The Scottish Government
Riaghaltas na h-Alba

Crime and Justice: Civil Justice

Civil Law of Damages: Issues in Personal Injury Analysis of Written Consultation Responses

CIVIL LAW OF DAMAGES: ISSUES IN PERSONAL INJURY
ANALYSIS OF WRITTEN CONSULTATION RESPONSES

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The views expressed in this report are those of the researcher and do not necessarily represent those of the Scottish Government or Scottish Ministers.

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1. EXECUTIVE SUMMARY

1.1 Damages for personal injury are the amount of money negotiated between pursuers and defenders, or awarded by the courts, to compensate the pursuer for the injury and loss suffered as a result of the wrongdoing of the defender. In its manifesto, the Scottish Government committed to consolidating and updating the existing legislation on the law of damages, building on the work of the Scottish Law Commission (the Commission).

1.2 The Scottish Government published a consultation paper on 19 December 2012 in which views were invited on implementing the Commission's 2004 report on *Damages for Psychiatric Injury*[1], its 2007 report on *Personal Injury Actions: Limitation and Prescribed Claims*[2], and on the one outstanding recommendation in its 2008 report on *Damages for Wrongful Death*[3]. The other recommendations in that report were taken forward in the Damages (Scotland) Act 2011.[4] It also sought comments on a range of related issues such as the discount rate to be applied in calculating future loss; interest on damages; and periodical payments.

1.3 Forty five responses to the consultation were submitted: 82% of these were from organisations, and 18% from individuals. The largest category of respondent was insurance bodies, comprising 29% of all respondents.

1.4 A summary of views contained in the consultation responses follows.

Psychiatric injury

1.5 The summary of defects outlined in *Damages for Psychiatric Injury* (2004) was considered to be full and accurate by the majority (80%) of respondents who provided a view. However, there were mixed views on whether common law rules applying to reparation for mental harm should be replaced by a statutory obligation to make reparation for wrongfully caused mental harm. Concerns focused largely on a common perception that this would risk courts losing their flexibility to deal with cases according to their individual circumstances.

1.6 A slight majority (57%) of those who addressed the issue disagreed with the SLC that the concept of "ordinary fortitude" is unsatisfactory, arguing that the term has been generally understood over time, has been well tested in case law and is accepted as a standard.

1.7 The vast majority (89%) of those who provided a view did not agree that an appropriate balance between the right of an injured person to secure damages and the right of a defender to expect a certain level of mental resilience in individuals would be achieved by focusing on the stresses or vicissitudes of life or the type of life the person leads. The most common

[1] The report is available at www.scotlawcom.gov.uk/download_file/view/350
[2] The report is available at www.scotlawcom.gov.uk/download_file/view/237
[3] The report is available at www.scotlawcom.gov.uk/download_file/view/393
[4] http://www.legislation.gov.uk/asp/2011/7/contents

argument was that each case should be assessed according to its own specific circumstances, rather than applying broad brush rules.

1.8 Most (71%) of those who provided a view agreed that where physical harm is reasonably foreseeable, but mental harm is not, and a victim sustains only mental harm, the negligent party should not be held liable.

1.9 The vast majority (88%) of those who provided a view agreed that there should be a general prohibition on obtaining damages for a mental disorder where the victim has sustained that injury as a result of witnessing or learning of an incident, without being directly involved in it. Most (82%) of those who addressed the issue agreed that it is appropriate to except rescuers from the general prohibition; most (81%) agreed that it is appropriate to except those in a close relationship with anyone killed, injured or imperilled by the accident from the general prohibition. Around two-thirds (69%) of those commenting agreed that the two exceptions outlined above strike the appropriate balance between the right of the injured person to secure damages and the right of a defender.

1.10 The majority (82%) view amongst those who commented was that, overall, the proposed framework set out in the Commission's report does not strike the appropriate balance between flexibility of approach and certainty of outcome. Some respondents considered the framework to lack precision and leave too much to judicial discretion.

Psychiatric Injury caused by a Wrongful Death

1.11 The majority (79%) of those providing a view agreed that it should not be possible for a bereaved relative to secure damages for psychiatric injury under s.4(3)(b) of the 2011 Act.

1.12 It was commonly thought that the overall impact of the proposals under discussion would be an increase in the number of actions, cases coming to court, preparation time, court time, awards of damages and size of damages.

Time-bar

1.13 Around three-quarters (74%) of those who provided a view agreed with the Commission that it would not be advisable to seek to revive prescribed claims for all personal injuries, regardless of the nature and circumstances of the personal injury, even it were lawful to do so. The most common argument in favour of not reviving prescribed claims was that this would unfairly prejudice defenders who would most likely encounter problems gathering quality evidence.

1.14 There was much opposition (77% of those providing a view) to the proposal to raise the standard limitation period from three to five years. Main arguments were that extending to five years could pose a risk to the quality of evidence and might encourage unnecessary delays in proceedings. The majority view (79% of commentators) was in favour of a single, standard

limitation period for all types of personal injury claim. This was seen as creating a simple rule which is easy to understand.

1.15 Respondents were evenly split over whether there should be a statutory, non-exhaustive list of matters relevant to determining whether it would be equitable for the courts to exercise discretion to allow an action to be brought outwith the limitation period.

1.16 The majority (73%) of those who provided a view agreed that it is in the interests of justice that there should be only one limitation period following the discovery of a harmful act, during which all claims for damages for associated injuries must be brought. Most (71% of those commenting) did not consider that there should be any exceptions to this principle. It was commonly felt that only one cause of action should arise following a delictual act, with all damages sought at that time. A recurring view was that the Carnegie approach[5] cannot readily be reconciled with this principle, and the current law as defined by Aitchison[6] is now part of the bank of case law which informs the court in relation to applying discretion under s.19A[7].

1.17 Of those who provided a view, the majority (79%) did not consider there to be a need to make provision for cases where it was known that the initial harm was actionable but where decisions not to litigate were taken in good faith in reliance on the rule in Carnegie before it was overturned by the court in Aitchison.

1.18 It was commonly thought that the overall impact of the proposals under discussion would result in an increase in the number of actions raised with more of these coming to court and requiring more preparation and court time. Respondents envisaged overall increases in the number and size of awards for damages.

Recent legislative reform

1.19 Of the 18 respondents who provided a view all agreed that the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 is achieving its central aim of ensuring that a person dying of mesothelioma can secure damages without thereby preventing members of his/her immediate family making a future claim. The 2007 Act was viewed largely as producing positive impacts such as a swifter settlement of claims, helped by the earlier disclosure of information in support of claims.

[5] *Carnegie v Lord Advocate* (2001). The *Carnegie* approach would result in a pursuer who could establish that the emergence of a further injury was wholly separate and distinct to an earlier injury would have the right to raise an action for the later injury even if they had not done so for the earlier injury.
[6] *Aitchison v Glasgow City Council* (2010). In this case, the argument was that following a delictual act, a single cause of action arises, in which all associated damages must be sought.
[7] Here and elsewhere, s.19A refers to s.19A of the Prescription and Limitation (Scotland) Act 1973.

1.20 Fifteen of the 16 respondents who provided a view agreed that the Damages (Asbestos-related Conditions) (Scotland) Act 2009 is achieving its central aim of ensuring that a person with pleural plaques (or one of the other specified asymptomatic asbestos-related conditions) may pursue an action of damages in the same way as a person with any other non-negligible personal injury. The most significant positive impacts of the 2009 Act were described as opening up justice to claimants previously unable to access this, and widening the scope of justice to encompass claimants with a "fear of the future". The most commonly cited unintended consequence was highlighted as the settlement of claims usually on full and final basis, rather than on a provisional basis as had been expected. This resulted in barring any subsequent claims in the event of serious asbestos-related conditions developing.

1.21 In general, respondents felt that it was too early to assess the extent to which the Scottish Government's financial estimates were accurate regarding the number of additional claims, their average level of costs associated with these and the overall financial implications of the 2007 or the 2009 Acts.

1.22 Fourteen of the 19 respondents who expressed a view did not consider the Damages (Scotland) Act 2011 to be achieving its central aim of bringing greater clarity and accuracy to Scots law, so far as it relates to damages for fatal personal injuries, reducing requirements for potentially intrusive, protracted and costly investigations, and thereby facilitating the swift and fair settlement of claims.

1.23 The majority of those who commented highlighted negative impacts associated with the 2011 Act. In particular, insurance bodies considered there to be a lack of clarity due to the decision to remove the deduction of the surviving spousal income; ambiguity over what constitutes "manifestly unfair"; and knock-on delays in settlements of cases.

1.24 The majority view, largely amongst insurance bodies, was that all of the Scottish Government's financial estimates relating to the 2011 Act were inaccurate, with the financial implications much greater than predicted. However, it was generally agreed that more informed assessment is required and should be based on data from the records of several different solicitor firms.

Future legislative reform

1.25 The vast majority (93%) of those providing a view saw merit in reviewing the existing approach to periodical payments. These were envisaged as potentially a fair way to settle claims, particularly in serious, catastrophic cases, in order to ensure that pursuers do not outlive the care package put in place following their injury claim.

1.26 The large majority (88%) of those who provided a view considered that there would be merit in reviewing separately the existing approach to interest on damages for personal injury. Many respondents perceived there to be a current mis-match in the judicial and market interest rates, which provided an incentive to pursuers to delay settlement.

2. INTRODUCTION

2.1 In its manifesto, the Scottish Government committed to consolidating and updating the existing legislation on the law of damages, building on the work of the Commission . Previous reviews have looked at modernising aspects of Scots civil law. The Scottish Civil Courts Review was undertaken by Rt Hon Lord Gill and addressed how rights and obligations are enforced; and in the Review of Expenses and Funding of Civil Litigation, Sheriff Principal Taylor is examining the financial aspects of civil litigation. The Scottish Government gave its commitment to reform the law of damages in order to update the *substance* of those rights and obligations.

2.2 Damages for personal injury are the amount of money negotiated between pursuers and defenders, or awarded by the courts, to compensate the pursuer for the injury and loss suffered as a result of the wrongdoing of the defender. For a civil action for damages for personal injury to be successful, evidence needs to demonstrate on the balance of probabilities that:

- there was a breach of a duty of care owed to a person;
- that breach of duty caused the person real harm;
- that harm was reasonably foreseeable as a result of that breach; and
- the person or entity that failed to fulfil the duty of care behaved deliberately or negligently.

2.3 It is also necessary for a civil action for damages to be brought within a defined period. This period is commonly called the "time-bar" and is set out in the Prescription and Limitation (Scotland) Act 1973. The period defined aims to strike an appropriate balance between the rights of individuals who may wish to make a claim for personal injury having reasonable opportunity to do so, and on the other hand, the protection of individuals and organisations against open-ended civil liability.

2.4 The Scottish Government published a consultation paper on 19 December 2012 in which views were invited on implementing the SLC's 2004 report on *Damages for Psychiatric Injury*[8], its 2007 report on *Personal Injury Actions: Limitation and Prescribed Claims*[9], and on the one outstanding recommendation in its 2008 report on *Damages for Wrongful Death*[10]. It also sought comments on a range of related issues such as the discount rate to be applied in calculating future loss; interest on damages; and periodical payments.

2.5 In addition to consulting in a written document, the Scottish Government held two public stakeholder events across Scotland focussing on time-bar, to ensure the issues under consideration were made accessible to a wider range of respondents. The views generated by each of these consultation approaches complement each other and inform the Scottish Government's decisions on the reform of damages law as recommended by the SLC.

[8] The report is available at www.scotlawcom.gov.uk/download_file/view/350
[9] The report is available at www.scotlawcom.gov.uk/download_file/view/237
[10] The report is available at www.scotlawcom.gov.uk/download_file/view/393

2.6 The written consultation closed on 15 March 2013. This report presents the analysis of views contained in the written responses only. These responses have been made publicly available on the Scottish Government website[11] unless the respondent has specifically requested otherwise.

Consultation responses

2.7 Forty five written responses to the consultation were submitted. Table 1 shows the numbers of responses by category of respondent. Insurance bodies formed the largest category of respondent, accounting for 29% of responses. Overall, 82% of responses were from organisations; the remaining 18% of responses were from individuals. The full list of respondents is in the Annex.

Table 1: Number of responses by category of respondent

Category	No.	%
Insurance bodies	13	29
Legal body representatives	7	16
Solicitor firms	4	9
Academics	3	7
Medical Defence Unions	3	7
Representative bodies of Historic Child Abuse	2	4
Union	1	2
Other	4	9
Individual legal	1	2
Individual public	7	16
Total	**45**	**100**

NB Percentages do not add to 100% exactly due to rounding.

2.8 It should be noted that the legal body representatives and solicitors who responded to the consultation included those representing pursuers *and* those representing defenders. These different perspectives are reflected in their responses, as presented in the following chapters.

2.9 An electronic database was used to collate the responses to assist analysis. Qualitative and quantitative approaches were used to analyse the responses to questions which included both open and closed aspects.

Report of findings

2.10 The following four chapters document the substance of the analysis. **Chapter 3** examines views on the current law on psychiatric injury and proposals for change. **Chapter 4** analyses responses to proposals relating to limitation and prescription which are aimed at striking an appropriate balance between the rights of pursuers and defenders. **Chapter 5** summarises views on whether three key recent legislative reforms are achieving their central aims; and **Chapter 6** presents comments on two main aspects of future legislative reform: periodical payments; and interest on damages.

[11] The consultation non-confidential responses can be viewed at: http://www.scotland.gov.uk/Publications/2013/08/5509

2.11 Respondent categories have been abbreviated in the report as follows:

Insurance bodies	Ins
Legal body representatives	Leg Rep
Solicitor firms	Sol
Academics	Acad
Medical Defence Unions	MDU
Representative bodies of Historic Child Abuse	Rep CA
Union	Union
Other	Oth
Individual legal	Ind-Leg
Individual public	Ind-Pub

3. PSYCHIATRIC INJURY

Current law

3.1 If a person suffers a psychiatric injury as a result of the fault of another, there may be a case for an award of damages. The existing common law rules have been developed by the courts over the past century. The rules are complex and widely considered to be in need of reform.

