ECONOMY, ENERGY AND FAIR WORK COMMITTEE

DAMAGES (INVESTMENT RETURNS AND PERIODICAL PAYMENTS) (SCOTLAND) BILL

SUBMISSION FROM Dr Hugh Stewart on behalf of the Medical Defence Union

Damages (Investment Returns and Periodical Payments) (Scotland) Bill

General

1. What are your views on the Bill overall? Is legislation in this area required? How far do you think the Bill will achieve what it sets out to do?

The Medical Defence Union (MDU) believes reform of the methodology for setting the discount rate is necessary because of the unintended but nonetheless punitive and retrospective effect the move to a discount rate of -0.75% has had on public services such as the NHS.

The MDU has for many years provided indemnity in Scotland for clinical negligence claims for general medical and dental practitioners, and consultants practising in the independent sector. Our comments on the Bill are informed by our concern that the recent unprecedented 3.25% drop in the personal injury discount rate will have a damaging effect on medical and dental practitioners and on the NHS in Scotland more widely.

Clinical negligence claims, unlike most other personal injury claims, are long tail. That means there may be many years between the date of the incident that gave rise to the allegedly negligent damage, and the notification (usually three years and often far longer and sometimes up to ten, twenty or more years) and, later, resolution of the claim. This means the recent steep drop in the personal injury discount rate had a retrospective effect because the discount rate applicable to a claim is that in effect at the time of settlement (or trial) rather than the rate at the time of the clinical incident giving rise to the claim.

As the financial memorandum to the Bill makes clear, at p8, the 3.25% drop in the discount rate in 2017 led to an increase in the provision for claims against Scottish NHS Health Boards of £160m which will include funding for the retrospective effect. This is public money that would better be used for patient care. For these public policy reasons we believe legislation is required to address the problem and support the Bill as an attempt to put in place a statutory methodology for calculating the discount rate.

Having said that, the Scottish government has recognised that the assessment of a lump sum award of damages, particularly for future loss, can never be an exact science and that there will inevitably be levels of under- and over-compensation (para 26 of the policy memorandum). The importance of providing appropriate compensation for patients who have been negligently harmed by their medical care is obvious. But it is also vitally important for the public policy reasons described above that the methodology for setting the discount rate does not allow systematic over-compensation. In this respect we are not convinced that the Bill will achieve what it sets out to do because, principally, the provisions that would govern the way in which the rate is set do not provide a sound enough evidential basis for a decision on a rate which has the potential for such a damaging effect on the public purse. We expand on these concerns in our answers below.
Part 1

2. Part 1 of the Bill aims “to reform the law on the setting of the personal injury discount rate in order to make provision for a method and process which is clear, certain, fair, regular, transparent and credible”. Is it an aim with which you agree? And to what extent do you believe the reform will achieve all these things – a clear, certain, fair, regular, transparent and credible method and process?

We have explained in our general comments that we do not believe the proposed reform which envisages the rate being set by the Government actuary and based on a notional portfolio is fair because it will not have a sound evidential base. Although it is argued that a notional rate, based on a lower risk mixed portfolio, is fair, it will not be based on evidence. There is little evidence about how pursuers were or are advised, nor how they invested/invest their money, nor the returns those funds achieve. For a decision to be truly fair to all parties, reliance on what a hypothetical investor might do and achieve is not sufficient. There should be provisions in the Bill to collect this and other relevant information in order to inform decisions. There should also be a requirement for those who make the decision to take proper account of available evidence and to demonstrate they have done so.

In support of this there should also be provisions in the Bill to mandate that parties possessing such information are required to disclose it with suitable confidentiality safeguards so that the data can processed and used in an aggregated and anonymised form. We cannot see how an attempt to set a rate using a notional portfolio could be considered fairer or more credible than a commitment to identify and mandate collection of appropriate information to form an evidence base. As the aim of the procedure is to ensure appropriate levels of compensation, the procedure must ensure that those who make decisions fully understand and can cite relevant evidence and provide a compelling and public rationale for their decision. We address this concern in more detail below.

3. In terms of who sets the rate, the Scottish Government proposes to have the rate reviewed by the Government Actuary rather than Scottish ministers (as is the current situation). It believes that this will remove the setting of the rate from the political sphere “where there is the potential for pressure from external interests to attempt to influence the outcome” and “should provide fairness to all parties involved”. What are your views?

The decision to set the discount rate is not just a legal one. It is a financial decision because there are many parties materially affected such as defenders providing public services. There is a need to consider and weigh in the balance additional costs to public services and other services (such as insurance which is also heavily affected) which need to be borne by taxpayers and citizens more widely.

