Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Damages (Return on Investment) Bill: Mrs Naomi Long MLA, Minister of Justice

28 January 2021

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Paul Givan (Chairperson)
Ms Linda Dillon (Deputy Chairperson)
Mr Doug Beattie
Ms Sinéad Bradley
Ms Jemma Dolan
Mr Gordon Dunne
Mr Paul Frew
Ms Emma Rogan
Miss Rachel Woods

Witnesses:

Mrs Long	Minister of Justice
Mr Peter May	Department of Justice
Ms Laurene McAlpine	Department of Justice

The Chairperson (Mr Givan): I formally welcome Naomi Long, the Minister of Justice; Peter May, the permanent secretary; and Laurene McAlpine, the deputy director of the civil justice policy division. The session will be reported by Hansard, and a transcript will be published in due course.

Minister, I will hand over to you at this stage.

Mrs Long (The Minister of Justice): Thank you, Chair. I very much appreciate it. Thank you for the opportunity to address the Committee on the reasons that the Damages (Return on Investment) Bill needs accelerated passage. I am particularly grateful to the Committee for making time at short notice.

The reason for seeking accelerated passage for the Bill is to allow a stable discount rate to be set as soon as possible, as this is the only way to bring an end to the ongoing uncertainty and consequent delays that claimants are experiencing in the settlement of personal injury claims. Currently, the rate set under Wells v Wells is 2·5%. However, the Department has concluded that the Wells v Wells methodology does not deliver 100% compensation and that legislation should be brought forward as quickly as possible to change the basis on which the rate is set. For some time, claimants and defendants have been expecting the rate to change and almost certainly to reduce, whether under Wells v Wells or, as the Department has now decided, under a new legal framework. For claimants, even a small downward adjustment in the rate can mean a substantial increase in their lump sum. It would not be in a claimant's interests to offer to settle cases until the rate is reduced. Until that happens, cases are being deferred, thus creating a backlog in the courts. I want to be able to set a

new rate and have that in place as soon as possible to bring the delays to an end and to enable claimants to have the full amount of compensation to which they are legally entitled.

It is not in the interest of defendants to have cases delayed. I am aware that, in some cases, parties are negotiating settlements outside of the prescribed rate, but that is not possible in all cases and many are on hold. None of us wants that. It is especially not good for those who have suffered serious injury and want to receive their compensation so that they can get on with their lives. This uncertainty will end only when a stable rate is set under a new legislative framework. It follows that we want the framework to be in place as soon as possible, hence the request for accelerated passage. If accelerated passage is granted, I am hopeful that the Bill will receive Royal Assent by the summer — possibly sooner — dependent on the Assembly. Under the legislation, the Government Actuary's Department (GAD) would be required to set a new rate within 90 days, and I hope that that could be done more quickly. A new rate could be set by early autumn. I cannot say that that would be possible outside of an accelerated passage procedure.

I am sure that no one will disagree with the policy aim of the Bill, which is to deliver the legal principle of 100% compensation, better than is currently the case. In giving effect to that, the Bill is largely technical in nature, prescribing the detail of how the Government Actuary's Department will determine the rate. I appreciate that, technical or not, the Committee would prefer to scrutinise the Bill as normal. Normally, we would welcome that input, but the time taken for scrutiny will inevitably mean that it will take longer for the Bill to be enacted with a new fixed rate under it. Such a delay is not in the best interests of personal injury claimants.

In steps taken to minimise the future use of accelerated passage, I can assure the Committee that I have no plans to use the procedure again, and I would not expect the particular circumstances of this Bill to arise again. This is very much an exceptional request.

I am happy to answer members' questions about the accelerated passage. Before that, Laurene will talk you through the detail of the Bill.

The Chairperson (Mr Givan): Thank you, Minister.

Ms Laurene McAlpine (Department of Justice): Thank you for the opportunity to brief the Committee on the content of the draft Damages (Return on Investment) Bill. It will amend the Damages Act 1996 as it applies to Northern Ireland to put in place a new statutory framework for setting the discount rate. The Minister referred to the legal principle of 100% compensation, meaning that an award of damages for future financial losses should fully compensate a claimant for those losses, but no more and no less. The Bill does not change that. Indeed, as the Minister said, the overall purpose of the Bill is to give better effect to that core principle.

Whilst the provision in the Bill, in particular in the schedule, is quite technical, in summary, it does three key things. First, it provides that the task of reviewing and determining the discount rate be carried out by the Government Actuary. That is in clause 1, which provides for a new section to be inserted into the 1996 Act.

Secondly, the Bill sets out a new methodology for how the rate is to be calculated, which is based on the assumption that a claimant invests their damages award in a mixed portfolio of low-risk investments. That is to reflect the reality of how a claimant would be advised to invest their lump sum. It is in contrast to the current framework, which, applying Wells v Wells, assumes that a claimant invests in only very low-risk, index-linked gilts.

Thirdly, the Bill establishes a time frame for regular reviews of the rate.

The detail of the new methodology and the time frame for reviews are provided in a new schedule to be inserted into the 1996 Act by clause 2.

Paragraphs 1 and 2 of the schedule deal with the timing of reviews. The first review, which will begin as soon as the legislation has commenced, will be a review of the current rate of 2·5%. The next review will be in July 2024 to align with the reviews of the discount rate in Scotland. The rate will then be reviewed every five years. Under the Bill, the Department has the power to require an earlier review but that would not affect the cycle of five-yearly reviews. Under paragraph 3, the Government Actuary is required to complete a review of the rate within 90 days.

The next paragraphs in the schedule set out the basis on which the Government Actuary is to determine the discount rate. Under paragraph 7, it is to reflect the rate of return on an investment over a 43-year period in the notional portfolio. The notional portfolio is set out in paragraph 12. Under paragraph 9, the rate is to be adjusted to take account of inflation. Paragraph 10 provides for two standard adjustments:

> *"a deduction of 0.75 of a percentage point to take account of the impact of taxation and the cost of investment advice and management and a deduction of 0.5 of a percentage point as a further margin".*

The fact that the investments assumed to be made by a claimant are specified in the legislation is one of the reasons for adopting the Scottish model: the basis on which the rate is calculated is thereby clear and transparent.