3.2 The Scottish Ministers invited the SLC to review the law in this area and make recommendations for reform. The SLC published its report, *Damages for Psychiatric Injury* in 2004. The report identified six main defects in the present common law rules in the sphere of pure psychiatric injury as follows:

- Victims are divided into two categories, primary victims and secondary victims. The two categories have different rules for compensation, yet the boundary between them is unclear.

- While, in general, liability arises only if the injury to the victim is reasonably foreseeable by the wrongdoer, a primary victim may recover for an unforeseeable psychiatric injury if some physical injury was foreseeable but did not occur.

- For secondary victims at least, compensation is awarded only if they have suffered a shock – the sudden appreciation by sight or sound of a horrifying event.

- Secondary victims can recover only if they meet the so-called Alcock[12] criteria:
  (There must be a close tie of love and affection between the secondary victim and the injured person; the secondary victim must have been present at the accident or at its immediate aftermath; and the secondary
  victim's psychiatric injury must have been caused by direct perception (i.e.
  through his or her own unaided senses) of the accident or its immediate
  aftermath.)

- Secondary victims can recover only if their psychiatric injuries were foreseeable in a person of — "ordinary fortitude" – a legal construct that is
  difficult to evaluate.

- Rescuers are treated as primary rather than secondary victims in that they do not have to meet the Alcock criteria. However, they may well have to have feared for their own safety.

[12] The "Alcock criteria" are derived from the case of *Alcock v Chief Constable of South Yorkshire Police* (1992).

3.3 Overall, around 70% of respondents to the consultation addressed the issue of psychiatric injury. In understanding the balance of views it is important to be aware that the views of insurance bodies were prominent across most issues, with all 13 insurance body respondents tending to provide the same or similar perspectives in response to the questions posed.

3.4 The consultation asked:

Question 2a) Do you agree that the 2004 report's summary of defects in the existing common law is a reasonably full and accurate one in today's circumstances?

3.5 Thirty respondents (67% of all respondents) addressed question 2a) as follows:

Table 2: Summary of views on whether the summary of defects is full and accurate

Respondent category	Yes	No	Total
Insurance bodies	12	1	13
Legal body reps	4	2	6
Solicitor firms	3	1	4
Academics	2		2
MD Unions	1	1	2
Reps of Historic Child Abuse	1		1
Other	1		1
Individual public		1	1
Total	24	6	30

3.6 The vast majority (80%) of those who provided a view agreed that the 2004 report's summary of defects is a reasonably full and accurate one. Those agreeing included all but one of the insurance bodies and solicitor firms respectively.

3.7 A common view (mentioned by nine respondents, including seven insurance bodies) was that rather than labelling the points raised as "defects", they should instead be considered as a summary of issues emerging from a complex area of law. Another view was:

> "The report has identified a number of aspects of the common law that we would not categorise as defects because we consider they are necessary safeguards for defenders" (Medical Defence Union).

3.8 There was also agreement (6 mentions) that much of what was perceived as the complexity and conflict in the current law had arisen from the case-by-case approach adopted over the years to considering delictual liability. However, despite such perceived complexity, a recurring recommendation amongst insurance bodies was to avoid over prescription in this area of law, to enable courts to retain some flexibility in decisions.

For example:

> "Although predictability in the law is generally good, it should not become formulaic or a straight [sic] jacket and therefore the courts must retain flexibility to reach appropriate decisions on the facts of a case so as to continue to develop the law in this area as appropriate" (AXA Insurance).

3.9 Some respondents outlined specific challenges they associated with the current law:

- Does not achieve an appropriate balance between the rights of the injured person and the rights of a defender (Sol, MDU).
- Currently depends on too much interpretation (MDU).
- Some of the distinctions ("cut off" points) which require to be made are artificial and therefore difficult to understand (Sol).

3.10 Whilst three respondents (Ins, Sol, Leg Rep) highlighted difficulties in distinguishing between primary and secondary victims in current law as a challenging issue, several others (8 respondents), commented that the law on this distinction is reasonably clear.

<u>Perceived gaps in defects identified</u>

3.11 One respondent (Sol) emphasised their view that the most significant defect in the common law is what they considered to be "the artificial and inappropriate distinction between physical and mental harm" (Thompsons Solicitors and Solicitor Advocates).

3.12 Another respondent (Acad) considered that the topics of intentional infliction of psychiatric harm, and psychiatric injury arising out of ongoing stress in the workplace, both require more detailed examination.

3.13 The consultation asked:

Q2b) Do you agree in principle that existing common law rules which apply only to reparation for mental harm should be replaced by a statutory obligation to make reparation for wrongfully caused mental harm?

3.14 Thirty five respondents (78% of all respondents) addressed question 2b) as follows:

Table 3: Summary of views on whether common law rules applying to reparation for mental harm should be replaced by a statutory obligation to make reparation for wrongfully caused mental harm

Respondent category	Yes	No	Commentary only	Total
Insurance bodies		13		13
Legal body reps	2	3	1	6
Solicitor firms	2	1	1	4
Academics	2			2
MD Unions	1	1		2
Reps of Historic Child Abuse	2			2
Other	1			1
Individual public	5			5
Total	15	18	2	35

3.15 Around half (51%) of those who provided a view did not agree that existing common law rules which apply only to reparation for mental harm should be replaced by a statutory obligation to make reparation for wrongfully caused mental harm. Respondents holding this view included all of the insurance bodies. Both academics and both organisations representative of historic child abuse were amongst the 43% of respondents who agreed with the principle.

<u>Views against the implementation of a statutory obligation to make reparation for wrongfully caused mental harm</u>

3.16 The most common reason to oppose the implementation of a statutory obligation was that this would risk courts losing their flexibility to deal with cases according to their individual circumstances. All 13 insurance bodies cited this reason in their opposition, one summing up their argument thus:

> "The creation of a statutory obligation could give rise to spurious claims and bar valid claims due to the rigidity introduced by statute" (Association of British Insurers).

Another respondent agreed:

> "While we understand the desire to codify in statute liability for all mental harm, we believe that to do so would risk losing the flexibility which can be essential" (Association of Personal Injury Lawyers).

3.17 Other reasons stated in opposition to implementation of a statutory obligation were:

- There is limited evidence of injustice in the relevant current law (MDU, Leg Rep).
- The proposed change could extend defenders' potential liability considerably (MDU).
- No attempt was originally made by SLC to assess how many additional claims may result from the law change, nor what the cost implications may be (MDU).

Views supporting the implementation of a statutory obligation to make reparation for wrongfully caused mental harm

3.18 Four substantive arguments were provided in favour of changing the law:

- The current law is deficient in this regard and needs to be changed (Leg Rep, Oth, Sol).
- Implementing a statutory obligation will create more certainty and clarity (both Academics, Sol, MDU).
- The change in law will help to protect victims better in the future (several members of the public were of this opinion).
- Implementing a statutory obligation will help to address the current perception of unfairness in the law, amongst sections of the public (Leg Rep).

Outstanding concerns

3.19 One solicitor firm commented that although they supported the statutory obligation, they acknowledged that it will be challenging to create statute which adequately balances the rights of injured persons and defenders.

3.20 A legal body representative expressed concern about the effect of the proposed reform in circumstances where elements of physical and mental harm are closely interrelated, making it difficult to categorise a case as involving purely "mental harm".

Individual resilience

3.21 An existing restriction in Scots law is that, as regards a secondary victim, a defender is not liable to pay damages in relation to a psychiatric injury which would not have been expected to occur in someone of "ordinary fortitude". After considering whether this level of resilience should be in future be extended to apply to primary as well as secondary victims, the SLC eventually concluded that, for reasons of practice and principle, it should not. This reflects the SLC view that the concept provides an artificial and unsatisfactory mechanism for protecting defenders against claims from exceptionally vulnerable individuals, and therefore should be applied to neither category of victim.

3.22 Against this background, the consultation asked:

Q2c) Do you agree that the concept of "ordinary fortitude" is unsatisfactory and, therefore, should no longer be a consideration in assessing whether a victim should be able to seek damages for his/her psychiatric injury?

3.23 Thirty five respondents (78% of all respondents) addressed question 2c) as follows:

Table 4: Summary of views on whether the concept of "ordinary fortitude" is unsatisfactory

Respondent category	Yes	No	Total

Insurance bodies		13	13
Legal body reps	3	3	6
Solicitor firms	3	1	4
Academics	2		2
MD Unions		2	2
Reps of Historic Child Abuse	2		2
Other	1		1
Individual public	4	1	5
Total	15	20	35

3.24 Fifty seven per cent of those who provided a view did not regard the concept of "ordinary fortitude" unsatisfactory in this context. These respondents included all of the insurance bodies. Of the 15 respondents (43% of those who commented) who agreed that the concept of "ordinary fortitude" was unsatisfactory, four were individual members of the public, along with both of the representative bodies of historic child abuse.

Summary of views in disagreement

3.25 The most common argument, made largely by insurance bodies, was that the principle of "ordinary fortitude" is generally understood, having been tested in case law over time, and having become a standard or benchmark (11 mentions). One respondent reflected the views of many:

> "Ordinary fortitude has been the test in a number of cases, therefore the legal standard is established in this regard. The boundaries of liability need to be set so that liability is not unfairly wide and those with valid claims are compensated" (Forum of Scottish Claims Managers).

3.26 Other arguments opposing the notion that "ordinary fortitude" is an unsatisfactory concept were:

- There is no clear need to change it as it appears to cause few difficulties (MDU, Ins, Leg Rep).
- The concept has been effective in providing a fair balance between pursuer and defender (Ins, Ins).
- The concept is likely to remain easier to understand than the alternative concept suggested (Leg Rep, MDU).
- The distinction between primary and secondary victims should remain (Leg Rep).

Summary of views in agreement

3.27 Six respondents, including three solicitor firms and two academics, argued that the concept of "ordinary fortitude" was imprecise and unhelpful.

3.28 Three of the individual members of the public focused on their argument that "ordinary fortitude" is a difficult concept to apply to people who may be affected many years later by an earlier experience which has left them vulnerable to psychiatric harm in what may seem to be ordinary contexts.

3.29 One view (Acad) was that the concept discriminated against psychiatric injury, as the criterion was not present in liability for physical harm. Another view (Rep CA) was that the concept discriminated against those most resilient.

Stresses or vicissitudes of life

3.30 As an alternative to providing that a defender is not liable if a person of "ordinary fortitude" could have coped with the event in question, the approach preferred by the SLC is to specify that:

a) There should be a general restriction on the statutory obligation to make reparation for wrongfully caused mental harm if the mental harm is of such a nature that a person in the position of the victim could reasonably be expected to endure it without seeking reparation.

b) A person should reasonably be expected to endure mental harm without seeking reparation if, for example, it results from:

i) the normal stresses or vicissitudes of life or of the type of life which that person leads; or

ii) bereavements or losses of a type which persons can reasonably expect to suffer in the course of their lives.

3.31 Against this background the consultation asked:

Q2d) Do you agree that an appropriate balance between the right of an injured person to secure damages and the right of a defender to expect a certain level of mental resilience in individuals would be achieved by the recommended focus on the stresses or vicissitudes of life or of the type of life that person leads?

3.32 Thirty six respondents (80% of all respondents) addressed question 2d) as follows:

Table 5: Summary of views on whether a balance is achieved by focusing on the vicissitudes of life or the type of life led

Respondent category	Yes	No	Total
Insurance bodies		13	13
Legal body reps	1	5	6
Solicitor firms	2	2	4
Academics		2	2
MD Unions		2	2
Reps of Historic Child Abuse		2	2
Union		1	1
Other	1		1
Individual public		5	5
Total	4	32	36

3.33 The vast majority (89%) of those who provided a view did not agree that an appropriate balance between the right of an injured person to secure damages and the right of a defender to expect a certain level of mental resilience in individuals would be achieved by focusing on the stresses or vicissitudes of life or on the type of life that person leads. The question split the views of solicitor firms, two of which agreed with the proposal and two disagreed.

Summary of views in disagreement

3.34 Eleven substantive arguments were submitted in opposition to the proposal. The most common argument (10 mentions from insurance bodies and individual members of the public) was that **each case should be assessed according to its own specific circumstances**, rather than by applying general rules. One member of the public remarked that based on previous experiences in life:

> "....what is traumatically stressful for one person may be trivial for another" (Ind-Pub).

3.35 Related to the argument in the previous paragraph was the plea from 8 insurance bodies that **courts should retain flexibility** to ensure parity of justice for pursuer and defender. They felt that such flexibility could be compromised by the proposal.

3.36 Five respondents including 2 solicitor firms considered that taking into account **the type of life a person leads is too judgemental**, with routine life not necessarily linked to mental resilience. One respondent commented:

> "...a test which involves the 'type of life' analysis would result in a real risk of an invidious and subjective assessment of individual life styles; this could involve lifestyle choices such as sexual orientation or practices, gender, marital status, race and religion and family dependency" (Faculty of Advocates).

3.37 A few respondents (4 including 2 academics) considered that the term **"vicissitudes of life" lacked precision and meaning** which could lead to

inconsistent application by different judges, and possibly an increase in litigation at least in the short to medium term.

3.38 Four respondents from four different respondent categories perceived the proposal to be **unfair by applying different standards to different people**, thereby offering some less protection than others. One remarked:

> "Whilst I can accept that police officers and indeed other members of the emergency services are used to dealing with traumatic events and are perhaps greater able to cope, it seems very unfair to me to restrict their ability to pursue compensation to such a high degree" (Scottish Police Federation).

3.39 Whilst three respondents (Ins, Ins, Sol) considered it **difficult to identify a clear distinction** between "ordinary fortitude" and "vicissitudes of life"; a further three (MDU, MDU, Leg Rep) suggested that the **current law does not need to be changed**.

