



FACULTY OF ADVOCATES

RESPONSE by the
FACULTY of ADVOCATES
To

CONSULTATION ON INSURABLE INTEREST DRAFT BILL

Faculty welcomes the opportunity to respond to this consultation. It has considered the draft Bill and the Commissions' Short Consultation Paper. This response addresses the Questions in the Consultation Paper in the same order.

Question 1

Faculty sees no reason to have different rules of insurable interest for these types of insurance.

Question 2

Faculty is satisfied that the definition works for annuities. Faculty can see no reason for this to be problematic for investment related insurance products. However the insurance industry will be better placed to comment on the position for more specialised investment linked insurance products.

Question 3

Faculty understands the intention may be that someone who is living with a person as a partner should have an insurable interest and would agree that is an appropriate place to draw the line. Nonetheless Faculty has reservations that the phrase "lives with the insured as a spouse or civil partner" achieves that end. Although the phrase is similar to those used in damages statutes, it is not clear whether the requirement to live "as a spouse" means simply cohabitation as a partner or something more. Does the cohabitation have to have the characteristics required for a common law marriage? The Damages (Scotland) Act 2011 uses the phrase "as if a spouse". The phrase "as a civil partner" may be even

more difficult in practice as there is little social history to look to in order to give meaning to not being a civil partner but living together as one.

At “(f)” Faculty suggests that “suffer economic loss” ought to be deleted and “harm to economic interests or lose economic benefits” substituted therefor. Economic loss may be interpreted as loss of a person’s property or damage to a right that he/she has.

Faculty can envisage a situation where children have a legitimate interest in the health or life of a parent where there is a “legitimate expectation” of support but no actual right to it. It is possible that there are other situations where someone has a legitimate expectation to protect but no legal right. It is considered that this wider approach to insurable interest would be fair and could be achieved if at proposed s.2 (2) (f) for the words “economic loss” there was substituted “harm to his economic interests or loss of economic benefit”.

It is agreed that the list should be non-exhaustive; but it is unclear what other factors might be relied upon to establish insurable interest when the proposed s.5 arguably has the effect of superseding the existing guidance within the common law.

Question 4

See the response to question 3.

Question 5

Faculty defers to those actually writing investment linked insurance products who would be better placed to offer comment on the effects on their business.

Question 6

The factor in s.3(3)(d) is again tied to economic loss which may be interpreted as loss of a legal right or of property. There is a question as to whether there may be legitimate interests which it should be possible to protect that may not amount to legal rights or rights of property. Faculty can envisage circumstances in which interests falling short of such legal rights ought to in fairness be capable of being insured. Anyone whose relationship with the subject matter of the insurance fell short of a legal right may be excluded from insuring the subject matter. Some interests in possession are acknowledged in s3(3)(c) but the provision would not assist anyone whose use of the subject matter was not exclusive. As mentioned below the factor might also exclude some persons or bodies who might have legitimate interests to protect by parametric policies.

Whilst those in the industry may be able to offer better informed comment, it is envisaged that it is possible some insurance products (such as parametric insurance) might be adversely affected.

Question 7

It is agreed that the list of factors should be non-exhaustive but similar considerations arise to those discussed in answer to Questions 3 and 6 above.

Question 8

Faculty considers that the present proposal appears to strike a fair balance between the respective interests.

Question 9

It would seem to be fairer to apply the proposed new rules to policies entered into after the commencement of the Act. The proposal seeks to introduce an element of retrospective effect without any significant justification therefor.

Question 10

It would be more desirable to make it clear that a lack of insurable interest under one head of a combined policy would not lead to the remainder of the policy being void or unenforceable unless that was explicitly agreed. It would be preferable to make that more clear than the existing state of the authorities appears to allow.