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

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.