Given the potential for the discount rate to have a damaging effect on public service as the current rate does, it is also a public policy decision. Such decisions are better made by individuals who can be held accountable publicly and that would suggest Ministers, who are accountable to Parliament, rather than the GAD which cannot be held publicly accountable to the same extent. The suggestion that Ministers may be susceptible to pressure from external interests attempting to influence the outcome of a discount rate decision has no force. The same Ministers are responsible for numerous decisions about public policy matters where there are invariably competing interests and often large financial sums
involved and yet they are considered capable of balancing competing interests in order to reach an appropriate decision. To suggest Ministers should be relieved of the power to make a decision because it relates to the discount rate, whereas they are clearly considered capable of making rational decisions on other equally important matters makes no sense. The important point is that those who make such decisions must be required to be transparent about the process and provide a detailed rationale and be capable of being held publicly accountable. We do not believe a process that relied on the GAD alone to make such an important policy decision would have all these necessary safeguards. There is the further point that, by setting the portfolio and the standard adjustments, the government would be, in large part, setting the rate itself.

In order to advise Ministers, we believe there should be an expert panel created in Scotland (which might reasonably include the Government Actuary). Given that a panel should be set up to advise the Lord Chancellor, there may be some benefit to the Scottish Government in availing itself of that expertise, though when advising Scottish Ministers, it would be important for the panel to properly reflect on the position in Scotland. It should be possible to substitute some members of that panel for experts with financial and other expertise relevant to Scotland.

The Bill should also mandate Ministers to take the panel’s advice into account and to demonstrate in a transparent way how the advice influences the decision and to provide a rationale. This would provide a safeguard against any concern that a Minister would succumb to pressure from external influence and, more important, provide the Minister with advice from experts from a range of relevant fields who will be chosen for their knowledge and expertise.

If an expert panel were set up with the ability to advise on the appropriate discount rate on the basis of their own deliberations on how a pursuer is likely to invest, those deliberations should be informed by evidence about how pursuers actually invest (as we have explained above). The Policy Memorandum, at 32, notes that 101 out of 122 respondents to the consultation on how the discount rate should be set supported the involvement of an independent panel of experts That would require the panel of experts to be involved in assessing how a pursuer should be taken to invest his or her damages, in addition to the likely return from such an investment strategy.

4. The Scottish Government has chosen to lay down in detail how the rate should be calculated in legislation. Do you support this proposal over the approach taken in England and Wales of leaving much more to the discretion of the Lord Chancellor and an expert panel?

We explain immediately above why we believe the decision should be left to Ministers.

We have also explained briefly why we disagree with the concept of a notional portfolio and submit our detailed comments.

The policy memorandum (para 67) refers to a portfolio ‘designed to match the objectives and characteristics of the hypothetical investor…’ but does not set out any detail on how it was designed. The memorandum notes that this is ‘a different approach to that consulted on, which asked about how awards were actually invested.’ While we accept there are some difficulties in using historical information about how pursuers have invested in the past, much of this information would be recent, and it would span two different discount
rates. We would suggest (assuming it has not already done so) that such information must form part of the process of constructing any portfolio that is relied on. It must be of relevance – in determining the lump sum necessary to generate a given annual income – to know how that money is likely to be invested and to know what those investments achieve, albeit collecting this data will be an ongoing exercise.

The Government Actuary’s department report of July 2017 explored the effects on the discount rate of two different portfolios provided to it by the Ministry of Justice, based on that Ministry’s consultation with wealth managers on the way people who have received damages in personal injury awards invest. It is instructive the extent to which the difference in the make-up of those two portfolios (both described as average or typical portfolios invested in by those receiving damages for personal injuries) alters investment return over 30 years (and so any discount rate based thereon). It is our view that the ‘notional portfolio’ in the Bill is more cautious than either of these typical portfolios and that it must more closely represent actual experience.

**Standard adjustments**

While we understand the standard adjustment proposed for the impact of tax, cost of management advice etc (though not how this has been calculated at -0.5%) we cannot understand why the Scottish government, envisaging the setting of a portfolio which is low risk (and would therefore produce a low discount rate), and very possibly lower risk than a typical pursuer would actually invest in (leading to over-compensation), would then require the Government Actuary to deduct a further half of a percentage point from the rate of return at Schedule B1 10 (2) (b). The Government Actuary Department report of July 2017 needs to be read as a whole and is based on a number of assumptions, but in our view it makes absolutely clear that a difference of 0.5% to the discount rate can have a significant effect on the likelihood of overcompensation of pursuers. The Financial Memorandum to the Bill makes it clear that it could also have a significant effect on public finances and in practice may add millions of pounds per year to Scotland’s NHS indemnity costs.

