These notes refer to the Damages (Return on Investment) Act (Northern Ireland) 2022 (c.1) which received Royal Assent on 2 February 2022

Damages (Return on Investment) Act (Northern Ireland) 2022

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the Damages (Return on Investment) Act (Northern Ireland) 2022, which received Royal Assent on 2 February 2022. They have been prepared by the Department of Justice ("the Department") in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by the Assembly.

2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section, or part of a section, or a paragraph, or part of a paragraph, in the Schedule does not seem to require an explanation or comment, none is given.

BACKGROUND AND POLICY OBJECTIVES

3. The civil legal remedy for wrongfully inflicted personal injury, for example, as a result of a road traffic accident or medical negligence, is usually an award of damages. The award will be to cover pain and suffering and all the losses flowing from the injury, including future financial losses. Examples of damages for future financial 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. The 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 fully compensate the claimant but neither more nor less ("the 100% rule").

4. It is assumed that a lump-sum award of compensation for future losses or expenses will be invested until those losses or expenses are incurred, and that during this time, the claimant will earn a return on the investment. Without any adjustment being made for this, the claimant may not be fully compensated, contrary to the 100% rule. Therefore, a court, when assessing the amount of the award, has to take into account the personal injury discount rate.

5. The discount rate is an assumed rate of return on investment and is currently 2.5% as set by the Lord Chancellor in 2001. Since devolution of justice

the power to set the rate sits with the Department, in consultation with the Government Actuary and the Department of Finance, under section 1 of the Damages Act 1996 ("the 1996 Act").

6. At present, the 1996 Act does not specify how the discount rate is to be set so it has to be set in accordance with legal principles established by the House of Lords in *Wells v Wells*. The Lords considered that a claimant should be assumed to be very risk averse in investing their lump-sum award and should therefore be assumed to invest solely in index-linked gilts ("ILGs"). Accordingly, the discount rate for Northern Ireland currently has to be set based on returns on ILGs.

7. Evidence obtained from consultation and analysis in the other UK jurisdictions since 2017, however, found that, while claimants should be treated as more risk averse than ordinary prudent investors, in reality they would be advised to invest in a low-risk diversified portfolio rather than very low-risk ILGs alone. Setting the rate under *Wells v Wells*, therefore risks over-compensation of claimants and a resulting unfair financial burden on public bodies, business and consumers.

8. In view of this, the Department proposed that the legal framework for setting the rate in Northern Ireland should be changed so that it is no longer tied to *Wells v Wells* and consulted on options. The overall policy in reforming the law on setting the personal injury discount rate was to ensure the rate is set in a way that gives effect to the 100% rule and is fair to both claimants and defendants.

OVERVIEW

9. In summary, the Act provides for a new statutory methodology for calculating the discount rate; establishes a timeframe for review of the rate; and provides that the task of reviewing and setting the rate falls to the Government Actuary.

10. The Act, which amends the 1996 Act as it applies to Northern Ireland, contains six sections and a Schedule. Sections 1 and 2 make amendments to the 1996 Act, including introducing the Schedule to the Act, which is a new Schedule to be inserted in the 1996 Act. Sections 3 to 6 deal with ancillary provisions, interpretation, commencement and the short title of the Act.

COMMENTARY ON SECTIONS

Section 1 - Assumed return on investment

Section 1, subsection (1) inserts a new section C1 into the 1996 Act to replace the existing section 1 as it applies to Northern Ireland (which is repealed by subsection (2)), so as to remove the Department's current role in setting the discount rate.

Subsection (1) of new section C1 provides that, in an action for personal injury, the court must take into account the rate of return set by the rate-assessor in determining the return a claimant is expected to receive from investing a sum

awarded as damages for future pecuniary loss. This duty is subject to any rules of court made for the purposes of the section (although no such rules have been made to date under section 1 of the 1996 Act as it currently applies). Subsection (2) preserves the ability for a court to take a different rate of return into account if any party can show that it is more appropriate in the circumstances of the case. (However, there is case law, the decision of the Court of Appeal, England and Wales in *Warriner v Warriner,* which constrains the use of this power to cases with special features.)

