ECONOMY, ENERGY AND FAIR WORK COMMITTEE

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

SUBMISSION FROM: LV= General Insurance

About LV=:

LV= General Insurance (LV=) is the UK’s third largest personal insurer with around six million customers. We provide car, home, pet, travel and landlord insurance, and offer our services directly to consumers as well as through intermediaries, such as brokers.

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?

Overall LV= supports the changes set out in the Damages (Investment and Periodical Payments) (Scotland) Bill as we believe that reform of the methodology for setting the Discount Rate is long overdue. While we welcome the changes to the discount rate which have been drafted by the Scottish Government, we ultimately believe that the rate should be in-line with the rest of the UK to ensure consistency for motorists, pursuers and insurers, and discourage “jurisdiction shopping”.

We strongly believe that the method for setting the rate should be fair, stable and transparent for all parties involved.

We therefore have concerns that the methodology for setting the rate as set out could lead to significant over-compensation. We have always believed in the principle of 100% compensation not more, not less. However, we have concerns that the following aspects of the Bill could be a departure from the principle of 100% compensation if they are not addressed:

- The assumption that the relevant period for investment is 30 years – we believe this is too low
- Content of the notional portfolio, which we feel is overly cautious
- Additional adjustment which is described as the “further margin”

We would urge the Scottish Government to look at these aspects of the Bill to ensure that it results in 100% compensation, which is fair and stable for everyone involved.

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 “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.” However, there is a risk that it may actually lead to inequality if the rate is set at a different level to that of the rest of the UK as it could result in slightly higher policy premiums in Scotland, than in England, Wales and Northern Ireland.

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 agree with the Scottish Government that the rate should be reviewed by the Government Actuary, and not Scottish Ministers. However, we do not believe that it will wholly remove the setting of the rate from the political sphere and will not prevent attempts to influence the outcome. We would therefore suggest that the provisions within the Bill are looked at in more detail in order to ensure that the setting of the rate is truly removed from the political sphere and from external pressures from interested groups.

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?

We believe that any rate that is set should be consistent across the UK in order to avoid jurisdiction shopping in the event of an accident and for fairer and more consistent policy premiums for customers. If the rate is different in Scotland than that of the rest of the UK then it could potentially lead to customers in Scotland paying more for their car insurance.

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 support reviewing the rate at regular intervals to ensure that the rate is appropriate and is not subject to significant changes. While we support the idea of additional, out-of-cycle reviews, we would urge Ministers to implement such reviews with caution, and only on rare occasions.

We also believe that reviews should be carried out every 5 years rather than 3 given that catastrophic injury claims can take an average of 5 years to settle and therefore
a longer review period would deter either party from trying to time the settlement of a claim in the anticipation of a favourable change in the rate.

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?

LV= supports the Scottish Government’s decision to move away from a rate based on Index-Linked Government Stock (ILGS) as we believe that the concept of pursuers investing damages in gilts is a myth, and no evidence has been produced to support it. We do not believe that investing in ILGS is a “no risk” or “very low risk” option is true. Individual pursuers could not invest solely in ILGS and, if they did so, they would find such investment carried significant greater risk. As recognised in the Government Actuary Department (GAD) report, investing solely in ILGS would likely guarantee losses against inflation, and it is therefore for these reasons that it should be accepted that pursuers did not invest in ILGS, but in a mixed portfolio.

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 firmly believe that it should be for the Pursuer, their lawyers, independent financial advisers and Barristers to decide whether they are the best option for their client, and not for the courts to decide. The judiciary should not be in position to override the wishes of the Pursuer, or mandate the settlement methodology in Civil matters and especially for PPOs, noting that such control is not exercised in any other area of compensation. Such a suggestion seems to be founded upon a misguided belief that in some way it is the Defender that drives the Pursuer towards a lump sum. That is not true as such a choice is entirely in the hands of the Pursuer and their representatives.

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 believe that in order to fully support the Scottish Government’s national outcome in relation to situations where people have been catastrophically injured through no fault of their own, there must be a discount rate in place that truly underpins the principle of 100% compensation. Such a discount rate will ensure a system that is fair for all. The current rate is not fair for everyone as the cost of over-compensation is ultimately met by insurance customers and tax payers in Scotland. We therefore believe that only a discount rate that does not lead to over or under compensation would meet the Scottish Government’s national outcome.

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 that once the aspects of the Bill that we have highlighted in our response have been addressed, then in general the balance between the interests of the two parties will have been restored. However, we do acknowledge that both pursuer and defender will no doubt have concerns about different parts of the draft legislation.

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

While we support the majority of changes outlined in the Damages (Investment and Periodical Payment) (Scotland) Bill, we ultimately believe that the rate should be in-line with the rest of the UK to ensure consistency for motorists, pursuers and insurers, and discourage “jurisdiction shopping”. We strongly believe that the method for setting the rate should be fair, stable and transparent for all parties involved.