ECONOMY, ENERGY AND FAIR WORK COMMITTEE

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

SUBMISSION FROM MDDUS

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?

1.1 The Medical and Dental Defence Union of Scotland (MDDUS) founded in 1902 is one of the three medical defence organisations that provide indemnity to health professionals working outside the NHS hospitals sector. MDDUS is the main provider of such indemnity in Scotland, although the substantial majority of its members work in the rest of the UK. We indemnify the great majority of GPs in Scotland and are the UK’s second largest indemnifier of GPs. MDDUS provides occurrence-based indemnity to its members, allowing for claims to be met even after the conclusion of a membership period, as long as the incident occurred during the member’s period of membership. MDDUS is a mutual “not for profit” organisation which does not have shareholders. MDDUS reserves membership funds responsibly to ensure that they are sufficient to meet current and future claims and established clinical negligence against the current and former membership. The annual subscriptions paid by medical and dental members practising in the NHS is significantly and adversely impacted by the discount rate change and we therefore welcome a Bill.

1.2 MDDUS also welcomes the opportunity to respond. The decision of Scottish Ministers in March 2017 to follow the Lord Chancellor in changing the discount rate from 2.5% to -0.75% has led to an increase in the size of compensation payments and very significant new costs for the NHS and medical defence organisations (MDOs) such as MDDUS. Whilst therefore welcoming the Bill, it is imperative that Scottish Ministers move with expedition to change their adopted approach to the setting of the discount rate.

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?
1.1 MDDUS agrees that overall the method and process are clear, certain, regular and transparent.

1.2 We would wish however to see further evidence on the background to the notional portfolio prior to the final outcome of the Bill.

1.3 MDDUS does also have concerns regarding the additional 0.5% adjustment (the “further margin”) which is referred to at paragraph 10(2)(b) of Schedule B1. It is clear that the portfolio has been determined as appropriate for a hypothetical cautious investor and therefore, we do not understand the additional 0.5% adjustment requirement which will unnecessarily increase the probability of over-compensation. The portfolio itself is already set at a cautious level and any “further margin” we believe is unnecessary and would undermine the full compensation principle. We can see no evidence as to why such a further margin can be supported in particular when such over compensation will surely impact on funding for the NHS in Scotland in addition to other public bodies where such funding is greatly needed. We also consider that there would be a risk in certain circumstances that the application of the further margin could result in a discount rate which is lower than the returns available to a lower risk investor.

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?

It is unclear whether the way the Bill as currently drafted will remove the setting of the rate, from the political arena. MDDUS is clear that the decision on the rate, because of the major public policy and NHS expenditure issues it impacts on, needs to be a statutory decision. The Bill allows the Government the power to amend the basis for the calculation of the discount rate by modifying through regulation items such as margins for tax and expenses and the assumed investment portfolio mix.

However, we consider that the final decision on the rate should remain with Scottish ministers. This will also enable Scottish ministers to react to any significant differences which might arise between the discount rate in Scotland and in England and Wales.

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?

1.1 It is noted that the proposal to lay down in detail the rate by the Scottish Government will require a more rigid approach than has been taken in
England and Wales. We consider that the Government will in reality however require access and information from experts in the field and we are not aware of any evidence as to why Scotland should be any different to England and Wales.

1.2 It is unclear why the 30 year investment period has been assumed and we would welcome any data supporting this.

1.3 MDDUS is also concerned regarding the 0.5% “further margin” adjustment as previously stated which appears to go beyond the requirement of the pursuer and the 100% compensation principle and may well have a significant impact on the ability to protect NHS funds. We believe that the cautious approach taken elsewhere renders this additional measure both unnecessary and indeed positively harmful in terms of general welfare because of its effects on the NHS.

1.4 It is noted that the potential availability of Periodical Payment Orders removes the requirement of such adjustment should any pursuer be concerned about longevity and investment risk.

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?

1.1 It is recognised that the rate needs to be reviewed at consistent intervals. This avoids any significant adjustment as previously occurred at the last review.

1.2 However, MDDUS considers that a five-year cycle as has now been adopted in England and Wales is the most appropriate review cycle.

1.3 The drawback with a requirement for review over relatively short periods of time (for example 3 years) is that the process of review may be undertaken when it is unnecessary. It could also create incentives for “gaming” the litigation process by whichever side believes that their objectives are likely to be met by the impending change with implications for both the administration of justice and the timely award of necessary compensation for pursuers. We therefore consider it preferable to identify a factor that will trigger a review of the rates and there should be a requirement that a review has to take place periodically and we would suggest every 5 years from the last review as has been acknowledged in England and Wales.
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?

