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10 February 2021

Dear Paul,

DAMAGES (RETURN ON INVESTMENT) BILL – ACCELERATED PASSAGE

Thank you for your letter of 3 February. I was grateful to the Committee for accommodating my attendance at the meeting on 28 January.

First, let me say that I am pleased that the Committee fully supports the need to change the legal framework for setting the personal injury discount rate in order to deliver 100% compensation, which is, of course, a well-established legal principle.

I note that the Committee has written to the Minister of Finance about the wider financial implications for Government. One of the main reasons for changing how the rate is set is a concern that the current framework under *Wells v Wells* tends to over-compensation because of the assumptions made about how money is invested. Were it to be considered necessary to introduce an interim rate at some stage, that interim rate would have to be based on *Wells v Wells* and would require much higher payments than a rate under the

proposed framework in the Bill. The new methodology under the proposed legislation is designed to better deliver 100% compensation.

The cost for departments and indeed any other defendants arises from their legal liability to compensate fully a claimant and, accordingly, is a matter for them. My department understands, however, that the Department of Finance is engaging with the Treasury in regard to the budgetary implications for the Department of Health, in particular.

In your letter, you set out a number of specific concerns, which members have raised in regard to the proposed framework, which I will address in turn, but I also think it might be helpful for the Committee to have a clear comparison between the two models employed in Great Britain – both in terms of the legislative basis and the practical decisions taken once the legislation was introduced. The table below shows the main features:

Comparison of legal frameworks for England & Wales and Scotland

	E&W	Scotland
Rate-setter	Lord Chancellor subject to certain assumptions and the required consultation	Government Actuary according to the methodology set out in the legislation
Diversified low-risk portfolio	Y Detail of portfolio at discretion of Lord Chancellor subject to required assumptions and informed by required consultations	Y Detail of portfolio prescribed in legislation and may be changed by Ministers with approval of Scottish Parliament with requirement to consider before each 5 yearly review
Investment period	At discretion of LC (43 years was assumed in 2019)	30 years

Deduction for taxation/expenses	Y Required to be taken into account but amount at discretion of Lord Chancellor, subject to consultation	Y Prescribed in legislation at 0.75% but amount may be changed by Ministers with approval of Scottish Parliament
	(0.75% was deducted in 2019)	
Margin of prudence	Whether to apply any such margin and, if so, the amount is a matter for LC's discretion informed by expert advice (0.5% was deducted in 2019)	Y Prescribed in legislation at 0.5% but amount of deduction may be changed by Ministers with approval of Scottish Parliament
Review	5-yearly	5-yearly

In relation to your and other members' concerns that the Scottish model may tend towards over-compensation, there is no reason to believe that the Scottish model is more likely to lead to over- or under-compensation than, for example, the model in England and Wales. In practice, the decisions made on the deductions for taxation and expenses and prudence were the same in both jurisdictions and, therefore, the only differences are the detail of the assumed investments and the assumed investment period (as well as the time at which the rates were calculated). Without applying the respective models to today's conditions, we cannot know whether or not there would be a difference but, over time, either model could result in a different discount rate depending on investment conditions at the time.

The advantage of the Scottish model is that such matters are clearly set out on the face of the legislation and any changes to these can only be made by the Department, subject to the approval of the Assembly, which meets the need for political accountability. While

the Government Actuary is responsible for determining the rate, he must do this according to the methodology prescribed in the legislation and so the function is purely actuarial.

In terms of impacts on the insurance industry, businesses and consumers, I would note that rates set under new frameworks in England and Wales and Scotland have been in place since 2019 without any resulting disruption. I should stress again, though, that the impact of the discount rate cannot be a relevant consideration for my department.

You also noted that we are unable to quantify the number of cases currently being delayed as we do not know how many personal injury claims are otherwise close to settlement. NICTS statistics record 14,000 writs issued between 2010 and 2020; of which approximately 30% are claims arising from medical negligence or road traffic accidents. Many of the other cases, however, are also likely to involve personal injury caused by negligence or breach of statutory duty. We are also unable to confirm how many of the 14,000 cases are truly ‘active’ as the proceedings may have been discontinued or settled without the court being informed. As we have previously mentioned, the Directorate of Legal Services of Health & Social Care NI (which represents the health and social care trusts) indicates that, as of May 2020, there were 138 high-value cases outstanding.

The Committee has also sought further information about the implications of adopting an assumed investment period of 43 years, as was applied in England and Wales, rather than an assumed investment period of 30 years, as set out in the Scottish legislation. It is worth highlighting that the assumed investment period for calculating the discount rate does not affect the length of time over which an individual is recompensed (which would likely be for their expected lifetime or their working lifetime). The discount rate is used to assess what the total sum an individual is entitled to in the event that they take the lump sum rather than a periodical payment. A periodical payment is payable for the claimant’s lifetime whereas a lump sum is a one-off payment which the individual can then chose to invest as they see fit.

As noted in the Department's letter to the Committee dated 23 December, broadly speaking, assuming a longer investment period is likely to result in a slightly higher discount rate, because longer-term investments are likely to have better returns. (The Committee will wish to note, however, that it is entirely possible that there might be a situation in the future whereby expected investment returns are higher in the short term than in the long term, in which scenario the longer duration would result in a lower discount rate.) The Government Actuary's Department, however, has advised that, in practice, the difference between the two assumed investment periods is likely only to make a small difference of 0.1% or 0.2% in the rate calculation (if all other aspects of the calculation were equal). Since the discount rate is rounded to the nearest 0.25%, the material effect on the rate, therefore, would either be nil or +0.25%.

It might be helpful to the Committee to demonstrate what difference a 0.25% change would make using an entirely hypothetical case of a thirty-year-old male with an annual requirement of £50k (to meet his loss of earnings and cost of care). In this scenario, as calculated using the Ogden Tables, a discount rate of –0.25% would mean damages of £2,987,500, but with a discount rate of 0.0% then the damages would be £2,773.000. We do emphasise that this example is purely illustrative as we don't know what the discount rate would be under the framework provided for in the Bill. While I understand that some may, understandably, want to know that level of detail, the reason we cannot provide that information is that the discount rate can only be set at the point when it is going to take effect and so any projection provided now will not be the final answer. In addition, the Committee will recall that the Scottish model provides GAD with 90 days to do this work: it is not a simple calculation, but one that takes substantial time and effort (and for which there is a charge), which is why we could not ask for this work to be done except at the point of need.

I think it is also important to stress that we all agree that the assumed investment period ought to be selected with the aim of delivering as closely as possible a discount rate that

provides 100% compensation, and we believe that 43 years best achieves that by reflecting the average investment period of claimants. This is supported by the available evidence which was provided to the Ministry of Justice as part of its call for evidence in advance of the first review of the discount rate under the new framework for England and Wales in 2019 (see page 15 of the summary of responses to the call for evidence and page 34 of the Government Actuary's advice to the Lord Chancellor).

I welcome the Committee's engagement and appreciate that the Committee wishes to ensure that the framework being proposed is the most appropriate way forward. As I advised, however, when explaining to the Committee my reasons for seeking accelerated passage for this Bill, it is essential that a new framework is put in place as soon as possible, so that a stable discount rate can be set under it. This is the only way to bring an end to the current uncertainty for all parties to personal injury litigation and above all, to ensure that claimants receive the full compensation to which they are entitled, which is the legal obligation on the Department.

I hope, therefore, that this further information will reassure Members in regard to the model provided for in the Bill and that they will support my efforts to ensure that this legislation is passed through the Assembly by Summer Recess.

NAOMI LONG MLA Minister of Justice