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 in principle but we are not wholly supportive of all of the detail. We have the following general observations:

**Discount Rate**

This is an area in which precision and accuracy are difficult to achieve. A rigid or overly prescriptive approach is undesirable.

The minus 0.75% personal injury discount rate (PIDR) applicable in Scotland since 28 March 2017 has been judicially referred to as “by any standard an extraordinarily low discount rate”.

The problems which can arise over time from a fixed, rigid, or prescriptive link or formula, as seen with the link to Index-Linked Government Stock (ILGS), should not be forgotten when re-setting the approach. The urgency with which the present formula needs to be fixed is underscored by the reluctance of the courts to take into account a rate of return other than the PIDR on a “more appropriate” test.

Whilst we fully respect the distinct full legislative competence of the Scottish Parliament in re-setting the methodology by which the PIDR is to be set, we observe that:

- Scottish Ministers have traditionally, in both 2002 and 2017, adopted the same PIDR for Scotland as that set by the Lord Chancellor for England and Wales. Except for the 8 day period 20 – 28 March 2017, the PIDR has been the same throughout the UK since February 2002.
- There is no evidence of which we are aware that the investment attitude and behaviour of, and options available to, Scottish investors of any kind are any different to those in England and Wales.
- The Ogden Tables, first published in 1984 and now in their seventh edition (2011), are of equal relevance UK-wide. Since 2007, geography within the UK has had no specific role to play in The Ogden Tables. Explanation and
justification of any possible divergence on rate between Scotland and England / Wales, with reference to both fact and underlying legal principle, would be welcome.

- Scots Law and the Laws of England and Wales operate on effectively the same fundamental principle of personal injury damages, namely that the injured person should, insofar as possible and so far as money can ever allow, be “restored to the position” that he or she would have been in had the accident never happened.

With the above points in mind, the reasons for having a system in which Scotland might end up with a different PIDR to England and Wales are not clear. We observe that speculative, “snap-shot” government estimations of a 0% PIDR in Scotland and a 0 – 1% PIDR in England and Wales were made at the separate points in time when the Damages (Investment Returns and Periodical Payments) (Scotland) Bill was introduced to the Scottish Parliament (14 June 2018) and the Civil Liability Bill was introduced to the Westminster Parliament (20 March 2018).

Periodical Payment Orders and their implications for the PIDR

We welcome the move to provide Scottish Courts with the power to impose the awarding of Periodical Payment Orders (PPO) as a means to deliver fair and risk free compensation to pursuers, and to be available alongside the existing lump sum approach. It should be remembered, in the context of the Bill as a whole and the setting of the rate, that PPO will be available as a no risk solution in cases in which the level of the PIDR will have the greatest impact on lump sum damages. We are aware of an evidence-based case that the PIDR drafting in the Bill at present does not strike the right balance as low risk and sets risk too low.

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 this aim.

Whether the methodology set out in the Bill is likely to produce a rate that reflects truly the likely investment returns for a compensated party is a question for investment experts, financial advisors and actuaries.

We also refer to the other comments made within this response.
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 process of setting the rate should be evidence and expert led. Involving the Government Actuary is sensible but political accountability is desirable. The Government Actuary is tasked in the Bill at present with determining the rate on a prescriptive methodology which is set by, and subject to alteration in terms of, the Bill. It follows that this Bill does not remove the setting of the rate from the political sphere.

The Civil Liability Bill, which is less prescriptive in methodology, proposes that the Lord Chancellor consult the Government Actuary, amongst others, prior to setting the rate. As such, it is likely to be more expert and evidence led than the proposed process in Scotland.

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?

For the reasons set out in our responses above, we favour the approach taken in the Civil Liability Bill. As above, there are good reasons for the discount rate to be consistent across the UK.

It is also worth emphasising that the link to ILGS became a misplaced hypothesis over time. Setting a formula in statute runs the risk of that formula too becoming inappropriate over time. We appreciate that Schedule B1 15 gives to Scottish Ministers power to add, remove or modify an entry or figure in respect of the notional investment portfolio by regulations. The notional investment portfolio table is prescribed in primary legislation at Schedule B1 12. Allowing secondary legislation by ministerial regulations (subject to affirmative procedure) to amend primary legislation, without full scrutiny and without consultation, could be avoided by adopting the more discretionary, more expert and evidence led and less rigid / prescriptive approach provided for in the Civil Liability Bill.

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 agree that having regular reviews is essential but, in terms of the practical implications, having more time than three years between reviews is likely to be beneficial.

If parties constantly have to consider the implications of a review, it may complicate settlement negotiations and result in cases taking longer to resolve across the board.

The effect on ongoing cases could be mitigated by having a review on a five or seven year cycle rather than every three years. Indeed, as was observed in the House of Lords when, on 27 June 2018, the review cycle in terms of the Civil Liability Bill was increased from three to five years, this “could help 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 make no specific comment on this other than to refer to the points already made.

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 agree that courts in Scotland should have the power to impose PPO. PPO are not suitable in all cases but the courts should have the option to impose them where they are suitable. It would be preferable if the imposition by the court of a PPO could only happen when sought by either or both of the parties. One of the consequences of s.6 (6) (a) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 is, though, that the court is given a supervisory role of satisfying itself, and stating that it is so satisfied, that the future element of any loss, if greater than £1m, is better paid as a lump sum rather than in periodical instalments before it may make an award on a lump sum basis. Unlike England and Wales, Scotland does not have a Court of Protection. This imposition of a supervisory role on the courts could have been
avoided if future losses were ring-fenced for the purposes of Success Fee Agreements. Now it has passed into law in Section 6, albeit not yet in force, it will be necessary to consider the implications for the introduction of the equivalent of a Court of Protection.

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 have no specific comment to make.

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 balance is required between certainty and flexibility. If it is in the interests of justice to revisit a compensation award, it may be appropriate that this be permitted in tightly controlled circumstances, always identified in advance. This can be an important part of ensuring that a party is not over or under compensated.

The variation or suspension provisions of the Bill should also be qualified by the insertion of the words “on the motion of any party” in the context of what a court may do.

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?

No.

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?

We make no specific comment on this other than to refer to the points already made.

Other comments

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

No.