Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Personal Injury Discount Rate: DOJ Briefing

3 December 2020

NORTHERN IRELAND ASSEMBLY

Committee for Justice

Personal Injury Discount Rate: DOJ Briefing

3 December 2020

Members present for all or part of the proceedings:
Mr Paul Givan (Chairperson)
Ms Linda Dillon (Deputy Chairperson)
Mr Doug Beattie
Ms Sinéad Bradley
Ms Jemma Dolan
Mr Gordon Dunne
Mr Paul Frew
Miss Rachel Woods

Witnesses:

Mr Peter May	Department of Justice
Ms Laurene McAlpine	Department of Justice

The Chairperson (Mr Givan): I welcome Peter May, permanent secretary, and Laurene McAlpine, deputy director of the civil justice policy division at the Department of Justice. You are both very welcome. As is normal, the session is being recorded by Hansard, and the transcript will be published in due course. Peter, I will hand over to you to make some opening remarks. Then, we will get into some questions. Over to you, Peter.

Mr Peter May (Department of Justice): Thanks for the opportunity to provide further clarity on a number of points about the personal injury discount rate. The Committee raised five points in its letter to the Department. I will deal with each of them in turn.

First, you asked what we meant by the "transparency and clarity" offered by the Scottish model. Setting the discount rate involves working out what sort of return can be obtained on the lump sum. The Scottish model prescribes in primary legislation the specific investments that are to be assumed. Therefore, for example, 5% of the lump sum is assumed to be invested in property and 10% in index-linked gilts. That means that investments upon which the rate is based are transparent and clear to everyone. The Scottish model also prescribes in legislation the amount of any deductions to be made from the investment calculation.

Under the England and Wales model, the specific investments and the amount of any deductions are left to the discretion of the Lord Chancellor, having taken the advice of an expert panel. Unlike the Scottish model, therefore, it is not clear in English legislation exactly how the rate is to be calculated, exactly what investments will be assumed and the amount of any deductions that will be made.

Secondly, you asked why setting an interim rate would not address the ongoing uncertainty. That uncertainty exists because parties to litigation are anticipating a downward change to the current rate

of 2·5%. It is therefore not in the financial interests of claimants to settle cases until the new rate has been reduced. By the same token, if we set a new rate based on today's interpretation of the Wells v Wells judgment, that would mean a rate in the order of -1·75%. It would not, then, be in the financial interests of defendants to settle cases, as they will anticipate the rate increasing with the new legal framework. Setting an interim rate would not remove the uncertainty since both parties would still be anticipating a further change once the legislation was in place. Uncertainty will end only when we have a stable rate under a new legislative framework.

It is also worth saying that, currently, any new rate can be set only in accordance with the existing law, which is the Wells v Wells judgment. We were concerned that it would not be sensible to introduce legislation to replace Wells v Wells, as we do not believe that it complies with the objective of securing 100% compensation, while, at the same time, fixing an interim rate that is based on that judgment.

Thirdly, you requested information and details on the options considered by the Department in how it arrived at the proposed way forward. In June, we published our consultation paper, which had two suggested options: to adopt the model for England and Wales or the model for Scotland. We also asked respondents to suggest other models. The majority of respondents who mostly represented defendants preferred the model in England and Wales. Nevertheless, we considered that the Scottish model would be preferable, for the reasons that I have noted and because we were not attracted to the notion of an expert panel. We felt that the expert panel added complexity, cost and delay. We also felt that, once the parameters were in place, setting the rate is properly an actuarial rather than a political exercise. Thus, it was proper for it to be set by the Government Actuary.

Fourthly, you asked how the Bill would impact on the miscellaneous provisions Bill if it did not proceed by way of accelerated passage. It is worth saying that the principal reason for seeking accelerated passage is to secure the quickest possible long-term resolution of this issue. That is to the benefit of all parties to cases. In addition, it was our assessment that the subject matter was capable of being scrutinised by the Assembly using the accelerated procedure because it is tightly drawn, and the principal policy objective of securing 100% compensation for those who have been adversely affected is not at issue.

On the legislative programme itself, my colleagues and I are clear that this is a decision for the Assembly. As you know, the Department has an ambitious legislative programme of five Bills, four of which will be before the Committee at some time next spring. If the discount rate Bill were not granted accelerated passage, we consider there to be real risk that there would not be sufficient time for all four remaining Bills to be considered at Committee Stage and complete their passage through the Assembly, particularly if Bills are considered sequentially by the Committee rather than concurrently. The miscellaneous provisions Bill will be the last of our Bills to be introduced, and it is by far the biggest and has the widest variety of issues to be considered, so it would likely require the longest time for scrutiny and be the one most at risk if the Committee or Assembly were to run out of time.

Finally, you asked about the views of the Department of Finance and Government Actuary on the proposal to change the rate under the existing framework to -1·75%. The Government Actuary was concerned that, based on the Wells v Wells criteria, -1·75% would be an appropriate rate, but noted that that would mean a significantly different rate in Northern Ireland from the rest of the UK. The Government Actuary also noted that, because of the movement in the financial markets, the rate, still based on Wells v Wells, could also be -2%. In commenting on Wells v Wells, the Government Actuary also noted that a personal injury claimant was unlikely to invest 100% of his or her award in index-linked gilts.

The Department of Finance did not express a view on the actual rate but commented that it hoped that, within the parameters of our decision-making, we would act in a way that prevented overcompensation. A copy of the responses from the Government Actuary and the Department of Finance to our consultation on setting a new rate under Wells v Wells has now been provided to the Committee. I am very happy to take questions.

The Chairperson (Mr Givan): Thank you, Peter, for taking us through that brief overview. I have a quite a number of questions. First, I want to try to establish your role in this. When did the Minister declare an interest and recuse herself from taking the key policy decisions?

Mr May: She declared an interest —

Ms Laurene McAlpine (Department of Justice): I think that it was in August.

Mr May: — in the summer, yes. It was after the consultation and before the decision-making process on the way forward commenced.

The Chairperson (Mr Givan): Did she not notify the Department that she had a relevant interest at the point at which she came into office?

Mr May: I think that it is one of those things where it may not be immediately apparent that there is such a conflict of interest because the subject matter of the Department is wide and varied. It was only at the point when the decision-making came into view that it became clear that there was such a conflict.