The 43-year assumed investment period is a small difference from the Scottish framework, which uses a period of 30 years. We opted for the 43-year period on the basis of evidence that it reflects the average period over which personal injury claimants invest. England and Wales also used a 43-year period. The further margin of 0·5 of a percentage point is intended to protect against the risk of under-compensation in view of the risk inherent in any investment, however carefully advised.

The schedule gives the Department a number of powers to change by secondary legislation the parameters within which the Government Actuary is to set the rate. They include, in paragraph 8, the power to change the assumed period of investment of 43 years. Paragraph 11 confers a power to change the amount of the standard adjustments, and paragraph 15 confers a power to make changes to the notional portfolio. Any regulations made under those powers are subject to draft affirmative procedure, so they will be subject to scrutiny by the Assembly. The provision in the Bill therefore ensures that there is political accountability in how the rate is set while recognising that, once the method for calculating the rate is prescribed in legislation, the task of applying it to determine the rate is an actuarial exercise.

The paragraphs towards the end of the schedule include provision:

> *"for the Government Actuary to send a report of his review to the Department"*

— that is paragraph 23 — which the Department must, under paragraph 24, then lay before the Assembly. Under paragraph 25, the discount rate:

> *"as determined by the Government Actuary will come into effect on the day after the report is laid."*

Finally, clauses 3 to 6 are about ancillary matters including interpretation and commencement. We are happy to take any questions from the Committee.

The Chairperson (Mr Givan): Thank you. I have a couple of questions. The Bill has been drafted on the basis of the Scottish model. What was the Department's timeline for that? In a letter dated 10 December, the Committee advised the Department that it required further engagement with the Department and key stakeholders on whether the Committee supported the Scottish model for the new framework. The letter that the Committee received on 19 January said that the draft Bill was settled only last week. On that basis, did the Department proceed with getting the Bill drafted, implementing the permanent secretary's preferred framework, without first knowing whether the Committee supported the Scottish model?

Ms McAlpine: Instructions for the Bill were sent in November. I think that we saw the first draft in early December and the final version on 13 January.

The Chairperson (Mr Givan): Yes, Laurene, but did the Department go ahead with giving instructions despite the Committee not having indicated whether it supported the Scottish model?

Ms McAlpine: We do not have that indication from the Committee. The Executive approved instructions to draft.

The Chairperson (Mr Givan): Again, just answer the question: did the Department seek the Executive's approval to instruct a Bill to be legislated for, a Bill based on the Scottish model, without having sought the view of this Committee?

Mrs Long: Yes, I did, as Minister.

The Chairperson (Mr Givan): OK. Scotland added an additional margin that ensures that the applicant is not under-compensated and accepted that, in doing so, there was a risk that it could result in overcompensation. Can you clarify that for me? As you have said again today, the Department's core objective is 100% compensation — nothing less and nothing more. The Scottish model seems to build in, through a deliberate policy decision, a 0·5% margin to ensure that there is no risk at all of under-compensation. Does the Scottish model present a risk of overcompensation? Is that at odds with the Department of Justice's stated position that it wants 100% compensation?

Ms McAlpine: It is a legal principle of 100% compensation, but how you achieve that is not an exact science. The same principle applies in England and Wales and, I believe, in Ireland. Everybody is trying to devise a methodology that best delivers that. We think that our Bill best delivers it. Obviously, Scotland thinks the same about its Bill, as do England and Wales about theirs. We have a further 0·5% margin, but we have also provided for a slightly longer investment period than Scotland, which might tend to a higher return on investments.

The Chairperson (Mr Givan): Does the England and Wales model include the built-in 0·5% to ensure that there is no risk of under-compensation?

Ms McAlpine: It is not in their statutory framework. It is left to the discretion of the Lord Chancellor, and there are certain assumptions that he applies. That is why we think that our Bill and the Scottish Bill are clear and transparent: we know what the investments are supposed to be and what the statutory adjustments are supposed to be. The Department, with the approval of the Assembly, can change those assumptions and adjustments, but that is clear in the legislation, whereas, in England and Wales, it is more a matter for the Lord Chancellor's discretion, and he will be advised by a panel of experts. When they changed their rate in 2019, they applied a 0·5% deduction.

The Chairperson (Mr Givan): In terms of the change from 30 years to 43 years, are you able to provide an example of what the differential in payment would be?

Ms McAlpine: We will not know that until the Government Actuary's Department has run the numbers. Potentially, it will become apparent when GAD has a review and runs the numbers against the notional portfolio of 30 years in the case of Scotland and against an investment period of 43 years in the case of Northern Ireland. However, it may be that, with rounding, it will make no difference: if it is less than 0·25%, it might not be that significant anyway.

The Chairperson (Mr Givan): The proposed model is not the Scottish framework in that respect. The proposed model is 43 years, rather than the 30 years in Scotland.

Ms McAlpine: It is the Scottish framework in the sense that the Government Actuary makes the decision, and it is based on a notional portfolio and the prescribed deductions. Going forward, it is entirely possible that Scotland or Northern Ireland could, under their legislation, change their respective portfolios or the amount of the deduction.

The Chairperson (Mr Givan): One of the issues that we had identified in England, Wales and Scotland was access to the Treasury reserve. Are you able to clarify that the Treasury, recognising the increased payments that would be made, granted access to its reserve? Would we get access to the Treasury reserve for the additional payments required as a result of this change?

Ms McAlpine: That question is more for the Department of Health and the Department of Finance. In setting the rate, the Department of Justice does not take into account the cost to defendants. The Department recognises the potential cost but it is for those Departments to put a figure on that. Officials from the Department of Finance and the Department of Health may be considering an approach to the Treasury, but that is a matter for them, not the Department of Justice.

The Chairperson (Mr Givan): However, the Department of Justice has set up a new framework and rate that will have a knock-on impact on the money spent on medical negligence claims, for example, against the Department of Health.

Ms McAlpine: That is right. The principle is 100% compensation, and we are following that criterion.

The Chairperson (Mr Givan): The Scottish framework removes ministerial accountability. The draft Bill and schedule refer to the Department's ability to change, by way of regulation, the rate of discount. Therefore, will you be truly independent? An expert panel sets the rate, but you retain the power to provide a regulation that could, for example, change the 0·5%?