Subsection (3) introduces new Schedule C1, which is to be inserted in the 1996 Act (see further below).

Subsection (4)(a) provides that the rate-assessor is the Government Actuary and that in the event the office of Government Actuary is vacant, the rate-assessor will be the Deputy Government Actuary. Subsection (4)(b) gives the Department of Justice a power by regulations (subject to the draft affirmative procedure) to appoint a person other than the Government Actuary to be the rate-assessor, as well as somebody to deputise for that person (subsection (5)). Subsection (6) provides that the Department must obtain the agreement of the person to be appointed and the person who is to deputise, before making regulations under subsection (4)(b).

Section 2 - Process for setting rate of return

Section 2 inserts a new Schedule C1 into the 1996 Act, which details how the rate-assessor is to approach the task of reviewing and setting the discount rate.

Section 3 - Ancillary provision

Section 3 provides a power for the Department of Justice by regulations to make ancillary provision. Any such regulations which amend primary legislation are subject to the draft affirmative procedure.

Section 4 - Interpretation

Section 4 is an interpretation provision.

Section 5 - Commencement

Section 5 provides for the commencement of sections 3 to 6 of the Act on the day after it receives Royal Assent. It also allows for the remaining sections to be commenced by order made by the Department.

Section 6 – Short title

Section 6 describes the short title of the Act, which is the Damages (Return on Investment) Act (Northern Ireland) 2022.

Schedule

Schedule C1 contains 34 paragraphs and provides as follows.

Paragraphs 1 to 3 oblige the rate-assessor to review the discount rate and deal with the timing of reviews.

Paragraph 1 provides that the first review is to be a review of the discount rate set under existing section 1 of the 1996 Act as it applied immediately before the provisions of the Schedule are brought into operation. This rate was last set by the Lord Chancellor by the Damages (Personal Injury) Order 2001 (2001 No. 2301) at 2.5%. If there is no such rate in operation (for example, if that Order were to be revoked in its application to Northern Ireland without being replaced before the Schedule to the Act comes into operation), then the first review is to be a review of there being no prescribed rate. The first review is to start on the date on which the Schedule is brought into operation.

Paragraph 2 deals with the timing of subsequent reviews and requires the rate-assessor to start a subsequent review on 1 July 2024 (intended to align Northern Ireland with the cycle of regular reviews of the rate in Scotland) and thereafter on the day after the end of the five-year period, beginning with the day on which the previous regular review must be started (establishing a five-year cycle of regular reviews). The Department may, under sub-paragraphs (2)(a) or (b), require the rate-assessor to conduct a review starting earlier than the next regular review would do. However, if that occurs, the extra review does not disturb the commencement of a review on 1 July 2024, or the five-year cycle of regular reviews thereafter.

Paragraph 3 requires reviews (whether the first review or any subsequent regular or extra review) to be concluded within a 90-day period beginning on the day on which it must be started.

Paragraph 4 provides an overview of the rate-setting process. Paragraph 5 provides that a review will determine whether the rate is to remain the same or be changed. Paragraph 6 provides that the rate-assessor must have regard to the views of any person the rate-assessor chooses to consult, or whose advice has been sought, provided these are received within a reasonable time (including views received before the Schedule comes into operation – see paragraph 29).

Paragraph 7 sets out the basis upon which the rate-assessor is to determine the rate of return. Subject to standard adjustments and rounding of figures noted below, it provides that the rate should reflect the rate of return for the notional portfolio provided for in paragraph 12 over a 43-year period. Paragraph 8 gives the Department a power, by regulations subject to the draft affirmative procedure, to change the period of 43 years.

Paragraph 9 provides for an adjustment to the rate of return to take account of inflation by reference to the retail prices index or to an alternative source of information as prescribed by the Department in regulations subject to the draft affirmative procedure.

Paragraph 10 provides for standard adjustments to the rate of return arrived at on the above basis. The rate-assessor is to deduct 0.75 of a percentage point to take account of the impact of taxation and the costs of investment advice

and management. The rate-assessor is also to deduct 0.5 of a percentage point as a further margin (which recognises that there is risk inherent in even the most carefully advised and invested portfolio). Paragraph 11 provides that the adjustment figures may be changed by the Department by regulations subject to the draft affirmative procedure. The resulting figures may be zero or a positive number. They cannot be a negative number (so the adjustments can never raise the rate of return). They need not be whole numbers but can include a decimal fraction. Unlike the rate ultimately set by the rate-assessor (see paragraph 19), these numbers are not limited to being expressed in steps of a quarter percentage point.

