Finance and Constitution Committee Questionnaire

This questionnaire is being sent to those organisations that have an interest in, or which may be affected by the Damages (Investment Returns and Periodical Payments) (Scotland) Bill FM.

In addition to the questions below, please add any other comments you may have which would assist the Committee’s scrutiny of the FM.

Consultation

1. Did you take part in any consultation exercise preceding the Bill and, if so, did you comment on the financial assumptions made?

Answer: Yes, we responded to all 3 Consultations in October 2012¹, May 2013² and May 2017³.

We did comment on the financial assumptions in all 3 consultations.

2. If applicable, do you believe your comments on the financial assumptions have been accurately reflected in the FM?

No – In the October 2012 Consultation, we offered commentary and evidence regarding how the vast majority of claimants invest in a basket of equities approach.

In both the 2012 and 2013 Consultations, we made specific comment on limits of Indemnity of insurance policies and that if claims breach indemnity limits, then the costs above the limit have to be borne by the business or private individual directly. Small Commercial

Businesses Public Liability policies and Home Insurance policies (the Owner/Occupier/Personal Liability sections) frequently have a £2m limit of indemnity.

Taking the examples set out in paragraphs 25. & 26. of the Financial Memorandum, at the discount rate prior to 2017 (2.5%) these limits would have been broadly adequate, however, a Discount Rate of 0% would see similar injuries in the first 2 examples breaching the limit of indemnity. (the top example outright, and the second example would breach the limit in all probability once other heads of claim were added)

Higher limits of indemnity may be available, but at a higher cost reflecting the increased risk of the incidence of larger claims – in the same way that we continue to state that the true financial implications of higher payouts in damages is higher insurance premiums for individuals and businesses.

In the 2017 consultation, we endorsed the significant amount of evidence presented by the ABI, but note that none of this evidence is reflected in the notional portfolio.

3. Did you have sufficient time to contribute to the consultation exercise?

Answer: Yes

Costs

4. If the Bill has any financial implications for your organisation, do you believe that they have been accurately reflected in the FM? If not, please provide details.

Answer: No, but we accept that this is partially due to difficulties in ascertaining the true cost implications the Bill has.

At paragraph 15. Of the Financial Memorandum when putting forward an adjustment for investments costs and tax and then a further suggested deduction, it's stated that “there will inevitably be a probability of over compensation but it will be less than if the rate were set by reference to ILGS.”

This undermines the principle of 100% compensation (as does success fee agreements with Solicitors – see Answer 8. For more details) as the “real world” investment strategy adopted by Pursuers is “low risk” so we would offer the view that if the investments assumptions are correct and a deduction made for investment costs and tax, then there is no basis for a further deduction to apply additional caution on top of an already very cautious approach.

The “further margin” adjustment would be an indirect additional tax 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.
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., 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.

5. Do you consider that the estimated costs and savings set out in the FM are reasonable and accurate?

Answer: No – at paragraph 52. there appears to be an assumption that the setting of a higher discount rate now than that on March 2017 will mean a corresponding saving by way of reduced insurance premiums.

There is a recognition that the pre-2017 discount rate of 2.5% was too high applying the methodology of the overly prudent investor, but equally, the 2017 discount rate of -0.75% was then so low that it would result in considerable over compensation if applied rigidly.

Since the discount rate changed in 2017, the reality has been uncertainty for both Pursuers and Defenders alike, with settlements being achieved on a compromise somewhere between the old rate and the new rate.

Therefore, any new rate may alter the cost or saving depending what that rate is and when it is introduced, but it’s not possible to tell without knowing these factors in advance.

As explained in Answer 2., no allowance has been made for the limits of indemnity of insurance policies and the relative cost to individuals and businesses if those limits were to be breached or the cost and availability of insurance with higher limits of indemnity.

Additionally, there is no allowance made for the cost of delivering PPOs for either the administrative costs themselves, or the increased capitalisation requirements faced by Insurers.

6. If applicable, are you content that your organisation can meet any financial costs that it might incur as a result of the Bill? If not, how do you think these costs should be met?

Answer: Not Applicable - We are unable to answer this question as it would need to be answered by our individual members

7. Does the FM accurately reflect the margins of uncertainty associated with the Bill’s estimated costs and with the timescales over which they would be expected to arise?

Answer: No, we would advocate a 5 year review period (rather than a 3 year period) as it would introduce less volatility and provide a more lengthy period within the review cycle for cases to settle.
Wider Issues

8. Do you believe that the FM reasonably captures any costs associated with the Bill? If not, which other costs might be incurred and by whom?

Answer: Paragraph 53. anticipates that Solicitors are unlikely to be affected, however the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 does have the consequence that solicitors representing pursuers may benefit from increased damages payouts whilst eroding the principal of 100% compensation by the mechanism of a success fee as set out in Section 6\(^4\) of the Act.

Pursuers Solicitors will be able to take a share of the Pursuers future losses (by way of a success fee) if they total less than £1m, but will also be able to do the same for future losses over £1m if an independent actuary certifies that a lump sum settlement is in the best interests of the Pursuer.

Therefore, the lower the discount rate, (and particularly if we are in over-compensation territory) then there would be a windfall for the Pursuers Solicitor if they have a success fee agreement in place and the Pursuer would lose a proportion of their damages to their solicitor.

In our view, this proposition was not adequately explored with Pursuers Solicitors in the evidence sessions leading up to the passing of the now Act – the question remained unanswered - If lump sum settlements do not result in over compensation, then why would the levy of the success fee not leave the Pursuer with a shortfall on their damages?

9. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

Answer: It is difficult to provide an answer without the detail or subject matter on any subordinate legislation.