Ms McAlpine: We do not have an expert panel setting the rate. The portfolio is set in the legislation, so the Government Actuary applies that. If the portfolio were to be considered no longer suitable, we would consider that, alongside advice from the Government Actuary.

The Chairperson (Mr Givan): Has an impact assessment of these changes in respect of the insurance industry in Northern Ireland been carried out? What are the implications for businesses and consumers?

Ms McAlpine: No, it has not. Again, that is because the cost to defendants is not a consideration in setting the rate; it is about securing 100% compensation. It is not a matter of, "Well, 100% compensation will cost defendants too much, so we will give plaintiffs less than 100% compensation." The plaintiffs are entitled to what they are entitled to under the law, which is 100% compensation, and this is just the best way that we can devise to deliver that.

The Chairperson (Mr Givan): OK, I will bring other members in at this point.

Ms S Bradley: Thank you for the information to date. I take it from your commentary that the Executive gave their consent to go ahead with the drafting of the Bill. At that stage, was accelerated passage mentioned at Executive level?

Mrs Long: Yes, I said that it was highly likely that I would seek accelerated passage. I also flagged to the Executive that I would be discussing that with the Committee today. They are aware of the need for accelerated passage in this case.

Ms S Bradley: I think that there is a difference of the best part of six months in the timeline if accelerated passage were not granted. That shows that you could get this across the line faster; I accept that. I am trying to get a sense of the scale of the problem. For example, accelerated passage would have weight if there were cases waiting, but it would not have weight if there were zero cases. I do not know how many cases there are in the private sector and the public sector, and I have not seen any evidence of outstanding cases. Are those people being made aware that they can claim an interim payment? We are tinkering around the margins in terms of the percentage, but the larger part of any payment due to them could be settled while that piece of work was being carried out. Are you aware of any efforts or attempts to make sure that claimants understand that?

Mrs Long: In answer to the first part of your question, it is impossible to know exactly how many cases are awaiting settlement. How close a case might otherwise be to settling is known only to the individual parties to that claim. In September 2020, correspondence from the Association of Personal Injury Lawyers informed us that the majority of its settlements were on hold, so it is a significant issue. However, we do not have figures to put against that.

The Department has no influence whatsoever on the advice given to claimants. People in that situation seek their own independent legal advice. It is for their solicitor or legal representative to advise on whether they should take a partial settlement or an advance payment, or whether they should continue to hold out until the rate has been changed. All of that is subject to the legal advice given to individuals, which will be tailored to their specific circumstances and need. It may not always be possible to negotiate some kind of advance payment if there has been no agreement on the extent of any future payment, but the Department has no influence on that.

Ms S Bradley: I am sure that you appreciate that we are being asked to forego scrutiny of the Bill at Committee Stage, yet there are alternatives to partially settling, and we do not know the scale of the problem. That means that it is really difficult to make a judgement on it.

You have, essentially, adopted the Scottish framework, which, as far as I have been led to believe, quite explicitly and openly declares that it is there to ensure that the claimant is safeguarded and will not be under-compensated. That is quite a strong political position to take, but Scotland has taken it and is open about it. I have concerns, if we adopt that model, about our deviating from that in part, which the Chair spoke about. We are taking the Scottish framework but adding the extra years — it has gone from 30 years to 43 years — adopted by the Welsh and English. I would have thought that the longer you invest in a portfolio, be it notional or not, the greater the return is likely to be. Are we taking one position and amplifying what could be a difference between the two models by extending the number of years on the notional portfolio? Who set the original notional portfolio?

Mrs Long: On the political question, the reason why we are asking for accelerated passage is that we know from the claims that there are delays. There are people seeking to have their claims settled who do not feel that they can do so at the moment. That is backed up by the information that I recorded earlier in the discussion. Remember that there is still a legal duty on us to ensure that all victims receives their 100% compensation. That is what we have to aim to achieve. That is what we are required to do. At the moment, that is what we cannot achieve. It is therefore important that we do this irrespective of how many people are waiting. We are not fulfilling our obligation to deliver 100% compensation, and we need to correct that as soon as possible. There is an imperative to do this and to do it quickly.

I will pass to Laurene to go into more detail on the technical aspects. Bear in mind that the outturn of whatever portfolio is set and whatever term of investment is set will then be assessed by the Government Actuary. It is not that any adjustment to the length of investment or the portfolio will not be accounted for in the work of the Government Actuary. I am happy to hand across to Laurene for the detail on that.

Ms McAlpine: On the 43 years, we have taken into account that, based on evidence from the Ministry of Justice, that is, in reality, the average length of a personal injury claimant's investment period. That is evidence-based. I do not know where the 30 years came from in Scotland.

We consulted GAD on the notional portfolio, and it indicated that it is still appropriate. I cannot honestly speak to where Scotland came up with the portfolio in the first place, but I expect that it was after consultation with GAD. GAD has certainly indicated to us that it is still appropriate.

Ms S Bradley: OK. So, you are just mirroring exactly the Scottish portfolio.

Ms McAlpine: After consultation with GAD.

Ms S Bradley: OK. Have you considered, Laurene, that extension of the years? Without understanding why Scotland has gone for 30 years, may it be that it was to, for want of a better word, *[Inaudible]* the fact that it is, unapologetically, leaning towards having a more claimant-friendly Bill? The 30 years may be some way of rectifying or adjusting any overpayment that may happen. Should we be investigating that? If that is the case — I do not know that it is — the 43 years might amplify any correction that is needed

Ms McAlpine: The Bill in England and Wales and the Bills in Scotland and Northern Ireland are about 100% compensation. It is not about having a claimant-friendly Bill or a defendant-friendly Bill; it is about how we deliver 100% compensation. As I said, in practice, with rounding, the 30-year or 43-year period might not make any difference when GAD comes to run the numbers. We went for 43 years, as did England and Wales, because there is an evidence base for that.

Mr Peter May (Department of Justice): Laurene might make sure that what I am saying is correct. My understanding is that, in Scotland, England and Wales, the 0·5% margin is applied. The difference is that, in Scotland, it is in the legislation. In England, it is at the discretion of the Lord Chancellor. If, at some point, the Lord Chancellor chose to change that, he would be able to do so without recourse to the legislature, whereas our proposal requires any change to that margin or the notional portfolio to come back in front of the Assembly and to be debated and considered in that way. So, to some extent, our approach is more transparent. However, I do not think that the margin actually makes a difference in practical terms currently, even though the two pieces of legislation say slightly different things.