Paragraph 12 sets out the notional portfolio with the types of investments and percentage holdings on which the rate-assessor is to determine the rate of return. Paragraph 13 provides that, if the type of investment is not defined by regulations under paragraph 14, it is to be interpreted by the rate-assessor in the way it is commonly understood in investment contexts. Paragraph 14 provides that the Department may make regulations (subject to the draft affirmative procedure) to define any of the types of investment. Paragraph 15 provides that the Department may make regulations to make changes to both the list of investments and the percentage holdings.

Paragraph 16 provides that, before any review of the rate of return under paragraph 2(1), the Department must consider whether it is necessary to make regulations under paragraphs 14 and 15 to ensure that the notional portfolio remains suitable for investment in by a hypothetical investor, as described in paragraph 17. Sub-paragraph (2) provides that, in considering this, the Department must consult such persons as it considers appropriate. However, sub-paragraph (3) provides that no such consideration is required before an extra review under paragraph 2(3).

Paragraph 17 describes a hypothetical investor as follows: a recipient of damages; who will invest the damages as properly advised; who 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 will make withdrawals from the investment fund deriving from investment of the damages; and whose objectives are to secure that the damages will meet the losses and expenses for which they are awarded and be exhausted at the end of the period of the award.

Paragraph 18 clarifies that, for the purposes of paragraphs 16 and 17, the damages are damages for future pecuniary loss in an action for personal injury and they are paid in a lump sum.

Paragraph 19 provides that the rate will be set as a percentage figure, whether a whole number of percentage points or multiple of a quarter percentage point. It can be expressed in quarter percentage points and rounded to the nearest whole number or quarter percentage point. Paragraph 20 provides for the rounding of the figure so as to comply with that requirement.

Paragraph 21 provides that there will be a single rate of return which will apply to all cases unless regulations provide otherwise. Where the Department sets out in regulations (subject to the draft affirmative procedure) that there should be more than one rate, a review is to be carried out separately for each rate of return. Under paragraph 22, such regulations must set out the circumstances in which each rate is to apply and require the rate-assessor to report separately on each rate of return.

Under paragraph 23, the rate-assessor must send a report to the Department when the review has concluded and no later than the last day of the 90-day period for carrying out the review. The report must be dated and contain the rate determination and a summary of how the rate is calculated. Under paragraph 24, the Department must lay the report before the Northern Ireland Assembly as soon as practicable after it has been received and on the same day, the rate-assessor must publish the report. Paragraph 25 provides that the rate will come into effect on the day after the report is laid. Paragraph 26 provides for the Department to reimburse the rate-assessor for costs incurred in connection with a review.

Paragraphs 27 to 30 make provision for transitional arrangements so that the rate of return currently prescribed under section 1 of the 1996 Act will continue to apply until such times as a rate is set under the provision in the Act when enacted.

Paragraph 31 deals with regulations made under the Schedule. Sub-paragraph (1) allows regulations to make different provision for different purposes. For example, in the event that the Department makes regulations under paragraph 21 requiring more than one rate to be set, paragraph 8 (as read with paragraph 31(1)) could be used to prescribe different periods to be used in connection with the setting of the different rates. Sub-paragraph (3) provides that regulations made under the Schedule will be subject to the draft affirmative resolution procedure.

Paragraphs 32 to 34 are interpretation provisions for the purposes of the Schedule.

HANSARD REPORTS

11. The following table sets out the dates of the Hansard reports for each stage of the Act's passage through the Assembly and the date Royal Assent was received.

STAGE	*DATE*
First Stage	1 March 2021
Second Stage	8 March 2021
Committee Stage Report	21 October 2021
Consideration Stage	15 November 2021

STAGE	*DATE*
Further Consideration Stage	29 November 2021
Final Stage	7 December 2021
Royal Assent	2 February 2022