

## ECONOMY, ENERGY AND FAIR WORK COMMITTEE

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

**SUBMISSION FROM: *Medical Protection Society (MPS)***

#### **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?**

We welcome this Bill, as we believe that the proposed amendments would make significant steps towards ensuring the discount rate more accurately reflects the way in which most pursuers choose to invest their compensation payments.

The assumptions that underpin how lump sums are calculated need to reflect reality; that independently and professionally advised pursuers are ordinary, prudent investors looking for income and long term growth, dependent on their circumstances, and would not invest in a single vehicle with the risk of nil or negative returns.

As the Scottish Government recognises, the assessment of a lump sum award of damages, particularly for future loss, can never be an exact science and there will inevitably be levels of under- and over-compensation because of a range of factors. The aim is to achieve the best possible balance and we believe that the text of the draft legislation will go a significant way to more accurately reflecting actual pursuer investment behaviour.

*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 agree with the aim of the Bill being 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.

We believe there are three main tests to achieving this outcome.

Firstly, the discount rate needs to provide a better and fairer system for pursuers and defenders, ensuring that pursuers are paid no more but no less than they should be.

To do this the assumption that underpins how lump sums are calculated needs to reflect reality of how most pursuers invest lump sum payments.

As a medical defence organisation, we do not hold data on the investments typically made by pursuers. Common sense and the evidence in the public domain does however suggest that independently and professionally advised pursuers would invest like other ordinary, prudent investors looking for income and long term growth and that they would be advised to invest in higher yielding investments, particularly given the current net rate of return on ILGS.

Secondly, the way that the rate is set needs to be much more predictable. The change to the rate at the start of 2017 was dramatic and sudden; this created real instability in terms of how much pursuers expect to receive and also how much providers of indemnity and insurance need to collect. The proposal within the Bill to review the rate every three years would help to address this problem by ensuring that there is more predictability in when the rate will change.

Thirdly, we believe it is vital that the framework which determines how the discount rate is set considers the balance between the need for patients who are harmed due to clinical negligence to receive reasonable compensation with the impact on the NHS, the public purse and the affordability of professional protection for healthcare professionals. We would welcome consideration as to how this can be best achieved under the proposed new system.

- 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 most important consideration is to ensure that the decision is based on a broad perspective by someone who can weigh up a range of considerations, especially if they think the proposed change might lead to unfairness to pursuers, or defenders, for example as per the reduction in the rate last year or the impact on the NHS and the provision of other critical public services.

We believe that a Scottish Minister could be well placed to take on this role with the input of expert advice. We are however open minded about other approaches and understand the rationale behind the proposal to move the determination of the rate away from the political arena.

On a related note, we would appreciate clarification on who has designed this notional investment portfolio, or assessed it as being suitable for the “cautious investor” as referred to in the Bill. We assume that the Government Actuary is calculating the return, but more clarity is needed about the Government Actuary’s involvement with the design and oversight of the notional investment portfolio. We would also appreciate clarity on how the investment return for a notional 30 year duration for UK equities, for example, would be assessed.

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?**

Whilst we think it is useful to indicate a possible notional investment portfolio, it remains unclear as to the governance of this being an appropriate investment portfolio that neither over or undercompensates a pursuer. Leaving more discretion around a notional investment portfolio may remove some issues around potentially short-term market movements disproportionately affecting a calculated rate. We would also note that the assessment of likely 30 year returns on some of the investment classes specified could be the source of some debate.

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?**

We strongly support the draft legislation ensuring that the discount rate be reviewed regularly.

It is important that there is a regular and predictable point at which the rate is reviewed in order to avoid sudden and dramatic changes, and a review every three years would help to make this less likely.

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?**

As a medical defence organisation, we do not hold data on the investments typically made by pursuers. Common sense and the evidence in the public domain does however suggest that independently and professionally advised pursuers would invest like other ordinary, prudent investors looking for income and long term growth and that they would be advised to invest in higher yielding investments, particularly given the current net rate of return on ILGS.