Ms S Bradley: OK. I appreciate that assurance because it concerned me that we were proposing sticking to the script in large part and then deviating with something that could have an effect overall.

Yes, ultimately, everybody is aiming for 100%. That is why I am concerned that, through that deviation, we may do something that would take us further from 100%, which is, ultimately, everybody's target from whatever is agreed or decided. I am trying to weigh this up, as you can appreciate. The accelerated passage piece is based on the duty to ensure that 100% can be achieved as soon as possible. That is a duty on the Department, and I appreciate that.

The Chairperson (Mr Givan): Just to clarify, whilst the Lord Chancellor has the discretion to use 0·5%, does the Scottish model not have two steps it adds to the percentage, so it has 0·25% and then 0·5%? Is that why the percentage in England and Wales is different from the one in Scotland?

Ms McAlpine: No, we have 0·5% for the further margin, and we have 0·75% for investment, advice and management and that sort of thing. They have that in Scotland as well. The Lord Chancellor applied the same deductions, but he did so as a matter of discretion. In Scotland, however, it is in the legislation, as is the case here. If we wanted to change those margins, we would have to go to the Assembly to do so.

The Chairperson (Mr Givan): How do we account for the current difference in the rate between the Scottish model and the English and Welsh model?

Ms McAlpine: There are a couple of reasons for that. The first is that England and Wales fixed their rate at a slightly different time than Scotland did, so there were some market adjustments between the two time periods. Also, they used a slightly different portfolio. The portfolio that the Lord Chancellor relied on was not identical to the Scottish portfolio. There is a third reason, which currently escapes me.

The Chairperson (Mr Givan): It is just that, when we met a group to discuss —.

Ms McAlpine: Oh yes, sorry, the 30-year/43-year period may have accounted for a difference between the English and Scottish rates. Everybody is aiming for 100%. Scotland, and England and Wales are at different rates. When the GAD runs the Northern Ireland figures, we may very well have a different rate again, because the market will be different from what it was when England and Scotland ran their rates.

The Chairperson (Mr Givan): A number of us met representatives from the Forum of Insurance Lawyers (FOIL), and they gave us an example of an award that, under the Scottish model, would equate to £10 million and that, under the English and Welsh model, would be £8·5 million, giving a differential of £1·5 million more in Scotland. That was based on the Scottish 30 years. If we were to go for 43 years, logic would indicate that that would be a further differential compared with the English rate. Everybody wants to achieve 100% compensation — no more and no less. In the example that we were given, the difference was well over £1 million, and, under the move to 43 years, which you are not able to quantify or provide an example of, it could be even more.

Ms McAlpine: I caution against attributing the difference with England and Wales solely to the difference between the 30-year and the 43-year period. My impression is that that was mostly to do with the time at which the English rate and the Scottish rate were set, and there were also some slight differences in their portfolios. If there is a difference when the Northern Ireland rate is set, it will not be because of the 30 years or 43 years. There may be some difference because of that, but the main difference will be that the markets will have shifted so significantly from when the English rate and the Scottish rate were set.

Ms Dillon: Thank you, Laurene, and thank you, Minister. A lot of what I was going to ask has been well covered.

One of my main concerns — this is probably more for the Minister than Peter or Laurene — is about accountability and the fact that there is no ministerial responsibility. I understand that, and we obviously have information on it. However, I just want to check this, and excuse my ignorance: who is the Government Actuary responsible to? As I said, with there not being ministerial responsibility, I am a wee bit concerned about accountability and how we ensure that it is there. I have made this point before: we, as elected representatives, are accountable. If people do not like what we are doing, they can get rid of us any time that they want. They have that opportunity every four to five years. Obviously, others are employed and have all the rights that come with that, and rightly so. It is good that we, as elected representatives, and Ministers can be held to account. It is really important to have

that. How do we ensure that accountability? Is not having ministerial responsibility for that actually the right way to go?

Mrs Long: To be absolutely clear on that question, Linda, I have been very transparent about declaring my particular conflict of interest arising from my husband's membership of a medical defence union. Accordingly, I asked the permanent secretary to make the key policy decisions. Although the decision that the legal framework for setting the rates should be changed has been made by him, it is entirely for possible for me to bring the Bill that will implement that policy through the Assembly as normal. So, you will have the usual opportunities to question me on why that decision was taken, how it was taken and so on, even though it was not me who took the decision. It is not that there is no ministerial accountability for the process; it is simply that it would not have been appropriate for me to make the two decisions where there could have been a perceived pecuniary interest on my part.

If further decisions on any amendments arise during the passage of the Bill, I will, obviously, consider whether it is necessary for me to delegate those decisions to the permanent secretary, if, for example, those relate to areas where there could be a perceived pecuniary interest. However, again, it would not prevent me coming to the Assembly Chamber, undertaking my proper role and being allowed to do that.

If you look at the proposal that you have about putting these issues in the Bill —.

Ms Dillon: Minister, sorry. I apologise for cutting across you. Maybe it was how I framed the question, but I actually accept the issues around the *[Inaudible.]* I am talking about —.

Mrs Long: Yes. I was about to come to the second part of your question, Linda.

Ms Dillon: On the Bill? OK.

Mrs Long: I was coming to the second part of your question, Linda, on accountability for the legislation in the longer term. First of all, we are asking for accelerated passage; we are not suggesting that we take the Bill through without an adequate space of time between each stage. As you know, with accelerated passage, a Bill can be passed within 10 days. We are proposing to get a new framework and stable discount rate in place urgently. However, I still want sufficient time between stages to allow Members the opportunity to digest the technical detail of the Bill and to inform the debate on it. That will still be possible under accelerated passage. There will still be opportunities to properly debate and scrutinise the Bill and table amendments at Consideration Stage. Again, it does not preclude that oversight.

Furthermore, the Bill itself, as Laurene explained, actually adds to the transparency and accountability, because, if we decide to make any adjustments or changes either to the portfolio or rates, those would have to be brought back to the Assembly for further debate through legislation. In many ways, there is more oversight on the Bill as a result of the model that has been chosen than there would normally be and that may have been the case for the English and Welsh model. I also do not think that accelerated passage denies the opportunity for scrutiny. Although it obviously removes the Committee scrutiny element, it certainly does not, for example, prevent scrutiny and, indeed, amendment and so on in Consideration Stage and Further Consideration Stage.