3.40 The remaining arguments against the proposal were:

- It might result in extending too widely the scope of liability in the case of secondary victims (Ins, Ins).
- It may deter people from a career in the emergency services (Sol).
- It discriminates against psychiatric injuries in favour of physical injuries (Acad).
- Costs may increase due to the need to investigate claimants' expected levels of mental resilience (Ins).

Summary of views in agreement

3.41 Very few detailed arguments were documented in support of the proposal. Overall it was felt that the proposal represented an attempt to achieve a reasonable balance between the rights of injured persons and the rights of defenders. One solicitor firm commented:

> "It is appropriate to take into account the stresses or vicissitudes of the type of life that a particular person leads. As a result, a person whose routine existence involves proximity with danger can be expected to have a greater degree of resilience" (Simpson and Marwick Solicitors).

Reasonable forseeability

3.42 In the case of *Page v Smith* the House of Lords ruled that unforeseeable psychiatric injury, where there had been a risk of physical injury even though that physical injury had not actually occurred, could qualify for an award of damages. The SLC considers this approach unduly wide and in order to limit liability further where mental harm is caused unintentionally, recommended that the common law rules on delict which apply to reparation for physical harm should apply to the statutory obligation to make reparation for mental harm.

3.43 Against this background, the consultation asked:

Q2e) Do you agree that, where physical harm is reasonably foreseeable but mental harm is not, and a victim sustains only mental harm, the negligent party should not be held liable?

3.44 Thirty five respondents (78% of all respondents) addressed question 2e) as follows:

Table 6: Summary of views on whether there should not be liability where a victim sustains only mental harm which was not reasonably foreseeable

Respondent category	Yes	No	Total
Insurance bodies	13		13
Legal body reps	3	3	6
Solicitor firms	3	1	4
Academics	2		2
MD Unions	2		2
Reps of Historic Child Abuse		2	2
Other	1		1
Individual public	1	4	5
Total	25	10	35

3.45 Seventy one per cent of those who provided a view agreed that where physical harm is reasonably foreseeable, but mental harm is not, and a victim sustains only mental harm, the negligent party should not be held liable. All insurance bodies agreed with the proposal; members of the public tended to disagree. Representatives of legal bodies were split in their views on the proposal.

Summary of views in agreement

3.46 There was general agreement from supporters with the rationale set out in the consultation document, in particular the view that the current approach is unduly wide, with a need to limit liability further where mental harm is caused unintentionally.

3.47 Five respondents (Ins, Ins, Sol, Leg Rep, MDU) emphasised that reasonable forseeability is a basis of common law on damages. One remarked:

> "To us it is illogical that there should be liability for mental harm which was not reasonably foreseeable to the wrongdoer" (Aviva Insurance Limited).

3.48 Ten insurance bodies expressed the view that the situation, as built up by case law to date, clarifies the situations where victims can recover damages. They felt it important to retain the distinction between primary and secondary victims in this context.

3.49 An academic remarked that the proposal will remove the common law anomaly which had been created by the English case of *Page v Smith*.

3.50 The view of one legal body representative was that the proposal has merit in terms of legal principle, commenting:

"We are opposed to the idea that, because a clear, intelligible rule based on principle, 'may in practice lead to injustice in some situations', it should not be adopted for that reason alone" (Judges of the Court of Session).

Summary of views in disagreement

3.51 The arguments put forward were:

- The proposal is based on what these respondents purported to be an artificial division between physical and psychiatric harm (Sol, Leg Rep).
- Those responsible for child abuse many years ago should be held accountable for the mental harm experienced by their victims today (Rep CA, Ind-Pub).
- The proposal could lead to frequent injustices for victims (Sol).
- There is no need to change the status quo (Leg Rep).

No direct involvement in the incident

3.52 The SLC considers that where mental harm is caused by witnessing or learning of a distressing event or harm caused to others by a wrongful act, it is sound policy that in general the victim should not be able to claim damages against the wrongdoer. However, the SLC suggests two limited but important exceptions to that restriction:

Exception 1: where the victim was acting as a rescuer in relation to the incident.

Exception 2: where the victim had a close relationship with a person injured or killed, or at risk of being killed or injured, in the incident.

For the purposes of Exception 2, the term "close relationship" is defined as comprising "strong ties of affection, loyalty or personal responsibility" and including:

- any of a defined list of relatives, unless evidence proves that they did not have such a relationship with the person in the incident;
- any other person (e.g. a friend, neighbour, colleague), if evidence proves that they had such a relationship with the person in the incident.

3.53 Against this background the consultation asked:

Q2f) Do you agree that there should be a general prohibition on obtaining damages for a mental disorder where the victim has sustained that injury as a result of witnessing or learning of an incident, without being involved directly in it?

3.54 Thirty three respondents (73% of all respondents) addressed question 2f) as follows:

Table 7: Summary of views on whether there should be a general prohibition on obtaining damages for a mental disorder where the victim was not directly involved in an incident

Respondent category	Yes	No	Total
Insurance bodies	13		13
Legal body reps	4	1	5
Solicitor firms	2	1	3
Academics	1	1	2
MD Unions	2		2
Reps of Historic Child Abuse	1		1
Union	1		1
Other	2		2
Individual public	3	1	4
Total	29	4	33

3.55 The vast majority (88%) of those providing a view agreed that there should be a general prohibition on obtaining damages for a mental disorder where the victim has sustained that injury as a result of witnessing or learning of an incident, without being involved directly in it. Indeed, this was the unanimous or the majority view across all respondent sectors.

Summary of views in agreement

3.56 The few substantive arguments documented in any detail comprised:

- A general prohibition will contribute to limiting the scope of liability (3 insurance bodies; MDU).
- An extension of compensation to pursuers other than those directly involved in an incident goes against the fundamental principles of forseeability (Sol, Ins, Leg Rep).
- This will limit spurious or unmeritorious claims (Ins).
- Will provide limits whilst permitting some flexibility (Sol).

3.57 One supporter (Acad) suggested that further clarification is required over the concepts of “an incident” and “not directly involved”. For example, they commented that rather than one incident, a person may have been affected by an event or *a sequence of events*.

Summary of views in disagreement

3.58 Only one substantive comment was put forward: that in general issues should be determined by asking whether the victim was owed a duty of care in the circumstances (Leg Rep).

3.59 The consultation asked:

Q2g) Do you agree that it is appropriate to except rescuers from the general prohibition?

3.60 Twenty eight respondents (62% of all respondents) addressed question 2g) as follows:

Table 8: Summary of views on whether it is appropriate to except rescuers from the general prohibition

Respondent category	Yes	No	Total
Insurance bodies	11	1	12
Legal body reps	4	1	5
Solicitor firms	2	1	3
Academics	1	1	2
MD Unions	1		1
Reps of Historic Child Abuse	1		1
Union	1		1
Other	2		2
Individual public		1	1
Total	23	5	28

3.61 The vast majority (82%) of those providing a view agreed that it is appropriate to except rescuers from the general prohibition outlined at 3.52 above.

Summary of views

3.62 Relatively few views were provided to support indications of agreement or disagreement with the proposal. Four insurance bodies commented that as rescuers are difficult to categorise as either primary or secondary victims, a separate, distinct category for them would be more appropriate. One solicitor firm supported the exemption as important in terms of public policy in not discouraging rescuers. An academic called for great clarity on what is meant by "rescuer" and emphasised their view that in determining the scope of duty of care in relation to professional rescuers, certain circumstances should be taken into consideration, such as the precise nature of the pursuer's employment and the nature of any relevant training they had received.

3.63 Amongst those opposing the proposed exemption was one insurance body with concerns that it is inappropriate to compensate rescuers who had chosen to undertake their job; and one solicitor firm which considered there to be no justifiable basis to compensate professionals whose job entails dealing with accident victims.

3.64 The consultation asked:

Q2h) Do you agree that it is appropriate to except those in close relationship with anyone killed, injured or imperilled by the accident from the general prohibition?

3.65 Thirty one respondents (69% of all respondents) addressed question 2h) as follows:

Table 9: Summary of views on whether it is appropriate to except those in close relationship from the general prohibition

Respondent category	Yes	No	Total
Insurance bodies	13		13
Legal body reps	4	1	5
Solicitor firms	3		3
Academics	2	1	3
MD Unions		2	2
Reps of Historic Child Abuse	1		1
Union		1	1
Other	2		2
Individual public		1	1
Total	25	6	31

3.66 The majority (81%) of those providing a view agreed that is appropriate to except those in a close relationship with anyone killed, injured or imperilled by the accident from the general prohibition outlined at 3.52 above.

Summary of views

3.67 One concern emerging from several supporters of the proposal was whether disputes would arise over determining what constituted "close relationship" in individual cases. A recurring theme amongst insurance bodies was that a statutory list could be restrictive, or inadvertently include people who no longer have ties with the deceased, and that is should be for the claimant to evidence the close tie.

3.68 One view (Acad) was that the process of determining the relationship with the deceased might be invasive and insensitive at a time when relatives are grieving:

> "It opens up the distasteful possibility of counsel for well resourced defenders subjecting bereaved or otherwise distressed relatives to an intrusive level of cross-examination as to the depth and genuineness of their attachment to the injured person. A more sensitive way of dealing with this issues would be to allow the court time in fixing the amount of compensation, as in the general law of damages, to take into account the nature of the relationship between pursuer and injured person" (Acad).

3.69 One suggestion was that the statutory list should be the same as that identified in s.14(1) of the Damages (Scotland) Act 2011, "to ensure fairness and consistency" (Association of Personal Injury Lawyers). A related comment, from an opponent of the proposal, was that although it may be

appropriate that those witnessing an accident and going on to suffer mental harm fall outside the general prohibition, those subsequently learning of it should not (MDU).

3.70 The main substantive argument against the proposal was that the extension beyond close family ties made the exemption too wide. One opponent expressed their view:

> "We cannot support this recommendation as it would subject our members to claims from those alleging psychiatric harm because of a 'close relationship' with a person alleging negligence, when that person was, for example, merely a neighbour, friend or colleague, rather than someone with a close family tie which is the current requirement" (Medical Defence Union).

3.71 The consultation asked:

Q2i) Do you agree that these two exceptions strike the appropriate balance between the right of an injured person to secure damages and the right of a defender?

3.72 Twenty nine respondents (64% of all respondents) addressed question 2i) as follows:

Table 10: Summary of views on whether the two exceptions strike the appropriate balance between rights of pursuer and defender

Respondent category	Yes	No	Total
Insurance bodies	12	1	13
Legal body reps	4	1	5
Solicitor firms		2	2
Academics	1	1	2
MD Unions		2	2
Reps of Historic Child Abuse	1		1
Union		1	1
Other	2		2
Individual public		1	1
Total	20	9	29

3.73 Around two-thirds (69%) of those providing a view agreed that the two exceptions strike the appropriate balance between the right of an injured person to secure damages and the right of a defender. Most respondents supported their view by referring to comments they had already provided in relation to Q2f), g) and h) above.

3.74 One issue which re-emerged most commonly in the responses of those both in agreement and disagreement, was the need for further consideration of the proposal for rescuers to be excepted from the general prohibition. Distinctions were drawn between paid and unpaid rescuers; and exposure to horrific events in the normal course of employment, as distinguished from cases where additional negligence is identified amongst those who caused or permitted the rescuer to take part, that is, employers of police or fire and rescue officers.

3.75 The prevailing view amongst those who agreed that an appropriate balance had been struck was that the proposals were not overly prescriptive, but provided sufficient limits to prevent the "opening of floodgates". One respondent summed up their view:

> "The case law in this area has been developed over a number of years and provides suitable guidance as to victims who can and cannot recover damages. A balance will always have to be struck to compensate deserving victims without opening the floodgates. Situations will always arise on the boundary of the existing guidance and the common law is the most flexible way to develop the law as further cases are considered" (The Motor Insurers' Bureau).

Proposed framework

3.76 The consultation sought views on the wider framework proposed by the SLC:

Q2j) Do you agree that other recommendations in the Commission's report are appropriate?

3.77 Twenty six respondents (58% of all respondents) addressed question 2j) as follows:

Table 11: Summary of views on whether the other recommendations in the Commission's report are appropriate

Respondent category	Yes	No	Not entirely	Commentary only	Total
Insurance bodies		13			13
Legal body reps	1	3		1	5
Solicitor firms	2				2
Academics		1	1		2
MD Unions	1	1			2
Other		1			1
Individual public		1			1
Total	4	20	1	1	26

3.78 Only 4 (15%) of the 26 respondents who provided a view agreed that the other recommendations in the Commission's report are appropriate. Amongst those who disagreed were all 13 insurance bodies whose main concern was the SLC's suggestion of the removal of the need for mental harm to be induced by shock. According to these respondents, this would increase uncertainty and possibly open the floodgates for more claims. It was also asserted that medical and legal costs could increase as a result, due to complexities in distinguishing psychiatric injury from other forms of mental illness.

3.79 Other objections to the other recommendations, other than those already expressed in relation to the previous questions, were:

- Child abuse cases should be handled under different legislation (Ind-Pub).
- There should not be an attempt to supplant the common law with a new statutory footing (Leg Rep).
- Do not agree that the Commission's conclusions should be enacted (Leg Rep).

3.80 Two respondents who agreed that the other recommendations in the Commission's report are appropriate highlighted their support for the proposal to limit liability for mental harm to a medically recognised mental disorder, which they felt provided an objective basis upon which mental harm could be assessed (Sol, MDU).

3.81 One respondent (Leg Rep) considered that the question was too wide to enable a considered response within the context of the consultation.

3.82 The consultation asked:

Q2k) Do you agree that the proposed framework strikes the appropriate balance between flexibility of approach and certainty of outcome?

