FROM THE OFFICE OF THE JUSTICE MINISTER

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Dear Christine,

Damages (Return on Investment) Bill

Following the written and oral evidence provided to the Justice Committee on the Damages (Return on Investment) Bill, you wrote to the Department requesting its written response on the issues raised. The Department has added its comments to the table that you provided, which is attached.

Your letter also requested specific information in relation to two issues. The first was periodical payments orders (PPOs) and whether or not there is potential to make these compulsory, particularly in cases involving government-backed bodies.

Under section 2(1) of the Damages Act 1996, a court already has the power to make a PPO for future pecuniary loss without the consent of the parties and is required to consider whether or not to make one. Also a court cannot make a PPO unless the continuity of payment under the order is reasonably secure. Court rules specify certain matters that a court must take into account when considering whether or not to make a PPO and provide that the court shall have regard to all the circumstances of the case and, in particular, the form of award that best meets the claimant's needs, having regard to the following: the scale of the annual payments taking into account any deduction for contributory negligence; the form of award preferred by the claimant, including the reasons for their preference and the nature of any financial advice they received when considering the form of the award; and the form of award preferred by the defendant, including the reasons for the defendant's preference. The Department considers that this existing legislative provision is sufficient and that it would not be appropriate, or practical, to require a court to make a PPO in a particular type of case, without any consideration of all the relevant circumstances, and whether or not this form of order best meets the claimant's needs. The court will act in the objective interest of the claimant.

The Damages Act makes the same provision for England and Wales in relation to PPOs as it does for Northern Ireland. The Scottish legislation that changed how the discount rate is set in Scotland included provision (still to be brought into operation) giving a court the power to make a PPO for future financial losses without the consent of the parties, intended to bring Scotland into line with the rest of the UK.

The second specific issue was the basis on which the Department indicated to the Committee that it can only consider the framework for setting the rate and cannot consider the wider economic or societal impacts of changes to the rate, whether or not the Department sought legal advice on this issue, and why the same parameters do not apply in other jurisdictions.

The position that wider impacts cannot be taken into account in setting the rate stems from the legal principle that the purpose of an award of damages for future financial loss is to provide full compensation, no more and no less ("the 100% rule"). This is an established legal principle that applies in all the UK jurisdictions and dates back as far as the nineteenth-century House of Lords case of Livingston v Rawyards Coal Co. (1880) 5 App.Cas.25. The principle was affirmed by the House of Lords in Wells v Wells [1999] 1 AC 345. Lord Hope was clear that the difficulties of achieving 100% compensation in practice do not change the overriding legal principle:

"…the task of the court in assessing damages for personal injuries is to arrive at a lump sum which represents as nearly as possible full compensation for the injury which the plaintiff has suffered…It is of the nature of a lump sum payment that it may, in respect of future pecuniary loss, prove to be either too little or too much …But these uncertainties do not affect the basic principle. The purpose of the award is to put the plaintiff in the same position, financially, as if he had not been injured."

The same legal principle of 100% compensation applies in the Republic of Ireland and in the case of Gill Russell v HSE [2015] IECA in the Irish Court of Appeal, Ms Justice Irvine observed that the outworking of this is that the economic consequences for the defendant or society are not relevant in the calculation of the amount of damages payable:

"…*the appellant makes a range of submissions that are consistent only with an assertion that the court, when determining the amount of compensation payable, should have regard to the likely effect that the award may have not only on the defendant but also on society at large…It is thus of vital importance to state, in no uncertain terms, that it is mandatory for the court to approach its calculation of future pecuniary loss on a 100% basis regardless of the economic consequences that the resultant award may have on the defendant, on the insurance industry or on the public finances. If large awards in respect of claims of this nature have an adverse effect on insurance premiums or place pressure on the pockets of State defendants, that is not something that the court can take into account and, as a result, in some way moderate or reduce its award. The damages so awarded are, after all, destined to do no more than restore a plaintiff in financial terms to as close a position as they would have enjoyed in terms of wealth and independence had they not been the unwitting victim of the defendant's wrongdoing."*

The Department, informed by legal advice, consulted on changing how the discount rate is set, on the basis that as a matter of law, the application of the rate must, as accurately as possible, give effect to the principle of 100% compensation. Taking into account wider economic or societal factors, which do not relate to the return on investment of the lumpsum award – such as the impact on the cost of insurance or the health service – would, in effect, mean that a person who has suffered serious injuries because of the wrongful actions of someone else would only be entitled to be compensated to the extent that society is able or willing to pay. That would be a fundamental departure from the 100% principle.

The Department considers that the law on the payment of damages in Northern Ireland and the rest of the UK and Ireland is clear and must be followed by the Department, whatever the approach that may be adopted in other jurisdictions. We understand that the evidence to the Committee may have been referencing a 2017 briefing note on a comparative analysis carried out by the British Institute of International and Comparative Law for the Ministry of Justice. The briefing noted that in all the jurisdictions considered, the 100% compensation principle is the object of an award of damages for future financial loss resulting from negligence. While it also commented that determinations in relation to the discount rate in other jurisdictions have been influenced by broader economic and policy factors, this observation appears to have related largely to Australia. There seems to have been a reluctance by some states there to legislate to change their rate to reflect changed economic circumstances, as a result of concerns raised by the insurance industry. Notably, Australian legislation neither prescribes how the rate is to be set, nor requires any regular review. If anything, the experience in that jurisdiction would seem to demonstrate the importance of removing or reducing the opportunity for political lobbying in relation to the setting of the rate by providing (as the Bill does) for a methodology that is certain and transparent and for a requirement for regular reviews.

The Department's consultation was clearly predicated on giving better effect to the 100 % principle, not on replacing it, and we are not departing from that approach. That said, we recognise that the Assembly might consider legislating to change the law on damages so that the 100% principle no longer applied and the amount of compensation payable to a personal injury claimant is instead to be determined by factors outside the loss they have suffered. We would suggest, however, that such a significant change cannot be properly addressed in the context of the current Bill. Apart from anything else, we think it would require specific consultation with stakeholders, including personal injury claimants. Also, as it would be a change to substantive civil law, we think it would be a matter for the Department of Finance.

I trust that the Department's response is of assistance to the Committee. Officials are, of course, happy to discuss further at the meeting on 9 September and look forward to further engagement with the Committee on the detail of the Bill.

CLAIRE MCCORMICK
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