



States Greffe: Scrutiny

Senator John Le Fondré
Chief Minister
Cyril Le Marquand House
The Parade, St Helier
JE4 8UL

20 December 2018

Dear Chief Minister

Damages Law

I am writing to you in relation to the Draft Damages (Jersey) Law (P.131/2018), which you lodged on the 24th October 2018.

As you are aware, we have been reviewing the draft law and have received detailed submissions from a number of key stakeholders. We expect to publish our report on the draft law prior to the States debating it on 29th January 2019.

At this stage in the process, we consider it necessary to draw your attention to evidence that we have received from a number of stakeholders that is critical of the draft law. We consider that you may wish to consider withdrawing the draft law in order to re-draft certain parts.

During our hearing with BCR Law, the witness described it as follows; “*In principle the law is good, but it is constructed poorly.*”¹

In their written submission, BCR Law state that: “*The Draft Law asserts that it does not seek to move away from the principle of ‘full compensation’. That statement can be described, at best, and with a considerable degree of charity, as misleading. The Draft Law, as it is currently drafted, runs the risk of deeply disadvantaging plaintiffs (often amongst the most vulnerable in society) by almost guaranteeing that plaintiffs will be undercompensated. It is a deeply flawed piece of legislation which has clearly been prepared in haste without proper research or analysis.*”

In another written submission, Hempsons Solicitors argue that the proposals “*are not fit for purpose*”, and “*set out to emulate an English system that can only be financed by a*

¹ Public hearing, 17th December 2018



States Greffe: Scrutiny

government prepared to run a national debt.” It appears that Jersey’s law has been drafted on the English system referred to by Hempsons. In this context, we note a report of the House of Commons Public Accounts Committee in November 2017 which recommended a review of the English damages law in light of rising clinical negligence claims.

We also note that the Scottish Parliament has debated and approved in first reading this week a new damages law. This law is based around the principle of a hypothetical investor and has been welcomed for offering a modern solution.

BCR Law raised particular concerns about the introduction of a draft law that would impact on current cases:

The transitional provisions are extraordinary. If enacted, they would create a power to retrospectively impose the new statutory discount rates on existing cases prior to judgment and, even more extraordinarily, even on appeal. Further, they would create a power to retrospectively impose PPO’s on existing cases, even on appeal. (their emphasis)

and

This legislative exercise is clearly a reactive measure which has all the appearance of administrative panic in response to X Plaintiffs v. Minister. It has quite clearly been drafted in haste, without proper research or consideration, and with unlawful transitional positions designed specifically to disadvantage the Plaintiffs in that case.

We have identified specific areas of concern below and would ask that you respond with your comments.

- 1. Discount rate – Has the proposed Scottish system of introducing a statutory discount rate which is set by an official “rate-assessor” been considered for Jersey?** We have followed with interest the passage of the Damages (Investment Returns and Periodical Payments) (Scotland) Bill. BCR Law suggested to us that the proposals in the Scottish Bill to provide for a statutory discount rate set by an independent “rate-assessor” (in the case of Scotland, the Government Actuary) would be more appropriate.
- 2. Split discount rate – Few, if any, jurisdictions operate a split discount rate. Why has this been selected for Jersey. What consideration was given to the differential in awards for claimants with a loss just below or just above 20 years?**



States Greffe: Scrutiny

Stewart's Law argues that a Claimant with a loss spanning 19 years "*would receive more compensation than one of a little over 20 years.*" Instead, they recommend a differential discount rate to provide full compensation for earnings-related head of future loss.

Hempsons describes the selection as "*curious,*" and "*cannot be sensible on any footing,*" given the stark divide in compensation for claimants on either side of 20 years.

We understand that very few other jurisdictions have introduced a split discount rate².

- 3. Reliance on Government Actuaries Department – Why was it deemed appropriate to place reliance on the GAD report in setting the discount rate?**
BCR Law, Stewart's law and Mr Chris Daykin all raise concerns that the draft law relies too heavily on the report from the Government Actuaries Department (GAD) of July 2017. A number of failings in relation to the GAD report have been pointed out to us. This could lead to under compensation of plaintiffs in damages claims.
- 4. Transitional provisions – should the draft law apply to current damages cases?**
BCR Law believes that the provisions in the draft law may infringe upon Article 6 of the ECHR. If "*the new regime is imposed on current cases where evidence has been heard,*" then they believe it would "*almost certainly be unlawful.*" BCR Law also questioned the appropriateness of the "*States changing the goalposts as defendant.*"³
- 5. Periodical Payment Orders – Under what circumstances will a PPO be capable of being reviewed?** Whilst the ability to review PPOs was largely welcomed, the submission we received from BCR, and their subsequent hearing, made it clear that the proposed system was "*incomplete and ill-considered,*" due to the lack of a significant statutory framework underpinning this power, which is not the case in England. BCR also point to a lack of clarity over Social Security and Tax treatment of PPOs.

The ABI also suggest that a series of controls should be placed on PPO Appeals, including the "*requirement that the variation be limited to the chance of specific*

² Public hearing, 12th November 2018

³ Public hearing , 17th December 2018



States Greffe: Scrutiny

circumstances” and a “restriction of such circumstances to the chance of a serious medical condition.”

In light of the evidence we have received, we have concerns about a number of aspects of the draft law and the way it has been constructed. We consider that this evidence may be sufficient for you to consider withdrawing the draft law in order to re-draft certain elements. Please could you confirm whether this is an option you are considering?

In the meantime, we will continue with our work, in order to provide a full report to the Assembly in due course. Please could we receive your response to the above points by 7th January 2019.

Please note that we will be placing this letter, and your response, in the public domain.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Kristina Moore'.

Senator Kristina Moore

Chairman, Corporate Services Scrutiny Panel

Appendix

Quoted evidence

BCR Law [Submission](#) and [webcast](#) (transcript not published yet)

Hempsons Solicitors [submission](#), [transcript](#) and [webcast](#)

Stewart's Law [submission](#)

Chris Daykin [submission](#)

ABI [submission](#)

All evidence is published at statesassembly.gov.je/scrutiny