3.83 Twenty eight respondents (62% of all respondents) addressed question 2k) as follows:

Table 12: Summary of views on whether the proposed framework strikes the appropriate balance

Respondent category	Yes	No	Not entirely	Commentary only	Total
Insurance bodies		13			13
Legal body reps		3		1	4
Solicitor firms	2	2			4
Academics		2			2
MD Unions		2			2
Reps of Historic Child Abuse				1	1
Other	1	1			2
Total	3	23	1	1	28

3.84 Of those who provided a view, 82% did not consider that the proposed framework strikes the appropriate balance between flexibility of approach and certainty of outcome. In supporting their view, most respondents referred to their previous comments relating to earlier questions. One respondent added:

> "These recommendations as they stand are elegant in their simplicity, but leave too much to judicial discretion in operating core concepts. For practical purposes successful reform requires greater precision in this difficult area" (Acad).

3.85 One respondent did not wish to answer the question as posed without further details of the proposed framework. They remarked:

> "If the framework is intended to relate to cases involving secondary victims of nervous shock, then, generally, we consider it to be acceptable. However, it if is intended to be applied much more generally, then careful consideration of the precise terms would be required" (Faculty of Advocates).

Psychiatric injury caused by a wrongful death

3.86 The wrongful death of relative – e.g. from a negligently-caused industrial disease, or as the result of someone else's dangerous driving – can be the source of significant emotional and economic loss. Through the Damages (Scotland) Act 2011 the law provides that bereaved relatives may seek damages from the wrongdoer to compensate for such losses.

3.87 In some cases, the reaction of bereaved relatives to a wrongful death may go beyond 'normal' distress and heartache and involve the development of a psychiatric condition which represents an injury in itself. In such cases, a question arises as to what extent, if any, a relative's claim under the 2011 Act may take account of such a psychiatric injury (i.e. without having to demonstrate, as would be required in other circumstances, that the wrongdoer owed a duty of care to the injured relative as well as to the deceased). There are inconsistent court decisions, which precede the 2011 legislation, on this point which are relevant to the interpretation of section 4(3)(b) of the 2011 Act.

3.88 The consultation asked:

Q2l) Do you agree that it should not be possible for a bereaved relative to secure damages for psychiatric injury under section 4(3)(b) of the 2011 Act?

3.89 Twenty nine respondents (64% of all respondents) addressed question 2l) as follows:

Table 13: Summary of views on whether it should not be possible for a bereaved relative to secure damages for psychiatric injury under section 4(3)(b) of the 2011 Act

Respondent category	Yes	No	Total
Insurance bodies	13		13
Legal body reps	4	2	6
Solicitor firms	2	2	4
Academics	1		1
MD Unions	2		2
Reps of Historic Child Abuse		1	1
Other	1		1
Individual public		1	1
Total	23	6	29

3.90 The majority (79%) of those providing a view agreed that it should not be possible for a bereaved relative to secure damages for psychiatric injury under section 4(3)(b) of the 2011 Act. Whilst all insurance bodies were of this view, the views of representatives of legal bodies and solicitor firms were split.

Summary of views in agreement

3.91 There was much support for the decision taken in the *Ross v Pryde* case (2004) in which temporary Judge R F MacDonald QC expressed his opinion that the borderline between a natural human emotion and a pathological condition in the form of a psychiatric illness is not an artificial one and there is nothing illogical in differentiating between the two. Insurance bodies agreed that normal grief and psychiatric illness should be distinguishable and were of the view that for the bereaved to secure reparation they would have to establish that the defender owed a separate duty to them and they would also need to have fulfilled the Alcock test.

3.92 Two respondents (Sol, Leg Rep) argued the proposal would avoid the prospect of detailed evidence being led in relation to the degree of distress caused at a time when they are particularly vulnerable.

3.93 Two legal body representatives remarked that the alternative to this proposal would lead to different treatment for different categories of grief which would effectively create a league table for compensating grief.

3.94 The view of an academic was that if bereaved relatives were permitted to secure damages under section 4(3)(b) of the 2011 Act, this would conflict with the current principles governing liability for psychiatric injury and create an exception which could lead to ambiguous and incoherent law.

Summary of views in disagreement

3.95 One respondent (Leg Rep) remarked that the definition of “normal bereavement” is difficult to ascertain, and expressed the view that

bereavement reaction should be dealt with under section 1(4) even if it falls into the category of prolonged or abnormal.

3.96 Two solicitor firms considered the distinction between normal grief and psychiatric injury to be artificial, unjustifiable and unworkable.

Impact

3.97 The consultation asked for information to assist the Scottish Government in its preparation of a Business and Regulatory Impact Assessment and also the Financial Memorandum which will accompany any future Bill. The following questions were posed:

Q2m) What do you think the impact of implementing these proposals in full would be particularly in relation to the issues below?

Is it likely that more or fewer actions will be raised?
Is it likely that more or fewer cases come to court?
Is it likely that more or fewer cases will be settled out of court?
Is it likely that cases will require more or less preparation time?
Is it likely that cases will require more or less court time?
Is it likely that there will be more of fewer awards of damages?
Is it likely that awards of damages will be higher or lower?
Can you quantify the benefits for pursuers?
Can you quantify the benefits for defenders?
Can you quantify the drawbacks for pursuers?
Can you quantify the drawbacks for defenders?

3.98 Twenty nine (64%) of respondents addressed one or more of these questions. Of these, 13 (45%) were insurance bodies, with their views prevailing amongst those submitted and summarised in Table 14 below.

Table 14: Summary of views on impact of implementing the proposals in full

Impact on:	
No. of actions	More: 20 respondents Fewer: 2 respondents (Rep CA, Sol) No difference: 2 respondents (Sol, Leg Rep) Comments: one respondent (Oth) considered an initial spike in actions may reduce following the establishment of case law which will bring more certainty.
No. of cases coming to court	More: 17 respondents Fewer: 2 respondents (Rep CA, Leg Rep) Comments: increased numbers possibly arising from differing views over interpretation.
No. of cases being settled out of court	More: 1 respondent (Sol) Fewer: 14 respondents Comments: potentially fewer settlements out of court due to the fresh uncertainty of the boundaries of liability with impacts on satellite litigation using a number of test cases.

Impact on:	
Preparation time	More: 12 respondents No reduction: 1 respondent (Sol) Less: 1 respondent (Sol) Comments: potentially more preparation time due to fresh uncertainty over liability.
Court time	More: 12 respondents Less: 1 respondent (Sol)
Awards of damages	More: 11 respondents Less: 1 respondent (Sol) Comments: possibly more due to wider classification of claimants.
Size of damages	Higher: 12 respondents Lower: 1 respondent (Sol) Neutral: 1 respondent (Leg Rep)
Benefits for pursuers	Will know from the outset whether they are likely to qualify for damages and the types of loss which can be compensated (Sol); reforms extend the availability of claims for mental harm (MDU). No benefits: 10 respondents
Benefits for defenders	More certainty regarding liability (Sol, MDU). Generally beneficial: 1 respondent (Rep CA) No benefits: 9 respondents
Drawbacks for pursuers	Increase in time taken to access justice due to increase in preparation and court time (11 respondents). Some categories of pursuer will be outwith scope for qualifying for compensation (Sol). Risk of invidious, subjective assessment of individual life style (Leg Rep). Those working in stressful occupations may not qualify for compensation (Leg Rep). No drawbacks: 1 respondent (MDU)
Drawbacks for defenders	Increase in cost burden due to more court time taken up (12 respondents). Possible extension in the range of pursuers (MDU). No drawbacks: 1 respondent (Sol)
Cannot provide view at this stage until greater clarity on reforms	2 respondents (Rep CA, Leg Rep).

3.99 Other, general comments were:

- The potential increase in cost burden to defenders will need to be passed on to consumers (11 mentions).
- There will be increased costs for the Legal Aid Board (8 mentions).
- There could be issues in terms of the European Court of Human Rights if assessments of lifestyle are undertaken (Leg Rep).
- There will be benefits to the entire justice system of having simpler and more clearly defined rules governing liability for psychiatric injury (Acad).

3.100 The consultation asked:

Q2n) Do you consider that the proposals for the reform of damages for psychiatric injury will affect people, either positively or negatively with the following protected characteristics: age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race and religion or belief?

3.101 Overall, the impact of the proposals in this context were viewed as neutral. Very few comments were submitted by respondents. Two respondents (Rep CA, Leg Rep) considered that the reforms would impact positively on people whose disability involved mental health issues. One academic remarked that concepts such as normal stresses and vicissitudes of life will require to be interpreted with these equality dimensions in mind.

Summary of views

3.102 Most (80%) of those who provided a view agreed that the summary of defects contained in *Damages for Psychiatric Injury* (2004) is full and accurate.

3.103 There were mixed views on whether common law rules applying to reparation for mental harm should be replaced by a statutory obligation to make reparation for wrongfully caused mental harm. Concerns focused largely on the perception that this would risk courts losing their flexibility to deal with cases according to their individual circumstance.

3.104 The majority view (57%) was that the concept of "ordinary fortitude" is not unsatisfactory, being regarded as generally understood, tested in case law over time, and accepted as a standard.

3.105 The vast majority (89%) of those who provided a view did not agree that an appropriate balance between the right of an injured person to secure damages and the right of a defender to expect a certain level of mental resilience in individuals would be achieved by focusing on the stresses or vicissitudes of life or the type of life the person leads. The most common argument was that each case should be assessed according to its own specific circumstances, rather than applying general rules.

3.106 Seventy one per cent of those who provided a view agreed that where physical harm is reasonably foreseeable, but mental harm is not, and a victim sustains only mental harm, the negligent party should not be held liable.

3.107 The vast majority (88%) of those who provided a view agreed that there should be a general prohibition on obtaining damages for a mental disorder where the victim has sustained that injury as a result of witnessing or learning of an incident, without being directly involved in it. Most of those who addressed the issue (82%) agreed that it is appropriate to except rescuers from the general prohibition; most (81%) agreed that it is appropriate

to except those in a close relationship with anyone killed, injured or imperilled by the accident from the general prohibition.

3.108 Around two-thirds (69%) of those commenting agreed that the two exceptions outlined above strike the appropriate balance between the right of the injured person to secure damages and the right of a defender.

3.109 The majority (82%) view amongst those who commented was that the proposed framework set out in the Commission's report does not strike the appropriate balance between flexibility of approach and certainty of outcome. Some respondents considered the framework to lack precision and leave too much to judicial discretion.

3.110 The majority (79%) of those providing a view agreed that it should not be possible for a bereaved relative to secure damages for psychiatric injury under s.4(3)(b) of the 2011 Act.

3.111 It was commonly thought that the overall impact of the proposals under discussion would be an increase in the number of actions, cases coming to court, preparation time, court time, awards of damages and size of damages. Overall, the differing impact of the proposals on people with protected characteristics: age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race and religion or belief, was considered to be minimal.

3.112 In summary, whilst there was overall agreement that the current system had defects, there was no general consensus that what was proposed by the SLC would be an improvement on the current situation. There was, however, a body of support for some limited aspects of the framework.

4. TIME-BAR

Background

4.1 In order to be able to raise an action for damages in the civil courts for any form of personal injury, it must be done within the timeframe set out in the Prescription and Limitation (Scotland) Act 1973. There have been concerns that the current law in relation to limitation and to prescription may not always succeed in striking an appropriate balance between the rights of individuals who may wish to make a claim for personal injury and who should have a reasonable opportunity to do so, and the protection of all individuals and organisations against open-ended civil liability.

4.2 Scottish Ministers invited the SLC to review the law and make appropriate recommendations for reform. The SLC published a report in 2007[13] in which it made a number of recommendations, not all of which were tested in this consultation. In relation to prescribed claims they recommended:

Recommendation 18: Claims in respect of personal injury which were extinguished by negative prescription before 1984 should not be revived.

4.3 Each question on the issues relating to time-bar was addressed by more than half of all respondents, with some questions attracting 87% of respondents. As previously, the views of insurance bodies were dominant amongst responses.

Prescription

4.4 The consultation asked:

Question 3a) Do you agree that – for all personal injuries, regardless of the nature and circumstances of the personal injury – even if it were lawful to do so, it would not be advisable to seek to revive prescribed claims (i.e. claims relating to events before September 1964)?

[13] Scottish Law Commission (2007). *Personal injury actions: limitation and prescribed claims.* Scots Law Commission report no. 207.

4.5 Thirty nine respondents (87% of all respondents) addressed question 3a) as follows:

Table 15: Summary of views on whether it would not be advisable to revive prescribed claims

Respondent category	Yes	No	Commentary only	Total
Insurance bodies	13			13
Legal body reps	6			6
Solicitor firms	4			4
Academics	2			2
MD Unions	2			2
Reps of Historic Child Abuse		2		2
Other	1		1	2
Individual legal	1			1
Individual public		7		7
Total	29	9	1	39

4.6 Around three-quarters (74%) of those who provided a view agreed that it would not be advisable to seek to revive prescribed claims. All of the individual members of the public and both of the representative bodies of historic child abuse disagreed.

Summary of views in agreement

4.7 The most common argument (10 mentions) in favour of not reviving prescribed claims was that this would unfairly prejudice defenders who would most likely encounter problems gathering quality evidence. This situation was viewed as "contrary to justice" (Leg Rep). Five respondents suggested that reviving a claim which had been completely extinguished would be likely to raise issues for defenders under the European Convention of Human Rights.

4.8 Other main views in agreement were:

- Reviving such claims would result in uncertainty for defenders and insurers (Leg Rep, Leg Rep, Sol).
- It would not be appropriate to judge an incident occurring in the past by today's standards (Sol, Ins, Leg Rep).
- Changes in the law relating to liability and computation of damages will have occurred during the intervening period (Leg Rep, Leg Rep).
- There is already adequate provision for those with legitimate reasons to bring claims from the past, for example, a pursuer who sustains injury as a result of breaches of duty before 1964 does not have time running on the claim until that injury manifests (Sol, MDU).
- Interest will be running at a judicial rate over the whole period since the alleged wrong (Leg Rep).
- Those vicariously responsible for the acts of the perpetrator will have moved on (Leg Rep).
- This would result in a waste of time and resources (Ind-Leg).

Summary of views in disagreement

4.9 Two respondents (Ind-Pub, Rep CA) who considered that it should be possible to revive prescribed claims presented their argument that it can take many years before victims are mentally ready to come forward. Two members of the public described the feeling of not being able to revive such claims as being treated as a "non-person", and being faced once again with people not listening to their story.

