ECONOMY, ENERGY AND FAIR WORK COMMITTEE

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

SUBMISSION FROM: Allianz Insurance Plc

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Allianz Insurance Plc

Intro

Allianz Insurance Plc (Allianz) is one of the largest general insurers operating in the UK. It receives approximately 250,000 motor, employers' liability (EL) and public liability (PL) claims a year, which includes approximately 35,000 injury claims made by or on behalf of injured parties.

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?

Allianz supports the overall intention of the Bill and welcomes reform of the methodology for setting the Discount Rate.

The draft proposals are a significant improvement on the current Index Linked Government Securities (ILGS) investment strategy, which does not accurately reflect the true investment approach of pursuers. The ILGS approach has led to the over-compensation of pursuers and fails to deliver against the 100% compensation principle, a point highlighted by the Government Actuary Department.

Allianz fully supports the need for new legislation aimed at delivering the principle of 100% compensation no more and no less. This principle is central to any proposed legislation change.

Whilst the proposed methodology should improve transparency and lead to a more stable method for setting the Discount Rate, we have concerns that the Bill as drafted fails in its attempts to deliver fairness to all parties.

The content of the notional portfolio is over-cautious; the assumption of a 30 year investment period is too short and the additional adjustment which is described in the Bill as the "further margin" will continue to lead to the over-compensation of pursuers. These costs will have to be met by defenders including insurers, medical professionals, the NHS and other public bodies, ultimately all paid for by the Scottish general public through either the payment of their insurance premiums or tax.

It is our opinion that the proposed three year fixed review period may result in a number of unintended consequences, with large loss claims regularly taking longer than three years to reach settlement, it is possible that any agreement may be delayed further pending the outcome of a review. Adopting a longer term review approach of five years, would help resolve this whilst ensuring consistency with the position being adopted in England & Wales.

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?

Allianz welcomes the overall intention of the Bill aimed at delivering a method and process which, is clear, certain, fair and transparent. The methodology for setting the rate is clearly set out in the legislation, the requirement for the rate-assessor to publish a report at the point of a review should deliver transparency.

However, we have concerns that as drafted the Bill will fail in its intention to deliver a fair and credible outcome mainly due to:

- The calculation of the notional portfolio which fails to reflect the actual investment practices of pursuers.
- The additional 0.5% adjustment – the "further margin" referred to in clause 10(2)(b), we see no justification for its inclusion, these considerations should be included in the process for setting the rate
- The 30 year investment period being too low, all of which serve to weaken the 100% compensation principle directly leading to, continued over-compensation to pursuers paid for by Scottish general public.

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?

There are political sensitivities surrounding the setting of a new rate, for this reason we are firmly of the opinion that their needs to be political accountability for the decision. This will ensure that the decision remains a statutory one rather than a judicial one.

As drafted we do not agree that the Bill removes the setting of the rate from the political sphere. The Bill sets out the rate-setter's remit very precisely: the decision to specify this portfolio and the additional adjustments is very much a political one. The only area of discretion that the rate-setter has is around the interpretation of "other types" of investment in the notional portfolio.

The Scottish Government retains the power to alter the notional portfolio by way of regulations as well as to alter the adjustments and tax considerations. Our assessment is that it will need to exercise this power before each review, to ensure that the assumptions made remain accurate. The remit, whilst precise, is therefore still open to consideration within the political sphere.

This process does not remove the setting of the rate from the political sphere, nor does it avoid attempts to influence the outcome. Scottish Ministers will need to regularly review the provisions of the Bill, probably before each rate review, to ensure that they remain appropriate.

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?**

Allianz is of the opinion that this Bill fails to reflect the actual reality of the pursuers investment approach. When setting the rate the approach needs to be flexible in order to reflect the economic conditions as well as reflecting the true investment strategy adopted by pursuers.

The approach proposed in this Bill provides less flexibility than the approach being adopted in England & Wales. The Bill is much more prescriptive on the obligations and restrictions of the Government Actuary compared with England & Wales where an expert panel has to be consulted.

Whilst in reality the Government Actuary will, have access to, and be aware of, the views of the experts in this field; Allianz are of the opinion that the process in Scotland should be aligned to the one being adopted in England & Wales, the views of this expert panel will be as relevant in Scotland as they are in England & Wales..

