ECONOMY, JOBS AND FAIR WORK COMMITTEE
BUSINESS SUPPORT INQUIRY
SUBMISSION FROM Forum of Scottish Claims Managers

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?

The Forum of Scottish Claims Managers works to improve the handling of insurance claims to deliver a better service to claimants, and seeks to promote the interests of Forum members in civil justice matters covering the handling of insurance claims. We support reforms to promote improvements to the law to enable consumers easier and quicker access to justice. Further information about the Forum is included in Appendix 1.

We support many of the intentions and concepts of the Bill, subject to some reservations and concerns, which this response expands upon.

We support the principle of full compensation, but are concerned that some aspects of the bill will lead to over-compensation, in particular:

1. The “further margin” of 0.5% applies caution above and beyond an already over-cautious position
2. The make up of the notional portfolio appears to be overly-cautious

The additional cost of any over-compensation would ultimately be met by Consumers and Businesses in Scotland through additional insurance premiums or directly by them in certain circumstances, and an increase in compensation amounts would also have an impact not only on private sector interests but also public bodies such as the NHS in Scotland and local government budgets, if claims against such parties were to cost more.

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 broadly agree with the aim of the Bill as stated above, but have specific concerns over the ‘certain’ and ‘fair’ aspects.

In respect of ‘certainty’, it is really Part 2 of the Bill introducing Periodical Payments of Damages that introduces a ‘certain’ outcome for the catastrophically-injured or particularly risk averse Pursuer in the form of agreed annual payments tied to inflation. The discount rate is part of a larger and more uncertain process where other factors require to be predicted (like how long a person will live for and what age would they have chosen or been able to retire at) in order to arrive at multipliers to calculate future losses.

In considering ‘fairness’ we opine that there are two issues with the approach detailed in the Bill:

1. The notional portfolio: We support the view of the ABI and the further evidence they’ve produced on the matter from Pannells, namely that the notional portfolio is overweight in Fixed investments and underweight in Equity investments and is over-cautious by comparison to how Pursuers as low risk investors will actually invest (and be advised to invest by their Financial Advisers as assumed in Paragraph 70. of the Policy Memorandum) in the real world. The likely consequence is that this will lead to a higher probability of over compensation in the majority of cases.

2. The 0.5% “further margin”: As advised above, the notional portfolio is over-cautious and by applying an additional caution factor on top (in the form of the further margin) the double counting of prudence will result in over-compensation.

The Bill assumes the hypothetical investor will have financial advice and this is also reflected in the calculations. Therefore, the Pursuer will have the benefit of that dynamic financial advice to alter the balance of their managed portfolio as the market shifts. We would not expect a Pursuer to be advised to retain static fixed investments for the term as assumed in the notional portfolio.

The Investment market, investment advice and investment vehicles that will be used by Pursuers are not particular to Scotland – in other words, they will be exactly the same and equally accessible to investors from any part of the UK, so the “further margin” adjustment is an indirect additional cost imposed on Scottish consumers and businesses compared to other jurisdictions in the UK through inflationary pressure on insurance premiums that would not be replicated in those other jurisdictions.
To illustrate the impact of altering the discount rate in 0.5% increments, here are 3 example cases where we have kept all other factors static and only changed the discount rate:

<table>
<thead>
<tr>
<th>Discount Rate</th>
<th>1.50%</th>
<th>1%</th>
<th>0.50%</th>
<th>0%</th>
</tr>
</thead>
<tbody>
<tr>
<td>18 year old male suffered Moderately Severe Brain Injury in a fall</td>
<td>Total £8,600,000</td>
<td>£9,670,000</td>
<td>£10,980,000</td>
<td>£12,620,000</td>
</tr>
<tr>
<td>1.50%</td>
<td>1%</td>
<td>0.50%</td>
<td>0%</td>
<td></td>
</tr>
<tr>
<td>47 year old female paraplegic</td>
<td>Total £6,150,000</td>
<td>£6,650,000</td>
<td>£7,220,000</td>
<td>£7,890,000</td>
</tr>
<tr>
<td>1.50%</td>
<td>1%</td>
<td>0.50%</td>
<td>0%</td>
<td></td>
</tr>
<tr>
<td>54 year old male tetraplegic</td>
<td>Total £9,090,000</td>
<td>£9,650,000</td>
<td>£10,270,000</td>
<td>£10,980,000</td>
</tr>
</tbody>
</table>

As you’ll see, a change of 0.5% makes a significant financial change in each case.

