Consolidated responses to:

Discussion Paper No 174 on Damages for Personal Injury

V 1.0 prepared August 2026

DP No 174 on Damages for Personal Injury: Consultees' responses

This document contains, immediately below, a list of those who have responded to the Discussion Paper. Comments provided in relation to the individual proposals or questions in the Discussion Paper have been cut and pasted so as to follow the relevant proposal or question in the tables below. General comments have been cut and pasted into the section at the end of this paper.

Please note: external links quoted in any responses are as provided by consultees. The Scottish Law Commission accepts no responsibility for their content.

List of those who submitted responses

1. Midori Courtice
2. Ken Campbell
3. Scottish Courts and Tribunals Service
4. Stuart McMillan MSP
5. Wendy Kempler
6. Zurich Insurance UK
7. Ronald E Conway
8. Clyde & Co (Scotland) LLP
9. Association of Personal Injury Lawyers
10. Stagecoach Group plc
11. Forum of Insurance Lawyers
12. University of Aberdeen Law School
13. Tom Marshall
14. Unite the Union Scotland
15. Senators of the College of Justice
16. Aviva Insurance Ltd
17. Digby Brown LLP
18. Thompsons Solicitors Scotland
19. Drummond Miller LLP
20. Faculty of Advocates
21. DAC Beachcroft
22. Horwich Farrelly Scotland

23. Association of British Insurers
24. Society of Solicitors Advocate
25. Forum of Scottish Claims Managers
26. FOCIS
27. Direct Line Group
28. NFU Mutual
29. Kennedys Law
30. Law Society of Scotland
31. Medical and Dental Defence Union of Scotland
32. Action on Asbestos

1. Do consultees have any comments on economic impact?

(Paragraph 1.18)

Scottish Courts and Tribunals Service	The SCTS is unable to comment on the majority of the questions posed in the discussion paper as they do not directly affect the SCTS. However, there a number of questions/ proposals which will impact on the SCTS and in particular the Accountant of Court in terms of: • court time and relative court programming; • staffing resources where additional duties/ new functions may be conferred on sheriff clerks/ the Accountant of Court; • associated staff training and accommodation resources, and • costs involved in relevant IT changes. In particular, given what is acknowledged in the discussion paper at paragraph 5.6, the SCTS would highlight the importance of sufficient prior engagement for the purposes of contributing towards any relevant financial memorandum/ impact assessment(s) if required.
Stuart McMillan MSP	No
Zurich Insurance UK	No

Ronald E Conway	Introduction I am a member of the Personal Injury Committee, a sub-committee of the Scottish Civil Justice Council. I am the author of W. Green "Personal Injury Practice in the Sheriff Court" 4th Edition 2019 and also a contributing editor to "Delict" Edinburgh University Press 2021. Any comments below are made in a personal capacity. Preliminary The authors of the Discussion Paper are to be congratulated on a comprehensive and timely statement of the present law of damages, and for providing well reasoned arguments for reform. The only regret is that proposals on limitation contained in Chapter 4 are confined to asbestos related claims. The Consultation misses an opportunity to address limitation on a wider basis. It is an unfortunate fact that the general law of limitation in Scotland is currently dysfunctional and increasingly so. I am unable to comment on economic impact.
Clyde & Co (Scotland) LLP	No
Stagecoach Group plc	We understand that PITs are the only type of trusts used for managing awards of damages to children.
Forum of Insurance Lawyers	FOIL makes no comment on this question
University of Aberdeen Law School	We consider that the economic impact of any reforms introduced following this consultation mainly falls in two areas. The first relates to the incentives that act upon injured persons when arranging for personal services, particularly whether they engage professionals at commercial rates, or friends, neighbours or relatives on a gratuitous basis, as well as whether they choose to create a contractual agreement to regulate the provision of these services. The second relates to incentives which act upon injured persons when choosing where to obtain healthcare, care and accommodation, if such choices may have implications for an award of damages.
United the Union Scotland	We have no comments in this regard
Senators of the College of Justice	Other than to recognise that any increase in relation to the extent of recoverable claims is likely to be reflected in increases to the cost of insurance, we are not in a position to comment.

Aviva Insurance Ltd	In short, if the recommendations mean that Defenders ultimately pay higher damages in civil claims for personal injury, it should be recognised that the cost of that economic impact is felt by Consumers and Businesses through higher insurance premiums or an increased stretch on the public purse.
Digby Brown LLP	No
Thompsons Solicitors Scotland	We have no comments in this regard.
Faculty of Advocates	No. The Faculty is not in a position to adduce evidence or data on economic impacts.
DAC Beachcroft	We have no immediate comment on this. We do not have sufficient data to be able to respond to the question.
Horwich Farrelly Scotland	We have no comments to make
Association of British Insurers	It should be noted that if as a result of the Scottish Law Commission's recommendations the costs to defenders of personal injury claims increase, the economic impact will be felt by consumers and businesses (due to higher insurance premiums) and taxpayers (due to increased demands on the public purse).
Society of Solicitor Advocate	No comments to make
Society of Solicitor Advocate	If the result of the recommendations is that defenders ultimately pay more in civil claims for personal injury it should be recognised that the economic impact of this is felt by Consumers, Business and Tax payers through higher insurance premiums or an increased stretch on the public purse.
Direct Line Group	To have a positive economic impact, reform to any area of personal injury damages must improve the experience of all participants by enabling access to justice through the removal of unnecessary processes, not implementing new or additional unnecessary processes, relieve pressure on the court system where possible and reduce both the time and cost involved in bringing a personal injury claim.
NFU Mutual	If proposed changes to the way in which damages for personal injuries are assessed and managed by the courts results in increases in damages payable by defenders and increased court fees or expenses, its an obvious assumption to be made that consumers and businesses shall incur a financial penalty by means of increased Insurance premiums and the public purse shall suffer a greater pull on its recourses.
Kennedys Law	No
Law Society of Scotland	No comments to make.
Action on Asbestos	No comment to make in relation to economic impact.

2. (a) Do you consider that the definition of "relative" in section 13(1) of the 1982 Act should be amended to include children/parents, grandchildren/grandparents, and siblings who are accepted as part of the family?

(b) Do you consider that there is any other category of "relative" which should be included?

(Paragraph 2.20)

Stuart McMillan MSP	2(a) - Yes
Zurich Insurance UK	(a) Yes (b) No
Ronald E Conway	I agree that the definition of "relative" should be extended. The reasons given in the Discussion Paper are compelling, and I refer generally to the Answers at 4. **Question 2(b)** - The definition of "relative" in the 1982 Act should be made consistent with the definition in the Damages (Scotland) Act 2011. An obvious analogy is with loss of financial support and the definition should be extended accordingly. The insightful judgement by Lord Armstrong in *Dewar* has helped considerably. But it still leaves a very intrusive evidential hurdle to establish the category of "relative". The law is no longer appropriate for contemporary relationship norms. More fundamentally, the focus should be on the nature and quality of the services provided , and not the relationship between the provider and the injured person. By way of example, a neighbour might provide morning help and assistance with dressing, breakfasting etc. , whilst a blood relative may attend to the injured person during evening hours. It is a anomalous that there should be an exigible claim for the latter and not the former.
Clyde & Co (Scotland) LLP	(a) Yes, given the changes in society in terms of the make-up of the modern family, many do not have spouses or civil partners and may not live with a significant other as spouse or civil partner. It is not unreasonable to extent the definition of relative to the wider family group. (In terms of siblings who are accepted as part of the family, the assumption is that this relates to step-siblings and adopted siblings.) (b) No, the extension from immediate family to wider family is sufficient.

Association of Personal Injury Lawyers	(a) Yes, this change will bring this section in line with section 4 of the Damages (Scotland) Act 2011, and will provide fairness and consistency. (b) We believe that the definition of "relative" in the 1982 Act should be brought in line fully with that contained in the Damages (Scotland) Act 2011, which includes immediate relatives but also allows extended family such as ascendents/descendants (aside from parent/grandparent, child or grandchild); the niece or nephew; uncle or aunt or former spouse or civil partner, to claim for loss of financial support. We suggest that payment in respect of services would fall under loss of financial support, and there would be consistency if the same definition was adopted in the 1982 Act as that used in section 4.
Stagecoach Group plc	(a) Yes we agree that the definition of "relative" in section 13(1) of the 1982 Act should be extended to include children, parents, grandchildren, grandparents and siblings, however, it should be acknowledged that the widening of the definition may result in more caims becoming litigated and, therefore, settlement being delayed for Pursuers. In the case of fatal claims, the Defender does not generally receive witness statements outlining the nature of family relationships and support that may exist. Their only opportunity to look into these issues is at proof. Where the definition of "relative" is widened, the need to establish these relationships will increase and can only be done at proof. A potential solution to these issues may be ruke changes on disclosure of witness statements, perhaps similar to pre action protocols (b) No we would not support the further widening of the definition of "relative" further than suggested at a.
Forum of Insurance Lawyers	(a) FOIL agrees that the definition of "relative" in section 13(1) of the 1982 Act should be amended as suggested. Society has changed and family structures are often different from those prevalent when the 1982 Act was envisaged. However FOIL contends that adequate safeguards are required to ensure that those falling within any revised definition are indeed part of the relevant family. (b) No, the extension proposed is adequate.
University of Aberdeen Law School	We consider it to be instructive that para 38 of the 1978 Report directs itself to the "system of division of labour and pooling of income" which obtains in the family group, so that services rendered are "in practice a species of counterpart for the benefits which that member receives as a member of the family group". While this rationale is referred to in the 1978 report specifically in connection with section 9 of the 1982

	Act, we consider that the reference to division of labour and pooling of resources in the family group can be read in light of both section 8 and section 9. It is therefore our view that the definition of "relative" in section 13(1) of the 1982 Act should comport as closely as possible to those individuals who are most likely to form part of a household unit in which labour is divided and income pooled across the members of the family group. It would also be beneficial if the definition of a "relative" were consistent across claims for wrongful death and claims in respect of services rendered to or by the injured person. We therefore consider that the definition of "relative" should be amended to include children/parents, grandchildren/grandparents, and siblings who are accepted as part of the family. We do not see any need for other categories of "relative" to be included in the definition at this time.
Tom Marshall	Yes. It makes sense to include those who are an accepted part of the injured person's family since, as the Discussion Paper recognises, the persons who may require to or actually perform services, or to whom the injured person might otherwise have performed services, are likely to be those persons who are part of the injured person's family at the time of or after the injury, rather than necessarily those persons who have always had a family relationship with the injured person.
Unite the Union Scotland	2(a) Reference is made to Section 6 of the Damages (Scotland) Act 2011, which provides for loss of services where death is a consequence of the act or omission. Section 6 provides for the recovery by a relative of the deceased's personal services. For the purposes of section 6, the class of relatives is defined by section 14 of the 2011 Act. Section 14 of the 2011 Act includes children/parents, grandchildren/grandparents, and siblings who are accepted as part of the family. Section 6 is analogous to services claimed under sections 8 and 9 of the 1982 Act. In our view there is no good reason for the definition of relatives to differ for the three separate statutory services entitlements. It is in the interests of justice that the three statutory provisions relating to 'services' should apply to the same class of relatives. The 1982 Act should accordingly be amended so that section 14 of the 2011 Act, subject to amendment, applies to section 8 and 9 services claims. (b) Yes. We are frequently instructed in cases where relatives other than those covered by section 13 of the 1982 Act or Section 14 of the 2011 Act either provide necessary services to the deceased or suffer loss of services of the injured person or deceased. Such relatives include in-laws, and former partners or spouses. Presently, section 13 of the 1982 Act includes divorced spouses and former civil partners as relatives for purposes of sections 8 and 9 of that Act. Former partners are not included.

	While divorced spouses and former civil partners are 'relatives' for the purposes of sections 8 and 9 of the 1982 Act, they are not classed as 'relatives' for the purposes of section 6 of the 2011 Act. As discussed in our response to question 2(a) above, these inconsistencies should be addressed by amendment of the relevant statutory provisions contained in the 1982 and 2011 Acts. In any event, it is our view that the definition of relative should be extended to cover "any person accepted by the injured person or deceased as a member of his family" With reference to, for example, Dewar v Graham's Diaries Limited the statutory provision for partners to be "living together" should be replaced with "in a relationship with". This is a situation we regularly encounter, where we are instructed in cases where strong family relationships exist although the persons concerned do not permanently "live together" in the conventional sense.
Senators of the College of Justice	(a) Yes, we consider that section 13 of the 1982 Act should be amended to provide for a wider definition that extends to these groups in order to reflect the perception of the concept of the wider family in the modern context, and to achieve consistency with the definition of "relative" in the 2011 Act. (b) Other than the categories identified at para. 2.14 of the Discussion Paper, and taking due account of the matters stated at para. 2.10, we see no need to extend the definition of "relative" further.
Aviva Insurance Ltd	(a) Yes, we accept that the definition of "relative" in section 13(1) of the 1982 Act should be amended to include children/parents, grandchildren/grandparents, and siblings who are accepted as part of the family (b) We do not believe there is any other category of "relative" which should be included
Digby Brown LLP	(a) Yes, we do as this will bring the section into line with section 4 of the Damages (Scotland) Act 2011 and introduce a degree of consistency. There seems no good reason for retaining the current differences, such as the omission of a person accepted by the injured person as a grandchild of his family, and the narrower definition of "sibling", and as a result, excluding services provided by those relatives from the damages claimed by the injured party. (b) No
Thompsons Solicitors Scotland	(a) Reference is made to Section 6 of the Damages (Scotland) Act 2011, which provides for loss of services where death is a consequence of the act or omission. Section 6 provides for the recovery by a relative of the deceased's personal services. For the purposes of section 6, the class of relatives is defined by section 14 of the 2011 Act. Section 14 of the 2011 Act includes children/parents, grandchildren/grandparents, and siblings who are accepted as part of the family. Section 6 is analogous to services claimed under sections 8 and 9 of the 1982 Act. In our

