



51 Adelaide Street, Belfast, Co. Antrim, BT2 8FE
T +44 (0)28 9032 7388 F +44 (0)28 9032 7732 DX 483 NR BELFAST 1 blmlaw.com

Letter to Committee clerk

Ms: Christine Darrah
Room 242, Parliament Buildings,
Ballymiscaw,
Stormont,
Belfast, BT4 3XX
Tel: (028) 9052 1629
Email: committee.justice@niassembly.gov.uk

Dear Ms Darrah,

Damages (Return on Investment) Bill - Committee Stage - consideration on Thursday 8th October 2021

We have been closely following the progress of this Bill and filed formal written submissions during an earlier phase of the Committee Stage proceedings. We remain grateful for the opportunity to share our views, which we do not propose to rehearse here in full.

One point, however, would like to re-emphasise is the *"0.5 of a percentage point, as the further margin involved in relation to the rate of return"* as set out at paragraph 10(2)(b) of the new schedule which the Bill will add to the Damages Act 1996.

For reasons already given, and elaborated in a short appendix below, we remain of the view that this further margin, when paired with a low risk notional investment portfolio, amounts to double counting of the risk it purports to address.

Maintaining this further adjustment at 0.5% in our view will artificially depress the discount rate and therefore artificially increase awards, thus unnecessarily increasing the costs of associated insurance and indemnity arrangements.

For these reasons, we would respectfully urge the Committee to consider moderating or removing the further margin. We should be very grateful if you would circulate this correspondence to Members before their further consideration of the Bill on Thursday this week.

Yours sincerely,

Patrick Connolly

Partner, BLM

Alistair Kinley

Director of Policy and Government Affairs, BLM



51 Adelaide Street, Belfast, Co. Antrim, BT2 8FE
T +44 (0)28 9032 7388 F +44 (0)28 9032 7732 DX 483 NR BELFAST 1 blmlaw.com

Appendix: additional submission from BLM regarding the “further margin”

1. In our initial written submission (at its page 8 of 11) we stated that this further margin may amount to ‘double counting’ of policy controls on investment risk (as an element of the personal injury discount rate) and therefore on the risk of over/under compensation.
2. The first ‘counting’ of investment risk is in the Bill prescribing a hypothetical investment portfolio which is more conservative - and which will therefore generate a lower return - than that adopted (albeit by Ministerial discretion rather than by legislative prescription) in England & Wales. The second ‘counting’ is then by way of the “further margin” of 0.5%.
3. We take issue with the Department’s view that this is not double counting (set out at the bottom right of page 65 of its letter to the Committee Clerk dated 4 September 2021).
4. The English approach to discount rate-setting is based on a low-risk investor who is properly advised. In that setting, the Lord Chancellor adjusted the notional yield (on which the Government Actuary had comprehensively advised) by 0.5% in order better to protect against the risk of under-compensation.
5. In contrast, the approach in Scotland was to prescribe a notional investment portfolio which is of lower risk than that adopted in England & Wales. For this reason, it remains our view that the Scottish approach already includes an adjustment at this initial stage to protect against under-compensation. The making of a further adjustment, later in the rate-setting process, of 0.5% to protect against under-compensation seems to us to be dealing, to a significant extent, with the same risk.
6. For that reason, we say there is a methodological error in the Scottish approach, one which it would be inadvisable for the Assembly to repeat when considering the current Bill which is so closely modelled on the Scottish legislation.
7. In responding to our point, the Department said the following (in the material linked at footnote 2 below):
“This does not represent double-counting. It is not known what portfolio of investments would be assumed or the amount of the adjustments that would be made if the England and Wales model were adopted, as these would be a matter of Ministerial discretion.”
8. In our view, this rebuttal does not provide a full picture. We suggest that the adjustments adopted by the relevant Minister in England & Wales (the Lord Chancellor) in 2019, of 0.75% for tax and investment charges and of 0.5% as a risk margin, would have been likely to have been repeated by a Northern Ireland Minister receiving similar advice from the Government Actuary.
9. We do not take issue with either the nature or the amount of these adjustments per se in England. However, in the Scottish and Northern Irish settings while it is logical to make an identical adjustment for tax and charges, in our view it remains inconsistent to make the full 0.5% adjustment against under-compensation in legislation in either of the latter jurisdictions.
10. At the risk of repeating ourselves, the selection of a lower risk investment portfolio in the current Bill (when compared to that used in England) at the outset of the rate-setting exercise and then using the same



51 Adelaide Street, Belfast, Co. Antrim, BT2 8FE
T +44 (0)28 9032 7388 F +44 (0)28 9032 7732 DX 483 NR BELFAST 1 blmlaw.com

adjustment as in England, in full and at 0.5%, to provide a policy 'buffer' against the risk of under-compensation, inevitably amounts to taking the same issue into account twice.