4.10 One view (Oth) was that what they perceived to be the denial of effective access to justice for survivors of historic child abuse could be addressed by a combination of appropriate amendments to the prescription and limitation regimes and the establishment of a national reparations programme.

4.11 Other main views in disagreement were:

- There is still much documented evidence associated with such claims which should be allowed to go to court (Ind-Pub).
- All victims should receive equal treatment and fairness regardless of when the alleged incident(s) took place (Ind-Pub).
- The human rights of such claimants have not been addressed to date, and their historical cases should be permitted to proceed through the civil courts (Rep CA).

Historical child abuse

4.12 in its 2007 report the SLC also made the following recommendation:

Recommendation 19: A special category of claims in respect of personal injury resulting from institutional childhood abuse which were extinguished by negative prescription before 1984, and which would allow this category only to be revived, should not be created.

4.13 Whilst the consultation did not ask specifically for views on this recommendation, there were a number of respondents including members of the public, representative bodies of historic child abuse, and the Scottish Human Rights Commission (SHRC), who shared a common view that survivors of historic child abuse in Scotland are currently denied effective access to justice.

4.14 In a paper attached to its main consultation response, the SHRC described the steps which other jurisdictions have taken to address the issue of access to justice for survivors of historic child abuse. In particular:

(i) Introduction of a "special regime" through either:

a) exemption from the prevailing limitation regime (examples were cited from several Canadian provinces); or

b) providing explicitly that judicial discretion may apply to cases of historic child abuse (example of New Zealand legislation provided).

(ii) Establishing *ad hoc* reparation programmes (compensation mechanisms) for survivors of historic child abuse (examples were cited from Ireland, Canada and Australia).

4.15 The themes of better access to justice and greater judicial discretion regarding cases of historic child abuse emerged repeatedly in responses of members of the public and representative bodies of historic child abuse to the current consultation.

The length of the limitation period

4.16 The SLC proposed that the current standard limitation period of three years during which time pursuers usually have to raise a claim, once they have become aware of all the relevant statutory facts and are not under a disability, should be extended to five years.

4.17 The consultation asked:

Q3b) Do you agree that the standard limitation period should be raised to five years?

4.18 Thirty nine respondents (87% of all respondents) addressed question 3b) as follows:

Table 18: Summary of views on whether the standard limitation period should be raised to five years

Respondent category	Yes	No	Mixed views	Total
Insurance bodies		13		13
Legal body reps	1	4	1	6
Solicitor firms	1	3		4
Academics	2			2
MD Unions		3		3
Reps of Historic Child Abuse	2			2
Other	1	1		2
Individual legal		1		1
Individual public	1	5		6
Total	8	30	1	39

4.19 Around three-quarters (77%) of those providing a view did not agree that the standard limitation period should be raised to five years. This included all of the insurance bodies. Legal body representatives and solicitor firms were split in their views, although the majority disagreed with the proposed extension.

Summary of views in disagreement

4.20 There was a general consensus that it is **in the public interest** for disputes between parties to be concluded as quickly as possible. A common view (15 mentions) was that three years is ample time for most cases. It was remarked that **facts rarely become clearer with the passage of time**, and 19 respondents expressed concern that the longer the time period, the greater **risk of the quality of evidence reducing**, due to, for example, witness memory failing. Some respondents cautioned that the passage of time also presented more chance **of policyholders going into liquidation.** Several respondents (9 mentions) emphasised their view that their support for retaining the three year period was on the presumption that s.19A of the Prescription and Limitation (Scotland) Act 1973 would still operate, giving judicial discretion for some cases (e.g. historic child abuse) to be brought outwith the standard period.

4.21 Ten respondents from four different sectors commented that extending the limitation period to five years would **encourage unnecessary delays** in cases proceeding, resulting in pursuers having to wait longer for their rightful compensation. It was commonly thought (8 mentions) that the extended period would attract **higher costs for pursuers** as more time is spent locating evidence and witnesses. These costs would most likely impact on size of future premiums.

4.22 Eight respondents described how establishing a five year limitation period would be **inconsistent with other limitation periods**, for example, the two years in aviation and shipping convention (Ind-Leg) and three years in the Consumer Protection Act (Acad). Four respondents from three different sectors considered that a five year period would create what they perceived to be an unnecessary distinction from the comparative period of three years in England.

4.23 Other arguments presented in disagreement were:

- In cases of historic child abuse it does not matter whether the period is three years or five years (6 mentions). One respondent saw any extension of the period to be merely “window dressing” (Ind-Pub).
- Three years strikes the right balance between the rights of pursuers and defenders (6 mentions).
- People are more aware of their rights to claim these days and are therefore able to raise cases more quickly (6 mentions).
- There is no substantive evidence that the current three year limitation period is not adequate (Ins, Leg Rep, Sol).
- A longer period would reduce certainty for both defenders and pursuers (MDU, Leg Rep, Sol).

Summary of views in agreement

4.24 Two respondents provided the view that modern-day cases sometimes demanded **greater investigatory work and expert reports** which could take longer than previously to produce (Acad, Leg Rep).

4.25 The other arguments provided in favour of extending the limitation period to five years were:

- Fairer to pursuers who may have delayed onset of a disease, disorder or illness caused by the event (Acad).
- Five years gives a better balance than three between the rights of the pursuer and the defender (Acad).
- Five years will allow more victims to receive justice (Ind-Pub).
- Five years will allow more pursuers to be taken seriously (Ind-Pub).

4.26 The consultation asked:

Q3c) Do you agree that it is appropriate to have a single, standard limitation period for all types of personal injury claim, instead of different periods for different types of injury?

4.27 Thirty eight respondents (84% of all respondents) addressed question 3c) as follows:

Table 17: Summary of views on whether there should be a single, standard limitation period for all types of personal injury claim

Respondent category	Yes	No	Total
Insurance bodies	13		13
Legal body reps	5		5
Solicitor firms	4		4
Academics	2		2
MD Unions	2	1	3
Reps of Historic Child Abuse		2	2
Other	2		2
Individual legal	1		1
Individual public	1	5	6
Total	30	8	38

4.28 Just over three-quarters (79%) of those providing a view agreed that it is appropriate to have a single, standard limitation period for all types of personal injury claim. This included all insurance bodies and solicitor firms.

Summary of views in agreement

4.29 The most common argument (14 mentions) in favour of a single, standard limitation period was that this creates a simple rule, which is **easy for the public to understand.** One respondent commented:

> "We should not differentiate the limitation period for different personal injury claims, as it is likely to cause more confusion in the courts and create artificial distinctions that do not take into account actual harm endured" (ENABLE Scotland).

There was acknowledgement amongst some of these respondents that discretion still applies under the law in cases of specific difficulty such as historic child abuse.

4.30 Thirteen respondents expressed their agreement with the argument that different limitation periods could lead to **difficulties in classifying the claimant's injury/injuries** to determine the applicable limitation period, which could result in further dispute and litigation.

4.31 Another common argument (13 mentions) was that a standard period would provide **for greater certainty** for both pursuer and defender. Six respondents remarked that **consistency within the industry** is very important.

4.32 Other arguments in favour of a single, standard limitation period were:

- There does not appear to be any useful purpose served by introducing different periods (Sol, Sol, Leg Rep).
- Different limitation periods would contribute to difficulties for the insurance industry in quantifying risk (Acad).
- Different limitation periods may imply certain injuries are of lesser or more significance than others:
  "....might unjustly discriminate between, or subconsciously indicate, the greater or lesser importance or significance of some injuries. For example, if the limitation period for taking an action for reparation of psychiatric injury were shorter than an action for reparation for physical injury the signal which the law would send is that physical injury is more worthy of legal protection" (Grzegorz Grzeszczyk (Acad)).

Summary of views in disagreement

4.33 The arguments outlined against one single, standard limitation period were:

- For some cases, such as historic child abuse, there should be different limitation periods or no limitation period (the view of five members of the public).
- Due consideration should be given to personal injuries which lie latent for some time before surfacing (Rep CA).
- Some occupational disease claims need longer limitation periods (MDU).

Judicial discretion

4.34 With respect to personal injuries, the Law Reform (Miscellaneous Provisions) Act 1980 introduced a new discretionary power to the courts to override the three year limitation period (now s.19A of the 1973 Act) where equitable to do so, and so allow a claim outwith the limitation period. The discretion is unfettered and, aside from the consideration of what is equitable, the legislation does not specify any factors which the court should take into account or disregard when exercising its discretion.

4.35 Since the introduction of the power, concerns have been raised from defenders that the discretionary power increases uncertainty and diminishes the confidence that can be taken, once the standard limitation period has expired, that there is not prospect of being pursued for damages. From the pursuers' perspective, there has been criticism that the power has been exercised too sparingly in that the courts' practical interpretation of the provision has not fully met society's expectations. The latter criticism has been particularly associated with claims for damages for historic childhood abuse.

4.36 The SLC recommended that the provisions relating to the discretionary power should be amended to include a non-exhaustive list of matters to which the court may have regard in determining whether to allow an action to be brought.

4.37 The consultation asked:

Q3d) Do you agree there should be a statutory, non-exhaustive list of matters relevant to determining whether it would be equitable for the courts to exercise discretion to allow an action to be brought outwith the limitation period?

4.38 Thirty nine respondents (87% of all respondents) addressed question 3d) as follows:

Table 18: Summary of views on whether there should be a statutory, non-exhaustive list of matters to assist courts in determining whether to exercise discretion

Respondent category	Yes	No	Depends on content	Total
Insurance bodies		13		13
Legal body reps	6	1		7
Solicitor firms	2	2		4
Academics		2		2
MD Unions	1	1	1	3
Reps of Historic Child Abuse	2			2
Other	1			1
Individual legal	1			1
Individual public	6			6
Total	19	19	1	39

4.39 Respondents were evenly split over whether there should be a statutory, non-exhaustive list of matters relevant to determining whether it would be

equitable for the courts to exercise discretion to allow an action to be brought outwith the limitation period. However, 68% of those disagreeing with the proposal were insurance bodies; apart from these respondents, only six others disagreed.

Summary of views in agreement

4.40 Few substantive arguments were presented by respondents to support their agreement with the proposal. These comprised:

- The list would allow s.19A of the Prescription and Limitation (Scotland) Act 1973 to operate more effectively (Ind-Leg, Leg Rep).
- It would help to achieve greater consistency in judicial decisions (Leg Rep, Sol).
- Will be fairer to pursuers in cases of industrial disease where symptoms may not emerge until many years after the injury has been caused (Leg Rep, Leg Rep).
- Gives practitioners guidance on the factors which the court must take into account, thereby assisting them in identifying relevant factors to present to the court (Sol, MDU).
- Enables each case to be considered on an individual basis (Ind-Pub).

4.41 One respondent recommended a change of wording from, "non-exhaustive list of matters to which the court may have regard", to "non-exhaustive list to which the courts shall have regard" (Leg Rep), which they considered would have the effect of making the consideration of the list mandatory rather than discretionary.

Summary of views in disagreement

4.42 It was commonly thought (13 mentions) that the current statutory provisions, along with case law, were working well and provided a simple and sustainable approach to allowing for judicial discretion. Four respondents (Acad, Ins, Sol, Leg Rep) questioned what additional benefits would be gained by the introduction of the statutory, non-exhaustive list. One commented:

> "By its very definition a 'non exhaustive' list does not include all relevant matters which can be taken into account by the court. It begs the question as to how useful a non-exhaustive list would be to either party.....A non-exhaustive list gives parties no better indication, certainty or consistency than allowing the list of relevant matters to be determined by the courts based on general guidance from established legal authorities, as happens at present" (HBM Sayers).

4.43 Five insurance bodies disagreed on the basis that a statutory list still could not account for all situations. Four respondents (Acad, Ins, Sol, Leg Rep) cautioned that any initial list may need regular updating as further factors feature in new cases.

4.44 Other views in disagreement were:

- The proposal could result in increased litigation and court time surrounding the interpretation of the new statutory rules (Ins, Ins, Acad).

- The proposal may result in the listed factors taking precedence over those relevant but unlisted (Acad, Sol).
- It may reduce judicial discretion, limiting decision-making on a case-by-case basis (Ins, Leg Rep).
- Defenders will face less certainty due to an increase in potentially subjective/random factors being adopted as the basis for extended liability (Acad).
- The introduction of a non-exhaustive list in addition to judicial discretion may encourage a "have-a-go" culture with pursuers more optimistic that their cases may be considered as an exception (Acad).

4.45 The consultation asked:

Q3e) Do you have views on potential options for reforms beyond those proposed by the Scottish Law Commission?

4.46 Three key recommendations emerged from responses. A prevailing view amongst insurance bodies was **that civil jury trials should be abolished** on the grounds that they create a two-tier system of justice which can lead to unfairness for both pursuers and defenders. It was suggested that if jury trials are to be retained, then juries should be referred to guidance such as case law or Judicial College Guidelines, in order to make fairer assessments of damages in accordance with previous decisions.

4.47 Four respondents (Rep CA, Rep CA, Ind-Pub, Acad) gave their view that **victims of historic abuse** have not been well served by the existing rules on limitation and that these required further examination and review in order to be fair. One academic's view was that a provision be introduced whereby any period of "effective incapacity" (such as brought about by an alleged victim's induced reticence or suppression of memory) is disregarded for the purposes of computing the limitation period.

4.48 The view of one solicitor firm was that in the event that the Aitchison decision is not reversed through statute, then **s.4(2) of the Damages (Asbestos related Conditions) (Scotland) Act 2009 is amended** to make clear that it was intended to be a transitional provision affecting only those cases in which proceedings had been brought prior to the commencement of the Act. This respondent argued that:

> "Doing so would permit persons who had developed an asymptomatic condition and had been advised of its presence more than three years prior to 17 October 2007 to contend that the injuries were not significantly serious to justify the bringing of court proceedings. The Aitchison decision would therefore not automatically force such persons who later develop a symptomatic condition to rely on the discretion of the court to permit their actions to proceed" (Thompsons Solicitors and Solicitor Advocates).