	view there is no good reason for the definition of relatives to differ for the three separate statutory services entitlements. It is in the interests of justice that the three statutory provisions relating to 'services' should apply to the same class of relatives. The 1982 Act should accordingly be amended so that section 14 of the 2011 Act, subject to amendment, applies to section 8 and 9 services claims. (b) Yes. We are freqvuently instructed in cases where relatives other than those covered by section 13 of the 1982 Act or Section 14 of the 2011 Act either provide necessary services to the deceased or suffer loss of services of the injured person or deceased. Such relatives include in-laws, and former partners or spouses. Presently, section 13 of the 1982 Act includes divorced spouses and former civil partners as relatives for purposes of sections 8 and 9 of that Act. Former partners are not included. While divorced spouses and former civil partners are 'relatives' for the purposes of sections 8 and 9 of the 1982 Act, they are not classed as 'relatives' for the purposes of section 6 of the 2011 Act. As discussed in our response to question 2(a) above, these inconsistencies should be addressed by amendment of the relevant statutory provisions contained in the 1982 and 2011 Acts. In any event, it is our view that the definition of relative should be extended to cover "any person accepted by the injured person or deceased as a member of his family" With reference to, for example, Dewar v Graham's Diaries Limited[i] the statutory provision for partners to be "living together" should be replaced with "in a relationship with". This is a situation we regularly encounter, where we are instructed in cases where strong family relationships exist although the persons concerned do not permanently "live together" in the conventional sense.
Drummond Miller LLP	(a) Yes, in the context of services in particular, the definition of "relative" should be amended to include other family members who are accepted as part of the family. By the very fact that services are being provided by them (to whatever extent, and which in any event will have to be established by the pursuer) it indicates that the nature of the relationship is the same as the relationship the pursuer would have had with the current defined "relative".
Faculty of Advocates	2(a) The Faculty considers that the definition of 'relative' in section 13(1) should be amended to include any person who has been accepted by the injured person as a part of their family, either as a parent, grandparent, grandchild or sibling. a) The principle that in this context a 'relative' may include a person accepted by the injured person as a part of the family is already recognised by section 13(1),

	in that the definition there includes (and has since the enactment of the 1982 Act included) a person accepted by the injured person as a child of their family. b) It is a matter of common experience and knowledge that people are from time to time informally accepted as part of families as parents, grandparents, grandchildren or siblings. The Faculty does not consider therefore that the amendment would in this context offend against contemporary ideas of what is meant by a 'relative'. Indeed the Faculty considers that the amended definition would be more consistent with those ideas than the current, more restrictive definition c) The Faculty considers that in circumstances where a person has been accepted by the injured person as part of their family as a parent, grandparent, grandchild orsibling, it would be unjust to exclude them from the definition of 'relative' and therefore from the scope of sections 8 and 9 of the 1982 Act. d) The Faculty notes that section 14 of the Damages (Scotland) Act 2011 includes in the definition of 'relative' a person who accepted the deceased as a child of their family; a person brought up in the same household as the deceased and accepted as a child of the deceased's family; a person who accepted the deceased as a grandchild; and a person who was accepted by the deceased as a grandchild. Given that the 2011 Act and the 1982 Act are both concerned with reparation for personal injuries, and notwithstanding that the Acts concern different categories of claim, the Faculty considers that it is desirable that consistency of definition be maintained between the Acts, so far as possible. e) The Faculty considers that it is important to bear in mind that in the context of the 1982 Act an award of damages will only be made to, or in respect of, a relative where the requirements of either section 8 or section 9 are satisfied. An award will not be made merely by reason of the relationship. Further, the overall aim of sections 8 and 9 is to restore the injured person (section 9) and the relative (section 8) to their position but for the injuries sustained. While therefore a widening of the definition of 'relative' is likely to lead to an increase in the value of claims, we do not consider that that increase would be disproportionate or unjustified.

	2(b) The Faculty considers that the definition of 'relative' in section 13(1) should also be amended to include any person who has been accepted by the injured person as a part of their family, either as a great grandchild or great grandparent. The Faculty considers that this would be a logical extension of the amendment discussed in para. 2 above.
DAC Beachcroft	(a) Yes. The Administration of Justice Act 1982 (the Act) as it presently stands allows for services rendered by or to someone defined in s13 as a relative. Services rendered by or provided to a relative who does not fall within the definition will only sound in damages if a contractual arrangement exists between them and the injured person. Under s14 of the Damages (Scotland) Act 2011 (the Damages Act), grandparents or grandchildren of the deceased, those who accepted the deceased as a grandchild or were accepted by the deceased as such together with a child brought up in the same household as the deceased and accepted as a child of the family in which the deceased was a child are all included in the list of relatives that may claim. If services have in fact been provided by these relatives, then it seems invidious to preclude them from being able to claim in the same way that they already can under the Damages Act. (b) No. Whilst it is problematic to define who should (and, by omission, those who should not) be classed as a relative for the purposes of the Act, we believe that the extension as proposed above will make reasonable provision and bring consistency to the definitions set out within both the Act and the Damages Act.
Horwich Farrelly Scotland	(a) Yes, subject to the onus remaining on a Pursuer to establish such a relationship exists. (b) No.
Association of British Insurers	(a) We agree that the definition of “relative” in section 13(1) of the 1982 Act should be so amended. This would follow the precedent set by s14 of the Damages (Scotland) Act 2011. However, proper safeguards would need to be introduced to ensure that those falling within the amended definition are indeed part of the relevant family. We would support a requirement for there to be an affidavit explaining the family’s circumstances, and an undertaking from the caregiver that they will in fact provide the services. It should also be a requirement for the affidavit, and the undertaking from the caregiver, to be provided early in the process. This will help to facilitate early settlement. (b) No.
Society of Solicitor Advocates	(a) Yes (b) No

Forum of Scottish Claim Managers	(a) Yes we consider that the definition of "relative" in section 13(1) of the 1982 Act should be amended to include children/parents, grandchildren/grandparents and siblings who are accepted as part of the family. However the widing of this definition could have unintended consequences in creating more complex and protracted claims. In fatal claims for example claims are presented without any details of the family dynamic and without witness statements being disclosed – this essentially keeps the Defender in the dark as to the true nature of the extend of family relationships and the family support network. The Defenders only opportunity to understand and question these issues is to do so at proof. If we are to expand the definition of relative in section 13(1) then to avoid more contentious cases going to proof some rule changes would be required at the same time so that affidavits from the service providers explaining the family circumstances and services provided are disclosable at an early opportunity. (b) No we do not consider that there is any other category of "relative" which should be included.
FOCIS	(a) Yes and this would provide consistency with Section 4 of the Damages (Scotland) Act 2011. (b) FOCIS considers that the definition of relative should be as contained in the Damages (Scotland) Act 2011.
Direct Line Group	(a) DLG have no objection to amending the definition of "relative" to include children/parents, grandchildren/grandparents and siblings who are accepted as part of the family. (b) Our view is consideration of additional categories is not necessary given acceptance of the amended "relative" definition as outlined in our response to questions 2 (a) and 3
NFU Mutual	(a) NFUM agree that the definition of "relative" in section 13(a) of the 1982 Act should be amended to include children/parents, grandchildren/grandparents and siblings who are accepted as part of the family. Such an amendment would bring this legislation in line with the definition contained within the Damages (Scotland) Act 2011.

	To avoid any unnecessary protraction or litigation of claims on this point however we would propose that protocols/rules are introduced outlining a clear framework of supporting such claims. We would opine this should include the requirement to share a clear detail of the family relationship that makes such a claim valid and a schedule of the services provided/received to include estimated timeframes for continued provision of same ("but for" or as a result of the accident giving rise to the claim). This should be confirmed by way of a sworn affidavit at an early stage from the service provider/receiver. (b) NFUM do not consider that there is any other category of "relative" which should be included.
Kennedys Law	(a) In our opinion the 1982 Act should reflect the same terms as the Damages (Scotland) Act 2011 to ensure consistency, and on the basis that similar policy considerations apply in assessing who should be caught by the statutory definition of "relative" in both situations. (b) No.
Law Society of Scotland	a) The unanimous view is for the section 13(1) definition to be extended so as to be in the same terms as the definition under the 2011 Act. b) No
Medical and Dental Defence Union of Scotland	(a) If one accepts (contrary to our arguments above) that section 8 and 9 claims should continue as valid heads of loss in clinical negligence cases, we concede that there is no good reason for excluding an individual who is accepted by the injured person as a parent, grandchild, grandparent or sibling. However, a person accepted as a child of the injured person's family is already included as part of the definition in section 13(1)(e) – "any person accepted by the injured person as a child of his family."
Action on Asbestos	(a) We do consider that the definition of relative should be extended to include children/parents, grandchildren/grandparents, and siblings who are accepted as part of the family. This would provide for the definition of "relative" to be consistent under the Administration of Justice Act 1982 and the Damages (Scotland Act) 2011 and therefore provide for equal treatment of relatives in both fatal and non fatal cases. (b) The category of "relative" should be flexible in order that the composition of family reflects modern day society. We are aware of instances where close friends and peers take on the roles that would have traditionally been undertaken by a relative. Rather than widen the category of relative, it would be more effective to include those individuals whom the injured person includes in their own definition of their family.

3. Should the definition in s 13(1)(b) be amended to include ex-partners?

(Paragraph 2.32)

Stuart McMillan MSP	No
Zurich Insurance UK	No. This is because, as per Part A, it gives a reasonable definition as to what a relative is.
Ronald E Conway	Yes. See Answer 4
Clyde & Co (Scotland) LLP	We consider that this should be defined to cover if the couple were together at the time of the accident.
Association of Personal Injury Lawyers	Yes, the definition should be amended to include ex-partners, as we set out in question 2(b) this would bring consistency between the 1982 Act and the 2011 Act, which allows former spouses and civil partners to claim for loss of financial support. It would also reflect the reality of modern family life, including blended families and where even if people are no longer involved as partners, they may still be in each other's lives and helping each other. It must also be borne in mind that the reason for separation may very well be the burden of the injuries caused by the accident. In a Headway survey of brain injury survivors and their partners, 38 per cent reported that their relationship with their partner had broken down following the brain injury. If a relationship has broken down as a result of the injuries suffered, the couple should not be further penalised, should the ex-partner remain to provide care to the injured person, by the fact that if they are no longer together as a couple.
Stagecoach Group plc	In principal, we have no objection to the definition of "relative" being amended to include expartners where evidence can be provided to demonstrate that the ex-partner continues to participate in a close relationship with the Pursuer. As in 2.a above, we would encourage the development of rules to require early disclosure of evidence supporting the existence of the relationship.
Forum of Insurance Lawyers	FOIL would be of the view that ex partners should be included within the defininiton of section 13(1)(b) if the couple were together at the time of any index accident, but not otherwise
University of Aberdeen Law School	Yes, we consider that the definition in s.13(1)(b) should be amended to include ex-partners, given that they will have previously formed a family unit with the injured person in which labour was divided.

Tom Marshall	Yes. Experience shows that former spouses and ex-partners are among those who do rally round since they may well maintain a close relationship with the injured person even though the marriage or partnership itself has ended. The 1982 Act already includes the divorced spouse of an injured person as a recognised category. Therefore extending the definition to include ex-partners makes sense.
Unite the Union Scotland	Yes, reference our response above. This is a situation we frequently encounter, and it is common for former partners to provide gratuitous personal services notwithstanding their divorce or separation.
Senators of the College of Justice	Yes. Consistent with our view in relation to Q2(b), and given both the legislative position as stated at para. 2.10, and the background of the social norms of wider contemporary society, we see no persuasive reason to exclude ex-partners, who formerly lived as man and wife, from the definition of "relative" in section 13(1)(b).We would not expect the inclusion of ex-partners in this way to be unduly burdensome as long as it is recognised that both the provision of services by the ex-partner to the injured party, and their necessity, would require to be the subject of satisfactory proof.
Aviva Insurance Ltd	We have no objection to the definition being amended to include ex-partners, however, there may be unintended consequences in doing so and the question needs to be considered more carefully. Indeed, at 2.30 on page 12 of the discussion paper there is helpful reference to the judgement of Lord Armstrong in *Dewar (or SD) v Graham's Dairies Ltd* [2016] CSOH 151 where paragraph 69 of the judgement *states "The hallmarks of a family unit are "a degree of mutual interdependence, the sharing of lives, of caring and love, of commitment and support" and the term "family" connotes essentially "some grouping, usually of persons who were connected with each other, by some particular bond" (Telfer v Kellock 2004 SLT 1290, 1294 B)."* In our experience, frequently in Fatal claims, claims are presented without any details of the family dynamic and without witness statements being disclosed – this essentially keeps the Defender entirely in the dark as to the true nature and extent of family relationships and the family support network. The Defender's only opportunity to understand and question these family dynamics is at Proof, therefore, any widening of the definitions further could lead to more contentious cases going to proof. To resolve any changes against these unintended consequences would need some rule changes made at the same time so that affidavits explaining the family circumstances and services are disclosable at an early opportunity and therefore it would be open to the parties to consider the extent that ex-partners are indeed part of the Pursuer's family unit.
Digby Brown LLP	Yes, both for the sake of consistency with the definition of "relative" in s14 of the 2011 Act, in terms of which former partners can claim for loss of financial support, and also to reflect the realities of family life in the 21st century. It has to be borne in mind that the section was enacted over 40 years ago, and the

	make-up of families has changed, with blended families being much more common now. This often means that former partners, while no longer in a relationship, remain part of each other's lives and provide mutual support. This may include the provision of services following an accident and we have had cases in which this situation has arisen. In a case we are currently dealing with, the client suffered severe injuries to his legs in a work place accident. Following discharge from hospital, his mobility was seriously restricted for several months. The client lives alone, but remains on good terms with his ex-partner, who lives near the client's home, and she provided a significant amount of necessary services on a daily basis over around 12 weeks. However, under the current provision, the client is not entitled to seek recovery of the value of those services, which would undoubtedly amount to thousands of pounds, on his ex-partner's behalf. This effectively leads to a windfall for the wrongdoer or their insurer as, if the same services had been provided by an ex-spouse or civil partner, damages to meet the value of those services would have been payable. It is also our experience that where one partner is involved in an accident, this can put strain on the relationship and ultimately lead to its breakdown. It seems both unfair and unreasonable that, where partners separate permanently, but remain on sufficiently good terms that one continues to provide services to the other, the services provided post-separation cannot be included in the damages claim.
Thompsons Solicitors Scotland	Yes, reference our response above. This is a situation we frequently encounter, and it is common for former partners to provide gratuitous personal services notwithstanding their divorce or separation.
Drummond Miller LLP	Yes. Many long-term committed relationships in our current society are purposefully not marked by marriage or civil partnership, despite having the same level of commitment and interdependency. There should be no distinction made in this regard.
Faculty of Advocates	The Faculty considers that the definition of 'relative' in section 13(1) should be amended to include ex-partners. a) The definition in section 13(1) already includes divorced spouses and former civil partners. In the context of a claim under either section 8 orsection 9, the Faculty does not consider that there is a principled distinction to be made between a person falling within one of those categories and an ex-partner who is neither a divorced spouse nor a former civil partner of the injured person. b) Again the Faculty considers that it is important to note that in this context an award of damages will only be made to, or in respect of, a relative where the requirements of either section 8 or section 9 are satisfied and that the overall aim ofsection 8 and 9 isto restore the injured person (section 9) and the relative (section 8) to their position but for the injuries sustained. While therefore it might be said (for

