



Informing Progress - Shaping the Future

Committee for Justice
Room 242, Parliament Buildings
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Sent by email to the Clerk to the Committee
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Dear Members of the Committee for Justice

Damages (Return on Investment) Bill

I write on behalf of FOIL NI in reference to the Committee for Justice meeting on Thursday 7th October coming, and the Formal Clause by Clause consideration of the Damages (Return on Investment) Bill.

The composition of the prescribed notional portfolio is very cautious and light in equities. It is a factor which potentially points towards the risk of overcompensation. During FOIL NI's evidence to the Committee on 10th June 2021, I made reference to the further margin adjustment of 0.5% - set out at paragraph 10 of the Bill.

In the view of the authors of the Scottish Policy Memorandum which accompanied the Scottish Act (upon which our draft Bill is broadly based), the *further margin* of a 0.5% adjustment *downward* of the gross rate of return would *inevitably* lead to a *probability of overcompensation*.

In more recent times, in a short Annex prepared by the Bank of England Prudential Regulation Authority (dated 15th April 2021), the Deputy Governor and CEO, Sam Woods offered some thoughts following the Committee's Call for Evidence. In relation to the Bill's inclusion of a *further margin*, he observed that the margin would slightly favour claimants but that omitting it, would achieve "strict balance" – that is the balance of risk between over and under-compensation.

The PRA did not offer a preference one way or the other, as it considered that judgement to be a “political decision” for the Northern Ireland Assembly. Whether one uses the term political or policy-based, the point is well made and echoes the views consistently made by FOIL NI to the Committee and to the Department in previous submissions concerning the Northern Ireland discount rate.

In response to the Committee’s question around the potential for over-compensation within the draft Bill, Sam Woods observed that, “it will not veer towards over-compensation in general, *other than marginally through the 0.5% prudent margin*”.

The notional investment portfolio within the Bill is already a very cautious approach as recognised in the evidence given to the Scottish Energy and Fair Work Committee (6th November 2018) by Minister Ash Denham.

At the core of the discussion around the Northern Ireland discount rate is the goal to deliver 100% compensation to injured plaintiffs, *no more and no less*. It is important that justice is done to each side in that balancing of the risk – of under and over-compensation.

The *further margin* lacks a clear evidence base. Significant concerns have already been flagged during the passage of the Scottish Bill suggesting that the inclusion of a further margin of 0.5% would lead to the *inevitable* probability of over-compensation.

FOIL NI would therefore ask the Committee to consider whether the inclusion of the further margin is necessary; but more particularly that by taking a policy-based or political decision to include it, the 100% compensation principle would be put to one side. FOIL NI would contend that the further margin should be removed by deletion of paragraph 10 (2) (b) from the Bill at line 21.

We trust that the Committee members will find these further comments of some practical use and should you wish to discuss any of the issues raised in this correspondence, please do not hesitate to contact FOIL NI.

Your sincerely

Kevin Shevlin
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FOIL, the Forum of Insurance Lawyers