The Chairperson (Mr Givan): On 10 July, a letter sent by the Minister to Sarah Ramsey QC relates to this matter in respect of the consultation on the legal framework and the interim rate. The Minister says:

> *"When both replies have been received, I will reflect on the views expressed and make a final decision."*

That is in respect of the Government Actuary and Department of Finance's consideration of the proposed interim rate. That was signed on 10 July by the Minister, Naomi Long.

Ms McAlpine: The Minister was involved in approving the statutory consultation to the Government Actuary's Department (GAD) and the Department of Finance. She knew that that process was under way. She also approved the consultation paper on the new legal framework. However, she has not had any involvement in the decisions that emerged after those consultation responses came in.

Mr May: That time frame is consistent with what we said about August.

The Chairperson (Mr Givan): Yes, the interest was registered in August, but the Minister was actively involved in the decision-making process in that matter and was signing letters on 10 July, no less, quite a number of months after she came into office. I am tying to understand the point at which she declares an interest, steps back from her departmental duty and transfers it to you. Clearly, it is not at the start of this process.

Mr May: As we have said, it was in August that she recognised her conflicts, and we provided advice to her about how she might choose to handle that. After that, a decision was taken to recuse herself from decision-making.

All of the work that she had done up to that point was preliminary, in the sense that it was of a process nature designed to seek wider views on the key issues. It was not taking decisions on what the outcome should be.

The Chairperson (Mr Givan): OK. It is there for the record when she declared the interest. It was in August. Before that, she was actively involved in signing letters and had a role in the decision-making process. Whether that is deemed a key role in making policy decisions or a moot point, she was involved.

You, Peter, got delegated authority to take decisions in August.

Mr May: I do not know whether it was August or September by the time the decision was reached.

Ms McAlpine: The consultation exercise ended about August, so it was at that point that it was apparent that decisions would have to be taken.

Mr May: Anyway, it was around August or September.

The Chairperson (Mr Givan): When you were given the authority to decide, was it your decision not to strike an interim rate but to go down this route of a legislative vehicle for a new framework, meaning that the rate would be struck pending that process?

Mr May: Essentially, yes. I was asked to take two decisions. The first was the consideration of what was the right model to secure the policy objective. As I said in my introductory remarks, the policy objective was to secure 100% compensation for those who had been affected. That was, I think, common ground for everybody. So, it was a question merely of how best to achieve that. That was the first decision: whether to go with the English model, the Scottish model or, indeed, some third option. The second decision was whether, in the interim, it was appropriate to set a rate, which would require secondary legislation and approval by the Assembly.

The Chairperson (Mr Givan): Did you consult the Minister as to her views on your decision?

Mr May: No, I did not.

The Chairperson (Mr Givan): Was the special adviser involved in that process?

Mr May: No.

The Chairperson (Mr Givan): What role will the Minister have in how this will be handled by the Department? Will you spell out what role she and her special adviser will have in this key policy decision?

Mr May: The Minister will now assume her normal role of presenting the proposed legislation to the Executive. If she decides to proceed with the accelerated procedure request, she will come before this Committee and take the legislation through the Assembly in the normal way.

The Chairperson (Mr Givan): What about your engagement with the Minister as you seek to take decisions on these areas? Has a firewall been set up so that the Minister is entirely insulated from that? Does that include her special adviser?

Mr May: There is not a firewall, as such, but if further decisions need to be taken, they will be taken on the same basis as they have been hitherto.

The Chairperson (Mr Givan): What precedent is there for a Minister delegating authority for key policy decisions to a permanent secretary?

Mr May: I am not aware of a direct analogue. I have a recollection that, in Whitehall, Ministers may have recused themselves from decisions about procurements in which they have a pecuniary interest, which is, in some ways, similar to this situation, but I am not aware of a direct analogue.

The Chairperson (Mr Givan): There is no example that you can point to of a Northern Ireland Executive Minister registering an interest and then recusing themselves from policy decision-making processes?

Mr May: I am not aware of any.

The Chairperson (Mr Givan): What advice was taken in setting up this precedent? This is now a precedent that other Departments and Ministers will look to.

Mr May: As you might expect, before reaching decisions, I took legal advice to ensure that this was an appropriate way to proceed.

The Chairperson (Mr Givan): From where was legal advice sought? Was it from the Departmental Solicitor's Office, the Attorney General or external to that?

Mr May: It was sought from a QC and supported by the Departmental Solicitor's Office.

The Chairperson (Mr Givan): An external legal opinion was sought, which was supported by the Departmental Solicitor's Office.

Mr May: Yes.

The Chairperson (Mr Givan): Do we know who the QC was?

Mr May: We do.

Ms McAlpine: Yes, it was Philip McAteer, who is junior Crown counsel.

The Chairperson (Mr Givan): OK. Are we able to access that legal opinion?

Mr May: It is normal practice not to share legal advice outside government. I would not move away from that normal practice.

The Chairperson (Mr Givan): It is normal practice for the Minister to make those decisions. It is without precedent and highly irregular, and we need to see the basis for that.

Ms McAlpine: It is not without precedent in other contexts. If a judge had a financial interest in the outcome of a court case that he was being asked to hear, he would recuse himself from that case.

The Chairperson (Mr Givan): I will continue that analogy: who would hear the case?

Ms McAlpine: Another judge.

The Chairperson (Mr Givan): OK. It would not be the clerk to the court, for example. It would not be a civil servant. It would be another judge.

Ms McAlpine: Yes.

The Chairperson (Mr Givan): OK. Should that not have been the case here?

Mr May: In England, legislation places powers in the hands of the Secretary of State. In that context, the Secretary of State means any Secretary of State. Therefore, had it happened in England, it would have passed to another Secretary of State to take that decision. In Northern Ireland, the statute book is set up differently, and powers reside in Departments. Occasionally, individual Ministers are given specific decision-making powers, but most powers rest with Departments. On that basis, it is not possible for a Minister from another Department to make a decision in a case such as this.

Ms McAlpine: The power to set the rate under the Damages Act rests specifically with the Department of Justice. Another Minister would not be the Minister of Justice and would have to be appointed Minister of Justice to have the legal power to prescribe the rate under that Act.