	example) that ex-partners should not be included in the definition because the person in question may only have been in a relationship with the injured person for a very short time, orthat there may be a proliferation of ex-partners for whom, or in respect of whom, claims may be made under section 8 or section 9, the Faculty does not consider that such arguments weigh significantly against the inclusion of ex-partnersin the definition, since an award will only be made if, and to the extent that, the ex-partner provided necessary services to the injured person (section 8) or if, and to the extent that, the injured person would have rendered personal services to them (section 9).
DAC Beachcroft	Yes. On the basis that ex-spouses and ex-civil partners are included, our view is that there should be no bar to a claim for services being made on behalf of an ex-partner with suitable supporting evidence.
Horwich Farrelly Scotland	The stautory definition of relative includes divorced spouses and former civil partners. While we recognise it is possible that there may be claims in which an injured person and their ex-partner retain a sufficiently close relationship such that the ex-partner would provide support and services, we are not aware of any evidence to suggest that there is a failure to deliver justice which requires the statutory definition to be extended to apply to an ex-partner who was not a spouse or civil partner.
Association of British Insurers	We recognise that there may be a case in principle for the definition in s 13(1)(b) to be amended to include ex-partners. However, we would be concerned about the definition being too broad and would therefore favour, before commenting further, an exploration of what tests might be applied to ensure that the definition was not too broad and ex-partners only fell within the definition in certain circumstances. As the discussion paper highlights, in Dewar v Graham's Dairies Ltd [2016] CSOH 151, Lord Armstrong summarised the case law on the issue of 'whether a couple are living together as man and wife'. Lord Armstrong stated that 'significant matters to be taken into account…include: the manner in which the couple lived together and their reason for doing so; the extent to which the couple were committed to the relationship and the extent of the time they spent together; whether assistance was provided in intimate respects; and whether, where relevant, there was assistance in building up self-esteem'. We suggest that this could be used as a starting point for exploring whether an ex-partner should fall within the definition in s 13(1)(b). Again, proper safeguards would need to be introduced with a requirement for suitable supporting evidence.
Society of Solicitor Advocates	We do not consider that this should be amended to include ex-partners.
Forum of Scottish Claim Managers	We have no object to the definition in s13(1)(b) being amended to include ex-partners, however would raise the same issues as set out question 2 (a) above and suggest that a rules change for the early

	disclosure of affidavits explaining the particular circumstances would be required to allow the parties to consider the extent to which that ex-partner is part of the Pursuers family unit.
FOCIS	We believe that ex-partners should be included and again this would bring the legislation in line with the 2011 Act provisions which allows former spouses and civil partners to claim for loss of financial support.
Direct Line Group	DLG have no objection to the inclusion of ex-partners in an amended "relative" definition subject to the couple previously being married, in a civil partnership or co-habiting for a period of at least 2 years.
NFU Mutual	NFUM have no objection to the definition in s13(1)(b) being amended to include ex-partners. We would issue a caveat that this extension may most sensibly require rule changes as per our proposals set out in Q2(a) in relation to sworn affidavits, with an additional consideration around clarification as to the term "partner" in terms of level of integration within the family unit and shared lives. There does exist a risk that such an extension may be exploited and utilised by those previously involved in personal relationships with the pursuer of a less significant nature, which is to be avoided and would ultimately lead to increased damages, greater disputes and possibly satellite litigation on the point.
Kennedys Law	No, not as a matter of course, but given the answer at 4(a) below, a former partner who maintained a close friendship with the injured party should be included in the revised terms of section 8 on the basis of that friendship, as opposed to the former relationship as partners.
Law Society of Scotland	The definition of relative under section 13 already includes divorced spouses under s13(1)(a) and former civil partners under s13(1)(aa). It should not be extended further i.e. it should not include an ex-partner where there was no marriage or civil partnership.
Medical and Dental Defence Union of Scotland	No. While we can see that it could be tempting to introduce ex-partners to dovetail with the definitions used in the Damages (Scotland) Act 2011, there are important policy reasons against so doing. An ex-partner of the deceased is entitled to claim for loss of support under section 4(3)(a), but is not entitled to claim for loss of society under section 4(3)(b). The availability to an ex-partner of a claim for loss of support reflects that the deceased person may have had a legal obligation to support them, but nothing more. This view is bolstered by the fact that under section 7(1) of the 2011 Act, assessment of compensation for loss of support is to be restricted for ex-partners, in a way that it is not restricted for current partners. It would be contrary to logic if an award of damages was to be available in respect of an ex-partner providing necessary services, when parliament has determined that such an individual should not be entitled to damages for loss of society in the event that their ex-partner has died. It is entirely appropriate for ex-partners to remain excluded from the definition in section 13 and, accordingly, from the scope of services claims under sections 8 and 9. While this question addresses the proposed

	extension of services claims to expartners (i.e. those who formerly lived with the injured person as spouse or civil partner but did not have either of those recognised statuses), our comments apply equally to the existing rights of divorced spouses and former civil partners to make such a claim. They too should be excluded from the definition in section 13(1)(b), for the policy reasons noted above.
Action on Asbestos	It would be inconsistent to allow for ex-spouses and ex civil partners to be included within s131(b) and not ex partners. It is not unusual in today's society for partners to maintain a degree of independence within their relationship by opting to not cohabit. These individual life choices should not be taken as a reflection of the relationship as being any less than those who cohabited, and there is no grounds to believe that the provision of services from ex partners would differ whether not they had co habited.

4. (a) Do you consider that section 8 of the 1982 Act should be extended to claims in respect of necessary services provided gratuitously to an injured person by individuals who are not family members?

(b) If so, should an individual who is not a family member be regarded as providing services gratuitously if he or she provides them without having any contractual right to payment in respect of their provision, and otherwise than in the course of a business, profession or vocation; or according to some other formula and, if so, what?

(Paragraph 2.44)

Stuart McMillan MSP	No to both
Zurich Insurance UK	(a) Yes. (b) Yes. If gratuitous care is provided by a friend, we see no reason why they should not be able to claim for it and therefore there should not be a need for a contractual arrangement. However, it is important that any claim is made by a private individual and not a company/organisation. We also believe that claimants should be provided with a reasonable level of proof to demonstrate that the services were in fact undertaken.
Ronald E Conway	Yes for the arguments contained generally in the Discussion Paper.
Clyde & Co (Scotland) LLP	It is understood that services may be rendered to an injured party by a neighbour or friend, however, it is difficult to put limits on this and it would broaden the potential for claims too much essentially allowing anyone to be a "relative" and opening up the possibility of spurious claims. If section 8 were to be extended to individuals who are not family members, then this should be in exceptional cases where the

	injured party does not have any "relatives" at all or any "relatives" who live within a commutable distance from the injured party. We consider that a neighbour who lives within the same street/in close proximity to the injured party would be reasonable.
Association of Personal Injury Lawyers	(a) Yes, we agree – claims should also be permitted in respect of necessary services provided gratuitously to an injured person by friends and neighbours, as this reflects modern life. As the consultation points out, 36 per cent of households are single person households. Not everyone lives near or with their family, and those people who rely on others who do not happen to be related to them, should not be penalised. (b) Yes, an individual who is not a family member should be regarded as providing services gratuitously if they provide them without having any contractual right to payment for their provision, and provide them otherwise than in the course of a business, profession or vocation. This is a pragmatic approach.
Stagecoach Group plc	a No. We do not consider that the provision of services on a gratuitous basis not provided by family members should be capable of inclusion in a financial settlement of a claim. We consider that to do so would widen the scope of claims to an extent that Defenders would be unable to identify who may be entitled to make such claims without proceeding to proof. b No. Where services are provided gratuitously and there is no contractual right to payment for those services, they should not be recoverable
Forum of Insurance Lawyers	FOIL accepts that as a matter of fact services may be rendered to an injured party by indivuduals who are not family members. FOIL is however concerned at the scope for spurious or questionable claims. In the event that section 8 of the 1982 Act were to be extended as suggested (ie to individuals who are not family members), then this should be in cases where the injured party does not have relatives falling within the existing definition contained in the 1982 Act. Further, any such claims should be propery evidenced before being accepted, i.e. on cause shown.
University of Aberdeen Law School	We consider that there are powerful policy reasons to extend claims under section 8 of the 1982 Act to services provided gratuitously by individuals who are not family members. Just as a degree of reciprocal rendering of services generally obtains in the family unit, so it does, albeit to a lesser extent, in local communities where friends or neighbours take an interest in one another's wellbeing. This will be particularly true where more vulnerable members of the community who live alone, such as elderly persons, are concerned. We agree that social attitudes have moved on since the Commission stated in

	1978 that "it is only within the family group that there is a demonstrable social need to allow recovery in respect of services rendered". In our view, an injured person should not be placed at a disadvantage owing to a failure to enter into a contractual agreement with a person other than a relative who has rendered services. There is considerable artifice in requiring such agreements where they would not usually be created in the ordinary course of friendly or neighbourly behaviour. It would not generally occur even to a person who was reasonably viligant and astute about their legal position to do so. We therefore consider that the formula for gratuitous services should be that an individual who is not a family member "provides them without having any contractual right to payment in respect of their provision, and otherwise than in the course of a business, profession or vocation".
Tom Marshall	Yes. There are really two fundamental reasons. In the first place, before an injured person could be in need of necessary services, it is axiomatic that the injuries sustained by the injured person have resulted in some level of external assistance being provided to the injured person. In the second place, the principle is that the responsible person should be bearing the burden of the external assistance required by the injured person, whether that assistance is being provided gratuitously or commercially. As was discussed in Drake v Foster Wheeler at paragraph 41, there is no rational basis for distinguishing between one type of person providing those services and another. It is noteworthy that the decision in Drake v Foster Wheeler was not challenged on appeal and has been accepted as a correct statement of the law in England & Wales. It is probably better that quantification is left to be determined by the court, since prescribing any basis is unlikely to cover all eventualities.
Unite the Union Scotland	4(a) Yes. We frequently act for pursuers who either have no family members or who have family who live a long way away. In our experience it is common for friends and/or neighbours to provide services. (b) Non-family members providing services gratuitously should be entitled to an award of damages calculated on the same basis as presently for relatives' claims for services.
Senators of the College of Justice	(a) Yes, for the reasons set out at paras. 2.34, 2.35 & 2.37. (b) Yes. We do not envisage the need for a different formula.
Aviva Insurance Ltd	(a) No. We believe that to do so would be fraught with unintended consequences and would lead to an increase in cases running to Proof on this issue for similar reasons to that highlighted in our answer 3. It is frequently the case in Fatal claims, where the Defender is kept entirely in the dark as to the true nature and extent of the family dynamics and support network prior to any Proof.

	We see such an extension to widen the scope of section 8 claims to anyone as exacerbating this situation yet further as including individuals outwith the family unit could give rise to difficulties proving (or disproving) the nature and extent of such services and perhaps even give rise to conflicting evidence from the family members to that of non-family members. This would create real issues for Pursuers and Defenders alike. Additionally, the Defender's only opportunity to understand and question the situation would be at Proof and therefore more cases would run to Proof on these issues alone. This would have the effect of prolonging cases to the detirement of Pursuers and Defenders and utilising valuable court resources in the process. (b) In the event that Section 8 of the 1982 Act is extended to include individuals who are not family members, we agree that they should only be regarded as providing services gratuitously if they provide them without having any contractual right to payment, and otherwise than in the course of a business, profession or vocation.
Digby Brown LLP	4(a) Yes, we do consider that this would be appropriate. This proposal reflects the realities of modern living, with many people living alone. It is no longer tenable to take the approach set out by the Commission in 1978 that "*The occasions on which persons outside the family group render such services are less frequent, and less readily foreseeable"* as this is no longer borne out, as the Discussion Paper identifies. Many people live alone, often without the opportunity to seek support from extended family, either because there are no such family members, or because they live far away. In those circumstances, individuals are likely to rely more on the support of friends and neighbours. It seems inequitable that, in cases such as those, compensation for the services provided cannot be recovered when, if the same services were provided by a relative, damages could be claimed. The inclusion of claims on behalf of those who are not family members is unlikely to complicate the settlement process as the same information and evidence would be required to vouch the claim as is required in support of a claim on behalf of a relative. There seems no basis on which to conclude that widening the scope of claims for services in this way will lead to an increase in spurious claims and there is no compelling reason why the wrongdoer should avoid liability to cover the value of necessary services provided by a friend or neighbour, rather than a relative. 4(b) Yes, an individual who is not a family member should be regarded as providing services gratuitously if they provide them without having any contractual right to payment for their provision, and otherwise than in the course of a business, profession or vocation. This reflects the situation that is likely to arise

	in the majority of cases where non-family members will provide services without any form of contract in place or having a contractual right to payment. However, if s8 is to be extended to claims in respect of necessary services provided gratuitously to an injured person by bodies or organisations such as charities (covered in Question 5 below), the reference to services provided in the course of a vocation would need to be removed to allow for recovery in respect of services provided by a charity helper.
Thompsons Solicitors Scotland	4(a) Yes. We frequently act for pursuers who either have no family members or who have family who live a long way away. In our experience it is common for friends and/or neighbours to provide services. (b) Non-family members providing services gratuitously should be entitled to an award of damages calculated on the same basis as presently for relatives' claims for services.
Drummond Miller LLP	(a) Yes. As noted in the discussion paper – there are many situations where the current situation results in the responsible / paying party not having to meet claims for services when the injured party lives alone / lives with friends and so relies on individuals who are not family members for care and assistance. This comes at a personal cost to those individuals who are providing the care and it is right that they should be compensated (to some degree). (b) It should be regarded as providing services gratuitously if he or she provides them without having any contractual right to payment in respect of their provision, and otherwise than in the course of a business, profession of vocation.
Faculty of Advocates	4(a) The Faculty considers that section 8 should be extended to claims in respect of necessary services provided gratuitously to an injured person by individuals who are not family members. a) The Faculty considers that there is obvious merit in providing that where a person has rendered necessary services to an injured person gratuitously then the injured person should be entitled to recover reasonable remuneration for those services (and related expenses) on their behalf, even where they are not a relative (within the meaning of s.13(1)). b) Again the Faculty considers that it is important to bear in mind that in this context an award of damages will only be made where the requirements of section 8 are satisfied. Thus, if section 8 were extended in this way, an award would only be made where the individual in question had rendered necessary services to the injured person and where they had done so gratuitously. While therefore an extension of section 8 in this way would likely lead to an increase in the value of damages claims, we do not consider that that increase would be disproportionate or unjustified

	c) The Faculty considers that in this context there is no longer any sound justification for distinguishing between necessary services rendered by a relative, as opposed to those provided by a person who is not a relative. d) In particular the Faculty notes the previous rationale for confining such claims to relatives (Discussion Paper, paras. 2.24 and 2.25). The Faculty does not consider that the factors identified there justify continuing to confine claims to persons within that category. For example, the Faculty considers that the contention that 'it is only within the family group that there is a demonstrable social need to allow recovery in respect of services rendered' no longer holds good. It is within common experience and knowledge that persons who are not relatives, such as friends and neighbours, provide necessary services to injured persons and that they do so gratuitously. That such individuals do so, at the expense of their time and effort, is no less meritorious or deserving of remuneration than relatives who provide necessary services. The Faculty agrees with the comments in the Discussion Paper (para. 2.35) to the effect that admitting claims for individuals who are not relatives would not be likely either to complicate the procedure for settling claims or to increase the number of spurious claims. We agree with the comments in the Discussion Paper (para. 2.37) summarising the advantages of extending such claims beyond relatives. 4(b) The Faculty considers that an appropriate formulation would be to the effect that the services were provided: a) By an individual; b) Otherwise than in the course of a business, profession or vocation; c) Without the individual having been paid for the services; and d) Without the individual having an enforceable contractual or other right to payment for the services (save as arises under section 8).
DAC Beachcroft	(a) No. As identified in the 1978 Report and highlighted at point 2.25 already complicated evidential and quantification issues regarding s8* services from relatives becomes more complicated and convoluted. It is likely that more cases will require to be heard to test the merits of any s8 claim from “a friend”, and also open up this area to fraudulent claims. There is no equivalent in Scotland of a finding of fundamental dishonesty with the effect of dismissal of the primary claim in its entirety as there is in England and Wales pursuant to s57 of the Criminal Justice and Courts Act 2015. There is therefore a risk of further unnecessary litigation with additional cost being incurred.