Seriously harmed Pursuers with a cautious, very low or no-risk investment appetite will have the option of taking their compensation under a PPO to reduce their risk. Therefore, the further adjustment is unjustified and adds an additional layer of cost.

In Paragraph 26. of the Financial Memorandum, it’s stated that “The portfolio and adjustments in the Bill would currently produce a discount rate of 0%” – our members question these calculations as they have been unable to reach a net rate of 0% using the portfolio and adjustments.

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?

We do not believe the proposals wholly remove the setting of the rate from the political sphere.

The Scottish Government retains the power to alter the notional portfolio and the further adjustments and will need to at least review whether or not to exercise that power before and during every review. This therefore retains the potential for political considerations to enter the decision-making process.
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?

The approach proposed in this Bill is significantly more rigid than the approach put forward for England & Wales. The Bill sets constraints on the rate-setter, the Government Actuary. It is clear from the Policy Memorandum that most responses supported the involvement of an expert panel to support the work to be completed by the Government Actuary, but the Bill does not require this.

The Government Actuary will certainly have access to, and be aware of, the views of the experts in this field. As we put forward in our answer 2, there are no factors that differentiate underlying investment strategies for Scotland from the rest of the UK and Scottish Pursuers will be accessing a single UK investment market via their Financial Advisers, so the views of the experts on the panel for England & Wales apply equally in Scotland as in the rest of the UK.

The Bill as currently drafted, “ties the hands” of the Government Actuary because of the prescriptive notional portfolio and assumptions made, so allows far less flexibility without Scottish Government changes being made at each review.

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 would propose a five-year review period would be more stable than a three-year review period for the following reasons:

1. These types of claim take longer to settle – an average of three years

2. As a review period approaches, one side or the other may attempt to stall if they perceive a review will give them a better outcome

3. Equally, in the aftermath of a review, there will be a period of stabilisation

Therefore, we would advocate that a slightly longer period between reviews in turn provides a longer period of stability at the same time.

In any event, there is flexibility in the Bill to carry out an ‘out of cycle’ review.
One additional observation we would make is that if there is a full review undertaken ‘out of cycle’ then perhaps the default position should be that the this resets the clock and the next review should be five years from then.

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?

Yes, in our opinion, the Scottish Government is justified in assuming injured people will be properly advised in this regard. We would expect Pursuers Solicitors would be negligent if they failed to properly advise or ensure their clients have access to proper financial advice as part of any settlement process – it may be that this is a question the committee could explore with an organisation like APIL or the Law Society during evidence sessions as they’ll be able to draw on first hand experience.

As answered earlier, we believe the notional 30-year term low-risk portfolio does not meet the balance between fixed investments and equities that a real world Pursuer will choose and again, this is perhaps an area the Committee could explore with organisations who will have first hand experience in this area and who represent Pursuers.

Additionally, we would again draw attention to the “further margin” of 0.5% adding prudence on top of an already prudent approach which will yield the unintended consequence of over-compensation. On the matter of over-compensation, again we would emphasise that additional costs on insurers can ultimately lead to increased premiums. We believe in full and fair compensation, but feel the downsides of over-compensation should also be recognised and taken seriously as this legislation is considered.

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 support the introduction of powers to allow the courts to impose PPOs in Scotland which will ensure a similar situation to what happens in England and Wales.

PPOs should be available for catastrophically-injured Pursuers who require a certainty of funding for their future care needs.