The Chairperson (Mr Givan): Yes, as you highlighted in a letter to the chairman of the Bar Council in 2018. You referenced that the Department holds the power:

> *"under Article 4(1) of the Departments (Northern Ireland) Order 1999 'the functions of a department shall at all times be exercised subject to the direction and control of the Minister'".*

That response was provided to justify why the Department, when it could have taken a decision, given the powers that Westminster gave to it during a period of direct rule, did not do so. You held back on the basis that it was for a Minister to make the decision because of that legislation.

Mr May: The key distinction to make is that the Minister, in recusing herself, asked me to take these decisions, so I was acting under the direction and control of the Minister in taking that decision. It is a different scenario when there is no Minister in place. I have been in that place, taken decisions and had them challenged in court on the basis that there was no authority to make decisions in the absence of a Minister.

The Chairperson (Mr Givan): You have indeed.

As the policy decision-maker, will you make direct representations to Executive and Assembly proceedings?

Mr May: I do not intend to do so at this stage. As I said, the decisions taken are in a very narrow space. The key policy objective is to secure 100% compensation. Essentially, it is about how best to achieve that and whether it should be done by an actuary or a Minister on the advice of a panel.

The Chairperson (Mr Givan): Its outworkings will affect people's lives —

Mr May: Indeed.

The Chairperson (Mr Givan): — the insurance industry, the Department of Finance's dealing with negligence claims and so on. I agree that the objective is clear, but its outworkings will have huge ramifications. That is why it is a key policy area that needs to be considered, and you are now responsible for doing that. Under Standing Orders, you cannot appear before the Assembly, because you are prohibited from doing so, so it will be the Minister, who has declared an interest and recused herself, who will have to speak on your behalf. That is highly unusual.

Will you give media interviews to defend those policy decisions or will that be left to the Minister, who was on the radio today?

Mr May: We will consider any media enquiries that are received on a case-by-case basis. Officials do not normally do media unless there is a particular reason to do so. If there are any media enquiries, they will be considered at the time.

The Chairperson (Mr Givan): In a democracy, we are expected to operate in a way that is open and accessible to the public, and that includes the media. The Minister has recused herself. I could replay this morning's interview, which did not sound like a recusal to me. She sought to provide policy interpretation and justification. Indeed, she indicated that you had been providing advice. Is it not a fact that you are not providing advice but taking the decision?

Mr May: As I explained, I have taken two specific decisions. I have explained that the Minister will take the legislation through the Assembly, assuming that the Executive approve it.

The Chairperson (Mr Givan): OK. An interim rate could be struck. Is there any legal impediment that prevents you from approving the interim rate that has been consulted on and which, as you have confirmed, the Government Actuary's Department has deemed an appropriate rate to strike?

Mr May: There is nothing to prevent secondary legislation being brought before the Assembly to set an interim rate.

The Chairperson (Mr Givan): This morning, the Minister said categorically that that could not be done. You are stating clearly that there is no legal prohibition preventing you, with the authority as the key decision-maker in this area, from taking a decision to authorise the rate of -1·75%, which your Department has consulted on and on which you have received advice from the Government Actuary's Department that it is appropriate? You can take that decision.

Ms McAlpine: The point that the Minister was making —.

The Chairperson (Mr Givan): I am sorry, Laurene, just one second. You can take that decision, Peter.

Mr May: Chair, I think that we should approach these discussions in a sensible way. I do not think that we should make it feel like an inquisition. If Laurene wishes to add something, I am very happy to hear from her, and I will respond to anything further that you may wish to say.

The Chairperson (Mr Givan): With respect, Peter, I am chairing the meeting; you are not chairing it.

Mr May: That may be so, Chair.

The Chairperson (Mr Givan): You can defer to Laurene on this if you wish. I am quite happy for Laurene to respond. The line of questioning was to you. Please feel free to —.

Mr May: The point that I am making, though, is that you can make this feel as though it is almost a legal proceeding, "You will answer the question that I have asked you". I am not clear that that is really an appropriate way for us to try to work together when we have, it seems to me, as I have tried to say throughout this process, a shared policy objective, which is to secure 100% compensation for those who are affected and to do so as quickly as it is possible to do.

It is possible to set a rate on an interim basis. I explained in my introductory remarks why I concluded that that was not the most appropriate way to proceed at this stage. I keep that under review, and I could, at some future point, need to take that decision again.

The Chairperson (Mr Givan): OK. The record will show that you could take this decision, which is contrary to what the Minister said this morning.

Ms McAlpine: May I just clarify that? The point that the Minister made this morning was that she could not just fix a rate that is equivalent to the English or the Scottish rate. We can fix a rate only if it is based on Wells v Wells; it is not the case that we can fix an interim rate of our choosing. We are bound by the Wells v Wells outcome, which is -1·75%. The suggestion this morning was that she might be able to pick some other rate, which is not possible.

The Chairperson (Mr Givan): I am not sure who made that suggestion, although it draws out the point that I am making: although no longer in charge of taking these decisions, the Minister is giving interviews and trying to outline policy. Nobody has suggested that the Minister should take the rate that is in place in Scotland or England. The Department has consulted on the rate of -1·75%, and the Government Actuary's Department has said that it is appropriate. The permanent secretary, who has the power, has confirmed that that decision could be taken and implemented without the need to wait for legislation providing for a new legal framework.

According to the consultation responses, the proposal for a new legislative framework based on the Scottish model reflects a minority position The majority indicated that they were opposed to it. Having taken a minority position on the new legal framework and given that the Minister has recused herself from the key policy decision-making process, how can there be justification for an accelerated process, which would bypass the Committee Stage?

Mr May: A number of different points have been joined together there. You are right that the majority of the consultation responses that we received preferred the England and Wales model. Those who responded in that category mostly represented defendants. We looked very carefully at the most appropriate way to go forward, and I explained the reasons that we came to the conclusion that we did.

Where accelerated passage is concerned, it is our desire to be able to provide long-term certainty as quickly as possible to those who are affected here. As you said, you were on the radio this morning with, I think, a constituent of yours who has been badly affected. You will understand that I am not able to talk about individual cases, but that should not undermine the importance with which we view the need to resolve those issues for people like that lady and many others. That is the principal reason why we suggested that accelerated passage is appropriate. The number of issues at stake is small, and the legislation will be short and technical. As I said, it will all be targeted on achieving a policy outcome that is not contentious.