## *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?**

We understand that the requirement under the proposals is that security is essentially similar to the position in England and Wales: PPOs are deemed secure if it is covered by a guarantee or scheme under S213 FSMA, or a recognised body or office holder, i.e. through a Minister of the Crown or a department of the Government of the UK.

As a not for profit defence organisation offering discretionary cover, we are not deemed to be automatically secure to give PPOs.

We have in the past had a mechanism for offering PPOs to claimants in England and Wales. We found that the uptake for PPOs was minimal, and we decided, as of last year, to revert simply to offering lump sums.

Although the courts have the power to impose PPOs in England & Wales, we are unaware of a case in which the court has done so. We would anticipate that even with the power to impose PPOs, the Scottish Courts would use the power sparingly, if the pursuer has a strong preference for a lump sum settlement.

In our experience most claimants prefer to receive the loss of earnings element of their compensation payment as a lump sum to maximise the flexibility that a lump sum payment can give them, for example to fund the purchase of accommodation.

**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?**

As we have stated above, although the courts have the power to impose PPOs in England & Wales, we are unaware of a case in which the court has done so. We would anticipate that even with the power to impose PPOs, the Scottish Courts would use the power sparingly, if the pursuer has a strong preference for a lump sum settlement.

There may be some claims where the Courts are unable to order PPOs, for example where indemnifiers are not deemed to be automatically secure.

There may be other reasons why security of payments may not be possible. As an example of the difficulties associated with PPOs for clinical negligence awards where damages are reduced by a percentage to represent the pursuer’s own contributory negligence, it may be beyond the ability of the court to satisfy itself that a PPO is able to secure the full scope of the plaintiff’s award. Alternatively, where indemnity is capped, sufficient funds may not be available to meet periodical payments over the lifetime of the pursuer.

- 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?**

In England & Wales there can be a provision for step changes in the payment amount to be written into a PPO. These are known as stepped PPOs and will apply at fixed points in time where a specific change in circumstance has already been foreseen at the time of settlement. Similarly there can be a provision for variability orders, where the case can return to court in specific circumstances, such as a deterioration in the claimant's medical condition. These cases are however rare. For both the stepped and variability orders, the terms under which the increase in payments will be triggered must be defined clearly at the time of the settlement. A deterioration in the claimant's medical condition that had not been foreseen and specifically allowed for as a variability order at the time of settlement should not result in an increase in the regular payment amount.

Where some of the cost of care is borne by the local authority, insurers may need to offer a guarantee in the PPO to cover costs in the event that the local authority payments are reduced or withdrawn in the future.

#### *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?**

We do not have any comments to make at this stage on this point.

- 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?**

As noted above, we support the aims of the Bill to make provision for a method and process of compensating pursuers by ensuring certainty around both the discount rate and the terms of PPOs which is clear, certain, fair, transparent and credible.

#### *Other comments*

- 12. Are there any other aspects of the Bill you wish to comment on?**

- We welcome the steps being taken by the Scottish Government in this Bill and hope that in future the respective national governments could co-ordinate their approaches to implement similar rates simultaneously. Such co-operation on rates and the timing of the change of rate would minimise the potential and impact of market dislocation.

- We note that the regulations include adjustments to the rate including “15 (b) 0.5 of a percentage point, as the further margin involved in relation to the rate of return”. This adjustment is described as a “margin for prudence”. We are concerned that by including this margin the rate ceases to become a best estimate of achievable investment return and hence the calculation method for the lump sum will more likely than not result in over-compensation.

### **About MPS**

MPS is the world’s leading protection organisation for doctors, dentists and healthcare professionals. We protect and support the professional interests of more than 300,000 members around the world, and approximately 7,000 in Scotland. Membership provides access to expert advice and support together with the right to request indemnity for complaints or claims arising from professional practice. Our in-house experts assist with the wide range of legal and ethical problems that arise from professional practice. This can include clinical negligence claims, complaints including those involving the Scottish Public Services Ombudsman (SPSO), medical (GMC) and dental (GDC) council inquiries, legal and ethical dilemmas, disciplinary procedures and fatal accident inquiries.