ECONOMY, ENERGY AND FAIR WORK COMMITTEE

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

SUBMISSION FROM Enterprise Holdings

About Enterprise Holdings

Enterprise Holdings operates in more than 90 countries and employing more than 100,000 people worldwide. Enterprise Holdings is committed to optimising vehicle usage and through car club and car rental, operate the cleanest vehicle fleet in the UK.

Part of Enterprise Holdings, Enterprise Rent-A-Car is an industry leading, multinational car rental company. Our UK fleet has in excess of 95,000 vehicles, positioning us as the largest private purchaser of vehicles in the country. We employ over 5,000 people across 460 locations in the UK.

Our interest in the discount rate

As a total mobility provider and an integral part of the automotive value chain, we serve the needs of a wide variety of businesses, consumers, government agencies and organisations. One of our company’s largest ongoing costs is the impact of personal injury claims as a result of accidents involving its vehicles. It is our third highest expense after fleet acquisition costs and personnel.

While we welcome the proposal to reform mechanism for setting the discount rate, we are concerned that the Bill as drafted risks over-compensating pursuers. The new process must be credible and fair to both rented car drivers and the motor and insurance industry.

Responses to Consultation questions

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 the reform of the methodology for setting the Discount Rate and support the need for legislation in this area. It is important that there is a more stable and fairer method for setting the discount rate in the future and that the process should be more transparent for all parties.

However, the assumptions set out in the Bill (over-cautious notional portfolio, 30-year period and additional 0.5% “further margin” adjustment) suggest that the approach to be taken in Scotland will produce a rate lower than that produced by the process in England & Wales. This outcome 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.

This would not reflect a fair system that achieves the Scottish Government's national outcome, nor does it meet the overall policy of Part 1 of the Bill, i.e. that it is clear, certain, fair, regular, transparent and credible. An outlier rate would not appear to be fair to motorists who have to meet insurance premiums and it would not appear to achieve a credible outcome.
We are also concerned that the Bill also provides that multiple rates could be set, should the Scottish Minister require this, by regulation. It is not at all clear how this could work and the Bill does not create an appropriate mechanism for this process. As currently drafted, the Bill would be unworkable if multiple rates should be set.

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 support the overall aims of the Bill. It is agreed that the method and process are clear, certain, regular and transparent.

However, we would highlight the following:
- The notional portfolio is over-cautious. A portfolio which has more weighting to Equity investment would be more appropriate if the 100% compensation principle is to be upheld.
- The “further margin” adjustment is unnecessary and undermines the 100% compensation principle.

We consider that these two factors will deliver over-compensation to pursuers. The cost of this over-compensation would be met by defenders and would inevitably be passed on to motorists as part of insurance premiums.

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 believe that must be political accountability for the setting of the rate to ensure that the decision remains a statutory one, as opposed to a matter for judicial interpretation.

However, we do not agree that the Bill as drafted removes the setting of the rate from the political sphere for the following reasons:
- The Bill sets out the rate-setter’s remit very precisely.
- 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.
- It is likely that Scottish Ministers would need to consider investment practice and the make-up of a suitable portfolio and revise the notional portfolio before each review takes place. This means assumptions made by Scottish Ministers will largely dictate the outcome.
3. 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 to be taken in 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 as drafted makes no provision for this.

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 the principle of reviewing the rate at consistent intervals. Regular reviews mean that any changes to the rate should become incremental and would not result in a significant adjustment as occurred at the last review.

   However, we consider a 3-year review cycle to be too short, and consider a 5 year review cycle to be more appropriate. Catastrophic injury claims take an average of 3 years to settle; a longer interval would therefore discourage a party to a claim trying to speed up or slow down the settlement of an individual claim in the anticipation of a favourable change in the rate. This is also consistent with the responses in the Policy Memorandum.

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 correct to change the methodology to move away from a rate based on ILGS, and to assume that injured people have access to the necessary expertise to allow for sufficient flexibility and to manage their risks.

   As the evidence provided to previous consultations demonstrates, properly advised investors would not invest solely in ILGS (or indeed in any single asset class). It is also important to note that pursuers will always have access to independent financial advice when their claim is being settled.
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?

The Bill relates to situations where people have been catastrophically injured through no fault of their own. This is why a discount rate that underpins the 100% compensation principle is vital. The current discount rate of minus 0.75% has created a system where pursuers are over-compensated for their losses.

What is required to support the national outcome is a system that is fair to all. A system that ultimately delivers on the principle of 100% compensation is fair to all members of society. Ultimately the cost of over-compensation is one which is otherwise met by insurance customers and tax payers in Scotland. The process for setting the discount rate must strike that balance and must not lead to over- or under-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?

Subject to the points raised in our responses above, we consider the Bill to be an appropriate balance between the different competing interests and to create a fairer system for all.

Previously, those supporting pursuer interests felt strongly that the previous discount rate of 2.5% was unfair as it was too high. However, the evidence clearly demonstrates that the current rate is unfair and too low. Both rates were set on a basis that is now seen as outdated and not fit for purpose.

Whilst there are concerns about the drafting of the current legislation, and we would like to see the concerns expressed in the response addressed, the aims are to balance the interests of pursuers and defenders, and should create a system that reverses the current unfairness towards motorists and is fairer to both rented car drivers and the motor and insurance industry.