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 proposals made by the Scottish Government are an improvement on the previous system, much of which has led to over compensation, with a cost to society at large through increased prices.

The review of the discount rate should properly reflect the reality of the practice of lump sum investment.

We believe that Pursuers would benefit from a 5 year cycle of review and also from the wider use of PPOs.

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 the aims of the reform.

The proposed methodology will provide transparency.

More credence should be given to the content of the notional investment portfolio to better reflect the actual investment strategy followed by pursuers in receipt of lump sum settlements. Otherwise, there is a significant risk of over compensation.

Additionally, pre-determining the make-up of the portfolio does not allow for future, alternative investment opportunities.

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?

Leaving the Scottish Government with the ability to deliberate investment practice and the constituent parts of the portfolio will mean that the decision is influenced in the “political sphere”.

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 would prefer that discretion is available to reflect wider issues such as the economic cycle, and to avoid anomalous situations.

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 support a longer period between reviews – 5 years preferably, to minimise the number of cases where either party could attempt to disrupt settlement in anticipation of a change to the discount rate.

Out of cycle reviews should reset the three year cycle to avoid more cases being subjected to timing tactics by either party.

If implemented, both of these points would provide more certainty to the Pursuer.

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?

No comment.
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 the courts in Scotland should have the power to impose periodical payments where it is in the best interest of the Pursuer.

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?

Not known. We believe that PPOs are a very valid way of reaching settlement and wish to see more cases being concluded in this manner. It removes risk from the Pursuer and minimises the risk of over or under compensation.

Most PPOs are funded through insurers and the public sector and are expected to be secure.

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?

We agree with the proposals in the bill. It should be noted however that the majority of cases brought back for review are likely to be ones where the Pursuer’s condition has deteriorated and the Pursuer seeks additional compensation. This is because the Pursuer will know themselves of any such deterioration whereas a compensator will not routinely know of any change in the Pursuer’s condition, such as a recovery or improvement.

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?

Improvements in the accuracy of settlements to remove over-compensation will benefit society at large – either through reduced pressure on premiums or on the costs of services provided in both the public and private sector.
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?

No comment.

Other comments

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

No

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