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Christine Darrah
Clerk to the Committee for Justice
Parliament Buildings
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Our Ref: SCOR-219-21

5 May 2021

Dear Christine

DAMAGES (RETURN ON INVESTMENT) BILL

I refer to your letter of 26 March 2021 seeking my views/comments on the Damages (Return on Investment) Bill as it proceeds through the Committee Stage.

I note that the Bill was introduced into the Assembly on 1 March 2021. The Bill passed Second Stage on 9 March 2021 and the Committee Stage commenced on 10 March 2021.

You have advised that the Committee will be considering a number of specific issues and have asked for my views which I have set out below.

- *Is the new statutory methodology to calculate the personal injury discount rate the most appropriate to achieve as close to 100% compensation as possible?*

The Department of Justice advice is that, of the options available, the new statutory methodology to calculate the personal injury discount rate is envisaged to be the most appropriate to achieve as close to 100% compensation as possible, which is fair to both claimants and defendants.

- *Has the new methodology the potential to veer towards over compensation and if so how can this be rectified?*

I believe the Department of Justice are of the view that the current "Wells vs Wells" framework tends to over-compensate. The proposed change in the framework is therefore in itself a mitigation against potential over-compensation.

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As above, the new methodology is considered as the most appropriate to achieve as close to 100% compensation as possible from the options which are available.

- *Does the new statutory methodology reflect how a claimant would be advised to invest their award?*

The rate of return under the new statutory methodology would be based on the claimant investing their award in the notional portfolio which is made up of a number of various types of investment at set out at 12(3) and 12(4) of the Bill.

- *What are the likely effects of using an investment period of 43 years rather than 30 years in the model and do you agree with this approach?*

The assumed investment period of 30 years in the Scottish model may not accord with the average or typical investment period for a lump-sum award of damages. The assumed investment period used by the Lord Chancellor in setting the discount rate in England and Wales in 2019 was 43 years.

I understand that the Department of Justice consulted with the Government Actuary's Department as to the most appropriate period, and following this consultation, concluded that 43 years is more appropriate as this is understood to be the average investment period for a lump-sum award of damages based on evidence collected by the Ministry of Justice. I am therefore content that appropriate consultation has taken place to determine the most appropriate investment period.

- *What are the advantages or disadvantages of transferring responsibility for setting the rate from the Department of Justice to the Government Actuary and is there an appropriate level of accountability in the new statutory methodology?*

The Government Actuary is now responsible for setting the rate for Scotland and has an in-depth knowledge, understanding and overview of the appropriate level of personal injury discount rate across the UK. In transferring this responsibility, the Government Actuary can set the rate as they see fit in conjunction with how rate levels are performing in England and Wales and Scotland.

Accountability for the setting of the rate will therefore rest with the Government Actuary however the Department of Justice will retain the power by regulations to amend the amount of this adjustment (and the other adjustment for taxation and expenses, as well as the detail of the notional portfolio), and the appropriateness of these must be reviewed every five years.

I hope you find this response useful.

Yours sincerely

SUE GRAY