	(b) For the reasons narrated above, the definition of "relative" should be restricted and construed accordingly.
Horwich Farrelly Scotland	(a) We acknowledge that in principle, an extension might reasonably be considered if necessary services are provided in such circumstances, particularly where someone has no family members, or family members who live too far away to provide support. However, a point of potential concern would be how this would be evidenced and valued, in particular when future claims are advanced which can be of significant value. We would also query whether such an extension is truly required if these services are being provided gratuitously with no expectation of payment. We acknowledge that someone providing assistance may indeed accept compensation if the possibility is raised, but is so and damages are recovered, it would seem appropriate for the injured person to account for payment being made. Without such safeguards, there is at least the risk of the injured person being overcompensated. (b) We consider the test proposed would be reasonable if the Section was to be amended, subject to the caveat of considering whether such a person would wish compensation for the services provided and whether an injured person would require to pass on any sums recovered.
Association of British Insurers	(a) Similarly, we recognise that there may be a case in principle for section 8 of the 1982 Act being extended to claims in respect of necessary services provided gratuitously to an injured person by individuals who are not family members. However, we would be concerned about the definition being too broad and would therefore again favour, before commenting further, an exploration of what tests might be applied to ensure that this was not too broad, and section 8 only applied to individuals who are not family members in certain circumstances. It would be useful to consider, for example, the extent to which the individual who is not a family member is committed to providing services, the extent of the services they provide and whether their provision of services can be properly evidenced. It would be important for the definition to not be too broad to avoid (i) opening up this area to fraudulent claims and (ii) the risk of further unnecessary litigation with additional cost being incurred (it should be noted that there is no equivalent in Scotland of a finding of fundamental dishonesty with the effect of dismissal of the primary claim in its entirety, as there is in England and Wales pursuant to s57 of the Criminal Justice and Courts Act 2015). Again, proper safeguards would need to be introduced with a requirement for suitable supporting evidence. (b) In the event that section 8 of the 1982 Act is extended as above, we agree that any individual who is not a family member should be regarded as providing services gratuitously if they provide them without

	having any contractual right to payment, and otherwise than in the course of a business, profession or vocation.
Society of Solicitor Advocates	(a) Yes. As the consultation paper points out, the traditional family is very different than in the past. Often injured people are supported by their friends. Whether an award was made would depend on the facts and circumstances of each case. (b) There ought to be no need for a formal contractual arrangement. A calculation using an hourly rate (to be increased by RPI) for the amount of hours providing assistance ought to be used.
Forum of Scottish Claim Managers	(a) No we do not consider that the scope of section 8 of the 1982 Act should be extended to claims in respect of services provided gratuitously to an injury person by individuals who are not family members. To do so would widen the scope too far creating a situation where it would be near impossible for Defenders to establish who is entitled to present such a claim without the expense of going to Proof. Contrary to paragraph 2.37 of the consultation paper we believe that extending the scope of section beyond relatives would lead to more court actions where the pursuers relationships and private life are questioned as defenders seek to establish who the service providers are and the extent of the gratuitous care provided. (b) As per our answer for (a) above we do not believe that scope of section 8 of the 1982 Act should be extended beyond family members however, if section 8 of the 1982 Act were to be extended beyond family members then we agree that they should only be regarded as providing services gratuitously if they provide them without having any contractual right to payment in respect of their provision, and otherwise than in the course of a business, profession or vocation.
Direct Line Group	(a) DLG believes that individuals who provide necessary services gratuitously should receive reasonable compensation for the services rendered. (b) An award for services rendered will remain evidence based however, we believe the compensation mechanism will be driven by the nature of the claim and the service reasonably required by the injured person. For cases involving serious injury, an award should be calculated by adopting the relevant commercial rate by reference to the National Joint Council for Local Government Services which is discounted by 25% to reflect the gratuitous nature of the services as they are provided on a non-commercial basis. It is common practice for a Statement of

	Valuation to contain the number of hours claimed, with a monetary figure attached, in respect of a claim for services for cases that involve minor or moderate injuries. We believe that this approach is proportionate for these types of cases because, as previously stated, calculation of an award will remain evidence based (primarily medical report content) and negotiation between the parties results in amicable pre-litigation agreements. On the other hand factoring in calculations related to business, profession, vocation or other formula is not proportionate and will unnecessarily complicate settlement discussions for lower value cases
NFU Mutual	(a) NFUM do not consider that the scope of section 8 of the 1982 Act should be extended to claims in respect of services provided gratuitously to an injury person by invidviduals who are not family members. Such an extension would create a situation of further complications to an already difficult head of loss to evidence and may well give rise to spurious claims and protracted litigation over relatively minor sums of damages, with the increased expenses being borne by the defenders. Following the introducation of QOCS in the absense of legislation akin to that established in England & Wales under S57 of the Criminal Justice and Courts Act 2015 wherby the risk of a claim being dismissed if a finding of fundamental dishonesty is made, there is no great deterent to control an abuse of any widened entitlement. (b) As per our answer for (a) above we believe the scope of the secion 8 of the 1982 Act shold remain restricted to family members. However, if it is extended we would agree that any provider should only be regarded as providing services gratuitously if they have no contractual right to payment in respect of their provision, and otherwise than in the course of a business, profession or vocation.
Kennedys Law	**(a)** While a services head of claim emerges in most personal inury claims and therefore any extension of the definition could have a significant financial impact for insurers, yes, in our opinion, section 8 of the 1982 Act could be extended to incorporate friends and/or neighbours who maintain a close relationship with the injured person, for example, where friends share a home, and live together as a traditional family would otherwise have lived together historically. However, the extension should go no further than those who maintain such a close relationship,

	and evidence of such a relationship would need to be led, as opposed to the extended provision automatically applying in all cases where a living space is shared. **(b)** Yes, those individuals as identified in answer 4(a) who provide services beyond the definition of "relative" should be considered to be providing those services gratuitously, in line with the approach for assessing gratuitous care provided by "relatives" under section 8 of the 1982 Act.
Law society of Scotland	a) Yes, if care was provided then it should not matter who provided it. Non-relatives should be able to benefit from a section 8 claim. This would include provision of care by friends and neighbours. b) The proposed criteria appear to be a sensible categorisation of who is entitled to claim. Professionally paid care can of course be claimed as a separate head of claim.
Medical and Dental Defence Union of Scotland	(a) For all of the reasons outlined above, it will be clear that we oppose any such extension. While the foreseeability rules are already stretched to breaking point with the availability of such claims for family members, the inclusion of non-family members is too remote. Defenders and their indemnifiers require a reasonable level of foreseeability when reserving for such claims. Whilst we recognise that there has been considerable societal change since the 1982 Act came into force, the changes in family composition and dynamics over the last 40 years are not the only relevant societal changes that require to be considered. Changes in service provision and expectations placed on the NHS (with consequent cost implications) over the same period are also relevant factors, as outlined in our introductory remarks above.
Action on Asbestos	(a) Yes. In accordance with the response to 2(b), rather than widen the category of relative or extend the terms of s8 of the 1982 Act to include non-relatives, s8 should be amended to provide for the injured person themselves to determine who they consider to be members of their family to allow for the inclusion of relatives, non-relatives or any other person that they have a close and enduring relationship with akin to that traditionally associated with relatives. (b) Yes. Non relatives and non-family members should have a right to payment for the provision of gratuitous services and this should be calculated in accordance with the current calculation methods adopted for family members. There has to be equal access to damages for those providing gratuitous services, regardless of whether they are relatives or non relatives.

5. (a) Do you consider that section 8 of the 1982 Act should be extended to claims in respect of necessary services provided gratuitously to an injured person by bodies or organisations such as charities?

(b) If so, should legislation prescribe how damages should be assessed or should it be a matter left to the discretion of the courts?

(c) If you consider that legislation should so prescribe, what factors do you consider that the court attention should be directed to? For example should the court be directed to consider "such sum as represents reasonable remuneration for those services and repayment of reasonable expenses incurred in connection therewith" as an appropriate means of assessment or should a concept of reasonable notional costs be adopted? Or some other way of assessment?

(Paragraph 2.44)

Stuart McMillan MSP	5 (a) – yes, and should include healthcare services (NHS, HSCP) 5 (b) – yes 5 (c) – if in relation to hospital treatment, it should take into account matters such as ambulance costs, cost of prescriptions, cost of appointments etc. If HSCP services, could cover number of hours a care worker has spent at the injured person's home. If it's a care home, it could cover the fees.
Zurich Insurance UK	(a) No. (b) N/A (c) N/A
Ronald E Conway	As above There are no particular difficulties with quantification in this area. In serious cases, the court will expect to be assisted by an expert report. Minor cases increasingly tend to be treated with abroad brush.
Clyde & Co (Scotland) LLP	(a) We do not consider that such an extension is necessary. (b) The legislation should prescribe how the damages should be assessed to ensure transparency and clarity. (c) The damages should be assessed in the same way as if the services had been provided by a "relative" and not take into account the cost for the body or charity. If additional services were provided that would have been over and above what a "relative" would have been able to provide then this would

	not fall within the terms of s8 and would therefore not be recoverable as a claim. Taking into account notional costs is veering into claims for professional care rather than gratuitous care.
Association of Personal Injury Lawyers	(a) We believe that section 8 should be extended to claims in respect of necessary services provided gratuitously to an injured person by charities.
Stagecoach Group plc	(a)No. Charities and voluntary organisation that provide services do so without expectation of recovery. If they provided service expecting financial reward, they would be businesses and subject to a more onerous tax regime. (b)No. We do not agree that services provided by charities or voluntary organisations should be capable of being assessed at all. If they were, we consider the assessment should be left to the courts to decide based on the evidence presented in support of any cost. We consider that any legislation introduced could not be be drafted to include all elements of claim that could be brought and may, in fact, result in a new area for dispute, resulting in more litigation and additional cost. (c)Please see our response to a and b above.
Forum of Insurance Lawyers	(a) FOIL does not consider that such an extension is necessary or merited. (b) In the event section 8 of the 1982 Act were so extended, FOIL takes the view that guidance in the legislation would be welcome, to give a measure of certainty to insurers / compensators. (c) In the event such legislation were to be introduced, FOIL is of the view that there ought to be a correlation between their worth if provided by a relative, and their worth if provided by a charity or other organisation / body corporate. The assessment of costs for charities that may have varied charitable goals and activities etc would be unduly complex, and also blurs the boundaries between gratuitous care and professional care, which can (where appropriate) already be claimed for separately.
University of Aberdeen Law School	No, we do not consider that section 8 of the 1982 Act should be extended to claims in respect of bodies or organisations. There is a significant difference in policy terms between reciprocal services which may be rendered as an instance of friendly of neighbourly behaviour and those services which are made available on a general basis for public benefit by an organisation. Likewise the “moral obligation” felt by the executrices of the deceased in Drake v Foster Wheeler Ltd to provide recompense to an organisation which had provided services to the deceased, though it may have been strongly and sincerely felt, was of a qualitatively different character from the obligation that family members, friends or neighbours often feel to have regard for one another’s needs. We therefore consider that claims of this type are too far removed from the original policy rationale for section 8 and would introduce conflicting priorities to its interpretation.