The key issue is that, in the long term, the issue with the Government Actuary making changes will have to be brought to the Committee and Assembly if any changes were going to be made. In that respect, you have oversight of any changes that are proposed. Laurene, do you want to answer the question specifically on the Government Actuary and its departmental responsibilities?

Ms McAlpine: The Government Actuary is a non-ministerial Department. It comes under the umbrella of the Treasury, and I think that the chief Government Actuary probably reports to the permanent secretary in the Treasury. It is a non-ministerial Department, and it has indicated that it is more than content to help the Northern Ireland Executive with the legislation.

Ms Dillon: My question was more about the setting of the rate going forward and ministerial accountability for that rather than some of the issues that the Minister raised.

Mrs Long: Bear in mind, Linda, that I will not necessarily be Minister. In future reviews there may not be a conflict, in which case it would be for the Minister to bring the Bill forward, but it will have scrutiny in the Assembly because it could not be done other than via legislation.

Ms Dillon: OK. Fair enough.

Mr May: I think that, if I understood it correctly, half the question was about whether the Minister should have a role in setting the rates. There are alternative options. The England and Wales model provides for the Lord Chancellor to make the decision based on the work of a panel of experts. The reason why we drafted the Bill in the way that we did is because it is not clear on what basis a political figure should change the decision reached by the independent expert, which, in this case, is the Government Actuary. If the Government Actuary decides that a certain level will deliver 100% compensation, what would be the basis on which a political decision would then be taken to change that? Again, for the purposes of transparency and so that all parties to any court case understand clearly how a decision was reached — in this case, it would be based purely, as I say, on that independent assessment — we believe that that is a more satisfactory approach than one that allows the Minister —. It gives accountability, but it is not clear on what basis any Minister could then intervene to change that rate.

Ms Dillon: OK. I accept what you are saying to a degree, Peter. We did not have great experience with independent oversight in the Assembly when we had it, on some occasions, so maybe that is what makes me a bit nervous.

Mr May: The way that this will work is that the rate will be set and, as cases are settled, people will be able to judge, and if they believe that there is a problem, that would, in exactly the way that you would expect, come back to the Department. If it were concerned, the Department could choose to have a review before the five-year period. Alternatively, if it were convinced that there was a problem, it could look at either the notional portfolio, if that seemed to be the cause of the problem, or at the half per cent margin, if that appeared to be the cause of the problem, and then bring proposals to the Assembly to make a change. In that way, there would be ministerial accountability for the system that is put in place. It is just about the way in which the rate is set and that it needs to be for the courts to determine the cases that are before it. There is no political role in that bit, and, if I may say so, I think that is the right way to look at it.

Ms Dillon: OK. Thank you, Peter and Minister.

Mr Frew: Thank you for your time and your answers so far. On that last point, Peter, on the actuary versus a political decision, I get why that dilemma and that question is there, but has that been extended into the political process of producing law? Is that one of the reasons why you are going for accelerated passage through the legislature?

Mr May: The only reason for accelerated passage is to try to resolve the uncertainty that exists so that those who are in the middle of cases, on whichever side, have a solid basis on which to resolve them. As the Minister explained, we are aware of cases, the number of which we cannot quantify, in which there is delay. That is undesirable. The Committee has drawn that out in previous engagements that it has had with us about the Bill.

Mr Frew: I get the urgency and the duty on you to produce something as quickly as possible, but "as quickly as possible" could mean many things in a process that you are going through. You are leaving out the Committee's scrutiny piece in order to produce the legislation as quickly as possible. I get the duty to do it as quickly as possible in order to give people certainly, but you said that you cannot quantify the number of cases that are going through. Surely you have it within your remit to get the quantum of listed cases.

Mrs Long: With respect, Paul, the issue is not that you cannot tell what stage cases are at. Knowing that there are live cases does not give you any indication of how close a case might be to settling. That would be known only by the individual parties. Some of the cases that are in negotiation will not be ready to settle even if a new rate were to be set. Others may have agreed everything bar the settlement on the basis that they do not want to agree at this stage without the new rate being in place. We have no insight into what stage those cases are at, nor would we be expected to; it is an entirely private matter between the two parties. We cannot provide the kind of information that you are seeking about the number of cases that may be affected.

We are looking to speed up the only part of the delivery process that we can, which is, first, passing the Bill through the Assembly process. We are looking to do that with pace, but we are not cutting out all opportunity for scrutiny and engagement. That is important because I recognise the important role that the Committee has in scrutinising the Bill. We are also, for example, looking to work with the Government Actuary's Department in advance so that we can deliver, hopefully in fewer than 90 days but at a maximum of 90 days, the decision on the rate to allow us to be able to move to a stable position as quickly as possible. Where we can do things quickly, that is what we are seeking to do. Those are two areas where, at this stage, we can make savings on time without a huge loss of scrutiny.

As I said, the minimum period is 10 days. We are not aiming to put the Bill through in a 10-day period because we recognise that the Committee will want to reflect and may have a wish to bring issues at Consideration Stage and at Further Consideration Stage. We want to try to accommodate that, albeit with accelerated passage.

Mr Frew: So —.

Ms McAlpine: People will not set their cases down for trial if there is a big outstanding issue about the statutory discount rate. It is not just a matter of asking which cases are listed, because people will not list them.

Mr Frew: Given the present delays in our court system, would it not be unwise not to list as soon as possible in order to get to the other side of that court process more efficiently and quicker? So —.

Ms McAlpine: Most of those cases will be settled without being heard in court. If you were a plaintiff, you would make haste slowly because you would not want to settle your case or have it disposed of with the current rate as set under Wells v Wells.

Mr Frew: So, it is not the case that court processes or cases are being delayed; it is that the delay seems to be in moving and listing them. Is that correct?

Ms McAlpine: It is a matter —.

Mrs Long: No. It is *[Inaudible]* them.

