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DOJ to scrap plans for -1.75% personal injury discount rate in Northern Ireland

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On 22nd October 2020, the Committee for Justice (CfJ) heard evidence from Department of Justice (DoJ) officials on its plans to change the existing personal injury discount rate (PIDR) and introduce a new legal framework for setting the discount rate.

In a surprise announcement, the DoJ confirmed that it intended to scrap the planned move to change the PIDR in line with Wells v Wells, which is the existing legal framework for Northern Ireland. The DOJ officials advised that if they proceeded with this route it would lead to change to the discount rate, which still officially sits at 2.5%, to -1.75% or even -2%.

The DoJ instead announced plans to seek “accelerated passage” of a Bill reforming the framework for setting the PIDR in line with the statutory framework that exists in Scotland. The Scottish PIDR, is currently at -0.75%, and higher than the current rate set for England and Wales at -0.25%.

Speaking on behalf of the DoJ, Deputy Director Laurene McAlpine advised the Committee that the main priority was to introduce the new framework *“as quickly as possible”* to provide certainty for injured parties and their lawyers. She outlined a plan, under “accelerated passage” to introduce the Bill in January / February 2021 with a view to obtaining Royal Assent by September 2021. Ms McAlphine emphasised that without accelerated passage, it would likely be September 2021 before the Bill was introduced and perhaps early 2022 before Royal Assent was obtained.

The planned move away from a temporary -1.75% or even -2% discount rate will be welcome news for insurers, local health trusts, businesses and consumers. The current legal model for setting a discount rate under Wells v Wells has been widely discredited across all other regions. At present the discount rate in Northern Ireland is 2.5% and a change to -1.75% would have had a drastic impact on insurance premiums for consumers and businesses across the province, as well as imposing a significant additional strain on government funding for health trusts responsible for clinical negligence claims.

Background

On 27th February 2020 the Department of Justice Civil Justice Policy Division confirmed, that the Minster of Justice had asked officials to undertake a statutory consultation with the Government Actuary’s Department (GAD) and the Department of Finance (DoF) on a proposed change to the personal injury discount rate in Northern Ireland. The proposal to be consulted over was to vary the existing discount rate of 2.5% to a rate of -1.75% (based on a 1 year average of yields on index linked gilts (ILGS), excluding those with less than 20 years to maturity, rounded to the nearest 0.25%).

At the same time, in recognition of the recent legislative changes to how the discount rates in the rest of the UK are set, it was indicated that the Minister would in due course give consideration to reviewing how the rate in Northern Ireland is set. In response, a public consultation was launched in June 2020 on a new framework for setting the discount rate, and consideration was given to both the Scottish and English models.

The current English model is based on a more realistic and evidence-based investment approach, which in 2019 produced a realistic median real return of +0.25%. The Lord Chancellor, with powers afforded by the framework, reduced this by 0.5% to arrive at a PIDR of -0.25% in July 2019.

In Scotland, the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 provides that the PIDR is set using a notional investment portfolio. The Act is prescriptive and sets out standard adjustments which must be made to the gross percentage return. The PIDR in Scotland was set at -0.75% in September 2019.

Committee for Justice Hearing

The Committee for Justice heard that the Justice Minister, Naomi Long MLA, owing to a conflict of interest, had recused herself from decisions on the Bill. She had instead requested the Permanent Secretary instead take key policy decisions on the matter.

The DoJ officials advised that a key consideration was to give effect to the 100% compensation rule. Following a consultation process over the summer months on a new legal framework for setting the rate, the DoJ had concluded that it would seek to introduce a new legal framework which mirror the current framework in Scotland.

The Committee raised queries as to how the DoJ had arrived at this model given that the majority of consultees had suggested a preference for the English framework.

Next Steps

The Committee concluded that they had not been convinced, at this stage, of the merits of the proposed accelerated passage of the Bill. They have sought further clarification from the Minister in respect of her decision to recuse herself from policy decisions on the Bill and, importantly have asked that she appear before the Committee to provide further detail on the merits of proceeding via the "accelerated passage" route.

No timeline has been set for the implementation of these proposed next steps but we will continue to keep you advised of further developments in this area.

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