	If section 8 were to be extended to claims in respect of bodies or organisations, we consider that the attention of the court should be directed to the reasonable notional costs of care, having regard to the organisation's mission and sources of income as well as the nature and extent of services provided.
Tom Marshall	See answer 4
Unite the Union Scotland	5(a)Yes. In some cases, the injured person may not have any family, friends or neighbours who can provide necessary gratuitous services. They may not be in the position to pay for such services and so turn to charities providing the personal services required. Examples may include the significant emotional and psychological support provided to those suffering from asbestos related disease by the charity Action on Asbestos, particularly to those individuals without family support. The charity also fund specialist nurses to provide care to mesothelioma patients which would not be otherwise available on the NHS and would need to be paid for privately. (b)Legislation should prescribe how such damages are to be assessed. (c) The assessment of damages in such cases should be calculated by reference to the reasonable commercial rates of providing the services to the injured person.
Senators of the College of Justice	(a) No, on the information currently available to us. In the absence of further information bearing on the particular constitutions of individual charities, we perceive that there may be issues of principle that could preclude the recovery of outlays and expenses on behalf of such bodies. We recognise that there is a distinction to be drawn between (i) individuals who provide gratuitous care or services out of love, affection, loyalty or compassion, and (ii) charitable bodies, for whom the provision of care and services simply reflects the *raison d'etre* of the organisation concerned. We consider that there is a possibility that the extension of section 8 to claims in respect of necessary services provided by charitable organisations might be perceived as running contrary to the public perception of the concept of registered charities, the vocational purposes of which are to assist those in need, without compensation. We also observe that other issues may arise in connection with the continuing charitable status of such organisations in such circumstances, not least (and depending on the individual managed organisational structure of any such organisation) in relation to the identified criteria in relation to which care and services might be provided, and the possible risk of such organisations favouring the provision of assistance where recovery was possible in preference to other deserving cases with merit where that

	was not the case. A further practical material consideration might be the need to recognise the impact of such recovery on the management of claims for damages by individual pursuers. We recognise that it is difficult to generalise in the absence of information in relation to such particulars, and consider that detailed consultation with the charitable sector would be appropriate before any extension of section 8 is pursued. (b) Although it may be difficult to generalise, in circumstances where the particular organisational structure and powers of individual charities may vary, that being a factor which might bear on the different approaches set out at para. 2.41, we consider that, for the benefits of consistency, the issue should be the subject of legislation. (c) We view the issue to be one of policy for the legislature, and do not therefore, offer a view.
Aviva Insurance Ltd	(a) We do not agree that section 8 of the 1982 Act should be extended to claims in respect of necessary services provided gratuitously to an injured person by charities or voluntary organisations. As the discussion paper highlights, charities and voluntary organisations provide services in the course of a vocation. In our view, they would therefore not have an expectation of recovery. (b) We see this area as fraught with difficulty for the courts which is why we do not agree Section 8 should be extended in this way. Nevertheless, if enacted in this way, our opinion is that damages should be left to the discretion of the courts to decide. (c) In the event that section 8 of the 1982 Act is extended as above, then in our view a concept of reasonable notional costs should be adopted as in *Drake v Foster Wheeler Ltd*. We would prefer that the means of assessment be set out in secondary legislation (giving Scottish Ministers the flexibility to amend this if necessary), with guidance/tables identifying reasonable notional costs. As above, any legislation should also preclude charities and voluntary organisations from recovering a commercial rate for services.
Digby Brown LLP	(a) Yes, we do consider that section 8 should be extended to claims in respect of necessary services provided gratuitously to an injured person by bodies or organisations such as charities.

	Our clients often make use of services provided by charities free of charge, but there is clearly a cost to the charity in providing such services, which they choose not to pass on to service users. However, it seems both appropriate and just that if section 8 is to be extended to cover services provided by someone other than a relative, services provided gratuitously by organisations such as charties should also be included. There is no reasonable basis for distinguishing bodies or organisations such as charities from a private individual in this context and there is no principle of the law of damages in terms of which such bodies should not recover damages when services have been provided at no cost to the injured person. (b) This should be left to the discretion of the courts to allow different facts and circumstances to be taken into account. This is an exercise that the courts are experienced in carrying out in respect of other heads of claim.
Thompsons Solicitors Scotland	5(a)Yes. In some cases, the injured person may not have any family, friends or neighbours who can provide necessary gratuitous services. They may not be in the position to pay for such services and so turn to charities providing the personal services required. Examples may include the significant emotional and psychological support provided to those suffering from asbestos related disease by the charity Action on Asbestos, particularly to those individuals without family support. The charity also fund specialist nurses to provide care to mesothelioma patients which would not be otherwise available on the NHS and would need to be paid for privately. (b)Legislation should prescribe how such damages are to be assessed. (c) The assessment of damages in such cases should be calculated by reference to the reasonable commercial rates of providing the services to the injured person.
Drummond Miller LLP	(a) There are certain distinctions that can be made between private individuals providing gratuitous care and that provided by bodies or organisations such as charities. Private individuals provide the care at a sacrifice to their own time & expense – whereas those in the course of business / profession / vocation have been set up with the specific purpose of providing that care. However, that doesn't necessarily mean that section 8 shouldn't be extended to those care providers. In reality – those bodies or organisations will be providing their services to the injured party to the loss of another individual who might also require those services. As per the answer in 4(a) the responsible / paying party will avoid paying for services due to the fact that another organisation has stepped in to provide care and assistance in circumstances where the injured party cannot pay for assistance but desperately requires it. If that person might have been able to afford to

	pay for care rather than relying on a charity they may have done so – and so it is fair for the charity to receive some recompense for the care provided. (b) No strong view either way. Having it discretionary for the Court would keep it consistent with the way that it is discretionary for the Court in terms of hourly services rate for family, however there could be benefit to legistlation prescribing how damages should be assessed – to provide guidance and at least a base from which courts will no doubt interpret the facts of the case against. Such sum as represents reasonable remuneration for those services and repayment of reasonable expenses incurred in connection therewith. Could this be considered in the same way as Recoverable Sick Pay – i.e. only if there is some kind of contract between the charities etc and the injured party?
Faculty of Advocates	(a) The Faculty does not consider that section 8 should be extended to claims in respect of necessary services provided gratuitously to an injured person by bodies or organisations such as charities. a) The Faculty acknowledges that the idea of such an extension has attracted judicial and other support (Discussion Paper, paras. 2.40 - 2.41). The Faculty agrees that it is arguable that the provision of gratuitous services by a charitable organisation is analogous in this context to the provision of such services by an individual. It would no doubt be financially advantageous for charities and other organisations to be able to recover remuneration for services rendered under section 8. Indeed the availability of remuneration under section 8 may encourage charities and other organisations to make necessary services available gratuitously to persons who have sustained injury as a result of the fault of a third party, in the expectation that they would recover remuneration for providing the services. It is not however clear whether charities would welcome an extension of the type under discussion or the extent to which they would be likely to take advantage of it in practice - those questions would best be answered by the charities themselves. b) On the other hand, charitable organisations have existing fundraising avenues available to enable them to perform their functions including, where applicable, the provision of necessary services to injured persons. It is therefore arguable that there is no need for them to be able to recover remuneration under section 8. Indeed it might be said that opening this avenue to charities as a source of generating revenue would allow them to make double recovery - by raising funds to enable them to provide the necessary services and by then claiming remuneration for having provided them. In any event if charities considered that

	it would be in their interests to recover payment for the services that they are rendering, then they may well be able to provide the services through a commercial agency or subsidiary and charge for the services commercially, with an expectation of recovery in the event of a successful damages claim. For that reason the suggested extension of section 8 may be unnecessary. c) On balance, the Faculty considersthat it would be undesirable to extend section 8 in the manner under discussion. At present there is a clear distinction between, on the one hand, claims under section 8 in respect of necessary services provided by individuals and, on the other hand, claims for charges incurred by the injured person for obtaining services on a commercial basis. The Faculty considers that extending section 8 claims to charitable and other organisations would blur that distinction unnecessarily. The present approach to quantifying section 8 claims, which is generally regarded as a 'jury' question according to the circumstances of the case, as opposed to reliance on fixed rates, would sit uncomfortably with a claim by an organisation for providing service iin a quasi-commercial manner. The Faculty considers that it is unnecessary to go down this route, because as noted above it may well be open to charities to provide necessary services on a fully commercial basis, through a suitable agency or subsidiary, on the basis that where a claim for damages is available the pursuer would seek to recover the charges on their behalf from the defender. d) The Faculty notes that the recovery of gratuitous hospice costs has been allowed in England, in two cases at first instance (Discussion Paper, paras. 2.40 - 2.41). Although to that extent the position in Scotland differs from that in England, the Faculty does not consider that that in itself is sufficient justification for extending section 8 in the manner under discussion. (b) Please see the answer to q.5(c). (c) If section 8 were to be extended to claims in respect of necessary services provided by charitable and other organisations, the Faculty considers that the assessment of damages should be left to the discretion of the courts. For example, the courts in the two English cases cited in the Discussion Paper (at paras. 2.40 - 2.41) appeared to manage quantification without undue difficulty. The Faculty further considers that the court should be directed to consider 'such sum as represents reasonable remuneration for those services and repayment of reasonable expenses incurred in connection therewith', or similar, as an appropriate means of assessment, in order that the court has full discretion to award such sum as it considers reasonable in the circumstances of the case.

DAC Beachcroft	(a) No. In our view there is a difference between services provided gratuitously by an individual, whether a family member or not, and an organisation such as a charity, notwithstanding the English decided cases referred to in the Discussion Paper. The recovery of the notional or actual cost of gratuitous care by an individual is to compensate them for the time they would not otherwise have had or chosen to spend providing assistance to the injured person. Where the body providing the care is a charity, such as a hospice, we would argue that its purpose is to provide care and, as such, is a service it would have provided, essentially free of charge, in any event. Our view is that assistance provided by a charity does not constitute the type of gratuitous care to which the SLC refers. (b) We believe that the matter, if it is to be considered, should be left to the courts' discretion (c) Notwithstanding our views set out in (a) above, each case must be dealt with on its merits. It is worth pointing out that both English decisions referred to in the Discussion Paper, Drake v Foster-Wheeler Ltd [2010] EWHC 2004 (QB) and Witham's Executrix v Steve Hill Ltd [2021] EWCA Civ 1312 involved palliative care provided by hospices. In Drake, the judge said that, in relation to ascertaining the principle on which the courts accept this head of claim as being recoverable, that it was "difficult to discern a clear principle". He went on to say that "Recovery of the costs of hospice care in such cases does not give rise to a fear that the so-called floodgates will open or that a new head of recovery has suddenly been opened up."
Horwich Farrelly Scotland	a) No. We do not consider this is akin to individuals providing services. b) Not applicable. c) Not applicable.
Association of British Insurers	(a) We do not agree that section 8 of the 1982 Act should be extended to claims in respect of necessary services provided gratuitously to an injured person by charities or voluntary organisations. As the discussion paper highlights, charities and voluntary organisations provide services in the course of a vocation. In our view, they would therefore not have an expectation of recovery. (b) As above, we do not agree that section 8 of the 1982 Act should be so extended. However, in the event that section 8 of the 1982 Act is extended as above then, in our view, how damages should be assessed should be a matter left to the discretion of the courts. This is because legislation would risk introducing unnecessary complexity and additional legal costs. (c) N/A.
Solicitor of Society Advocates	(a) Yes

	(b) It would give certainty if the calculation was prescribed by legislation. It ought to be linked to RPI and have a review period of say every 5 years to make sure payments remain relevant. (c) The formulation suggested seems to be reasonable. It seems to me that a sensible way forward would be to look at the costs incurred by residents in a private nursing home.
Forum of Scottish Claim Managers	(a) No we do not consider that section 8 of the 1982 Act should be extended to claims in respect of necessary services provided gratuitously to an injured person by bodies or organisations such as charities. As the discussion paper highlights charities and voluntary organisations provide services in the course of a vocation. In our view, they would therefore not have an expectation of recovery. (b) We see the assessment of these damages as being fraught with difficulty for the courts which is why we do not agree that Section 8 should be extended in this way. Nevertheless if enacted in this way our opinion is that damages should be left to the discretion of the courts to allow them to decide cases on their individual circumstances. Legislation would introduce complexity and additional legal costs and is unlikely to be able to cover all of the possible individual scenarios that could arise. . (c) In the event that section 8 of the 1982 Act is extended as above, then in our view a concept of reasonable notional costs should be adopted as in *Drake v Foster Wheeler Ltd*. We would prefer that the means of assessment be set out in secondary legislation (giving Scottish Ministers the flexibility to amend this if necessary), with guidance/tables identifying reasonable notional costs. Any legislation should also preclude charities and voluntary organisations from recovering a commercial rate for services.
Direct Line Group	(a) DLG continues to support charities in associated areas such as road safety or victim support, but we are not persuaded that section 8 should be extended due to the potential for unintended consequences. New organisations may become established to obtain charitable status to take advantage of the section 8 extension that allows recovery of the costs involved in services provision. Organisations such as charities provide their services in the course of a vocation; service provision is facilitated regardless of what caused the need and with no expectation of payment for that service provision. Recoverability may create conflict within an organisation as services may only be directed towards persons for whom recovery prospects exist.

	Administration could become a barrier. Smaller organisations may not be able to self-fund the cost of employing staff to administer the recovery process and the fact that someone needs to administer the process adds a further layer of unnecessary cost. Extension may also result in disputes around the services provided. Organisations such as charities provide a range of beneficial services to those in need, but those services differ based upon organisation size and scope. Services which are offered and provided but are not reasonably required would be disputed, adding another layer of unnecessary cost to the administration of the recovery process for both sides. Raising valid objections in relation to the recovery of services provided also results in the displacement of that organisation's resources to deal with the dispute. This displacement includes the time and cost in documenting the service(s) for which recovery was sought and any additional time and cost involved in furthering the dispute. These finite resources would be better placed in the provision of services offered, particularly for those smaller organisations. (b) DLG believes that either option could lead to another unintended consequence; satellite litigation. The testing of new legislation through litigation to provide certainty relating to interpretation disputes would place additional burdens on the court system. Whilst the courts will make decisions based upon the facts and evidence before them, it is likely that a range of disputes must be heard before settled precedents are available. The above lends further weight to our view that section 8 should not be further extended. (c) In light of our responses to parts (a) and (b), we have no additional comments to make.
NFU Mutual	(a) NFUM do not consider that section 8 of the 1982 Act should be extended to claims in respect of necessary services provided gratuitously to an injured person by bodies or organisations such as charities. Such services are provided on a voluntary and vocational basis with no expectation of any financial recovery. (b) We believe, if implemented as an extension, the matter ought to be left to the discretion of the courts on a case specific basis. (c) If it is determined that section 8 of the 1982 Act is to be extended as above, a concept of reasonable notional costs should be adopted as in Drake v Foster Wheeler Ltd. Our preference would be for the means of assessment be set out in secondary legislation, thus giving Scottish Ministers the

	flexibility to amend this if necessary and would include guidance/tables identifying reasonable notional costs. Any legislation should also preclude charities and voluntary organisations from recovering a commercial rate for services.
Kennedys Law	(a) We do not agree that the definition of gratuitous services in terms of section 8 of the 1982 Act should be extended to include services provided gratuitously by bodies and organisations such as charities. (b) N/A (c) N/A
Law Society of Scotland	a) No, we do not agree to extending the definition of gratuitous services provided by individuals to include organisations such as charities. Provision of assistance by charities and the like is not the same thing as a neighbour, friend or family member going out of their way to help. b) n/a c) n/a
Medical and Dental Defence Union of Scotland	(a) We agree with the view expressed in the discussion paper that there are plainly serious issues of policy about whether such an extension would be appropriate. In clinical negligence cases, which are funded by the public purse or indemnity subscriptions met by individual clinicians, this proposal amounts to robbing Peter to pay Paul. It is our position that the gratuitous services of a charity such as a hospice (open to everyone) can be distinguished from gratuitous services provided by family members. We do not agree with the suggestion that the law should recognise a moral obligation that the injured person's relatives may feel to recompense a charity for services provided prior to that person's death. If, contrary to our position, section 8 is extended to include services provided by charities, this should be restricted to past services under section 8(1) and should not include future services under section 8(3). There should also be a clear obligation to account to the charity for past services damages.