I think that it is pretty much the case that the choice of either the Scottish or the English and Welsh model could achieve the policy outcome that has been set. It was a finely balanced decision. I am not saying that the England and Wales system is wrong; I am saying only that there were reasons why we felt that the Scottish one was preferable.

Ms McAlpine: The Scottish model also gives the legislature a much bigger say in the new legal framework. The English model leaves a lot more to the discretion of the Department.

The Chairperson (Mr Givan): That takes you into the policy content of what is being proposed. Peter, you said that it was a finely balanced call which model to go for. However, the Committee would be sidestepped in its ability to consider that.

Mr May: We are before you now, and we have come before you at every stage. There would, of course, still be opportunities for the Assembly to amend the legislation at its various stages. I explained that this is a matter for the Assembly to decide. We made the proposal because of the belief

that it will secure a quicker, more certain outcome for those who are affected, and we believe that that is in the public interest, for want of a better word.

The Chairperson (Mr Givan): The timeline for accelerated passage references one month for every stage. If the Department introduces it in January, it is not intended that it will get Royal Assent until September, or possibly June. There will be one month for introduction. There will be a gap of one month before you have the Second Stage, which, by the way, is longer than the gaps between the First and Second Stages of the Committal Reform Bill. There will then be another month, and a month thereafter. Normal procedure for accelerated passage is for urgent legislation that gets put through within weeks, not a process that you intend to spend four to five months on.

Mr May: Let me clarify that. The dates that were provided previously were very conservative estimates. They were based on a belief that there may need to be a little more time between the stages in order to recognise the scale and nature of any Assembly business that needs to be conducted. It is not us who will drive the timetable of the legislation; it is the Assembly. Were the Assembly to wish to move more quickly, there would be no difficulty on our part in doing so. It is certainly possible to pass the Bill through accelerated passage on any reasonable basis. It would not on the quickest rate possible, but it would be possible to pass the Bill within a number of weeks and to have Royal Assent well before the summer, if that were the will of the Assembly.

The Chairperson (Mr Givan): OK. I know my views on accelerated passage for the issue. Let me bring in other members, and then I will come back on some of the issues.

Ms Dillon: Thank you, Peter and Laurene. Some of my questions have been answered, to be honest, and Laurene clarified the biggest one. I was not 100% sure that there was no potential for setting any other interim rate, so that is definitive, which is helpful. Thank you.

I understand the reasons for the current interim rate not being ideal and the potential implications for the Executive and the Finance Department. What is the greatest danger with it? I am asking that for this reason. Obviously, defendants can choose not to settle as well. They can choose to hang on. Is the greatest potential danger that those who have been injured do not get settlements when they need them?

Mr May: The risk is that, at the moment, it is in the financial interests of the claimant not to settle because they can see a bigger rate. As you say, if you set a rate at the other extreme, where it is likely to move upwards as a result of the legislation, that would create an incentive the other way for defendants, especially when the legislation is coming along.

This is not the key deciding factor, but it is fair to note that it would take some effort and activity in the Department to pass the interim rate and to make that all happen in a sensible way. That would be done by the same team that is working on the legislation, and that would push the legislation back a bit further. As I said, that is not the critical factor, but it is one thing that means that, if you set an interim rate, it is likely to be longer before you have that certainty. You are then not really helping to resolve the issues, whereas, if you moved straight on to the legislation and got it through, that would be the quickest way of achieving that certainty.

We also believe that, when the legislation is going through, we could ask the Government Actuary to begin work on what the right rate should be. We cannot assume that it will be either the Scottish or English rate because, at each review point, they look at the market forces and at what is needed in order to secure that 100% compensation. They could do that in parallel with the passing of the legislation, which would reduce the amount of time after that passage before it could come into effect.

Ms Dillon: I share some of the Chair's concerns about those who are injured not getting what they are fully entitled to. I am keen that this is dealt with in the best possible manner, and I am trying to get to the bottom of that.

Ms McAlpine: If I could assist, at the minute, the rate set under Wells v Wells runs the risk of plaintiffs being under-compensated, which is why they will not settle. If we changed the rate under Wells v Wells, we run the risk of plaintiffs being over-compensated, which is why defendants will not settle. We need a new legal framework that means that plaintiffs are neither under- nor over-compensated, which is why we need a Bill and why we are trying to get there as quickly as possible.

Ms Dillon: If the secondary legislation had to happen for the interim rate — excuse my ignorance on this — what kind of —?

Ms McAlpine: The rate would drop so much that it would run the risk of plaintiffs being over-compensated. At the moment, the risk is that they would be under-compensated.

Ms Dillon: I understand the risk. What I am saying is that defendants just would not settle and that would be it. I was trying to bottom out the interim stuff. What kind of time period would be involved in the secondary legislation? Again, excuse my ignorance on this, because I just do not —.

Mr May: Interim legislation could be brought forward reasonably quickly — within a matter of weeks.

Ms McAlpine: It would involve a statutory rule going through the negative resolution procedure, but that would distract us from progressing the primary legislation.

Ms Dillon: Chair, you might be able to give me some guidance on this. If we were not to go for accelerated passage, how quickly could we do it with the Committee Stage included? I am trying to get all the information because, at the minute, I could not take a position on any of this. I need the information.

The Chairperson (Mr Givan): The time frame for Committee scrutiny would be up to the Committee. Under Standing Orders, you need an extension to go beyond a month, which we have done with other legislation. You could take two months, three months or six months, but that is notwithstanding that the starting point on this is a policy decision on the Scottish model. I have not reached a view on which is better, because I have some sympathy for the English and Welsh model, which gives more flexibility to ministerial control, and I have some sympathy with those who are arguing that it is a better way forward. My dilemma is that I am yet to be convinced that what is being proposed is the best way forward. Where the Committee Stage is concerned, I think that it can be as long or as short as the Committee wants it to be.

Ms Dillon: OK. Those are all my questions for now.

The Chairperson (Mr Givan): OK. Thanks, Linda.