There are several points set out in the Bill which mean that the Government Actuary discretion as to the final rate is very limited in particular:

1) The impact of inflation
2) The 30-year investment period
3) The standard adjustment of 0.5% as a further margin

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?**

Allianz welcomes a regular review of the rate which in turn should result in incremental changes, avoiding the need for a significant movement as we experienced following the last review. However, we are of the opinion that a three year review period is too short and we propose that Scotland should align itself with England & Wales where a five year review cycle is being adopted.

A three year review cycle is likely to raise a number of intended consequences which ultimately may lead to delays in compensation being paid as parties try to slow down or speed up settlements anticipating a more favourable rate change. Amending the Scottish provisions to ensure consistency of approach would be welcomed.

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?**

The Scottish Government is right, both in changing the methodology to move away from a rate based on ILGS, and in assuming that injured people have access to the necessary expertise to allow for sufficient flexibility and to manage their risks. As the evidence provided to the 2017 consultation clearly demonstrates, no properly advised investor would invest solely in ILGS (or indeed in any single asset class). The Scottish Government is reflecting the reality of what pursuers are advised to do now.

It is important to note that pursers will always have access to independent financial advice when their claim is being settled. However, given this advice is inevitably confidential to the pursers and their advisers, insurers do not have sight of the exact nature of the advice 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?**

Allianz agrees that there is merit in adopting a consistent approach to PPO's across the UK but remains of the view that the majority of pursuers will want the flexibility of a lump sum payment. We hope the courts do not seek to impose further take up of PPO under the new provisions in the absence of demand from the parties concerned. .

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?**

Allianz are of the opinion that the majority of pursuers are still likely to want the greater flexibility of a lump sum rather than a PPO.

A critical part of the use of a PPO in England and Wales is the requirement that any settlement before or after court proceedings have been started, requires the approval of the court to represent a valid discharge of the claim. This is more than a "rubber-stamp" exercise and will, in practice, involve written and oral submissions to the court as to the adequacy of the settlement. In high value cases where a PPO would be contemplated, it would also involve the pursuer disclosing financial advice to the court alone to evidence the form of award which best meets their needs.

Scottish Courts currently have no equivalent system requiring approval. We believe it forms an important safeguard for the interests of a child or other person lacking legal capacity to manage their own affairs, and would invite the Scottish Government to consider either introducing similar provisions alongside this legislation or asking the Scottish Civil Justice Council to consider the issue.

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?

It will be vitally important to ensure that this provision is not misused or abused, extreme care must be taken so not to undermine the certainty of the litigation process.

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?

Allianz fully supports the 100% compensation principle; unlike the current discount rate of minus 0.75% which has resulted in over-compensation being paid to pursuers. It is vitally important that we strike the right balance when compensating a pursuer for their loss, a system which is fair to all, a system which pays 100% losses no less, no more.

Ultimately the system is funded by insurance customers through the payment of their premiums as well as Scottish tax payers The significant costs of over-compensation creates a problem for society as a whole, not just through the payment of their motor insurance premiums but also through the impact on business premiums as well as the additional costs incurred by public bodies including the NHS who have to meet the cost of any over-compensation.

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?

This Bill as drafted helps address a lot of the fundamental problems which exist under the current system, unfortunately it fails to deliver a balanced and fair system which will continue to result in over-compensation of damages to pursuers, more can be done in order to fully conform to the 100% compensation principle.

There are a number of inconsistencies in the Bill when compared with the provisions being adopted in England & Wales. Aligning the provisions of this Bill with those being adopted in England & Wales will go a long way in delivering the 100% compensation principle.

Other comments

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

The Bill is much more prescriptive on the obligations and restrictions of the Government Actuary compared with England & Wales, this suggests that the approach in Scotland will produce a lower rate compared with other jurisdiction

This is likely to leave Scotland with the lowest single discount rate, suggesting an ongoing lack of balance in the setting of the rate in Scotland. The application of these factors is a political decision and not the responsibility of the rate setter.

Allianz are of the opinion the outcome will not deliver the aims of the Bill and fail to create a fair and credible system for all resulting in the continued over-compensation of pursuers, the consequences of which is not fair to insurance consumers who have to meet the cost of additional insurance premiums in order to fund the level of over-compensation.

Allianz Insurance Plc
September 2018