The subsequent emergence of an additional injury

4.49 The consultation asked:

Q3f) Do you agree that it is in the interests of justice that there should be only one limitation period following the discovery of a harmful act, during which all claims for damages for associated injuries must be brought?

4.50 Thirty three respondents (73% of all respondents) addressed question 3f) as follows:

Table 19: Summary of views on whether there should be only one limitation period during which all claims must be brought

Respondent category	Yes	No	Commentary only	Total
Insurance bodies	13			13
Legal body reps	4	1	1	6
Solicitor firms	4			4
Academics	1	1		2
MD Unions	2			2
Reps of Historic Child Abuse		2		2
Other	1			1
Individual public		3		3
Total	25	7	1	33

4.51 Around three-quarters (76%) of those providing a view agreed that it is in the interests of justice that there should be only one limitation period following the discovery of a harmful act, during which all claims for damages for associated injuries must be brought.

Summary of views in agreement

4.52 Five respondents commented that having only one limitation period brings a degree of **certainty** for both pursuers and defenders. Three respondents (Ins, Sol, Leg Rep) considered that unless one limitation period was adopted, **practical difficulties and increased costs** would be generated in deciding whether late emerging conditions were wholly distinct or related to the original wrong. Finally, two insurance bodies emphasised that **courts still have discretion** to override limitation periods by virtue of s.19A of the 1973 Act.

Summary of views in disagreement

4.53 One main substantive point was made by a legal body representative who cautioned of serious consequences of this recommendation for people with long-latency industrial disease and victims of historic child abuse. As an example, this respondent hypothesised:

> "As a result of Aitchison.... a terminally ill mesothelioma victim who claims compensation for this condition but who (having known about the presence of plural plaques but failed to claim for it) will no longer be able to receive the help he desperately needs, quite literally, dying without compensation" (Association of Personal Injury Lawyers).

4.54 One respondent (Acad) remarked that despite this proposal not necessarily being in the interests of justice (for example, in relation to historic abuse victims), it nonetheless was in accord with legal principle, and means that the law of limitation in this regard is consistent with that of prescription.

4.55 The consultation asked:

Q3g) Do you consider that there should be any exceptions to this principle?

4.56 Thirty one respondents (69% of all respondents) addressed question 3g) as follows:

Table 20: Summary of views on whether there should be any exceptions to this principle

Respondent category	Yes	No	Total
Insurance bodies		13	13
Legal body reps	2	3	5
Solicitor firms	1	2	3
Academics		2	2
MD Unions	1	1	2
Reps of Historic Child Abuse	2		2
Other		1	1
Individual public	3		3
Total	9	22	31

4.57 Of those who provided a view, the majority (71%) did not consider that there should be any exceptions to the principle that there should be only one limitation period following the discovery of a harmful act, during which all claims for damages for associated injuries must be brought.

Summary of views opposing exceptions

4.58 The following key reasons were given in opposition to there being exceptions to the principle:

- Courts are already able to make exceptions under s.19A of the 1973 Act (11 mentions). One respondent remarked:
  "It is in the interests of justice for all parties for there to be certainty. The current Act provides that certainty with an 'escape' which Judges can apply if it is the interests of justice to do so" (Aviva Insurance Limited).
- In the interests of justice, certainty and consistency there should be no exceptions (4 mentions).
- A formal list of exceptions will be too prescriptive (Ins, Ins).
- It will be difficult to compile a list of exceptions as too narrow a list will risk a pursuer unable to make a claim, and too broad a list risks rendering the limitation period irrelevant (Ins).
- Permitting exceptions may lead to satellite litigation and further dispute (Ins).

Summary of views in favour of exceptions

4.59 The following key reasons were given in favour of exceptions to the principle:

- In cases such as historic child abuse, mental illness resulting from the event(s) may not emerge until many years after the abuse took place, leading possibly to loss of employment and financial security deserving damages much higher than those originally sustained for physical injury (Rep CA, Rep CA).
- There may be additional injury emerging, distinct from the previous injury, which should give rise to a fresh date of knowledge and therefore a further limitation period for a claim for that additional injury. One respondent commented:
  "The area that this would be most relevant in is disease cases. For example, a person subjected to excessive noise exposure may suffer hearing loss and tinnitus which are separate and distinct conditions. The victim may be diagnosed with one condition with the other not becoming apparent until a much later date. If there were to be one limitation period only, then it is possible that one claim may become time barred with reference to the other. This could also apply to asbestos cases where a victim may be diagnosed with one condition such as asbestosis to then be later diagnosed with mesothelioma" (Thorntons Law LLP).
- Decisions on exceptions should not be left to the discretion of Judges (Leg Rep).

4.60 The consultation asked:

Q3h) How would you suggest that the difficulties and anomalies identified by the Scottish Law Commission (in their report at paragraphs 2.17-2.24) and the Court in Aitchison[14] might be overcome?

4.61 Twenty four respondents (53% of all respondents) addressed question 3h). The prevailing view (20 mentions including all 13 insurance bodies) was to concur with the SLC that the overriding principle has to be that following a delictual act, only one cause of action should arise in which all damages must be sought. It was felt that the Carnegie approach cannot readily be reconciled with this principle, and that the current law as defined by Aitchison is now part of the bank of case law which helps inform the court on the circumstances in which it should exercise its discretion under s.19A.

4.62 The importance of applying only one limitation period was re-emphasised by five respondents. One outlined the rationale behind their view:

"We consider that the application of one limitation period is appropriate for the following reasons:
1. It is wholly consistent with Scots law as it has developed from the 19th Century.

[14] In *Aitchison v Glasgow City Council* (2010) the Lord President, sitting as part of a bench of five senior judges concluded that *Carnegie* had been wrongly decided and that in fact, Scots law had always been as the Commission recommends it should be.

2. It provides certainty. When an action has been raised and concluded, all parties know that it is at a definitive end.
3. The rights of the pursuer are protected where he or she can seek provisional damages.
4. The rights of the pursuer who chooses not to raise an action for a minor injury are further protected by judicial discretion under s.19A" (Simpson and Marwick Solicitors).

4.63 One insurance body also highlighted the provisions of s.12 of the Administration of Justice Act 1982, which allows the court to award provisional damages to an injured person who has sustained injury as a result of the fault of another person in circumstances where there is a risk that at some time in the future the injured person will, as a result of the injury, suffer some serious deterioration in their physical or mental condition.

4.64 A few respondents (4 mentions) argued that exceptions should be made for specific circumstances such as historic child abuse or industrial disease, where late onset psychological or physical injury can develop.

4.65 The consultation asked:

Q3i) Do you consider there is a need to make provision for cases where it was known that the initial harm was actionable but where decisions not to litigate were taken in good faith in reliance on the rule in Carnegie before it was overturned by the Court in Aitchison?

4.66 Twenty eight respondents (62% of all respondents) addressed question 3i) as follows:

Table 21: Summary of views on whether there is a need to make provision for cases relying on the rule in Carnegie

Respondent category	Yes	No	Total
Insurance bodies		13	13
Legal body reps	1	4	5
Solicitor firms	1	3	4
Academics		1	1
MD Unions		1	1
Reps of Historic Child Abuse	2		2
Individual public	2		2
Total	6	22	28

4.67 Of those who provided a view, the majority (79%) did not consider there to be a need to make provision for cases where it was known that the initial harm was actionable but where decisions not to litigate were taken in good faith in reliance on the rule in Carnegie before it was overturned by the court in Aitchison.

Views of those against making provision for such cases

4.68 Two respondents (Leg Rep, Sol) commented that in their view, very few cases fall within these circumstances. It was commonly thought (17 mentions) that the discretion afforded to the courts by s.19A should be sufficient to accommodate such cases. One respondent (Leg Rep) argued

that it is unsatisfactory to make provision for one special class of cases within a general legislative scheme. Another (Acad) cautioned against establishing provisions with a retrospective effect, commenting that if a risk was taken previously over a decision not to litigate, then the victim must deal with the consequences of that decision now.

Views of those in favour of making provision for such cases

4.69 One respondent (Rep CA) argued that unless provision is made for such cases, some victims of historical abuse will be penalised for taking decisions not to litigate previously due to legitimate reasons such as being incapacitated at the time, or not having full facts. Another (Ind-Pub) recommended that special law is required for cases of historic child abuse, with the legislation separate from the damages law. One legal body representative repeated their view that the Aitchison decision should be overturned.

4.70 One solicitor firm re-iterated their point previously documented at paragraph 4.48 above) by citing the Damages (Asbestos-Related Conditions) (Scotland) Act 2009 as an example of legislation being necessary to protect the position of victims due to changes in the law (see paragraph 5.18 for further information on this Act). They suggested that a similar enactment should be introduced to protect victims in the situation described here to prevent them suffering any prejudice as a result of relying on the decision in Carnegie.

Impact

4.71 The consultation asked for information to assist the Scottish Government in its preparation of a Business and Regulatory Impact Assessment and also the Financial Memorandum which will accompany any future Bill. The following questions were posed:

Q3j) What do you think the impact of implementing these proposals in full would be particularly in relation to the issues below?

Is it likely that more or fewer actions will be raised?
Is it likely that more or fewer cases come to court?
Is it likely that more or fewer cases will be settled out of court?
Is it likely that cases will require more or less preparation time?
Is it likely that cases will require more or less court time?
Is it likely that there will be more of fewer awards of damages?
Is it likely that awards of damages will be higher or lower?
Can you quantify the benefits for pursuers?
Can you quantify the benefits for defenders?
Can you quantify the drawbacks for pursuers?
Can you quantify the drawbacks for defenders?

4.72 Twenty eight (62%) of respondents addressed one or more of these questions. Of these, 13 (46%) were insurance bodies, with their views prevailing amongst those submitted and summarised in Table 22 below.

Table 22: Summary of views on impact of implementing the proposals in full

Impact on:	

Impact on:	
No. of actions	More: 16 respondents Fewer: 1 respondents (Leg Rep) No difference: 2 respondents (Sol, Leg Rep) Comments: one respondent (Sol) considered there retaining the Aitchison approach could give rise to more cases for less serious conditions.
No. of cases coming to court	More: 10 respondents Fewer: 1 respondents (Leg Rep) No difference: 2 respondents (Sol, Sol) Comments: increased numbers possibly arising from differing views over interpretation.
No. of cases being settled out of court	More: 2 respondents (Acad, Leg Rep) Fewer: 7 respondents No difference: 1 respondent (Sol) Comments: potentially fewer settlements out of court due to the more satellite litigation over the interpretation of provisions.
Preparation time	More: 10 respondents (due to the complexity of the new issues involved; and due to difficulties establishing evidence relating to cases from a long time ago).Less: 1 respondent (Leg Rep) No difference: 1 respondent (Sol) Comments: one solicitor firm remarked that there will be more time available for preparation rather than an increase in time taken in preparation.
Court time	More: 6 respondents Less: 1 respondent (Leg Rep) No difference: 3 respondents (Sol, Leg Rep, Leg Rep) Comments: more time was envisaged due to the need to consider a statutory list of matters for possible exemption. Also, one respondent (Sol) suggested that legal advisors may put more cases to the court hoping to persuade the court to exercise discretion.
Awards of damages	More: 6 respondents No difference: 3 respondents (Sol, Leg Rep, Ins)
Size of damages	Higher: 8 respondents Lower: 1 respondent (Sol) Neutral: 2 respondent (Sol, Ins)
Benefits for pursuers	Improvement in access to justice, especially for historic child abuse and occupational disease cases (Acad). Compensation sometimes to undeserving claimants due to some late reported claims not being adequately investigated (Ins). More certainty regarding timing of raising actions and factors which will be taken into account (Sol, Leg Rep). More time in which to make a claim (Leg Rep, MDU) Generally beneficial: (Leg Rep) No benefits: 8 respondents

Impact on:	
Benefits for defenders	More certainty regarding liability over only one limitation period (Sol, Leg Rep). No benefits: 13 respondents
Drawbacks for pursuers	Increase in time taken to access justice due to increase in preparation and court time (10 respondents). Adversarial court cases which are potentially intrusive, protracted and costly (Rep CA). Some deserving claimants may not be compensated due to some late reported claims not be adequately investigated (Ins). Only one limitation period so the pursuer cannot follow an earlier action with another arising from the same incident (Sol).
Drawbacks for defenders	Increase in cost burden due to more cases at a higher cost which may require more staff to deal with and which could ultimately affect premiums (13 respondents). Applications can still be dealt with under s.19A so there may still be need to deal with old claims (Sol). Possible future adversarial legal processes (Rep CA). Extension of limitation period will require all organisations to keep records for longer, presenting a bigger administrative burden (Sol). Defenders' practices and reputations could be called publicly into question with their being held fully accountable and responsible (Rep CA).
Cannot provide view at this stage until greater clarity on reforms	1 respondent (Rep CA)

4.73 The consultation asked:

Q3k) Do you consider that the proposals for the reform of the law of limitation for personal injury actions will affect people, either positively or negatively with the following protected characteristics: age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race and religion or belief?

4.74 Overall, the impact of the proposals in this context were viewed as neutral. Very few comments were submitted by respondents. Three respondents (Rep CA, Ind-Pub, Leg Rep) considered that depending on which reforms are adopted, they could potentially discriminate against or work positively for survivors of childhood abuse who years later suffer associated mental health problems.

4.75 One further comment (Acad) was that the SLC's recommendation 10 concerning updating the terminology "unsoundness of mind" is positive for those with mental disability as the existing terminology is potentially offensive.

Summary of views

4.76 Around three-quarters (74%) of those who provided a view agreed that it would not be advisable to seek to revive prescribed claims for all personal injuries, regardless of the nature and circumstances of the personal injury, even it were lawful to do so. The most common argument in favour of not reviving prescribed claims was that this would unfairly prejudice defenders who would most likely encounter problems gathering quality evidence.