1.1 We believe that the Scottish Government is justified in assuming that injured people do have access to the necessary expertise to achieve a mixed portfolio of assets providing it flexibility to properly manage risk.

1.2 It is our experience that many pursuer and claimant firms offer investment advice to pursuers or alternatively recommend independent financial advice.

1.3 MDDUS does not have evidence of the advice provided as this is of course confidential to the parties involved but we see no evidence (for example action by regulators) to contradict the proposition that appropriate advice is provided.

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?

   a. As the call for evidence acknowledges, the legal framework in relation to periodical payment is different between England, Wales and Scotland. When undertaking the stated intention to consider whether periodical payments might be a better way to compensate for future financial loss, it must also be borne in mind that these mechanisms are not available to a significant number of indemnity providers. MDDUS has previously advocated that consideration could be given to relaxation of the provisions on “reasonable security” to increase the availability of PPOs but only if they can be provided at reasonable cost for the relatively small minority of cases for which they may be the most appropriate solution.

   b. We consider that it is overly simplistic to look to greater take up of PPOs to alleviate the profound impact of the discount rate change. The answer to this problem is to change the approach and methodology for setting the rate for lump sum awards to enable a more realistic choice for claimants.
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?

   a. MDDUS’ experience is that the majority of claimants in England and Wales still want the increased flexibility of a lump sum in preference to a PPO for them to invest themselves, knowing it will sufficiently meet their needs.

   b. However, pursuers should have the opportunity to have at least part of their compensation paid in the form of a PPO but as stated above, MDDUS is one of many organisations that are currently precluded from offering Periodical Payment Orders on sufficient security grounds.

   c. As stated above, not all indemnifiers are in a position to offer PPOs given the defined requirements for future security of payments. Only regulated insurers and government bodies are eligible to provide PPOs. In the healthcare field, only state supported bodies such as NHS, CLO and NHS Resolution offer PPOs. In practice, our understanding is that only bodies funded on a “pay as you go” basis such as NHS Resolution and the MIB use a mechanism given the prohibitive costs of making capital provision for such payments in many cases.

   d. In our opinion, it must also be understood that there are drawbacks to the PPO model; it is likely to apply to only part of the award and entails substantial future administrative costs. However, they may be appropriate as a method of risk sharing in achieving early resolution without stressful and expensive court proceedings where there is significant uncertainty about the potential life expectancy of a Claimant.

   e. Given the dramatic change in the discount rate in favour of pursuers and claimants, we have now found that lump sum awards, as opposed to PPOs are particularly attractive to claimants and will remain so while the discount rate is set at such a currently indefensibly low level.

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?

   a. MDDUS is concerned that there is no express reference to the vital principle that the pursuer’s medical condition must be attributable to the injuries arising out of the circumstances giving rise to the claim and which must be clearly stated to avoid further deliberation, cost and litigation.

   b. It is also noted that Sections 2(f) and 2(h) provide a wide discretion in terms of varying the recalculation index and method to which payments are made and is a cause of concern.
c. Essentially, the provisions appear to go wider than the rest of the UK with specific provision to allow for suspension which appears beneficial.

**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?

a. We agree with the broad suggested principles of the Bill, given that we understand them to provide for enquiry as to actual investment choices and returns for pursuers, that it would not be assumed that a pursuer would be wholly risk adverse and mixed portfolio investment would be assumed.

b. In addition we would maintain that wider societal factors should also be relevant factors for consideration.

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?

a. We consider that it is essential that the wider societal, public policy and public expenditure and micro-economic impact are taken into account. We are most concerned about the impact on public service, especially the NHS where the net utility of additional payments to a small number of pursuers when compared to the wider benefits, a similar level of expenditure might command for patients as a whole ought to be one of the key factors to be taken into account when a change to the discount rate is under consideration.

b. Finally we would consider that a fair system does not require “further margin” and would not achieve the overall policy of Part 1 of the Bill in terms of it being clear, certain, fair, regular, transparent and credible. An outlier discount rate as currently in place does not appear to be fair to the wider need to protect public policy and to protect the NHS.

**Other comments**

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

a. We are not persuaded that compulsory PPO availability should be seen as a means of remedying the flawed assumptions relied upon in previously setting the discount rate for lump sum awards.