minister, the Department takes the view that transparency and clarity, as offered by the

notional portfolio of the Scottish model, are important features for a new framework. Given the importance of the actuarial input to setting the rate, it is appropriate to be clear as to the basis of the actuarial calculations and for this to be fixed by the Assembly. A statutory portfolio, drawn up on expert advice, and reflecting a low-risk strategy that realistically reflects how a claimant might invest his or her lump sum, provides 'up-front' information to everybody about how the discount rate is calculated. If the rate is to be calculated on the basis of a notional statutory portfolio, then the Government Actuary is, of course, best placed to carry out this exercise as is the case in Scotland and we see no need for any additional expert input, other than those whom the Government Actuary may choose to consult. We did observe that a number of respondents felt that it was important to retain a role for a Minister, but we note that under the Scottish framework, the Minister must keep the content of the notional portfolio under review and can amend the detail of it and the standard adjustments by regulations.

3.9 We will, however, reflect further on the detail of the Scottish notional portfolio in consultation with the Government Actuary's Department. In particular, we recognise the point made by some respondents that the assumed investment period of thirty years that is prescribed in the Scottish legislation may not accord with the average or typical investment period for a lump-sum award of damages. We note the investment period relied upon in England and Wales was forty-three years. We will also ask for GAD's advice on changes to the investment market since the Scottish legislation was made that would suggest that we should refine the prescribed investments in the notional portfolio.

3.10 We have concluded, therefore, that **the legal framework for Northern Ireland should be set by the Government Actuary with reference to the notional portfolio as prescribed in Scotland (subject to review)**.

3.11 In respect of reviewing the rate, we accept the consensus from the consultation that there should be a statutory duty for a regular review. We also concur with the consensus that **the interval between statutory reviews should be five years**. A shorter review period of, say, three years, may encourage a culture of parties to litigation seeking to delay settlements in

anticipation of a new discount rate that is expected to be more favourable to one side or the other; whereas a five-year interval allows for a period of stability, while also ensuring that the discount rate does not diverge substantially from changing market conditions for any significant length of time. We also consider that it would be prudent to provide a **power for the Minister to order a review sooner than five years** to allow a new rate to be considered in response to an unexpected change to economic or financial circumstances.

3.12 The Department intends now to seek the agreement of the Northern Ireland Executive to bring forward legislation to give effect to the above policy.

3.13 If you require any further information on the response to the consultation, please contact us by email: AToJ.Consultation@justice-ni.x.gsi.gov.uk.

Annex A

List of organisations that responded to the consultation

Association of British Insurers

Association of Consumer Support Organisations

Association of Personal Injury Lawyers

Aviva

AXA

The Bar of Northern Ireland

BLM Law

British Insurance Brokers' Association

British Medical Association Northern Ireland

CBI Northern Ireland

DAC Beachcroft (N. Ireland) LLP

Department of Health

Forum of Insurance Lawyers

Health and Social Care Sector in Northern Ireland

International Underwriting Association of London

JMK Solicitors (NI) Limited

Kennedys Law LLP

Law Society of Northern Ireland

Medical Defence Union

Medical and Dental Defence Union of Scotland

MPS

NFU Mutual

Northern Ireland Council for Racial Equality

RSA

Shadow Civil Justice Council

Zurich Insurance plc