Ms McAlpine: It is a matter between two private individuals. It is not like a criminal case that is driven by the state through the police and the prosecution. You have two private individuals, and how quickly or slowly they move their case is more under their control. There is case management, and the court would want to know how a case is progressing, but it is not the same as a criminal case, where the judge will want to drive the case on and there is more state ownership of the progress of the case.

Mrs Long: The key issue, Paul, to answer your question, is that the impact of not being in a position to meet the requirement of 100% compensation is that victims are not settling their cases because they are fearful of being undercompensated if they do. The sums of money that are involved can be life-changing, so it is entirely understandable and justifiable for them to be concerned about that. The only way that we can move from that position to a more stable position, where people can then progress their cases based on case progression in normal circumstances and are not influenced by this, is to get to a point where we have a stable rate that is recognised to deliver that 100% compensation. That is why it is so important that we get to that point quickly. So, it is not really about the business of the courts as much as it is about delivering the compensation to those who have been affected and are entitled to it. The delay really lies there rather than in the courts.

Mr Frew: Minister, you say that you will not use the 10-day period between stages. What, then, is the sufficient amount of time between stages?

Mrs Long: It is not about saying what the sufficient amount of time is; I am simply pointing out that the minimum is 10 days. Obviously, we want to make swift progress — it is important that we do — but we anticipate there being a few weeks between each stage in order to give Members the opportunity to engage properly with the Bill and to scrutinise it in the Chamber and when any amendments may be tabled at Consideration Stage or Further Consideration Stage.

Mr Frew: What you are saying is that you want MLAs to scrutinise a Bill without the support of the Committee structure. If that is the case, is there not a danger of MLAs coming to the Chamber totally uninformed and moving amendments that are, due to haste or by mistake, detrimental to your Bill, the outcome of the legislation and what you are trying to do? You could stand on the Floor and say, "You are wrong to bring this amendment because you have not scrutinised it properly". Would that be your stance?

Mrs Long: The fundamental issue is that, for every piece of legislation, the Committee plays a crucial role in scrutiny, but it is for every MLA, before they participate in a debate and vote, to scrutinise legislation. That is part of our role as Members, and we have a duty to do it. I have faith that Members will make the effort to do that if they are going to participate actively in the debates and, particularly if they are to table any amendments, to engage with the Department on them and discuss them in advance. That is why I said that we are not talking about 10 days; we are talking about having sufficient time between stages in order to give Members an adequate opportunity to digest the technical detail of the Bill and to inform the debate on it.

Mr Frew: Just to be clear, that would not be a formal Committee function; the Committee may well dip into aspects of the Bill, but there would not be a formal Committee Stage.

Mrs Long: That is correct.

Mr Frew: So, the work that the Committee as a whole could do on the Bill would be quite limited.

Mrs Long: Of course, and that is the downside of accelerated passage, which is why I said in my opening remarks that I would use it in only extraordinary circumstances and that it is not something that I anticipate using again in this mandate. As you well know, it is not something that I would be keen on using if the circumstances were not as urgent as they are in this case.

The degree to which I value the Committee's input into legislation is clear given that we did not piggyback on the Westminster legislation when we were doing the Domestic Abuse and Family Proceedings Bill in order to ensure that MLAs and the Committee had the opportunity to help it. That Bill is better for the work that was put into it. So, this is not something that I see as a routine matter; I recognise the importance of Committee scrutiny, and, as someone who sat on Committees for a long time, I value the work that they do and think that it is important. This situation is, though, an issue of urgency, and the accelerated passage procedure mechanism is there for circumstances such as this. This is exactly what it was designed for: Bills that are highly technical in nature and are unlikely to generate a lot of amendments and changes because of their technical nature and that are required to be delivered with a degree of urgency that perhaps does not apply to other legislation. In that sense, it fits the bill for going through under accelerated passage, but it does not in any shape or form create a precedent or undermine the value of the work that the Committee does on other pieces of legislation. Indeed, you have two substantive pieces of legislation with you at the moment, and I look forward to engaging with you in future meetings over those.

Mr Frew: As a final question, Minister, on the court processes, do you have a percentage of the current rate or speed of the court process in comparison with what it was at this time last year? Is it running at 50% or 30% of capacity?

Mrs Long: These would be civil court issues. In the criminal courts, we have been running above 100% over the last number of months with the work to try to clear the backlog. We have been working very hard to do that. Given the pandemic and the impact that it has been having with pressures on people, we have had to step that down slightly in order to allow all sections of the system to continue to fully function and to not lose any of the detailed consideration that is given to victims and the support and so on around that. However, we are still functioning at over 100% of the capacity with the cases that are going through. That is in order that we not only deal with new cases but tackle the backlog that was created when the courts were shut for a period while we COVID-proofed them for future work.

Mr Frew: What about in civil courts?

Mrs Long: I do not have those figures for civil courts. I have the others from recall because we were dealing with the Criminal Justice Board last week and I have those figures to hand. However, I can

certainly give you those for the civil courts. As I said, in this case, the issue is not so much driven by court capacity as it is entirely driven by the willingness of the two parties to reach a settlement.

Mr Frew: Thank you.

The Chairperson (Mr Givan): I have a quick query before I bring in Rachel Woods. Is there any risk of the Executive or the Assembly going down a different route around the Scottish model and the Treasury then saying that we have to pick up the tab because we have deviated from the English and Welsh model?

Mrs Long: I do not believe so, no, because Scotland has been able to introduce its model, so it is one of a range of options. We are not deviating from the principle, which is to deliver 100% compensation, and we are still doing that within the reasonableness confines of what is required of us. So, I do not anticipate that being an issue.

The Chairperson (Mr Givan): Rachel Woods.

Miss Woods: Hello, Chair. Can you hear me OK?

The Chairperson (Mr Givan): Yes, we can now.

Miss Woods: Perfect, thank you.

Minister, Peter and Laurene, thank you very much for coming to the Committee today; I really appreciate it. One of my questions was about the Treasury, and that has been asked. However, with regard to the letter that is dated 19 January, it is clear that the assessment is for the Bill to become law and a new rate to be set before the Assembly term ends, and that is regardless of whether accelerated passage is granted. Is that correct?

Mrs Long: Yes.

Miss Woods: OK. With the information that we have in the letter, the difference between accelerated passage and the normal procedure for the Bill would be a rate that is set around autumn 2021 or early 2022.