Ms S Bradley: It is important to comment on the process before saying anything else. It is unfortunate that we are getting caught up in that part of it, because we are losing sight of what we should be talking about, but thankfully, we are getting to it. However, it is a mess. The Minister may be 100% accurate in her choice to step back from this, and I was deliberating on that, but to learn today over the radio via 'The Stephen Nolan Show' details of the Minister's view when I could not hear it via the Committee, is, to say the least, disappointing. I do not know whether it was just a bad error in judgement for her to be there, but I appreciate the officials being here to talk about what we should be talking about.

I understand that, under Wells v Wells, the interim payment rate has to be -1·75%. Has the Department considered that an interim payment that may not be for that full amount could be a tool just to buy time? I see this as a case of time versus best practice. Has any thought been given to that? I would appreciate your thoughts on that.

Mr May: I will cover the two points that you made. First, it would be worth observing that, on her radio appearance this morning, the Minister went on the programme only because she heard that the Chair of the Committee and one of his constituents were going to be on the programme. She was responding to a request to ensure that the position was set out from a departmental perspective.

On your second point, on interim payments —.

Ms S Bradley: Sorry; I appreciate that. However, it was put to the Committee that the Minister felt the need to step back from this, and I accepted that. I heard, then, that she was the spokesperson on the issue from a departmental perspective, and I heard that perspective first-hand via the Minister. Although there were some very good points and she presented clear thinking at the outset, when she was giving her personal and departmental views, that made me think that she muddled the lines again. I really do not want to give too much time to that matter; I would rather get to the substantive

work that we have here today. I do not expect you to speak for her where that decision is concerned, because I am not convinced that it was a departmental decision for her to go on the radio.

Mr May: Any media appearance that the Minister does is for her to decide on.

I will move on to your second point, taking what you say about focusing on the substance of this work. The parties to each case, are, in most cases, not the Department. There will be somebody who has suffered damage of some description or other, like a medical damages case, where they may be taking a case against a health trust or some other public body, or a private individual —

Ms McAlpine: A road traffic accident.

Mr May: — from a road traffic accident. As I understand it, and Laurene can say more about this, it is possible that anybody who has a claim can settle it through a lump sum, and then the question is asked about what rate applies to that lump sum in order to make sure that it compensates them over the whole of their lifetime and takes account of any vagaries of the financial markets. Alternatively, they could choose to take, essentially, an annual payment. There is a phrase for that that has just escaped me —

Ms McAlpine: Periodical.

Mr May: — and I shall ask Laurene to say a bit more about that.

Ms McAlpine: Instead of taking the lump sum to cover their needs for their lifetime, they could take a periodical payment, which would give them their annual need. If someone lost a salary of £30,000 per year and had care needs of £70,000 per year, instead of taking £100,000 per year for the rest of their life as a lump sum minus the statutory discount rate, they could take an annual payment of £100,000.

It is also possible for parties to negotiate a settlement outside the prescribed statutory discount rate. I think that there is a general recognition, among even insured defendants, that 2·5% is on the high side. I am hearing anecdotally that some cases are settling for less than that, so parties might be able to negotiate a settlement. It is not that they are stuck with the 2·5%.

Ms S Bradley: Thank you for that. I am trying to get at a particular point, and maybe I am not explaining myself well. For example, we understand that if you put the dynamic in one way, the defendant will not settle, and if you go the other, the claimant will not settle, and that is understandable. I am trying to get at this: is there scope in the middle for us to put good legislative practice in place, which may take a longer time, meaning that we will not strike a more permanent considered rate? Is there room there for an interim payment to be made? What I mean by that is that it is not a conclusion or a settlement but a bridging payment. It could be set at, say, 70%, and then a calculation is made for the permanent settlement. It is not ideal, but I am only teasing out whether the pros and cons of that were ever considered.

Mr May: The short answer is that there is no way that the Department can require that to be the case for those who are parties to cases. It is, of course, open to parties to cases to arrive at any arrangement that they choose, but you could not legislatively prescribe how that would work in such a way as to provide the sort of certainty that people are, I think, looking for to ensure that people do not miss out, as it were, in the intervening period.

Ms S Bradley: I ask that because, ultimately, we are talking about individuals who are awaiting and dependent on a sum of money that they have not got access to in order to improve their daily life in a fundamental way. I just wondered whether there was a route to getting at least some of that money to them earlier, which would significantly change their life straight away. I can see how we can get so caught up in the process and the technicalities that we lose sight of the fact that we need to get that money to those people as quickly as we can. Wholly, of course, we want to give it to them, but I just wanted to know if giving it even partially could be explored.

I noted that you indicated your preference, and I appreciate that that was a deviation from, I think, only 28 respondents, to be fair. You mentioned as well that the length of the investment model was 30-something years as opposed to the English model, which was longer. I know that it is a notional investment model, but are you suggesting that the Department would consider extending the number of years that that portfolio would be measured against?

Ms McAlpine: We are considering that. The Scottish model is based on an investment period of 30 years, whereas the English Lord Chancellor took a period of 43 years, based on, I understand, an average claimant's life expectancy. There may be an argument for making that one adjustment to the Scottish model, but we are taking advice from the Government Actuary's Department on that.

Ms S Bradley: OK. Thank you very much.

Mr Beattie: Peter and Laurene, thank you very much. It is a complicated issue, and whether we go for the England and Wales model, look to the Scottish model or whether there is advice one way or the other, that all has to play out. My concern, notwithstanding the complexities of how we got to where we are and the time lag, is understanding the impact of this on all Departments. For example, if we change to the English and Welsh model, what will be the financial impact on, say, the health service? Will there be a huge impact? Will the health service —?

Ms McAlpine: We will not know that. We cannot compare the outcome of the English and Welsh model with the Scottish model until the Government Actuary or the expert panel runs the numbers.

Mr May: It is clear that, whatever legislation is passed, it will mean significantly increased costs for defendants when they settle because, at the moment, the rate of 2·5% is, everybody agrees, some way out of line with what could be expected. We know that in England and in Scotland, they set rates slightly differently. They set them at slightly different points in time, and that is the point that Laurene is making. The Government Actuary would look at the particular point in time when we set it. It would be set for five years, as I understand it, and there would then be a review. That is true for all these; you will understand that stock markets change over time and so on. If we were to move to the Wells v Wells interim rate, the impact would be still greater on defendants if they chose to settle because they would be moving a good bit beyond where we think the rate will likely end up. We cannot quantify that, for the reasons that we gave.