	(b) And (c) We note that questions 5(b) and (c) are tied to the concept of extending section 8 services claims to gratuitous services provided by charities, etc. We take this opportunity to express our views on assessment of services claims more generally. It is our position that too much is fact-dependent and case-specific to formulate any workable formula for these claims. The current mechanism of looking at reasonable remuneration and reasonable expenses, whilst not ideal, is likely to remain the most pragmatic solution.
Action on Asbestos	(a) Yes. Emotional and psychological support that is provided by bodies and charitable organisations can play a significant role in supporting the injured person, particularly where there is no equivalent service readily available within the NHS, within private health services, or from family or friends. At Action on Asbestos, providing emotional support following a diagnosis of mesothelioma can be necessary even in those instances where the person has strong family and community support. This is because there is an issue of fault to come to terms with as well as the diagnosis of a terminal illness and there can be a range of difficult emotions for the person to process. The Action on Asbestos team have considerable experience of supporting people through these emotions. Therefore, where the injured person does not have the necessary source of suitable support services from within their social network or healthcare setting, and the source of support they do receive is from an organisation rather than an individual, Section 8 of the Act should be extended to include this type of support. There is a view to be taken that in some instances, the cost of such services should also be recouped from the responsible party and awarded directly to the charitable organisation or body to secure the future provision of their services. (b) Yes. The vast majority of personal injury cases settle out of court, and legislation is required to guide the assessment of damages in these cases. Further, a legislative framework would remove any discrepancies in the award of damages that may occur across cases if the assessment was left to the discretion of the court. (c) The true cost of the service if purchased in the community should be used to determine the assessment of damages.

6. Should damages be recoverable in respect of gratuitous provision of services to an injured person where the person providing them is the defender?

(Paragraph 2.50)

Stuart McMillan MSP	No
Zurich Insurance UK	No. We do not believe that the person at fault, whose actions created the need for the provision of services, should be able to gain in any way as a result.
Ronald E Conway	Focus should be on the care provided and not the identity of the carer. The paradigm case is a road traffic accident where the injured person is a passenger and spouse is driver. It is inconsistent that funded commercial and more expensive care is compensated , whilst care which is frequently provided by spouse not met adequately. The insurers already receive a discount for gratuitous family care. The present law simply provides a loophole whereby no damages at all are paid.
Clyde & Co (Scotland) LLP	We do not consider that this requires to change. The injured person should not be able to claim for services if they are provided by the defender. If the definition of relative is extended and there is the potential for a neighbour or a charitable body to provide services, there is sufficient alternatives for the injured party to gain necessary services.
Association of Personal Injury Lawyers	We believe damages should be recoverable in respect of gratuitous provision of services to an injured person where the person providing them is the defender. If a person is insured for the risk of being involved in an accident, it does not seem right to distinguish when determining what can be claimed for under such insurance, between buying in services, and the defender providing the services themselves. If the defender is the person to provide the care to the injured person, they are likely going to be a close family member or friend, and as such are likely to provide better care than could be purchased, in any event. Provision of better care will help the injured person to recover more quickly, allowing them to return to work more quickly and to reduce the burden on the welfare system.
Stagecoach Group plc	No. The defender should not be able to benefit from their wrongdoing.
Forum of Insurance Lawyers	No. FOIL considers that as a matter of public policy the injured party should not be able to make a claim in terms of section 8 where any sums recovered would fall to be returned to the responsible person, who by definition would be the negligent party / wrongdoer in terms of the index accident.
University of Aberdeen Law School	Yes, we consider that damages should be recoverable in respect of gratuitous provision of services to an injured person where the person providing them is the defender. Again, it is our view that the law should avoid encouraging individuals to enter into essentially artificial contractual agreements (that is to say, agreements which would not have been made in the ordinary course of their dealings with others) in order to buttress their position in any future action. The present rule barring recovery in respect of

	services rendered by the defender unless they have entered into a contractual agreement has the effect of encouraging such artificial devices. We note that Hunt v Severs in the English law context was based on trust reasoning, i.e. that such damages would be recovered from and then held in trust for the same person. We consider that this reasoning did not take adequate account of the practical constraints facing injured persons who must secure services for their care. Often it will be less costly or more logistically appropriate for the defender to provide the necessary services than for professionals to be engaged at commercial rates.
Tom Marshall	It is interesting to review the dicta of Megaw LJ in Donnelly v Joyce [1974] QB 454 at 461-2, expressly disapproved by the House of Lords in Hunt v Severs, in the light of the approach taken in Drake v Foster Wheeler. In Donnelly the Court of Appeal was making clear that the requirement for services was the plaintiff's loss and that the source from which that requirement was satisfied was not relevant. Ultimately that appears to be what the judge decided in Drake. As an aside, I note that regarding the requirement for services as the injured person's loss avoids any suggestion that the responsible person is owing a duty of care towards the person providing the services, a point which has its parallel in considering section 9 (see below). In his analysis in Hunt v Severs at page 361 Lord Bridge of Harwich suggested the source from which the injured person's loss was satisfied was relevant in determining whether a claim could be made. However, the example he gave of the injured person receiving free NHS treatment, therefore there being no claim, no longer applies since the responsible person now has a statutory responsibility to meet NHS costs. Lord Bridge also commented on the then position of the Scottish Law Commission in paragraph 22 of its 1978 report, which led to the 1982 Act. It is explicit that the view taken 45 years ago no longer pertains and the views being expressed south of the border, noted by the Commission in the present Discussion Paper paragraphs 2.45 and following, merely reinforce the view that Hunt v Severs should be overturned.
Unite the Union Scotland	We agree there should be nothing to prevent damages from being recovered merely because the service provider is the defender.
Senators of the College of Justice	No. Standing the authoritative decision of the House of Lords in *Hunt v Severs* [1994] 2 AC 350, as set out at para. 2.45, and giving due weight to its rationale, we are unpersuaded that it would now be appropriate for the law to provide that damages should be or could be recovered in respect of the gratuitous provision of services for an injured person merely because the person providing the services was the defender (whether a "relative", as presently defined, or otherwise). We therefore favour adherence to the existing public policy considerations.

Aviva Insurance Ltd	We do not agree that damages should be recoverable in respect of gratuitous provision of services to an injured person where the person providing them is the Defender. We agree with the ruling in *Kozikowska v Kozikowski* (following *Hunt v Severs*) that the injured party should not be able to make a claim in terms of section 8 where the sum recovered would be given back to the responsible person – to do so would be against public policy and natural justice.
Digby Brown LLP	(6) We consider that damages should be recoverable for services provided to an injured person gratuitously where the person providing them is the defender. The defender may be the person best placed to provide the services required by the injured person, as in the case of a couple or a parent and child, for example. In one case that we are dealing with, we are seeking damages on behalf of a 6 year old child who suffered severe injuries in an RTA. She was a passenger in a car driven by her mother and her mother was responsible for the accident. The child's injuries are neurological in nature and affect her mobility, as well as her bowel and bladder control. The child's father works away from home and so her care falls to her mother, who wants to provide the services needed, as many parents choose to do, rather than paying for assistance from a commercial provider. The services provided include assistance with most activities of daily living, as well as the child's bowel and bladder care. In addition, the child needs care throughout the night and her mother provides this. However, because the child's mother is the defender, we are not able to make a claim for past or future s8 services. The injured party should not be discouraged from accepting services, simply because these will be provided by the person who is the defender. While a defender should not benefit from his or her own wrongdoing, in reality, where the defender is the person best placed to provide the services, the injured party will derive more benefit from those services than if they were provided by a less suitable relative, or even by a commercial provider. This is also likely to be a more cost effective way of obtaining necessary services than paying for these on a commercial basis.
Thompsons Solicitors Scotland	We agree there should be nothing to prevent damages from being recovered merely because the service provider is the defender.
Drummond Miller LLP	Yes – care (if it is necessary) will need to be provided in any event so it seems illogical to effectively prevent that person from providing care to the injured party if that would be the most expedient and cost effective way for it to be provided.
Faculty of Advocates	The Faculty does not consider that there should be an absolute bar to the recovery of damages for the gratuitous provision of services in circumstances where the services have been provided by the wrongdoer, (whether or not the defender). Rather, the Faculty

	considers that the court should be given the power to award damages in such circumstances, subject to a discretion to refuse to make such an award where it would be unreasonable or unjust to do so in the particular circumstances of the case. a) The Faculty notes the undesirable consequences which have been identified as potentially arising from an absolute bar on making such an award (Discussion Paper, para. 2.46). The Faculty agrees that unfairness may well arise in circumstances where a wrongdoer has provided necessary services but does not receive remuneration for them, or where the wrongdoer would otherwise have provided services but does not do so because of a bar on recovering remuneration for them. The Faculty considers that the general position should be maintained, namely that where necessary services are rendered to an injured person gratuitously, remuneration for such services should be recoverable on behalf of the person who has provided them. b) The Faculty notes the absurdity which might arise in circumstances where a wrongdoer isfound liable to pay damages, including remuneration for necessary services which the wrongdoer has themselves provided, resulting in an obligation upon the pursuer to pay that remuneration back to the wrongdoer. In such circumstances a discretion of the type which the Faculty has suggested would enable the court, if it saw fit, to decline to award damages representing such remuneration. The Faculty acknowledges that in practice the obligation to pay damages falls more often than not upon a third party, such as an insurer or employer, rather than the wrongdoer themselves, though the court would with the suggested discretion also be able to take such circumstances into account.
DAC Beachcroft	No. The public policy position and the reported decisions in Hunt and Kozikowska remain sound. The courts recognised that it is fundamentally wrong to “reward” a negligent party who also falls within the category of “relative”. That relative who then provides gratuitous services to the victim does so by way of moral obligation recognised as public policy. The suggestion that society considers that gratuitous care in those circumstances should have some “value” is flawed.
Horwich Farrelly Scotland	No. This would sidestep the fundamental principle that a wrongdoer ought not to benefit from their own negligence, per *Kozikowska v Kozikowski (No. 1),* 1996 S.L.T. 386, following the House of Lords decision in *Hunt v Severs,* [1994] 2 A.C. 350. While we appreciate that there may be cases where the negligent party is the only person who can provide services, more serious claims in which significant assistance

	is required will inevitably result in care costs being recovered, ensuring justice is delivered. We do not consider more modest claims justify eroding a fundamental legal principle, which may have unforeseen consequences beyond the context in which it is currently being considered.
Association of British Insurers	We do not agree that damages should be recoverable in respect of gratuitous provision of services to an injured person where the person providing them is the defender. We agree with the ruling in *Kozikowska v Kozikowski* [*1996] SLT 386* (following *Hunt v Severs [1994] 2 AC 350*) that the injured party should not be able to make a claim in terms of section 8 where the sum recovered would be given back to the responsible person.
Society of Solicitor Advocates	Yes where this is the practical reality of the situation although we recognise that there may be opposition to this on the basis that a wrongdoer ought not to benefit from their own wrongdoing.
Forum of Scottish Claim Managers	No, damages should not be recoverable in respect of gratuitous provision of services to an injuried person where the person providing them is the defender . We agree with the ruling in *Kozikowska v Kozikowski* (following *Hunt v Severs*) that the injured party should not be able to make a claim in terms of section 8 where the sum recovered would be given back to the responsible person. Allowing recovery would be against natural justice. The defender proving the services cannot benefit from their own wrong doing and the pursuer recovering funds and not passing them to the defender would equate to a double recovery in respect of services.
Direct Line Group	No, it is DLG's position that a tortfeasor should not benefit from their own tortious act
NFU Mutual	No, NFUM believe strongly that damages should not be recoverable in respect of gratuitous provision of services to an injured person where the provider is the negligent party (defender). NFUM agree with the ruling in *Kozikowska v Kozikowski* (following *Hunt v Severs*) that the injured party should not be able to make a claim in terms of section 8 where the sum recovered would be given back to the responsible person. The defender proving the services cannot benefit from their own wrongdoing and the pursuer recovering funds and not passing them to the defender would equate to a double recovery in respect of services.
Kennedys Law	Our view is that this would go against the principle that the wrongdoer cannot benefit from their own wrong-doing and as such, the provision of services should not be recoverable. While we agree that any such damages would be intended to reflect and make reparation for time and effort expended voluntarily by the defender, we consider that such effort expended by the defender should be a means of reducing the value of the claim only. We consider that it should not be permissible for a wrongdoer, where there

	is an insurer offering indemnity for the claim, to seek to insist upon receipt of a payment from their insurer to reflect the value of services gratuitously provided by the wrongdoer.
Law Society of Scotland	Opinion was divided on this issue. On the one hand, the Defender may be the only person available to provide gratuitous care to the accident victim. The situation often arises where the Defender is the driver in a road traffic accident and causes injuries to a relative. The only alternative would be to pay for professional assistance which would invariably be more costly and may not result in the ad-hoc care provision that is most often required on a daily basis. However, that goes against the principle that the Defender should not benefit from their own wrong-doing. Those representing Defenders do not agree with sidestepping the fundamental principle that a negligent wrongdoer ought not to benefit financially from their own negligence, per *Kozikowska v Kozikowski (No. 1),* 1996 S.L.T. 386, following the House of Lords decision in *Hunt v Severs,* [1994] 2 A.C. 350. While appreciating that there are cases where a negligent party may be the only person who can provide services, more serious claims in which significant assistance is required will inevitably result in care costs being sought, ensuring justice is done. In more modest claims, Defenders' agents do not consider this justifies departing from the principle mentioned above. One suggestion made by a Pursuer's agent was that any services provided to a Pursuer by a Defender should be recoverable in damages and valued in the same way as any other relative's services claim provided that the liability giving rise to the damages claim does not result from any deliberate conduct on the part of the Defender. Another suggestion was that the Pursuer be allowed to make the services claim based on the value of services provided by the negligent party but the obligation to account to them is dispensed with. But, as stated above, Defenders' agents are fundamentally opposed to any change that would permit a wrongdoer from benefitting from their own negligence
Action on Asbestos	Yes. It has to be considered that the employer, due to circumstances that may be unforeseen, may not be in a position to provide the services for the duration that the services are required. In this instance, the injured person will have to seek service provision elsewhere. The fact that the defender is, at the point of the conclusion of the case, providing the services does not therefore guarantee future service provision and must therefore be recoverable.

7. (a) Do you consider that section 9 of the 1982 Act should be extended so as to entitle the injured person to obtain damages for personal services which had been provided gratuitously by the injured person to a third party who is not his or her relative?

(b) If so, should the injured person be under an obligation to account to such a third party for those damages?