Mrs Long: Early on — sorry, go ahead.

Mr May: We cannot determine how quickly the Assembly will conclude the process in the event that there is a Committee Stage, so we have to make a projection as to how long that would be. We can say with some certainty that the legislation will be passed before the summer under accelerated passage, and then we would be able to proceed in less than 90 days after that. Therefore, we would have a rate in place no later than the early autumn. It is much harder for us to determine at what point the legislation would actually pass if there were not to be accelerated passage before then adding on the extra time for the actuary after that. You are right that it is unlikely to be before early 2022, and it could be a bit later than that.

Miss Woods: OK, thank you. Is it possible for the Bill to go through under normal procedure — that is, to have a Committee Stage — much more quickly than has been suggested and for the rate to be set around autumn this year without accelerated passage?

Mrs Long: I do not believe that it is possible to have a Committee Stage and to meet the kind of time frames that we would be talking about with accelerated passage. That is why we are seeking accelerated passage. That is one of the reasons why we have brought this request to the Committee. I do not think that it is possible to do it as quickly with the Committee Stage, given the strictures around that.

Miss Woods: Earlier, the Bill was referred to as being highly technical, and it was said that accelerated passage could be used because of that and its urgency. We are creating a new legislative framework for setting rates. It is a very important and complex exercise, and I do not claim to know all the details in this. However, it is a legal framework that will shape a process and future procedure, and

it is not simply about a calculation or formula to produce numbers. The new legislation will have lasting effects.

Whilst I appreciate that there is fine detail in this, the Scottish Parliament introduced its Damages Bill on 1 June 2010, and it was scrutinised by the Finance and Constitution Committee and the Subordinate Legislation Committee. It passed First Stage six months later in December. At the Bill's Second Stage, the Scottish Justice Committee considered 17 amendments, and it was referred back again. Many of the amendments were made, and the Bill got to Final Stage in March 2011, nine months after it was introduced. The Scottish example is important because it showed that the devolved legislator had a big role in refining and improving the legal framework as the Bill went through normal stages.

I know that it is refined, detailed and complex, but do you think that opportunities to refine or improve the Bill could be lost as a result of not having the Committee Stage?

Mrs Long: There are two elements to that, Rachel. First, the Scottish model has been tested through the Scottish Parliament. Whilst I am not suggesting for one moment that that in any way supplants the right of the Northern Ireland Assembly to look at its own business, there has been a degree of testing and stress-testing around this.

You mentioned the dates, and you will be conscious that we are a long way beyond the dates when the legislation was brought through in Scotland. Following Wells v Wells, the situation has been corrected in England and Wales. We are still behind. We come from a position in which we are already behind timewise and are under significant pressure to address this. That is one of the reasons why we are keen to move forward as quickly as we can in order to right this position to what our duty is.

Will there be opportunity for people to bring amendments and to seek out technical detail? As I said in answer to previous questions, I still think that that opportunity is available and that there is nothing to stop members from doing that. However, given its highly technical nature, there has to be some restraint shown in the degree to which people would wish to seek to amend legislation of this nature going through, given that it is carefully balanced and that professional advice has been sought on the content. However, that opportunity will still be available, and it will not be removed. As I said, I expect that there would be sufficient time between each stage, albeit through accelerated passage, for members to consider whether they wish to bring amendments or to make recommendations for changes to the Bill. The Department will be happy to work with members of the Committee and Members of the Assembly who have issues, queries or suggestions for change during that process.

Miss Woods: Thank you, Minister. Thank you, Chair.

The Chairperson (Mr Givan): Thank you, Rachel. Sinéad Bradley.

Ms S Bradley: Thank you, Chair. I have one quick point. Listening to the presentation and the answers, I genuinely appreciate it. In terms of being able to fully understand what is being proposed, it has been said that we will not know a lot of this until the numbers have been run through the system. Has the Department considered putting the Bill as drafted forward to the Government Actuary's Department to say, as much as we have already established a notional portfolio, let us run a notional settlement amount through the system in order to make a comparison with how the final figure would land in the Scottish model as opposed to the changed proposed model for Northern Ireland?

Ms McAlpine: We did have some discussion with GAD about that. However, it is reluctant to run the portfolio until the actual time for running it, because it is so market dependent. So, even if it gave us the number this week, by the time that the Bill is enacted, it could be a different number. If it did that, what would we use that information for? We know that, when it was run in Scotland in 2019, it brought out 0·75%, but the market has changed since then. None of us is an expert, but we could assume that it would be a higher rate than that.

Ms S Bradley: I am sorry, Laurene; I was thinking more from a settlement perspective. We have largely taken the Scottish model but have adapted it in a way that extends the number of years for the investment. I am saying that, if I reached a settlement today and used the discount rate, what would my settlement look like based on our proposed model as opposed to the Scottish model? They are both at a point in time, so even though it may look different next week, if they are both run in tandem at a point in time, that allows me as an MLA to know what the differential is that I am agreeing or not agreeing to.

Ms McAlpine: OK, yes; I understand now. If we just ran the Scottish model now against 30 years or against 43 years, would it make any difference? Yes. We will see whether the Government Actuary's Department can give us an indication of that; but asking it to undertake that exercise could take several weeks.

Ms S Bradley: Thank you. I appreciate that, Laurene, but I think that it would be worth doing it, in order to give us some clarity. It is complex, so to run through it would give us a realistic idea of what we are comparing.

The Chairperson (Mr Givan): Minister, you said that the Bill fitted the criteria for accelerated passage because it is technical in nature; maybe I am misquoting you on that. Who sets the criteria for what fits the bill for accelerated passage?

Mrs Long: It is designed for those Bills that are less likely to require or to be subject to significant change on their way through. It is also for matters of a highly urgent nature. For that reason, it fulfils those criteria. The criteria are not set down in law; it is simply a common-sense assessment of the purpose of accelerated passage. Obviously, as Ministers, in the vast majority of cases, we would prefer that these things went through the normal legislative process. However, the accelerated passage route is offered as an option for the Assembly and Ministers to consider, because there will be circumstances in which there is an urgency to the legislation that needs to be passed. This is such a circumstance, where we are behind the curve in relation to the situation in the rest of the UK and where we have a desire and a duty to ensure that people are compensated at 100%. We need to reach that point as rapidly as possible. In that sense, the Bill is a good fit for accelerated passage. As I have said, it is not a routine matter, nor would I want to see other issues passed via accelerated passage, but I believe that this is an exceptional case.