4.77 Around three-quarters (77%) of those who provided a view did not agree that the standard limitation period should be raised from three to five years. Extending to five years was opposed largely on the grounds that this posed a risk to the quality of evidence and encouraged unnecessary delays in proceedings.

4.78 The majority view (79% of commentators) was in favour of a single, standard limitation period for all types of personal injury claim. This was seen as creating a simple rule which is easy to understand.

4.79 Respondents were evenly split over whether there should be a statutory, non-exhaustive list of matters relevant to determining whether it would be equitable for the courts to exercise discretion to allow an action to be brought outwith the limitation period.

4.80 The majority (73%) of those who provided a view agreed that it is in the interests of justice that there should be only one limitation period following the discovery of a harmful act, during which all claims for damages for associated injuries must be brought. Most (71%) did not consider that there should be any exceptions to this principle.

4.81 It was commonly felt that only one cause of action should arise following a delictual act, with all damages sought at that time. A recurring view was that

the *Carnegie* approach cannot readily be reconciled with this principle, and the current law as defined by *Aitchison* is now part of the bank of case law which informs the court in relation to applying discretion under s.19A.

4.82 Of those who provided a view, the majority (79%) did not consider there to be a need to make provision for cases where it was known that the initial harm was actionable but where decisions not to litigate were taken in good faith in reliance on the rule in *Carnegie* before it was overturned by the court in *Aitchison*.

4.83 It was commonly thought that the overall impact of the proposals under discussion would result in an increase in the number of actions raised with more of these coming to court and requiring more preparation and court time. Respondents envisaged overall increases in the number and size of awards for damages. Overall, the differing impact of the proposals on people with protected characteristics: age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race and religion or belief, was considered to be minimal.

5. RECENT LEGISLATIVE REFORM

Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007[15]

5.1 The 2007 Act, which came into force on 27 April 2007, had the central aim of ensuring that – as an exception to the normal rule – a person dying of mesothelioma could secure damages without thereby preventing members of his/her immediate family making a future claim for damages for distress, grief and loss of society.

5.2 The legislation was introduced in September 2006 by the then Scottish Executive following a consultation exercise in July-August 2006, which itself followed expressions of concern in Parliament about the dilemma faced by mesothelioma sufferers, i.e. that they could pursue a claim for damages on their own behalf only if they were prepared to accept the consequence that their immediate families would not thereafter be able to pursue claims for damages for emotional harm. The Commission subsequently recommended, in the report on *Damages for Wrongful Death* (2008), that where a victim dies of mesothelioma, his relatives should retain title to sue for non-patrimonial loss, although the victim has excluded or discharged liability before his death, in accordance with the 2007 Act.

5.3 At the time it was enacted, the overall financial implications of the 2007 Act were predicted to be relatively limited. That was the view of the Scottish Executive and, after taking evidence, had also been the conclusion of Parliament's Justice 1 Committee in its report at Stage 1.

5.4 The consultation asked:

Q4a) Do you consider that the way in which the 2007 Act is working in practice is achieving its central aim of ensuring that a person dying of mesothelioma can secure damages without thereby preventing members of his/her immediate family making a future claim for damages for distress, grief and loss of society?

5.5 All 18 respondents (40% of respondents who provided a view) agreed that the 2007 Act is achieving its central aim. Those providing a view included nine insurance bodies, four legal body representatives, three solicitor firms, one academic and one representative of historic child abuse. A few of these respondents explained that they did not have direct knowledge to support their response, but their understanding was that this was the case.

5.6 It was generally recognised that the 2007 Act had the effect of creating certainty amongst mesothelioma sufferers that not only can their own compensation claim be resolved in their lifetime, but also their family's claim

[15] The Policy Memorandum and Explanatory Memorandum (including the Financial Memorandum) associated with the 2007 Act are available at www.scottish.parliament.uk/parliamentarybusiness/Bills/24941.aspx. (Technically, the provisions of the 2007 Act were repealed in July 2011 by the Damages (Scotland) Act 2011, but in substance they were continued thereafter by section 5 of the 2011 Act.)

can be resolved posthumously. One remark (Ins) was that the 2007 Act has brought consistency with the position in England.

5.7 A common theme amongst insurance bodies was that although the 2007 Act is achieving its central aim, it could be argued that it is not necessary on account of the existing interim damages provisions, which they considered could achieve the same outcome.

5.8 The consultation asked:

Q4b) Do you consider that the way in which the 2007 Act is working in practice is having positive or negative impacts/side-effects?

5.9 Only 13 respondents (29% of all respondents) addressed Q4b). Of these, six considered there to be positive impacts; six considered that there were neither positive nor negative impacts; and one perceived the impact to be negative.

5.10 Positive side-effects were described as:

- swifter settlement of claims (Sol, Sol, Ins)
- earlier disclosure of information in support of claims (Sol, Ins)
- removal of the "almost impossible decision" for a sufferer over whether to raise proceedings whilst alive or wait to allow their family to raise a claim following their death (Sol, Ins)
- settlement of some family claims in addition to the victim's claim, during the victim's life (some insurers were reported as offering to settle the family claims at the time of the sufferer's settlement) (Sol).

5.11 Those describing the effects as neither positive nor negative were five insurance bodies and one representative legal body, with some presenting the underlying argument that the legislation was not necessary in the first place.

5.12 One academic argued against the 2007 Act on the grounds that the Act extends the liability too far and creates an exception to the "once and for all" principle. According to this respondent, earlier discharge of liability should not allow subsequent claims.

5.13 The consultation asked:

Q4c) Do you consider that the Scottish Government's financial estimates were largely accurate, insofar as they forecast:
i) the number of additional claims?
ii) the average level of costs associated with those additional claims?
iii) the overall financial implications of the 2007 Act?

5.14 Only five respondents provided a response to these questions. Others stated that it was too early for evidence-based comments, with little data available on which to assess impact. One insurance body remarked that the Act was working within a wider context of legislative reform, and as such, it was difficult to isolate its specific impact.

5.15 One respondent's view was that:

> "The Scottish government's estimates were considered to fall primarily on business and the State. There was no breakdown or attribution to Scottish Court Service costs and the consultation paper makes no mention of estimates with regard to the number of additional claims or associated costs" (The Judges of the Court of Session).

5.16 Of the five respondents who addressed the questions, only one (Sol) considered that the Government's estimates were largely accurate in respect of the number of additional claims forecast. All of the other respondents (Ins, Ins, Acad, Sol) assessed the forecasts to underplay the number of additional claims, the average level of associated costs and the overall financial implications of the Act.

5.17 One solicitor firm referred to Health and Safety Executive information which predicted a peak in the number of claims from men in 2016, and from women even later than this. The latest judicial decision was referred to (*Elizabeth Wolff & Others –v- John Moulds (Kilmarnock) Ltd & Weir Construction Ltd [2011] CSOH 159*) by two respondents (Ins, Sol) to support their view that the average family claim will be higher than predicted by the Scottish Government.

Damages (Asbestos-related Conditions) (Scotland) Act 2009[16]

5.18 The 2009 Act, which came into force on 17 June 2009[17], had the central aim of ensuring that – notwithstanding a House of Lords ruling in October 2007 – certain asymptomatic asbestos-related conditions (such as pleural plaques) are recognised in Scots law as constituting actionable harm for the purposes of an action of damages, rather than being considered to be negligible.

5.19 At the time that it was enacted, the overall financial implications of the 2009 Act were difficult to forecast with accuracy. Revised estimates produced in February 2009, utilised a range of assumptions, with the Scottish Government concluding tentatively that by 2015 the annual cost could be:

- between £5.8m and £16.6m for business
- between £0.7m and £1.0m for local authorities
- between £0.5m and £0.8m for the Department of Business, Enterprise
- and Regulatory Reform
- between £0.3m and £0.4m for the Ministry of Defence
- between £0.1m and £0.2m for the Scottish Court Service

5.20 The consultation asked:

[16] The Policy Memorandum and Explanatory Memorandum (including the Financial Memorandum) associated with the 2009 Act are available at www.scottish.parliament.uk/parliamentarybusiness/Bills/16218.aspx

[17] While the 2009 Act came into force on 17 June 2009, it provided (i) that period between 17 October 2007 and that date should be "left out of account" for limitation purposes (i.e. that the running of the time-bar clock should effectively be treated as having been frozen for that 18 month period) and (ii) that its central provisions should be "treated for all purposes as having always had effect".

Q4d) Do you consider that the way in which the 2009 Act is working in practice is achieving its central aim of ensuring that a person with pleural plaques (or one of the other specified asymptomatic asbestos-related conditions) may pursue an action of damages in the same way as a person with any other non-negligible personal injury?

5.21 Sixteen respondents (36% of all respondents) addressed this question. Of these, fifteen (94%) agreed that the 2009 Act is achieving its central aim. Despite considering that the Act is working in practice, several insurance bodies highlighted their continued opposition to the introduction of the Act on grounds that:

- Plaques are symptomless as established by unanimous medical evidence and do not cause asbestos-related conditions, such as mesothelioma.
- The Act retrospectively overturned a fundamental legal principle of UK law, and the considered view of the highest court in the UK - that compensation is payable only when a claimant has suffered physical harm as a result of someone's negligence.
- The Scottish Government is now out of step with most countries, including the US and Australia, in compensating pleural plaques.

5.22 The consultation asked:

Q4e) Do you consider that the way in which the 2009 Act is working in practice is having positive or negative impacts/side-effects?

5.23 Seventeen respondents (38% of all respondents) addressed Q4e). Of these, three highlighted positive impacts only; nine highlighted negative impacts only; four identified both positive and negative impacts; and one was undecided on the balance of impacts.

5.24 Positive impacts were described as:

- opening up justice to claimants who had previously been unable to access this (Rep CA, Acad)
- widening the scope of justice to encompass claimants with a "fear for the future" (Sol, Acad)
- creation of a framework for agreement (Leg Rep)
- forcing a pragmatic approach which has fostered a degree of cooperation on "both sides" which was not present before the Act (Ins).

5.25 Negative or unintended impacts were described as:

- the majority of claims not being settled on a provisional basis (as had been expected), but settling on a full and final basis, barring any future claim in the event of the subsequent development of any serious asbestos-related condition ("statute barred") (6 mentions)
- s.4(2) of the Act along with the Aitchison decision having the consequence of enabling a time-bar plea to be taken against people who have not previously considered pleural plaques as sufficiently serious to justify court proceedings ("time-barred") (4 mentions)
- not all pursuer solicitors are working to an agreed framework and agreed framework costs and expenses (Sol, Ins)
- having to be funded by insurers (Leg Rep)

- extending liability for psychiatric injury too far (Acad)
- otherwise healthy people are subjecting themselves to exposure to X-rays and CT scans to investigate whether they have pleural plaques (Ins).

5.26 The consultation asked:

Q4f) Do you consider that the Scottish Government's financial estimates were largely accurate, insofar as they forecast:
i) the number of claims?
ii) the average level of costs associated with those claims?
iii) the overall financial implications of the 2009 Act?

5.27 Of the nine respondents (20% of all respondents) who addressed these questions, most stated that it is too early to assess the accuracy of the Government's financial estimates. One (Ins) suggested that this is re-visited in 12 – 18 months time.

5.28 One respondent (Sol) estimated that the success rate for claims could rise above the 75% to 80% predicted. Two respondents (Sol, Leg Rep) considered that the average cost per case has been significantly over-estimated.

Damages (Scotland) Act 2011[18]

5.29 The 2011 Act, which came into force on 7 July 2011, had the central aim of bringing greater clarity and accuracy to Scots law so far as it relates to damages for fatal personal injuries, reducing requirements for potentially intrusive, protracted and costly investigations, and thereby facilitating the swift and fair settlement of claims.

[18] The Policy Memorandum and Explanatory Memorandum (including the Financial Memorandum) associated with the 2011 Act are available at www.scottish.parliament.uk/parliamentarybusiness/Bills/18113.aspx.

5.30 The legislation was introduced in June 2010 as a Members Bill, following consultation undertaken in 2009, and took forward recommendations made by the Commission in their report *Damages for Wrongful Death* (2008). The Scottish Government supported the legislation and, taking account of representations, promoted amendments as it went through Parliament. As enacted, the legislation's key innovations included:

a) In relation to a victim's claim for future patrimonial loss, standardising the calculation of his/her reasonable living expenses at 25% of his/her projected future net income in all cases (unless doing so would produce a manifestly and materially unfair result).

b) In relation to a relative's claim for loss of financial support (where the relatives include a spouse, civil partner, cohabitant or dependent child), standardising the calculation of the total loss of support at 75% of the deceased's projected future net income in all cases (unless doing so would produce a manifestly and materially unfair result).

c) In relation to a relative's claim for loss of financial support, requiring that any multiplier is applied from the date of the interlocutor (rather than the date of death) and only in respect of future loss of support.

5.31 The consultation asked:

Q4g) Do you consider that the way in which the 2011 Act is working in practice is achieving its central aim of bringing greater clarity and accuracy to Scots law so far as it relates to damages for fatal personal injuries, reducing requirements for potentially intrusive, protracted and costly investigations, and thereby facilitating the swift and fair settlement of claims?

5.32 Nineteen respondents (42% of all respondents) addressed this question. Of these, fourteen (twelve were insurance bodies) did not consider that the 2011 Act is achieving its central aim. The remaining five respondents considered that the central aim was being achieved.

5.33 Amongst those who considered that the aim was not being met were respondents who stated that they had opposed the provisions from the start. Others qualified their view by explaining that it may as yet be too early to give a definitive answer.

5.34 Amongst the five respondents (Rep CA, Leg Rep, Leg Rep, Acad, Sol) who thought the central aim was being achieved, one commented:

> "We understand that parties are finding the Act easy to operate in practice, which is facilitating agreement and settlement" (Society of Solicitor Advocates).

5.35 The consultation asked:

Q4h) Do you consider that the way in which the 2011 Act is working in practice is having positive or negative impacts/side-effects?