(Paragraph 2.61)

Stuart McMillan MSP	7(a) – No 7(b) – N/A
Zurich Insurance UK	No. We believe that this is too remote.
Ronald E Conway	Yes for reasons above and as a matter of consistency.
Clyde & Co (Scotland) LLP	The extension of the definition of "relative" is sufficient and opening up section 9 to persons who are not relatives is opening the floodgates. We do not consider there should be any extension here.
Association of Personal Injury Lawyer	(a) Yes, it should. It is foreseeable that people look after each other, regardless of whether they are related, therefore the loss or provision of those services is a foreseeable loss that should be permitted to be claimed for. (b) Yes they should.
Stagecoach Group plc	(a)No. We cannot see how this would be a loss flowing from the wrongful act. Any cost to the person to whom the service was provided would be too remote to be recoverable. (b)While we do not agree with the premise of recovery in this situation, in the event that an award is made, the Pursuer should be made to account to person to whom they had provided gratuitous services. We consider that making it possible for the Pursuer to recover in these circumstances risks the introduction of claims that are without foundation. We also consider that ensuring the funds reached the third party is nigh on impossible to enforce.
Forum of Insurance Lawyers	(a) FOIL considers there is no merit in so extending section 9 of the 1982 Act. The broadening of the extension of the definition of "relative" referenced above is adequate. (b) In the event that section 9 of the 1982 Act were to be so extended then yes. Any injured person receiving damages ostensibly to compensate a third party should be obliged to ensure that such damages are adequately accounted for.
University of Aberdeen Law School	Yes, we do consider that section 9 of the 1982 Act should be extended in this way. We consider that it is reasonably foreseeable in the context of ordinary friendly or neighbourly behaviour that certain non-

	relatives, especially vulnerable or elderly neighbours or friends, will suffer a loss as a consequence of the injured person no longer being able to provide personal services. We do consider that it would be appropriate, in section 9 claims of this kind, for the injured person to be accountable to the relevant third party. Section 9(3)(b) would also require some adjustment for claims of this kind. Indeed it might be considered whether the construction of this paragraph remains appropriate even for section 9 claims in respect of relatives, given the social reality that many personal services, if not rendered by a relative, may be rendered either by friends, neighbours or professionals depending on the specific circumstances of the injured person, and that it is not unusual for the mixture of these various categories of service provider to change over time.
Tom Marshall	If it is accepted that an injured person may receive necessary services on a gratuitous basis from someone who is not a relative (and that the injured person should be able to claim damages in those circumstances), then there is no obvious reason why the inability of the injured person to provide personal services to someone who is not a relative should not be treated in exactly the same way. Either set of circumstances should not be regarded as being not reasonably foreseeable. I do not agree that it is the recipient of personal services who suffers the loss in the same way that I disagree with the proposition that it is the provider of necessary services who suffers the loss. In both sets of circumstances it is the injured person who suffers a loss. In the section 9 situation it would theoretically be possible to argue that the injury has actually benefitted the injured person in that they will no longer be burdened with the provision of the services. That is clearly an absurd perspective. I would also respectfully suggest that the position adopted by the Commission in 1978 was highly convoluted in an attempt to avoid the suggestion that permitting claims for personal services was extending the responsible person's duty of care. In fact, the law had already effectively permitted the recipient of the services to claim where the injured person had died – see section 1(3) of the Damages (Scotland) Act 1976 (and the original wording of section 9 of the 1982 Act) and now section 6 of the Damages (Scotland) Act 2011. It follows that an obligation to account, missing from the current section 9, should be added. Logically also section 6 of the 2011 Act would require to be extended to permit claims by non-relatives for the loss of those services in fatal cases. Alternatively, the deceased's estate could be permitted to make claims in such cases with an equivalent obligation to account, as it does with section 8 claims. Incidentally the current wording of section 9(3)(b) would no longer be appropriate since it pre-supposes that non-relatives do not provide gratuitous personal services.

Unite the Union Scotland	(a) Yes. Similarly, section 6 of the Damages (Scotland) Act 2011 should be extended to a third party who was not the deceased's relative. And consistent with our responses to questions 2(a) and (b) above, the class of relative should be extended to any person accepted as a member of the deceased's family. (b) Yes, it should be commensurate with the obligation in terms of section 8(2) of the 1982 Act to account to the relative providing gratuitous services to the deceased. Where damages are recovered for services provided to a third party, the injured party (or their executor for the purposes of section 6 2011 Act claims) should be under obligation to account to the third party.
Senators of the College of Justice	(a) There may be thought to be a certain logic, and some attraction, in consistency between the scope of sections 8 and 9 of the 1982 Act. However, as the Discussion Paper identifies at paras. 2.53 and 2.55, application of the principle of reasonable foresight as the test for liability for damages has categorised the services rendered as a species of counterpart for the benefits which the injured person receives as a member of the family group. In answering the question: "Where does the loss fall?", the Discussion Paper recognises – correctly in our view – that, in cases where personal services were provided gratuitously by the injured person to persons outside the family group, the loss would be that of the individual previously in receipt of the lost services. An unattractive side-effect of the extension contemplated would be that an obligation to account may arise in certain cases, involving persons outside the family group, but not in others where family relationships were concerned. At what point a line falls to be drawn between the two categories of case, while superficially obvious, may not be so in practice (especially if the definition of "relative" were to be extended to ex-partners). We therefore consider that careful thought will require to be given as to how any obligation to account would be defined (probably by legislation) before any extension of the kind contemplated by this question is proposed. (b) Yes, on the basis that the loss is suffered, not by the injured person, but by the recipient of the services formerly rendered.
Aviva Insurance Ltd	(a) We do not agree that section 9 of the 1982 Act should be so extended. In our view, the loss of personal services previously rendered to a non-relative is too remote to be recoverable and not within the reasonable foreseeability of the responsible person, and a reasonably informed member of the public would not have an expectation of an entitlement to damages. In addition,

	as the discussion paper highlights there would be a broad spectrum of possible claimants and in our view, there would be a real risk of spurious claims which cannot be properly evidenced. (b) As above, we do not agree that section 9 of the 1982 Act should be so extended. However, in the event that section 9 of the 1982 Act is extended as above, we agree the injured person should be under an obligation to account to the third party for damages – this would be fraught with practical difficulties in reality and we do not see how this could be implemented or enforced in practice and could give rise to satellite litigation.
Digby Brown LLP	(a) Yes, we do consider that section 9 of the 1982 Act should be extended as outlined. The third party has sustained a loss due to the absence of the injured party's services and may require to pay commercial rates for the same services. We do not consider that society today would consider such a loss too remote. As the past two years of the pandemic have demonstrated, friend and neighbours are willing to assist one another and to provide support, both practical and emotional, when this is needed. (b) Yes, they should, as is currently the case where damages are recovered for necessary services provided by a relative in terms of section 8(2).
Thompsons Solicitors Scotland	(a) Yes. Similarly, section 6 of the Damages (Scotland) Act 2011 should be extended to a third party who was not the deceased's relative. And consistent with our responses to questions 2(a) and (b) above, the class of relative should be extended to any person accepted as a member of the deceased's family. (b) Yes, it should be commensurate with the obligation in terms of section 8(2) of the 1982 Act to account to the relative providing gratuitous services to the deceased. Where damages are recovered for services provided to a third party, the injured party (or their executor for the purposes of section 6 2011 Act claims) should be under obligation to account to the third party.
Drummond Miller LLP	(a) Yes. It is foreseeable that an injured individual might have provided gratuitous assistance to non-family members. If that non-relative, as a result of the responsible party causing injury to the injured party, requires to pay for assistance, it is fair to seek that loss from the responsible party. As per previous answers it should not make a difference whether the person giving / receiving care to/from the injured party is a family member or not. In all cases the loss has to be defined and set out clearly and only the actual loss suffered can be compensated for. (b) Yes. If the non-relative has suffered the loss then the injured person should be under an obligation to account to such a third party for those damages (if they are recovered).

Faculty of Advocates	(a) The Faculty does not consider that section 9 of the 1982 Act should be extended to entitle the injured person to recover damages in respect of personal services provided gratuitously to a third party who is not their relative a) The Faculty considers that extending section 9 in this manner would create a right of recovery which differs substantially from the right which presently exists under the section. The justification for the right of recovery under the section as it presently stands is the injured person's loss of their ability to offer a counterpart in kind for the benefits that they receive within the family group (Discussion Paper, para. 2.53). In contrast, with the extension under discussion the loss would be that of the recipient of the services. The justification for the right of recovery which applies to existing claims under section 9 would therefore not apply to such a claim. Further, given that the loss would lie with the recipient rather than the injured person, the extension to section 9 would have to be accompanied by an obligation on the injured person to account to the recipient of the services. b) The Faculty considers that the loss which the extension of section 9 would be intended to address would be too remote to justify the significant innovation which the suggested extension would represent. The loss under contemplation is that of a person outwith the family group and the personal services themselves would be rendered outwith the family group. That loss may therefore readily be distinguished from the loss addressed by the present section 9: the loss there is suffered by the injured person, characterised as the loss of their ability to offer a counterpart in kind for the benefits that they receive within the family group. The latter loss is therefore reasonably proximate to the wrong which caused the injuries. It may also be helpful to consider the proximity of losses addressed by section 8. The existing section 8 addresses necessary services provided to the injured person, the loss being the time and effort expended by the relative in providing those services. Again therefore the losses there are reasonably proximate to the wrong which caused the injuries. Even if section 8 were extended to encompass necessary services rendered by a person who is not a relative, a reasonable degree of proximity would remain, in that the services would be received by the injured person and the provider would have expended time and effort in providing those services to the injured person as a result of their injuries. In contrast therefore to the losses recoverable under the existing sections 8 and 9, and to those which would be recoverable under an extended section 8, the losses which would be recoverable for personal services lost by a person who is not a relative of the injured person would be remote. c) While it may of course be argued that it is reasonable that a recipient of personal services outwith the injured person's family group should receive redress for the loss of those services resulting from the

	wrong in question, in the circumstances the Faculty does not consider that section 9 should be extended in the manner under discussion. (b) The Faculty considers that if section 9 were to be extended in the manner proposed, it would be necessary to introduce an obligation on the injured person to account to the third party for the damages in question. As discussed above, since the loss addressed by the extension would be that of the third party, as opposed to that of the injured person, then in order for the extended section to provide effective redress to the third party it would be necessary to provide a mechanism to ensure that the injured person accounted to them for the damages in question.
DAC Beachcroft	(a) No. The wording of s.9(3)(a) suggests that the personal services referred to are those which "might have been expected" to have been provided. In s.9(3)(c) the wording specifically refers to the services being rendered by the injured person to a relative. Whilst it is foreseeable that services might be provided by an injured person to a non-relative, our view is that the provision of such services is too remote to sound in damages. (b) Given our response to (a) above, we have no comment to make.
Horwich Farrelly Scotland	(a) Our views are broadly consistent with the reasoning provided in Answer 4(a) concerning the potential extension of Section 8 of the Act. Similar concerns remain and as is accepted in the discussion paper, there would be a broad spectrum of possible claimants and greater risk of speculative claims being made. The question of putting the injured person back in the position they would have been in but for the accident is arguably greater in these circumstances as in most cases, one would expect someone requiring "necessary" services to seek an alternative if the injured party can no longer do so. In our view this is all too remote and likely to lead to unnecessary disputes delaying settlement and potential unjustified enrichment. (b) In these circumstances we would consider that the injured person should both have to establish that the necessary services can no longer be provided by some reasonable alternative and that there should be an obligation to account to the person for damages received.
Association of British Insurers	(a) We do not agree that section 9 of the 1982 Act should be so extended. In our view, the loss of personal services previously rendered to a non-relative is too remote to be recoverable and not within the reasonable foreseeability of the responsible person, and a reasonably informed member of the public would not have an expectation of an entitlement to damages. In addition, as the discussion paper highlights there would be a broad spectrum of possible pursuers and in our view, there would be a real risk of spurious claims which cannot be properly evidenced.

	(b) As above, we do not agree that section 9 of the 1982 Act should be so extended. However, in the event that section 9 of the 1982 Act is extended as above, we agree the injured person should be under an obligation to account to the third party for damages
Society of Solicitor Advocates	(a) Yes (b) Yes
Forum of Scottish Claim Managers	a) No we do not agree that section 9 of the 1982 Act should be extended so as to entitle the injured person to obtain damages for personal service which had been provided gratuitously by the injured person to a third party who is not his or her relative. There is no loss suffered by the pursuer in this instance and any losses which are incurred are in our opinion too remote to be recoverable. In addition as the discussion paper highlights there would be a broad spectrum of possible claimants and in our view there would be a real risk of spurious claims which cannot be properly evidenced. b) As above we do not agree that section 9 of the 1982 Act should be extended in this way. However, if it was extended in this way then we agree that the Pursuer should be obliged to account to the third party for those damages. This would be fraught with practical difficulties as there is no mechanism to control how a Pursuer uses damages once awarded to them.
Direct Line Group	(a) No, DLG does not agree with extension of the 1982 Act. Our view is there is no direct delictual act between the third party receiving services and the tortfeasor; the third party's loss of services is simply too remote. (b) As the loss is too remote, no award would be recoverable
NFU Mutual	(a) No, NFUM do not consider that section 9 of the 1982 Act should be extended so as to entitle the injured person to obtain damages for personal services which had been provided gratuitously by the injured person to a third party who is not a relative. NFUM are of the view that damages of this nature are too remote and agree with the narrative contained within the discussion paper that there would be a broad spectrum of possible claimants and in our view, there would be a real risk of spurious claims which cannot be properly evidenced. As per our response in 4(b) the introduction of QOCS in the absence of legislation akin to that established in England & Wales

	under S57 of the Criminal Justice and Courts Act 2015 whereby the risk of a claim being dismissed if a finding of fundamental dishonesty is made, there is no great deterrent to control an abuse of any widened entitlement. (b) As above we do not agree that section 9 of the 1982 Act should be extended in this way. However, if it was extended in this way then we agree that the Pursuer should be obliged to account to the third party for those damages. It is unclear how compensators or the courts can ensure this occurs and the practical difficulties are significant as there currently exists no mechanism to control how a Pursuer uses damages once awarded to them.
Kennedys Law	(a) Yes, for the same reasons outlind in relation to section 8 in our response to Question 4 above. (b) Yes, in recognition of the need for that individual, rather than the injured person, to meet any commercial cost of securing services from a professional provider.
Law Society of Scotland	a) Yes, for the same explanation in terms of section 8 of the Act. b) Yes.
Medical and Dental Defence Union of Scotland	(a) No. The extension of the scope of section 9 beyond the family group goes beyond established remoteness principles. The loss of personal services previously rendered by an injured person to a non-relative is not within the reasonable foreseeability of a defender. (b) As identified above, there is no obligation on a pursuer to account to a third party relative in respect of damages awarded for a section 9 claim. While we oppose the expansion of the scope of these claims to third parties outwith the family, it should be noted that the absence of a requirement to account in respect of section 9 damages is a significant anomaly and requires to be rectified (regardless of the category of individuals entitled to make such a claim).
Action on Asbestos	(a) Yes. There will inevitably be neighbours or members of the community that have benefited from the injured person providing services for in some way; shopping, checking in on elderly neighbours, cutting grass to name a few. Where the injured person is no longer able to provide services to their extended community, there will be a loss of support to that person. The emotional cost to the injured person in relation to their loss of ability to participate in the community and loss of the ability to demonstrate the altruism that is part of their identity, should also be considered. (b) Yes. This would be consistent with existing legislation.