Ms McAlpine: The overall objective, though, as Peter said, is 100% compensation. It is not an exact science, and that is demonstrated by the fact that the Scottish figure is slightly different from the England and Wales figure. Our figure may be slightly different again, depending on what the markets are doing when GAD comes to run the exercise. Everybody is trying to achieve 100% compensation.

Mr Beattie: I do not think that anybody is against that. That is laudable, and I think that we are all with that, I guess. My concern is always going to be those numbers. If we are saying that there will be a significant increase in the amount that the health service will have to pay in compensation, that concerns me. My concern in all this, notwithstanding all the complexities, is about how much scrutiny I want to give this and how much I think that it needs to get. Therefore, what I am really stuck with is this: if I want to really dig into this and to understand it better, I do not want to give it accelerated passage. That will have an effect on some people, who will then defer their claims until they get a better rate, so to speak. I get that as well. The question about accelerated passage becomes my dilemma, really.

Peter, I know that you cannot run the numbers, but, for me to get an idea, if I took what the Department of Health paid out in compensation in 2019 and ran those numbers with the new figures and saw what it would be, I would at least understand what the increase could be.

Ms McAlpine: Ultimately, if it costs the Department of Health money, that is a consequence of negligence that has caused catastrophic injury to some individuals, and those people are entitled to their compensation. We have been quite careful that, in not setting a rate under Wells v Wells, the cost to defendants is not a consideration.

Mr May: I wanted to stress that point. In reaching the decision to proceed with either the Scotland or the England and Wales model, the outcome for the defendants cannot be a factor in the decision-making because the policy objective here is 100% compensation.

Mr Beattie: That is why I absolutely agree. There should not be an outcome to the defendants. They get it all, but there is a real difference in what the Department of Health would pay out compared with in England and Wales and in Scotland.

Ms McAlpine: Not necessarily —.

Mr May: Perhaps I can offer two observations. Would you like to go first, Laurene?

Ms McAlpine: When the England and Wales model is run again, maybe in five years, and the Scotland model is run again in five years, you might find that the England and Wales model costs defendants more and the Scottish model not so much. The England and Wales model depends more on the discretion of the Lord Chancellor and what the expert panel tells him, so there is no guarantee of how that will work out for defendants in the future. The England and Wales rate at the minute is lower than the Scottish rate. They went for 43 years instead of 30 years, and it was run at a different time. The portfolio of investments was slightly different, although that may change in the future. It would be wrong to assume that England and Wales will mean a rate more favourable to defendants. That is the way it worked this time, but we do not know how it will work in the future. It is not really about getting a favourable rate for defendants; it is about getting the rate that gives the nearest to 100% compensation.

Mr May: May I add a couple of points? It may be difficult to give you a run of numbers that concern the whole of the health service budget. However, we ought to be able to identify a sample case, Laurene, and use that to demonstrate the outcome for an individual, based on different outcomes. That ought to be possible. Let us see whether we can do something that would help to make it real, as it were, in terms of the impact and the consequences.

I had another point. However, I am afraid that I have forgotten it. If I remember it, I will come back to it.

Mr Beattie: I want to finish on this, Chair. I absolutely agree with you and want to make it absolutely clear that I want those who are entitled to the money to get 100% of it. I am absolutely with you on that, as you are living and breathing these numbers.

I am scrutinising, yet I am not scrutinising. My dilemma is whether I would support accelerated passage or whether I would need the time to scrutinise it to get it 100% right, because we do not know what the impact might be on our health service in four or five years' time. That is my concern, but I am with you.

Mr May: I remembered the other point, which may be helpful to you. Our understanding — we are looking into this in more detail — is that when they made this change in England and Wales, the Treasury made some allocation to the budgets of those who were affected to recognise that there was an increase in the payments. The obvious question is whether they would give us a similar allowance because we are making a similar change. At this stage, I cannot answer that question. However, I know that it is something that the Department of Finance is going to look into.

Mr Beattie: Thank you.

Miss Woods: Thanks, Chair, and I thank the witnesses for coming today. A number of questions that I had have already been asked, so I am not going to go into them. We heard the 'Nolan' programme this morning. I have questions about accelerated passage. We covered the issues with the accelerated passage calendar that was given to us earlier, but I wanted to tease out some dates.

If we were to legislate for a new legal framework under which a new rate can be set, how long would the Department need after that for it come into effect, either through accelerated or regular legislative passage? The Bar of Northern Ireland indicated that it is likely to take at least a year to come in. Is that correct?

Mr May: We believe that it should be commenced within three months of receiving Royal Assent.

Ms McAlpine: The legislation could come into operation straightaway. The legislation will require GAD to set a rate within three months, and, as Peter said, we have already teed up GAD so that it could start doing preliminary work while the Bill was making its passage through the Assembly. Without assuming the will of the Assembly, we will take the risk of GAD running some numbers so that, hopefully, it will not even take three months after the Bill has received Royal Assent for it to come up with a figure.

Miss Woods: OK. That is fine. So it will be three months, not, at the least, a year

Mr May: We think three months.

Miss Woods: OK. The periodical payment option for people was mentioned. Is that subject to the same rate?

Mr May: No. Essentially, the periodical payment is an alternative approach to needing to use the discount rate at all, because it sets a number that, presumably, is index-linked, but that is all.

Ms McAlpine: Yes, and you could come back to the courts to get the periodical payments order fixed. The point about a lump sum is that you have the advantage of taking your £2 million, £3 million or £4 million to invest and earn money on, whereas you will get the periodical payments annually to meet your needs.

Miss Woods: The rate that is up for discussion is only for lump-sum payments and affects nothing else?

Mr May: Yes.

Mr Dunne: Chair, I have a general point. This is an ongoing issue. We are aware of huge claims, especially against Departments, including Health, which have set aside a considerable amount of money to pay out on claims. Will the same rate apply whether it is — probably in a lot of cases — from an insurance company?