**Changes to the notional portfolio (and to the discount rate)**

We also note that the Bill would allow Scottish Ministers, by regulations, to ascribe meaning to the investment categories, change the categories of investment in the notional portfolio and alter the proportions of each investment vehicle (and the standard adjustments). This effectively allows the Scottish Ministers to change the discount rate. Given that a small change in the discount rate can have substantial effects on pursuers, defenders, insurers and other indemnifiers (and given the retrospective nature of those effects as discussed above) – we believe there should be a transparent process for doing this, which should require the taking of expert advice. It is our view that changes to the notional portfolio should be a matter for an expert panel, which could include the government actuary.

5. With no statutory requirement for the discount rate to be reviewed regularly, currently there can be a 15 year gap between reviews in Scotland. The Government Actuary will start a review of the rate on the date on which the relevant provisions of the Bill are brought into force. Thereafter they will be required to start a regular review every three years and the Scottish Ministers may decide on an additional, out-of-cycle review, but which would not disrupt three-yearly reviews. Do you have any views?
Given the often complex nature of clinical negligence claims, a three-year review period is too short. The complexity stems from many factors including the sometimes differing views of expert witnesses on what constitutes reasonable care and the fact that most cases involve difficult causation issues such as the extent to which harm would have been suffered in any event (in the absence of any negligence) due to the underlying injury or disease process (which is quite different from the situation in most negligence claims, such as for road traffic injuries).

The vast majority of clinical negligence cases are settled without a court hearing. A three-year period may introduce an incentive for one of the parties to delay settlement if a more advantageous discount rate were expected to take effect in the near future. Delay in settlement runs contrary to the public interest in resolving claims as swiftly as possible and generally means increased legal costs. It would be an unintended and unwelcome effect of the change to regular three-yearly reviews. With the Bill as introduced there could be three different discount rates within a period of just over three years. We recommend that the review period should be extended to at least five years to help to reduce the effect of the litigation practice of trying to game the system.

6. In changing the methodology to move away from a rate based on Index-Linked Government Stock (ILGS), the Bill makes provision “on the basis of portfolios described as cautious and which we believe would meet the needs of an individual in the position of the hypothetical investor who is described in the legislation”. The Scottish Government also states: “The portfolio does reflect responses to the consultation that investing in a mixed portfolio of assets provides flexibility and is the best way of managing risk”. Do you think the Scottish Government is justified in assuming that injured people have access to the necessary expertise to achieve this?

We have explained above that any decision about the discount rate should be made, as far as possible, on the basis of evidence. There are investment managers who specialise in advising pursuers who have been damaged by negligence how to invest their compensation. Given investment managers will have easy access to such information, they should be required to provide information about how they advise on investment of compensation awards and the returns that are achieved.

Part 2

7. Where damages for personal injury are payable, the Scottish courts may make a periodical payments order but only where both parties consent. This differs from England and Wales, where the courts have the power to impose such an order. Part 2 of the Bill will give courts the powers to impose periodical payments orders (PPO) for compensation for future financial loss. Respondents to recent consultations overwhelmingly supported courts in Scotland having the power to impose periodical payment orders, seeing this as a way of reducing uncertainty as well as the risk of over-/under-compensating pursuers. What is your position?

As a discretionary mutual organisation, the MDU is not subject to court orders for periodical payments under the existing provisions in England and Wales, and we believe the same position would apply under the proposed provisions of the Bill.
8. How well used do you think the provisions would be in practice? What impact do you think the requirement on the court to ensure the “continuity of payment under such an order would be reasonably secure” would have?

We cannot comment for the reasons given above.

9. The proposals in the Bill would allow the courts to revisit a compensation award where there has been a change of circumstances (although only where this has been identified in advance). This would represent a change to the current law. Do you have any comments?

We note that the proposal to revisit compensation awards would apply only in cases where a periodical payment was made. As a discretionary mutual organisation, the MDU is not subject to court orders for periodical payments under the existing provisions in England and Wales, and we believe the same position would apply under the proposed provisions of the Bill.

Overall

10. The Bill overall is intended to support the Scottish Government’s national outcome that: “We have strong, resilient and supportive communities where people take responsibility for their own actions and how they affect others”. Do you have any comment?

11. In previous consultations in this area, views have tended to be polarised between pursuer and defender interests. Does the Bill, in your view, manage to balance these interests?

For the reasons we have given above we do not believe the Bill as drafted fairly represents defenders’ interests, especially when some of the defenders are public bodies, such as the NHS which pays increasingly large sums in compensation out of funds that could be used for wider patient care. The inequality arises principally because it is assumed it is fair to set a notional rate which is not based on evidence. Further, there is no attempt in the Bill to seek to gather such evidence in order to create an evidence base that would provide greater accuracy in determinations about how awards are invested and what returns they achieve. None of this should be left to guesswork.