RESPONSE

by

THE REPARATION SUB-COMMITTEE of THE FACULTY of ADVOCATES LAW REFORM COMMITTEE

to

DRAFT PROVISIONS to ALLOW COURTS to IMPOSE PERIODICAL PAYMENT ORDERS WITHOUT THE CONSENT OF PARTIES

We would respond to the questions posed in the consultation document in the following way:

1. Do you agree that these provisions meet their intended aim as set out in the paragraph 13

While we consider that the provisions appear to meet the stated legislative intent, there can be no doubt that they mark a significant and important innovation to existing practice. The court is being put into a position where it has the responsibility to impose a settlement upon the parties notwithstanding their own considered view as to what arrangement they would make for themselves. The Faculty appreciates that this is a necessary feature of these proposals, but is concerned that the court should have the necessary specialist knowledge, experience, training, resources and infrastructure to permit these provisions to be operated successfully.

In our view there should be a financial threshold in relation to the value of future loss before a court would be required to consider making a periodical payment order. This could be set at a relatively low level (£500,000), the purpose being to avoid investigation where it is clearly unnecessary. We think that the court should be provided with a specific power to obtain evidence (such as actuarial or financial information) as required to fulfil its new function. Case management provisions contained in the existing practice rules will also require to be enhanced.

2. New section 2C(3) permits the use of a payment method other than that specified in the order in certain circumstances. What is your view on whether the court should be able to pre-empt the possibility of reliance being placed on this section and narrow down (either completely or partially) the method(s) of payment for all defenders?

We consider that this provision (section 2C(3)) ought to be re-drafted to expressly refer to the fact that alternative payment methods can only be adopted with the mutual consent of parties or by express order of the court. There is scope for a mischief to arise given that, read in isolation, it appears to permit of a different method being adopted without consent (provided that the conditions in sub-sections (a) and (b) are satisfied).

3. We propose that decisions made in relation to variation or suspension are to be subject to a bespoke review process. Do you have views on what level of review would be appropriate and on how that might best be achieved in practice?

We strongly disagree with the proposal to introduce a novel and bespoke "same tier" review mechanism in the context of PPOs. We see no reason why the ordinary right to an appeal to a superior court should be removed in the context of the variation or suspension of payment protection orders.

The review process envisaged by the draft provisions would leave litigants concerned with a PPO enjoying a less robust appeal process than litigants involved in all other types of cases.

The proposal to have another Lord Ordinary or Sheriff (i.e. a judge sitting in the same tier and having the same level of seniority as the one who made the order to be complained of) review the decision is completely out of step with the well recognised hierarchy of the Scottish court system and the principle whereby superior courts bind inferior ones. Furthermore, it is not clear how many reviews are to be allowed. If only one review is allowed then it seems bizarre that the second decision is treated as more important than the first decision. If more than one is allowed then at what point does review come to an end?

We consider that any review should be carried out using the standard appellate procedures (Sheriff Appeal Court and the Inner House).

Sub-section 4 of Section 2I should be removed entirely as it bears to seek to oust the court's inherent jurisdiction to review decisions of the Lord Ordinary or Sheriff.

4. In your view will the bankruptcy provisions work in the context of the wider bankruptcy legal framework?

We have not identified any aspect of the bankruptcy provisions which appears to us to be unworkable. It may be that sequestration of the estate of a person who is in receipt of

periodical payments will be a situation in which the amount of a debtor's contribution order would be fixed at nil under the Bankruptcy (Scotland) Act 2016, especially if the full amount of the damages for future pecuniary loss is in practice required to meet the increased living expenses of the debtor.

5. Do you wish to highlight any particular issues in relation to the draft provisions? Impact Assessment

We have highlighted particular issues in our responses to the other questions posed.

6. In general, what do you think the impact of implementing these provisions would be?

As indicated above there will be an increased burden on the individual decision makers in cases where these provisions apply. The Lord Ordinary or Sheriff will have to be sufficiently skilled, experienced and trained to operate these provisions successfully. Power to obtain and the ability to understand the appropriate and necessary information will be required.

We are of the view that judicious use of periodical payment orders by the courts will permit a fair and efficient method of dealing with substantial future losses. The need for evidence about life expectancy will be severely restricted or removed. It will avoid the serious risk of lump sum compensation running out. It will prevent over compensation where there is a significant change in circumstances such as a death earlier than predicted. It will reduce the scope of the controversy relative to the level of the discount rate.

7. Is it likely that more or fewer actions will be settled out of court?

A more interventionist approach from the court is inevitable in higher value cases. In certain cases there can be no settlement without the approval of the court.

8. Do you think the order making power would impact on how settlement negotiations are conducted? In what way?

It will inject uncertainty which may sound in a defender reducing the liability it is prepared to incur to take account of the risk of change to the agreement in the future.

Advisers on both sides are likely to proceed in an extremely cautious way given the risks which will attach to them if problems arise in the future. It may see fewer practitioners being prepared to advise upon such cases, which would restrict the availability of legal services to pursuers.

9. Can you quantify the benefits for pursuers?

A seriously injured pursuer will not have to fear that his or her compensation will run out prematurely. This will be an enormous benefit.

10. Can you quantify the benefits for defenders and compensators?

It will allow defenders to return to court to reduce the value of a settlement in the event that circumstances change.

11. Can you quantify the drawbacks for pursuers?

Other than a loss of autonomy we do not consider there to be any significant drawbacks for pursuers.

12. Can you quantify the drawbacks for defenders and compensators?

Insurers will be unable to close their books on cases and fully write off liabilities. Additional resources will be required to make provision for future risk. This will impact upon the conduct of insurers' businesses and budgets.

13. Can you quantify the impact on the Scottish Courts and Tribunals Service?

It will increase the burden in that the court is being given a new jurisdiction. It will require an increase in resources and specialist training for Sheriffs and Lords Ordinary.