5.36 Twenty one respondents (47% of all respondents) addressed this question as follows:

Table 23: Summary of views on whether the 2011 Act is having positive or negative impacts/side-effects

	No.	%
Positive impacts only	4	19
Negative impacts only	12	57
Both positive and negative impacts	2	10
Too early to say	2	10
Nothing unforeseen	1	5
Total	21	100

NB Percentages do not add to 100% exactly due to rounding.

5.37 The majority of those providing a view highlighted **negative impacts** associated with the 2011 Act. These are summarised below:

- lack of clarity due to the decision to remove the deduction of surviving spousal income (10 insurance bodies)
- lack of clarity over what constitutes 'manifestly unfair' when considering the 75% dependency base figure (10 insurance bodies)
- delays in settlements of cases without intrusive, protracted and costly investigations (10 insurance bodies)
- passing on of increased insurance costs to consumers in their insurance premiums (7 insurance bodies)
- inflexibility ("blanket approach") to calculating claims despite widely different family circumstances resulting in lack of fairness and accuracy (Ins, Ins, Ins, Leg Rep, Sol)
- multipliers applying from the date of interlocutor, rather than the traditional date of death (Ins)
- lack of consistency with the rest of the UK (Ins)
- no obvious reduction in the time taken to settle claims (Ins).

5.38 The **positive impacts** identified included:

- reduction in intrusive, protracted and costly investigations (Rep CA, Leg Rep, Sol)
- introduction of a sensible and fair method for calculating claims (Sol, Leg Rep, Acad)
- for claimants an increase in lost years/loss of support element (Sol, Leg Rep)
- injection of clarity and accuracy which has reduced the scope for disagreement between parties (Sol, Leg Rep)
- providing for loss of personal services in fatal and loss of expectation cases (in terms of the Administration of Justice Act 1982) (Acad)
- allowing the transmission of the rights of the deceased to the executor (Acad)
- extending the definition of an 'immediate family' (and the inclusion of half-blood relatives for the purposes of the loss to society) (Acad).

5.39 The consultation asked:

Q4i) Do you consider that the Scottish Government's financial estimates were largely accurate, insofar as they forecast:
i) the impact on the number of claims?
ii) the level of award in respect of those claims?
iii) the overall financial implications of the 2011 Act?

5.40 Seventeen respondents (38% of all respondents) addressed these questions. Insurance bodies were generally of the opinion that the forecasts made by the Scottish Government were not robust in that they were derived from an analysis of data from only one firm of solicitors. Furthermore, no information was provided to show the breakdown of the types of claims from which the data was obtained (e.g. road traffic accident fatalities; workplace fatalities; or long tail conditions such as mesothelioma). Such a breakdown, it was claimed, would have helped respondents to better understand the estimates and how they were compiled. Several suggested that more informed analysis is undertaken using data from the records of several different solicitor firms.

5.41 The majority view (largely amongst insurance bodies) was that all of the financial estimates were inaccurate, with the financial implications of the 2011 Act much greater than predicted.

5.42 Four respondents (Sol, Sol, Leg Rep, Ind-Pub) considered the Government's expectation of negligible impact on number of claims to be accurate. Three (Sol, Sol, Ind-Pub) concurred with the Government's prediction of an increased level of award.

Summary of views

5.43 Of the 18 respondents who provided a view all agreed that the 2007 Act is achieving its central aim of ensuring that a person dying of mesothelioma can secure damages without thereby preventing members of his/her immediate family making a future claim.

5.44 The 2007 Act was viewed largely as producing positive impacts such as a swifter settlement of claims, helped by the earlier disclosure of information in support of claims.

5.45 Of the 16 respondents who provided a view, 15 agreed that the 2009 Act is achieving its central aim of ensuring that a person with pleural plaques (or one of the other specified asymptomatic asbestos-related conditions) may pursue an action of damages in the same way as a person with any other non-negligible personal injury.

5.46 The most significant positive impact of the 2009 Act was described as opening up justice to claimants previously unable to access this, and widening the scope of justice to encompass claimants with a "fear of the future". The most commonly cited unintended consequence was highlighted as claims

tending to be settled on a full and final basis, rather than on a provisional basis as had been expected. This resulted in barring any subsequent claims in the event of serious asbestos-related conditions developing.

5.47 In general, respondents felt that it was too early to assess the extent to which the Scottish Government's financial estimates were accurate regarding the number of additional claims, the average level of costs associated with these and the overall financial implications of the 2007 or the 2009 Acts.

5.48 The majority (14 respondents) of the 19 respondents who expressed a view did not consider that the 2011 Act is achieving its central aim of bringing greater clarity and accuracy to Scots law, so far as it relates to damages for fatal personal injuries, reducing requirements for potentially intrusive, protracted and costly investigations, and thereby facilitating the swift and fair settlement of claims.

5.49 The majority of those who commented highlighted negative impacts associated with the 2011 Act. In particular, insurance bodies considered there to be a lack of clarity due to the decision to remove the deduction of the surviving spousal income; ambiguity over what constitutes "manifestly unfair"; and knock-on delays in settlements of cases.

5.50 The majority view, largely amongst insurance bodies, was that all of the Scottish Government's financial estimates relating to the 2011 Act were inaccurate, with the financial implications much greater than predicted. However, it was generally agreed that more informed assessment should be based on data from the records of several different solicitor firms.

6. FUTURE LEGISLATIVE REFORM

Periodical payments

6.1 When there is an award of damages in respect of a personal injury, it is generally paid as a lump sum. But however carefully the pursuer's long-term future losses and needs are estimated, they can rarely be known with certainty, and there is a risk that a lump sum award which underestimates actual requirements may cause the pursuer to suffer hardship. Conversely, an award which overestimates actual requirements may unfairly penalise the defender. An alternative approach, which may help to mitigate such risks, is through the mechanism of 'periodical payments' to spread payments over an extended period (e.g. annual payments, for the remainder of the pursuer's life). It may be that greater use of periodical payments offers scope to reflect pursuers' actual needs and losses more closely than is possible with lump sums.

6.2 At present, where damages for personal injury are payable in Scotland, the courts may make an order for periodical payments, only with the consent of the parties involved. This provision is set out at section 2 of the Damages Act 1996. This position differs from England and Wales and Northern Ireland, where an amended version of section 2 of the 1996 Act is in effect, and as a result, the courts now have the power to impose an order providing for periodical payments to the injured person without the consent of the parties.

6.3 The consultation asked:

Q4j) Do you consider that there would be merit in reviewing the existing approach to periodical payments, as currently set out in the Scottish version of s.2 of the 1996 Act?

6.4 Twenty eight (62% of all respondents) addressed question 4j) as follows:

Table 24: Summary of views on whether there would be merit in reviewing the existing approach to periodical payments

Respondent category	Yes	No	Total
Insurance bodies	12	1	13
Legal body reps	6		6
Solicitor firms	3		3
Academics	1		1
MD Unions	1	1	2
Other	3		3
Total	26	2	28

6.5 It was commonly felt amongst the 93% of respondents seeing merit in reviewing the existing approach to periodical payments, that these are a fair way of settling claims, particularly in serious, catastrophic cases, in order to ensure that pursuers do not outlive the care package put in place following their injury claim. Periodical payments were viewed as vehicles to reduce uncertainty and risk of over or under compensating pursuers. One respondent commented:

> "Giving the court the power to award payment protection order awards means that the interests of the pursuer are being considered fully and that the award is sufficient to fully provide for their financial needs during the whole of their lifetime" (ENABLE Scotland).

6.6 Overall, respondents envisaged both advantages and drawbacks of periodical payments to both pursuer and defender, but on balance they were welcomed as potentially:

- saving court time and legal costs
- providing greater predictability to help defenders' cash flow (rather than having to pay lump sums)
- bringing Scotland in line with England and Wales
- helping to overcome difficulties experienced in relation to the discount rate arguments
- taking account of issues arising post imposition of the payment such as changes in medical understanding
- benefitting the NHS in that they will limit the chance of the pursuer exhausting their pot of reparation, and being forced to rely on public support for their treatment and care.

6.7 Two solicitor firms recommended that the need for consent from both parties be removed. One remarked:

> "It seems to us that in an adversarial system such as ours, any provision requiring the consent of the opposing parties is rarely going to be invoked" (Thompsons Solicitors and Solicitor Advocates).

6.8 It was argued by two respondents (Acad, Sol) that an ongoing review regime be implemented so that the payments can be increased or decreased over time, should circumstances change.

6.9 The view of one of the respondents opposing the review of periodic payments was that a consensual approach between parties should be retained (Ins). The other respondent (MDU) in opposition stated that from their point of view there would be no merit in reviewing the existing approach to periodical payments as they were not considered a secure provider under s2(4) of the Damages Act 1996.

Interest on damages

6.10 In September 2006, the Commission published a report on *Interest on Debt and Damages*[19] with a draft Bill. The Commission proposed the creation of a statutory right to interest throughout the period from the date when the claimant loses the use of money to which he/she is entitled. It was also proposed that interest should run during the same period and at the same rate regardless of whether the claim is for payment of a contractual debt, a non-contractual debt or damages. The rate of interest would be set at a level which adequately compensates the claimant, rather than one which punishes the debtor for the late payment.

6.11 The Scottish Government consulted in January 2008[20] on the full range of recommendations made by the Commission. The responses to that exercise raised a number of important concerns about the proposed legislation. As regards interest on damages, the responses suggested that the proposals and their potential effect lacked clarity and relied excessively on judicial discretion, without giving express guidance to the Court.

6.12 The consultation asked:

Q4k) Do you consider that there would be merit in reviewing again (but this time, separately) the existing approach to interest on damages for personal injury?

6.13 Twenty five respondents (56% of all respondents) addressed this question, with the overwhelming majority (88% of those who provided a view) considering that the existing approach should be reviewed again, separately. Of the three respondents who disagreed, two legal body representatives argued that the approach is correct, but the interest rate should be reviewed. The other (MDU) provided no commentary to support their response.

6.14 The reasons given by those in favour of a new and separate review were:

- The current rate of 8% is not appropriate in the current economic climate, with what was perceived to be a "mis-match" between the judicial and market interest rates, unjustifiable (17 mentions).
- Currently pursuers have an incentive to delay settlement as the 8% interest rate provides a greater return than would be the case through investment of funds (10 mentions). One respondent commented: "Why would a pursuer accept a reasonably offered sum when to do nothing achieves a return of 8% - far more than any bank or investment fund (at reasonable risk) would be able to offer? This is an impediment to justice in Scotland" (Aviva Insurance Limited).
- Scotland's approach is out of step with that in England and Wales where interest rates are lower and interest is awarded from the date of issue of court proceedings, not prior to proceedings (7 mentions).

[19] The Commission's report can be found at www.scotlawcom.gov.uk/download_file/view/385.
[20] The consultation paper can be found at http://scotland.gov.uk/Publications/2008/01/15144204/0; the summary and analysis of responses at www.scotland.gov.uk/Publications/2008/05/16121025/1; and the (non-confidential) responses at www.scotland.gov.uk/Publications/2008/05/15104808/0.

- The rate of 8% is unnecessarily punitive (7 mentions).
- The current approach can result in the claimant being substantially overcompensated due to the difference between the judicial interest rate and the bank base rate (Sol).
- The current approach results in increased insurance premiums for consumers (Ins).
- This area of law is complex and requires its own dedicated consultation (Sol).

6.15 Many respondents referred to the recent decision in *Farstad Supply AS v Enviroco Ltd (2013) CSIH 9,* in which a modified judicial interest rate was applied with a suggestion that the Rules Council should address the mis-match between the judicial rate of interest and the market rate as a matter of urgency.

6.16 One solicitor firm suggested that interest rates for each case should be determined by the bank rates prevailing at the time:

> "It is submitted that the Scottish Law Commission should recommend that interest in respect of past elements of loss in personal injury actions should be awarded having regard to the prevailing rates of Bank interest rates during the relevant period. Clearly it would be impractical for the court to carry out a complex exercise particularly if there had been a large number of interest rate changes over the period but a "broad brush" approach should be employed. There should be no difficulty in providing guidance to the courts by way of Practice Notes" (HBM Sayers).

Summary of views

6.17 The vast majority (93%) of those providing a view saw merit in reviewing the existing approach to periodical payments. These were envisaged as potentially a fair way to settle claims, particularly in serious, catastrophic cases, in order to ensure that pursuers do not outlive the care package put in place following their injury claim.

6.18 The overwhelming majority (88%) of those who provided a view considered that there would be merit in reviewing separately the existing approach to interest on damages for personal injury. The most common reason given was to address what was perceived to be a mis-match in the judicial and market interest rates, which provided an incentive to pursuers to delay settlement.

ANNEX: LIST OF RESPONDENTS

Organisations

Insurance bodies
Allianz Insurance
Association of British Insurers
Aviva Insurance Limited
AXA Insurance
Direct Line Group
esure Insurance Ltd
Forum of Scottish Claims Managers
LV=
NFU Mutual Insurance Society Limited
PSV Claims Bureau Limited
Royal Sun Alliance Insurance
The Motor Insurers' Bureau
Zurich Insurance plc.

Legal body representatives
Association of Personal Injury Lawyers
Faculty of Advocates
Forum of Insurance Lawyers
Judges of the Court of Session
Sheriffs' Association
Society of Solicitor Advocates
The Law Society of Scotland

Solicitor firms
HBM Sayers
Simpson and Marwick Solicitors
Thompsons Solicitors and Solicitor Advocates
Thorntons Law LLP

Academics
Anon
Eleanor Russell
Grzegorz Grzeszczyk

Medical defence unions
Medical Defence Union
Medical and Dental Defence Union of Scotland
Medical Protection Society

Representative bodies of historic child abuse
Former boys and girls abused in Quarriers homes
Open Secret
Union
Scottish Police Federation

Other

Barnett Waddingham LLP
ENABLE Scotland
North Lanarkshire Council
The Scottish Human Rights' Commission

Individual legal
Simon Di Rollo QC

Seven individual members of the public

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