Mr May: Indeed.

Mr Dunne: We are all aware that claims can be for huge amounts. It could also be a private individual against whom the claim is made, so this rate will apply right across —.

Mr May: In all cases of —

Mr Dunne: It is really a lump sum.

Mr May: — serious damage.

Mr Dunne: It is an one-off lump sum.

The objective is to make sure that a claim of 100% is paid out. Is that fair?

Mr May: It is so that, over their lifetime, they can have all the care that they may need and live the life that they might have expected to lead.

Mr Dunne: The change from 2·5% to minus 1·75% is quite a drastic one.

Ms McAlpine: It is, yes.

Mr Dunne: Do you feel that you can justify it?

Ms McAlpine: It is based on Wells versus Wells. The difficulty is that, at the minute, the 2·5% runs the risk of plaintiffs being undercompensated —

Mr Dunne: Yes.

Ms McAlpine: — but changing it on Wells versus Wells to minus 2% runs the risk of plaintiffs being overcompensated.

Mr Dunne: Yes. OK, thank you very much, folks. That is great.

Ms S Bradley: Chair, can I come in with one more point please? I will be quick.

The Chairperson (Mr Givan): Yes, of course.

Ms S Bradley: I previously asked about trying to gauge the number of cases waiting to be settled under this. I appreciate that a lot of it might involve claims against private individuals and private *[Inaudible]* , but do we have any measure of how many cases are waiting to be settled against the public sector or public bodies? I ask because if there was a settled amount, is there likely to be a large wave at the start of settlements that may be so significant that we may need to know about it in terms of budgets?

Mr May: I do not think that you can know.

Ms McAlpine: I imagine that the Department of Health or trusts that have cases pending against them will have made some sort of accrual in their account for that claim. Of course, they will not know whether they will have to settle this with a rate of 2·5%, minus 1·75% or some other rate. However, the fact that there is a claim in the offing will have been accounted for in some way in their accounts.

Mr May: Part of the difficulty in making an assessment is that not all claims will necessarily be found to be justified, so not every claim will lead to a payment. That is the other point that makes it hard to estimate what the likely impact would be.

Ms McAlpine: There may also be claims — you have three years from suffering a personal injury to issuing your writ — that we will not even know about.

Ms S Bradley: OK. Thank you.

Ms Dillon: I have a couple of questions. I assume that this might be just an arrangement; it is not something that you could legislate for. However, could an individual, for example, settle by taking a periodical payment for three years before getting a lump sum? If they did that, would the lump sum be based on the new rate or on the rate at the time that they settled?

Mr May: I think that that would all depend on the individual parties in the case and the basis on which they settled the case. I suspect that all those things are possible, but we cannot legislate to require that to be the case.

Ms Dillon: I would not ask you to. I was just trying to dig deeper into where Sinéad had started us off.

Mr May: I think that it is possible to do those things in theory.

Ms McAlpine: I suppose that the parties can agree to whatever they want, but they generally do not seem to like periodical payments orders. It is an interesting one.

Ms Dillon: My other question is not really for the witnesses. Chair, can the Committee write to the Finance Minister to find out what approaches have been made to the Treasury on where additional money has been given in other jurisdictions? It would be helpful to know if that is going to happen.

Can we write to the Health Minister with regard to the last question that Sinéad asked? Our main concern is, as Doug said, that people get full compensation, and that is where the Committee will be at. Actually, it may not even be appropriate for the Committee to ask. I will not go down that road. We can ask in other roles. I just do not know whether we should be asking that in Committee.

Mr Frew: You are in danger of asking the question that you were not going to ask.

There is an issue with regard to trying to guarantee full compensation, as even the bonds might not deliver the return that someone might require in later life for illness, disablement or a medical condition through no fault of their own. However, if their condition deteriorates in later life, and their healthcare costs go up, or they require more healthcare —.

Mr May: There is always a matter of best judgement that is entered into about the level of disablement or damage that has been caused and its consequences.

Ms McAlpine: That is sometimes why cases can take so long to settle until the patient's long-term prognosis becomes clear. However, the person's annual need for the rest of their life is really a matter for the lawyers and expert witnesses to agree.

Mr May: Do you want to say something about the margin that is included?

Ms McAlpine: In Scotland, when they run the notional portfolio, there is a requirement for a deduction of 0·5%, which is described as a margin of prudence and which is really a safeguard to minimise the risk of a plaintiff being undercompensated. Of course, the insurance companies will say that that runs the risk of them being overcompensated. However, none of this is an exact science.

The Chairperson (Mr Givan): Can I ask about overcompensation? Is it not the case that Northern Ireland citizens have been less well off, compared to anywhere else in the United Kingdom, because this rate, which was struck in 2001, has not changed?

Ms McAlpine: It changed in England and Wales in 2017, and, yes, 2·5% runs a risk of plaintiffs here being undercompensated, which is why cases are not settling, or else parties are managing to agree a settlement that is different from the 2·5%.

The Chairperson (Mr Givan): If we extrapolate from that, insurance industry medical negligence claims have been protected in Northern Ireland in a better way than in other jurisdictions, and victims have been worse off. That is a layman's analysis. I am a little bit concerned that not moving on an interim rate, which the Government Actuary' Department has said is appropriate, is predicated on a concern of overcompensation for a victim.

Ms McAlpine: The Government Actuary's Department says that the rate is appropriate under Wells versus Wells. I do not think that it is offering a policy view on whether we should implement an interim rate or go for any new legal framework. In fact, the Government Actuary's Department said that it is unlikely that plaintiffs will invest all their money in index-linked gilts, on which the minus 1·75% is based.

The Chairperson (Mr Givan): The Department of Finance has been noncommittal, apart from being careful not to overcompensate. It has not given a definitive view that this would lead to that.

Mr May: Indeed. We have been clear with it that we cannot take account of the impact on public sector finances in the decision-making that we reach, and it has not sought to influence us on that basis.

The Chairperson (Mr Givan): This, and the Minister's decision, puts you in a very difficult position, Peter. I do not envy you. Maybe this is why you felt that this was too adversarial. Nevertheless, you are now the key policy decision maker. You have assumed ministerial office for this policy area, and therefore a challenge function will be exercised.