The Chairperson (Mr Givan): I am just trying to find out where the Executive policy stipulates the criteria for accelerated passage and whether that includes something that is technical but where there has been no indication from the scrutiny Committee that it supports the policy position. In my opinion, it does not strike me as neatly fitting into the accelerated passage criteria. That is where the matter becomes subjective. What I am trying to ask is this: are these your subjective criteria for accelerated passage?

Mrs Long: Yes, it is my view.

The Chairperson (Mr Givan): It is. So, it is not an Executive position, then.

Mrs Long: No. I have not said that it was either.

The Chairperson (Mr Givan): OK. Well, you talked about "colleagues" in the plural, not in the singular.

Mrs Long: Sorry?

The Chairperson (Mr Givan): You referenced "colleagues", as in ministerial colleagues, in the plural, not in the singular.

Mrs Long: Not with respect to that issue, I believe, Chairman.

The Chairperson (Mr Givan): OK. I want to summarise some of the key questions that I would like to have had answered to justify accelerated passage. First, I still do not know how many cases are being delayed. We know — I know — of some that are, but we do not know what that number is. We do not know what the financial impact on the Executive will be or whether they will have access to Treasury reserves. We know that the Committee raised that with the Finance Minister and that he subsequently engaged with the Treasury to indicate that they would want access, but we do not know the response to that. We do not know the financial impact of moving from 30 years to 43 years, which deviates from the Scottish model. We do not know the impact on the insurance industry, businesses and consumers. For example, should the market be reduced and insurance premiums increased, you could have reduced cover or no cover at all to claim against for injury. Yet, you want accelerated passage.

Ms McAlpine: *[Inaudible.]*

Mrs Long: Yes, absolutely, Mr Chairman, because none of those are considerations that we can legally take into account when setting the rate. Our duty is singular, and it is that we have to provide 100% compensation to victims. All the other matters that you raised may be of wider interest, but they are not allowed to influence the decision that we take on setting the rate. We cannot, should not and must not veer into issues on the sustainability of the insurance industry, the impact on the Executive's finances or any of those other issues, and, if the Committee is to be involved in scrutiny, it must not either. Those matters are solely for others to respond to. Our responsibility in the Bill — our sole responsibility — is to ensure that we achieve the objective of 100% compensation. Nothing else can influence our decision-making.

It is not that there has been a lack of attention to or awareness of the challenges that setting a rate might have on other parts of the Executive or, indeed, other industries. However, it is not something that we can take into account. We may be aware of those issues, but we cannot take them into account, and it would not be appropriate for us to do so.

The Chairperson (Mr Givan): Yes, but, in this discussion, we have identified that, at its core, the English and Welsh model is about 100% compensation — no more, no less. As in Scotland, however, that produces different results. Have the Executive and the Finance and Health Ministers all considered and debated the framework, which, you have now said, is a purely isolationist position that your Department is taking, one that does not take into consideration the impact on the Department of Finance or the Department of Health, for example? Have those Ministers fully engaged in it and considered its outworkings for them or are the Executive just operating in silos again?

Mrs Long: Again, Mr Chairman, you have misrepresented the position entirely. This is not a matter of us operating in silos or the Department of Justice taking an isolationist position. This is about the legal duty on the Department of Justice, which is to ensure 100% compensation. We are precluded from considering all those other issues. If we were to be lobbied by any other Minister on the cost to the Executive or anything else, and if we were to allow such considerations to influence our decision, we would be acting outside the responsibility and duty to which we are legally obliged to stick.

It is not about silos or people not being aware of the issues. I have raised the issue of the personal injury discount rate at the Executive. Other Ministers have had the opportunity to discuss the impact that it may have on them, but they fully understand and recognise that that is not a conversation to which I can be party nor can it influence any of the decision-making in setting the rate. It would be wrong to categorise that as a decision of the Department. It is simply our legally bound duty.

The Chairperson (Mr Givan): In the meantime, to deal with the urgency of this, the current law allows your permanent secretary to strike an interim rate.

Mrs Long: Yes, but with respect, that would not put us in a settled position.

The Chairperson (Mr Givan): In your opinion.

Mrs Long: For example, if we were to set an interim rate at this point, it would still have to be based on Wells v Wells. If we were to do that, we know that that would not achieve the objective of 100% compensation and could lead to overcompensation. The result of that would not be to address the settling of claims, but it would simply lead to a reversal, and defendants would not wish to settle the claim because of a fear that they would be overcompensating. They also know that it is our intention to come into line with the rest of the UK and to change the legal framework and the mechanism for setting the rate in the future, so they would know that it is not a settled position. They would then decide, as indeed victims have decided, that it would not be in their interests to settle until that settled position is reached.

That is why it is so important that we make these changes now and move forward as quickly as possible. That is the only reason for seeking accelerated passage in this particular case.

The Chairperson (Mr Givan): Do any other members wish to speak? Everyone is content. Minister, I thank you, Peter and Laurene for your contributions. I note that, despite recusing yourself, you spoke extensively and the permanent secretary hardly spoke at all, despite his now being legally responsible for this. However, I just note that for the record.

Mrs Long: This is an important distinction, and I set it out clearly in answer to the Deputy Chairperson's question. I have not recused myself from this entire subject matter. I am still fully across the detail of what is taking place. I will still be the person taking the Bill through the Assembly processes. I have not recused myself, in that sense.

Where I have recused myself and delegated decision-making is around two key decisions. They are decisions that have a perceived pecuniary interest on my part, and, therefore, it would not be appropriate for me to be involved in them. The first is with respect to the setting of any interim rate — the actual rate itself — and the second is in choosing the formal legal structures that will be used to achieve the rate. Were I involved in that, there could be a perceived pecuniary interest, and it would not be appropriate.

With respect to the rest of this and, in particular, the urgency of delivering 100% compensation, there is no pecuniary interest, no conflict of interest and no problem with me speaking on that matter.

The Chairperson (Mr Givan): In your opinion. Thank you very much, Minister, Peter and Laurene. The time that you have spent with the Committee is appreciated.