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?

If the discount rate in Part 1 is implemented exactly as suggested, then there could be very little interest in PPOs because the over-compensation situation created by the combination of the notional 30-year term low-risk portfolio and the further margin of 0.5% will mean that a lump sum award is more attractive in financial terms.

The unintended consequence of the notional portfolio as put forward, combined with the 0.5% further margin, is that the very Pursuers who would ordinarily have sought the certainty a PPO provides, (and who the legislation is designed to protect) could be drawn towards settling on a lump sum basis because of the sums involved. It would be interesting to hear the views on this notion from consultees who represent Pursuers’ interests.

We would not anticipate the requirement for continuity of payment to be reasonably secure to have a significant impact because the vast majority of compensators will either be insurers covered by the provisions of the FSCS or public sector bodies.

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?

In England and Wales, the PPO settlement needs to be approved by the court before it takes effect, so it may be that there’s a requirement for an equivalent procedure to be introduced in Scotland through secondary legislation or rules of court to produce a ‘Settlement order’.

The provisions on variation on the face of it introduce a very similar regime to the one that apply in the rest of the UK in that this mechanism only applies to a change in the Pursuer’s medical condition (i.e. rather than a change in his circumstances) and would then vary the terms of the order made at the time of settlement.
We do think however that any change in the medical condition should be expressly-linked to the injuries arising out of the act or omission which gave rise to the claim - This would, in our view, be in line with the approach adopted in the rest of the UK.

In other aspects, we would defer to the comments contained within the submission from the ABI.

**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?

We would repeat our earlier answers that there is a clear need for a discount rate that underpins the principle of 100% compensation and does not have unintended consequences of creating over compensation, the cost of which is ultimately borne by Scottish Consumers and Businesses.

In our response to the Financial Memorandum, we did point out that the principle of 100% compensation could already have been eroded by Section 6¹ of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 which enables Pursuers’ Solicitors to take away a share of a Pursuers future losses. (by way of a success fee)

The charging of such a success fee is in addition to the judicial expenses that a Pursuer’s Solicitor will recover from a Defender in the ordinary course of events.

How this will work in practice and how a Pursuer’s interests will be balanced is really a question to be answered by those charging success fees.

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 believe if the notional portfolio is changed to a more balanced approach and the “further margin” of 0.5% is removed from the Bill, then this will also remove the polarised views because you will have legislation that is reflective of real-world investment by Pursuers and the financial advice they receive, whilst minimising the potential for over-compensation.

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It should not be overlooked that the PPOs are then available as a real alternative for the risk averse and catastrophically injured Pursuer.

A Pursuer's Solicitor is duty-bound to try to maximise the compensation they obtain for their clients so will not only focus on the multiplier for a future loss claim (which is what the discount rate affects) but will also present arguments and evidence for the highest possible multiplicands they can seek to justify for their client.
APPENDIX 1 - ABOUT THE FORUM OF SCOTTISH CLAIMS MANAGERS

The Forum exists as a representative organisation on behalf of its members and works to communicate and promote their interests in the handling of insurance claims

1. The Forum aims to promote improvements to the law to enable easier and quicker access to justice for consumers.

2. The Forum's membership covers a number of major insurers, financial institutions together with claims handling companies and local authorities.

3. The individual members of the Forum are all senior professionals, being Claims Managers or equivalent within their respective organisations, and as such bring together a wealth of experience in insurance claims matters.

4. To provide some context of the size and scale of our membership:
   - Our members directly employ approximately 5,550 people in Scotland.
   - We generate over £1.9 billion annually in respect of insurance premiums collected in Scotland (Personal and Commercial business premiums.)
   - Solely on claims, we spend £1.257 billion annually in Scotland.
   - Our industry is a major economic contributor to Scotland, with Glasgow the largest insurance centre in the UK outside London and is regarded as a core pool of talented resources.

5. Insurance companies exist to provide financial protection for consumers and businesses in the event that the unforeseen happens.