

Northern Ireland Assembly Committee for Justice
Call for Evidence: Damages (Return on Investment) Bill

The Medical Defence Union (MDU)

Submission

28 April 2021

1. The Medical Defence Union (MDU) welcomes the opportunity to assist the Committee for Justice in its scrutiny of the Damages (Return on Investment) Bill.
2. The MDU is the UK's leading medical defence organisation. We are led and staffed by doctors and dentists who have real-life experience of the pressures and challenges healthcare professionals face every day. Our support spans multiple areas of their professional practice; from investigation by a regulator, to complaints, to claims of clinical negligence.
3. Members of the Legislative Assembly on the Committee have a substantial piece of legislation before them. The Bill seeks to reform the methodology for calculating the personal injury discount rate (PIDR) in Northern Ireland – reform that is long overdue.
4. At the outset of our brief submission to the Committee, and prior to addressing the central thrust of the Bill, the MDU reaffirms our long-held view that the setting of the PIDR is not just a legal decision. Decisions pertaining to what the PIDR should be, have profound financial consequences for the healthcare system in Northern Ireland and ultimately the taxpayer. No Minister and no Executive should be required, through legislation, to wilfully overlook the full financial consequences of a PIDR change.
5. We have experience of the sizeable effect on public services of a large drop in the PIDR. When the rate in England and Wales changed from 2.5% to minus 0.25% (at one point going as low as minus 0.75%), a claim that was valued at approximately £4.5m at the previous rate actually settled for £10.6m.
6. The Committee will be aware that an interim rate has now been set in Northern Ireland, reducing the PIDR from 2.5% to minus 1.75%.
7. A PIDR change of this magnitude will have a dramatic impact on HSC funding and on hardworking GPs across Northern Ireland. GPs fund their own indemnity arrangements and are already struggling with the highest indemnity costs in any part of the UK.

8. We are in discussions with the Department of Health about what policy interventions could be made by the Executive to shield primary care in Northern Ireland from the direct financial implications of this new PIDR. The timing could hardly be worse; after making such immense sacrifices in the fight against Covid-19 over the past 12 months, GPs in Northern Ireland now face marked increases in their indemnity subscriptions because of this latest government decision on the PIDR.
9. The current methodology for setting the PIDR in Northern Ireland – which this Bill seeks to amend - is derived from the 1998 House of Lords decision in *Wells V Wells*. In that case the court held that the financial impact on society was not a matter for them. It is, most certainly, a matter for government.
10. The MDU believes the new statutory methodology, proposed in this Bill, is greatly flawed.
11. The methodology proposed is based upon the framework used in Scotland – the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019.
12. As in Scotland, decisions on setting the PIDR in Northern Ireland will not be based on evidence of claimant behaviour and the returns they achieve from investing their compensation awards. Currently, no one knows what happens in practice with those investments. Research is urgently needed into how compensation awards are invested and what returns are achieved. It should be this that informs government policy. It should not be informed by a methodology that relies on unsubstantiated guesswork about investment returns.
13. The framework outlined in this Bill means that decision makers in government are not required to take account of all relevant factors, such as the fact that an adverse economic climate affects all stakeholders (not just claimants), or the impact of a disastrously low discount rate on funding for public services.
14. Decision makers in government are not required to consult arms-length bodies or even other Executive departments, so they cannot take into account any factors other than the presumed impact of the PIDR on claimants.
15. The MDU urges the Department of Justice to develop a different methodology with a robust evidence base of the investment behaviour and outcomes achieved by claimants in Northern Ireland (and elsewhere in the UK if appropriate).
16. The MDU also believes that such a framework should rule out any retrospective effect.
17. Any new discount rate should only apply to compensation awards relating to incidents that took place after the change in rate. This is particularly important with clinical negligence claims as they have a long tail; it is not immediately apparent there may have been negligence. Clinical negligence claims are generally not notified until 3-5 years after

the incident, and sometimes much longer. Claims are often clinically complex and so some claims then take three years or more after notification to reach a settlement. This is in part because it takes time for the extent of the damage to become apparent, especially in young persons. Also, issues such as causation are rarely straightforward.

18. To elucidate, it is often difficult to identify harm that may be a result of negligence and to separate it from damage that occurred as a result of the natural course of the original condition, or from a patient's other pre-existing and complicating conditions.
19. Finally, as we note at paragraph 4, the setting of the PIDR is not just a legal decision. It is a financial decision with wide ranging consequences – not least for public services. There is a need to both consider and weigh in the balance additional costs to public services and other services (such as insurance and indemnity which are also heavily affected), which will need to be borne by taxpayers and citizens more widely.
20. Given the potential for the PIDR to have a damaging effect on public services, any change in it must be seen for what it is - a public policy decision.
21. As such, we believe the responsibility for setting the PIDR should remain with the Minister of Justice, rather than with the Government Actuary. The Minister is accountable to the Assembly and to the people of Northern Ireland to a much greater extent than the Government Actuary. Those who make decisions about the PIDR should be required to be transparent about the process; provide a detailed rationale and be capable of being held publicly accountable. We do not believe a process that relies on the Government Actuary alone to make such an important policy decision has all these necessary safeguards. The responsibility should, therefore, remain with the Department of Justice.

Contact

Thomas Reynolds
Head of Governmental & External Relations

MDU Services Limited
One Canada Square
London
E14 5GS