Response by MDDUS to Call for Evidence by the Justice Committee – Committee Stage – Damages (Return on Investment) Bill

Question 1: Is the new statutory methodology to calculate the personal injury discount rate the most appropriate to achieve as close to 100% compensation as possible?

It seems to us that any methodology that suggests that any investor would deliberately invest to achieve a negative return, when positive returns at a reasonable level of risk are available, is flawed to the point of irrationality. We consider that the statutory methodology is more heavily weighted towards avoiding under-compensation than over-compensation and therefore, on average, is not likely to achieve as close to 100% compensation as possible.

Given the difficulty that there seems to have been in producing evidence to help decide on the most appropriate methodology and assumptions, it would seem to be appropriate that claimants who receive awards which have involved the use of the PIDR should be asked to provide regular updates on their investment decisions and outcomes. This information would be of great benefit for setting assumptions at future reviews.

Question 2: Has the new methodology the potential to veer towards over compensation and if so how can this be rectified?

In our view, the combination of assuming a low risk investor and the deduction of a further margin of 0.5% (Schedule C(1) 10(2)(b)) will make it more likely than not that the claimant will be overcompensated.

Over compensation means that at the end of the claimant's life there is still part of the compensation remaining which has not been spent. One option would be to require that any such remaining balance is repaid to the party who paid the compensation although consider that this may not be easy to do in practice.

Other options available to reduce the potential for over compensation would be to reduce the margin in Schedule C(1) 10(2)(b) or to change the notional portfolio to increase the level of investment risk being assumed.

Question 3: Has the new methodology the potential to veer towards under compensation and if so how can this be rectified?

Please see our answer to the previous question as we consider that the proposed new methodology is more likely to over compensate than under compensate.

Question 4: Does the new statutory methodology reflect how a claimant would be advised to invest their award?

We consider that further evidence is obtained that shows how claimants invest their award and, as mentioned earlier, we consider that it is important that such evidence is gathered in future to inform later reviews.

Question 5: What are the likely effects of using an investment period of 43 years rather than 30 years in the model and do you agree with this approach?

According to the analysis published by the Government Actuary's Department1, the likelihood of over or under compensation is sensitive to the investment period assumed in setting the PIDR and how this compares to the actual investment period of the claimant. The 43 year assumption was based on the responses to the call for evidence published by the Ministry of Justice2. It will not necessarily be the case that the same period would be applicable to claimants in Northern Ireland and this is another area where it would be useful to gather data specific to Northern Ireland.

As the investment period of 43 years differs from the period of 30 years used in Scotland, this could lead to different PIDR rates in Northern Ireland compared to Scotland even though Northern Ireland is proposing to follow the Scottish Model. Ministers would need to be mindful of possible reactions if the use of 43 years gave rise to a materially different PIDR compared to using 30 years as used elsewhere.

Question 6: What are the advantages or disadvantages of transferring responsibility for setting the rate from the Department of Justice to the Government Actuary and is there an appropriate level of accountability in the new statutory methodology?

Given the methodology set out in the Bill, the Government Actuary will have relatively limited discretion when setting the PIDR. Most of the assumptions are set out in legislation and can only be changed by regulations issued by the Department of Justice. The Government Actuary is left with deciding on the investment returns to assume. This seems to us to be an appropriate transfer of technical responsibility as this is part of the typical actuarial skill set and the Government Actuary will be required to comply with professional guidance and standards.

However, we consider that there should still remain political oversight of the PIDR given the impact that changes in this may have on public, corporate and individual finances.

Therefore the PIDR should be set by the Northern Ireland Executive collectively rather than either the Government Actuary – as what is involved is a matter of public policy judgement as well as a technical calculation – or by any individual minister as there are important cross-sectoral assessments that should be made, especially in relation to the impact on health financing, which seem to have been ignored in the decision-making process undertaken thus far.

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[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/817236/Setting_the_Personal_Injury_Discount_Rate__web_.pdf

[2] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/816711/setting-the-personal-injury-discount-rate-summary-of-responses.pdf