Mr May: I am very happy to be challenged, Chair. The way in which the challenge operates is important, not for me, per se, but for my colleagues who come before the Committee. It is important that they should not feel that coming before the Committee is an ordeal. They should feel that you will, by all means, scrutinise and challenge them but also support them, as necessary.

The Chairperson (Mr Givan): You are keeping under review your decision not to strike an interim rate. That is an active consideration.

Mr May: Were it to become clear that legislation could not be passed in this Assembly term, I would need to look again at whether it was a reasonable decision to have reached. That would be a change in the circumstances. I based the decision that I took on moving ahead as swiftly as possible to legislate.

The Chairperson (Mr Givan): I note from the briefing that there is not actually yet a final, definitive policy position. We are still waiting on that.

Mr May: In what sense?

The Chairperson (Mr Givan): In how we go forward.

Ms McAlpine: We are going with the Damages (Investment Returns and Periodical Payments) (Scotland) Act.

The Chairperson (Mr Givan): As I understand it, you are considering modifying the Scottish model.

Ms McAlpine: Only in respect of the 30-year or 43-year investment period. We have instructed counsel on the Scotland model.

Mr May: We now have a draft Bill, which we are looking at to test whether it meets the policy intent.

The Chairperson (Mr Givan): So, no Bill has gone through the Executive yet.

Mr May: The hope is that it will go to the Executive this side of Christmas or at the beginning of January. It will be introduced in February, subject to clearance and the Speaker's assessment, which, as you know, takes two weeks.

The Chairperson (Mr Givan): When will the Department officially decide whether to request accelerated passage and then come to the Committee? It is usually the Minister who comes to the Committee to provide official justification.

Ms McAlpine: The process is that the request goes to the Executive at the same time that we ask permission to introduce. The Minister comes to the Justice Committee, and then there is a vote in the Assembly.

The Chairperson (Mr Givan): So, you will need Executive approval for accelerated passage?

Ms McAlpine: Yes.

The Chairperson (Mr Givan): Obviously, this involves litigation concerning defendants and plaintiffs. Peter, how concerned are you that the Department is exposed to litigation from either defendants or plaintiffs as a result of the decisions that have been taken?

Mr May: I think that whatever decision had been taken — indeed, even if no decision had been taken — we would have been at risk of legal challenge. We have already received a number of pre-action protocol letters. As I said, I anticipate that, whatever the decision, there would have been the risk of challenge.

The Chairperson (Mr Givan): That is pre-action from plaintiffs and victims? I assume that defendants are not complaining.

Mr May: We have received a range of —

Ms McAlpine: Yes, they are claimants.

The Chairperson (Mr Givan): They are claimants who have sent these pre-action letters, and there is more than one.

Ms McAlpine: Yes.

The Chairperson (Mr Givan): Can you tell us precisely how many?

Mr May: Four, at the moment.

The Chairperson (Mr Givan): So, you have four pre-action protocol initiatives being taken against the Department for not striking an interim rate?

Mr May: There is a number of different grounds, but they are based on that, yes.

The Chairperson (Mr Givan): So, you are looking at judicial review of this decision. There will be court proceedings.

Mr May: Potentially.

Ms McAlpine: It is not the new legal framework that they are challenging.

The Chairperson (Mr Givan): It is the decision not to set an interim rate. Does that include the Minister's decision to recuse herself? Is that part of the legal challenge at this stage?

Mr May: No.

The Chairperson (Mr Givan): OK.

Ms McAlpine: It might emerge as an issue.

Mr May: It is not on the front of the letters.

The Chairperson (Mr Givan): OK. Notwithstanding the conversation that Committee members will seek to have, I am very concerned about the course of action that the Department is pursuing: the model that is being suggested, the Assembly process and, indeed, the Minister's decision in how she has delegated this. That will be difficult to resolve satisfactorily.

In the meantime, victims and claimants, such as my constituent, are stuck by this cruel decision. That is very unfair on people who want to move on with their life. Your active consideration of an interim rate should crystallise quickly in respect of the potential for taking through, by accelerated passage, a new legal framework that a minority of respondents to your consultation has supported. MLAs will be left in a very difficult position to get on board with the Department's assessment and approach in a time frame that I regard as acceptable to claimants.

That is my personal assessment. The Committee will need to discuss a Committee position to articulate to the Department, but that is where I am at this stage.

Ms Dillon: I am not sure that I agree with your assessment, Chair, because defendants still have the opportunity not to settle, so people like your constituent will be left relying on the hope that a defendant will settle. I am concerned that we could be drawing this out unnecessarily. We need to look at both of those issues, not from one side. I agree with you: if there is way of making the process quicker for victims, we need to do it. However, we may, by digging our heels in, be drawing it out with no benefit to the victims or to those who are injured. We need to think all that through and have a deeper discussion about it.

The Chairperson (Mr Givan): The Committee should discuss it, because I suspect that we will have to call for witnesses, such as the Bar, the Law Society, the Association of Personal Injury Lawyers, and even hear from victims in order to inform members. I do not disagree that we will have to have a considered Committee position on this.

Ms McAlpine: In the consultation, the Bar supported the Scottish model, if that is of any help.

The Chairperson (Mr Givan): OK. Are there any more points of clarity?

Ms S Bradley: I want to ask one more technical point. I appreciate the officials being here, so now may be the time to ask this. Am I right in assuming that, if there is an extension of the notional timeline against this notional portfolio, if you like, by extending the time, you are actually increasing the lump sum? Is that a fair assumption?

Ms McAlpine: Do you mean taking 43 years instead of 30 years?

Ms S Bradley: I mean that if you arrive at a figure between the two, such as, for example, 35 years. Either way, extending it beyond 30 years will increase the lump sum. Is that fair?

Ms McAlpine: I would really need GAD to advise on that, but, very generally — I am not an expert — my impression is that the longer the investment period, the better the rate of return. That would mean that there might be a discount rate that might favour insurance companies more. However, as I say, I am not an expert.

Mr May: Might we write to the Committee on that, having sought expert advice?

Ms S Bradley: Perhaps I should not make that point without knowing some more about it. I would appreciate that, Peter. Thank you.

The Chairperson (Mr Givan): Peter and Laurene, thank you very much for your time.