8. (a) Do you consider that there are any problems with the deductibility of social security benefits from awards of damages?

(b) If so, could you outline those problems? Do you have any solutions to suggest?

(Paragraph 3.21)

Zurich Insurance UK	Generally no - but there is an important qualification. In Scotland, benefits can only be deducted against care where the services are provided professionally and not when provided gratuitously, i.e. by a family member. This follows McManus v Babcock Energy. This is incompatible with practice in England & Wales and seems particularly sharp, because in Scotland, the pursuer is placed in funds by the state to allow them to secure care, but defenders then make payment in respect of the provision of those same services, but without benefit of deduction, which amounts to double recovery.
Ronald E Conway	The benefits which are causing difficulty are:- (i) Universal Credit (deductible against wage loss) is the principal area of difficulty (ii) Child Tax Credit (iii) Working Tax Credit Universal Credit has been phased in from April 2013 in terms of the Welfare Reform Act 2012. Typically the final CRU Certificate which is provided will show a single total for Universal Credit which frequently subsumes unrelated payments such as housing benefit (not deductible against wage loss). In a recent case the defenders accepted that the stated CRU position was wrong and compensator agents were able to negotiate the correct pre-settlement figure with them. If they had been unable to do so, the compensator would have been obliged to repay the whole amount, which would then be wholly offset by the compensator from damages paid to the injured person. The problem which then arises is that only the compensator can be a party to any CRU appeal, and that even if the appeal is successful and results in reduced payments, any refund is paid to the compensator and not the injured party. (See CRU Technical Guidance Section 8.2 available online).

	I have had sight of a complicated workaround whereby the compensator grants a pre-settlement undertaking to appeal the certificate, to co-operate with the claimant in respect of the appeal, and to pay any refund to the claimant. I don't know how effective this is in practice, and clearly it is unsatisfactory. Anecdotally I understand that an online enquiry to the CRU from the compensator will elicit an online breakdown of the benefit. Again I don't know how realistic this is in practice, and will of necessity involve co-operation between agents for compensator and injured person, and then a pre-deduction approach to the CRU. The Association of Personal Injury Lawyers and the Federation of Insurance Lawyers have put out a call for evidence (September 2021) with a view to making a joint approach to the Government on this issue. The problem is not with the substantive law, but with the presentation of benefits by the CRU. May I respectfully suggest that the Law Commission note the difficulties faced by practitioners in this area, for onward transmission by APIL or FOIL in their joint submission.
Clyde & Co (Scotland) LLP	(a) Yes. (b) As touched on by paragraph 3.20 of the Discussion Paper, the introduction of Universal Credit creates significant problems for both injured persons and compensators. Universal Credit creates a largely unavoidable risk of double compensation, which does not accord with the long-established principles of the law of damages. Universal Credit (UC) was introduced to replace the following benefits: Child Tax Credit, Housing Benefit, Income Support, Income-based Jobseeker's Allowance (JSA), Income-related Employment and Support Allowance (ESA), Working Tax Credit Of these, Income Support, JSA and ESA could be offset by compensators against any loss of earnings claim. This is no longer the case now that the 6 constituent benefits of Universal Credit have been banded together by the Compensation Recovery Unit (CRU). The Gov.UK guide on recovery of benefits notes:- *"Compensation in respect of loss of earnings during the relevant period may be reduced where the following benefits have been paid to meet the same need: … - Universal Credit."* Prior to Universal Credit, a pursuer might have received £3,000 in Housing Benefit and £1,000 in JSA. Only the JSA of £1,000 would be recoverable by CRU.

	However, as the two separate benefits no longer exist, a current claimant would receive £4,000 in Universal Credit. The entirety of the UC payment is recoverable As we see it, this will result in scenarios where either or both the injured person and the compensator lose out. These are either:- • Injured persons end up with less compensation for loss of earnings because compensators feel bound to make smaller offers due to the CRU's refusal to break Universal Credit down into its constituent parts, meaning the true value of the loss cannot properly be quantified; or • Compensators may be required to effectively make double payments by satisfying the pursuer's full loss of earnings claim while also repaying the full sum identified in Universal Credit to the CRU. The CRU's position is that they are not able to break down the constituent elements of Universal Credit to allow compensators/claimants to only repay those elements that they should properly be liable to pay. This, in our view, is not satisfactory. Consistent repayment of benefits at the right level is essential to an effective law of damages. We believe it is not unreasonable to expect the CRU to engage more meaningfully in the issue. We ask that the Commission considers the merits of legislative measures obliging them to do so. We are concerned that the solution proposed at 3.20 of the Discussion Paper is unlikely to yield adequate outcomes. That section notes:- *"It seems to us unrealistic to imagine that the practice of the CRU will change. That being so, the only option available to insurers, and one that is available only where evidence has been led in a case, is first to make payment to the CRU in accordance with the certificate and subsequently to seek, relying on the terms of the evidence given to the court, to submit to the CRU that some elements of the benefits paid do not properly fall within the amount certified, because they relate to benefits which do not fall within the scope of the 1997 Act."* Our reading of this is that, in cases where a party wishes to reduce the CRU payment on the basis that part of the benefits issued under Universal Credit should not be recoverable on account of being as a replacement for, say, housing benefit, that party would be precluded from doing that unless they went ahead with an evidential proof. As a matter of policy, agents are heavily encouraged by the Scottish Courts and Tribunals Service to avoid evidential hearings – or at the very least narrow issues as far as they can - wherever possible. This solution would fly in the face of that approach. The costs occasioned by the running of such hearings would also be significantly disproportionate in most cases to the prospective benefits of doing so.

	Even if success on the evidence was guaranteed, which is never the case, the cost of simply absorbing the additional payment will be lower than obtaining the evidence necessary to avoid it. Those costs would not have been recoverable even prior to the introduction of Qualified One-Way Costs Shifting as the pursuer clearly is not at fault for the CRU's refusal to break down her benefits payments. Secondly, we do not anticipate that it is likely that the CRU (without being compelled to do so by legislation) would issue a refund whether compelling evidence that it should do so was presented or not. We expect the CRU will insist that they are not empowered to break down Universal Credit into its constituent parts under any circumstances. If we are right about that, the extent of both the cost to compensators and the court time (of which there is precious little available) expended to reach that outcome seems unattractive. If this is correct, the introduction of Universal Credit has created an untenable scenario in which compensators will unavoidably be obliged to increase their total indemnity spend on all claims in which there is both a loss of earnings element and recoverable benefits identified. This could have significant consequences for the affordability of premiums which can be offered by insurers to the market at large. As far as we can see, the only party who profits from this development is the Department of Work and Pensions, which will receive substantial payments for benefits that Parliament never intended it to be able to recover. As recoverable benefits are such an inextricable element of the law of damages, it seems unsatisfactory that there is no anticipated scope to oblige the CRU to break down Universal Credit payments into constituent elements. It would be inappropriate if DWP/CRU held information to allow the breakdown of these benefits payments but did not release the same. clearly in possession of the information necessary to do so. Any legislative reform to this area should, in our view, include obligations on the CRU to provide the information necessary to ensure compensators are not obliged to make payments of benefits that were never intended to be recoverable. Any legislative reform to this area should, in our view, include obligations on the CRU to provide the information necessary to ensure compensators are not obliged to make payments of benefits that were never intended to be recoverable.
Association of Personal Injury Lawyers	(a) Some of our members have experienced the difficulties outlined in paragraph 3.20 of the discussion paper, relating to CRU certificates not specifying the components which make up an award of universal credit, and it therefore not being clear which benefits are deductible and which are not. (b) The components of Universal Credit should be defined so that it is clear which benefits are

	deductible and which are not.
Stagecoach Group plc	(a) We do not consider there are practical issues with the deduction of Benefits from the award of damages. We consider that failure to make such deductions would see the Pursuer receive funds twice. We are aware of some practical issues arising following the implementation of Universal Credit. (b) Where a Pursuer is in receipt of Universal Credit, their award is not broken down into its constituent elements and it is difficult to establish which heads of claim can be offset. As the application of Universal Credit is not controlled by the Scottish Government, we consider correcting this would require UK wide legislation – it cannot be fixed by this review.
Forum of Insurance Lawyers	(a) Yes. Issues of social security benefits reform are beyond the scope of this paper / response, but it is accepted that problems exist (b) FOIL recognises the problems set out in the discussion paper. The introduction of Universal Credit in particular has created issues in this field. Certificates issued by the Compensation Recovery Unit do not specify the components, creating problems over identifying which benefits should be reasonably deductible, and which should not. The solution, as FOIL sees it, is for CRU to provide a breakdown of the UC components. That however is a matter for the UK parliament to legislate upon if CRU are not willing to do so voluntarily. The present situation invites the possibility of double recovery by a party, or unjust deductions from awards of damages.
University of Aberdeen Law School	No, we do not consider that there are any problems with the deductibility of social security benefits.
Tom Marshall	No. The like for like regime operates fairly.
Unite the Union Scotland	(b) We do not consider there to be problems with deductibility of social security benefits presently requiring reform of the law in this area.
Senators of the College of Justice	(a) No. We agree that section 10 of the 1982 Act, and the existing wider relevant law, provides a statutory framework which is adequately comprehensive. (b) In light of our preceding answer, we have nothing further to add.

Aviva Insurance Ltd	(a) In general, there are no practical problems with the deductibility of social security benefits from awards of damages – this is generally a well understood area. However, we are aware of practical issues arising from the implementation of Universal Credit (UC). (b) Universal Credit (UC) does not break down into component parts to allow offsetting against different heads of claim for loss of earnings, care (Section 8. Services in Scotland) and services. This is a UK wide issue and therefore would require UK wide legislation and indeed, widespread overhaul of the UC system.
Digby Brown LLP	(a) We have experienced some issues in negotiating settlement of claims where the client is clear that the Universal Credit payments listed in the CRU certificate do not relate to benefits received because of the accident. The difficulty is that the certificate does not specify the components that make up an award of Universal Credit, so it is not clear which benefits are deductible and which are not. In a recent case, the client was able to provide a detailed breakdown of the various benefits covered by Universal Credit (some of which related to his disabled wife and child), but the majority of clients are unlikely to have such information readily available. (b) The components of Universal Credit should be defined so that it is clear which benefits are deductible and which are not. Otherwise, there will be an increase in review/appeals against CRU certificates.
Thompsons Solicitors Scotland	(b) We do not consider there to be problems with deductibility of social security benefits presently requiring reform of the law in this area.
Drummond Miller LLP	(a) No (b) N/A
Faculty of Advocates	(a) No. The Faculty agrees with the SLC's assessment that the recovery of benefits works in practice and that there is no useful change that can be suggested. The statutory scheme applies the principle that the state should be reimbursed while at the same time the wrongdoer should not pay more than is necessary to compensate the injured person. The identification of deductible benefits is workable in practice, subject to the caveat identified in paragraph 3.20 regarding Universal Credit. The Faculty has nothing to add to the SLC's conclusions. (b) Please see answer to question 8(a) above
DAC Beachcroft	(a) Yes. We emphasise that we agree with the points made in the Discussion Paper at paragraph 3.18 and have not experienced any difficulty with the deductibility of identifiable benefits from connected heads of claim as set out in the Social Security (Recovery of Benefits) Act 1997.

	(b) We echo the point made in paragraph 3.20 in that we do foresee a potential problem for compensators in relation to the deduction of the Universal Credit The solution discussed in that paragraph is, essentially, that the compensator pays the totality of the benefits as demanded and then makes representations to the CRU regarding their deductibility or otherwise. This is, in essence, the procedure by which a compensator would presently appeal against the amount stated in the Certificate of Total Benefits. This is a useful mechanism but has a cost attached to it for the compensator in terms of the time taken to put the appeal and attendant documentation together. We simply wish to raise the issue that, should this become the usual method by which a compensator has to seek clarity in relation to the apportionment of benefits within an award of Universal Credit, it will add to the cost of the compensator's dealing with the claim in a circumstance when the compensator has no option but to seek to clarify which benefits might fall outside the amount certified as recoverable. This seems to us to be unjust. Given that Universal Credit covers six previously separate benefits, we suggest that the CRU provide details of the reasons why certain sums have been paid under Universal Credit. We assume here, of course, that an exercise would have been carried out to assess eligibility and the result would be available.
Association of British Insurers	(a) While we note that reform of the law of social security is outside the scope of this project, we agree that there are problems with the deductibility of social security benefits from awards of damages (b) Our assessment of the problems is the same as set out in the discussion paper, namely that the introduction of Universal Credit has caused difficulty in quantifying claims as the certificates issued by the CRU do not specify the components which make up an award. It is therefore often not possible to separate out deductible and non-deductible benefits. It is also not equitable for the only option available to insurers to be first making payment to the CRU in accordance with the certificate, and subsequently seeking to submit to the CRU that some elements of the benefits paid do not properly fall within the amount certified. There is a clear need to avoid the pursuer being doubly compensated, but the problem with the current system is that it places the onus (and the cost) on insurers to avoid this outcome. There is also a risk that pursuers will simply settle in order to avoid litigation. This is clearly an issue for genuine pursuers, so there are potentially adverse consequences in terms of access to justice for both insurers and pursuers. As above, reform of the law of social security is outside the scope of this project, but in our view, it would be helpful for the Scottish Law Commission to draw attention to the problems with the current system and the fact that changing the practice of the CRU would require legislative action by the UK Parliament.

	As above, deduction of benefits is desirable to avoid double recovery, but there is also an issue in Scotland whereby deductibility of benefits against care can only be applied if care is provided professionally and not if care is provided gratuitously (for example, by a family member). This is incompatible with practice in England and Wales – the pursuer is compensated by the state to allow them to secure care and the defender then makes payment to the person who provides care, but without the benefit of deduction.
Society of Solicitor Advocate	a) Yes b) The CRU certificate does not set out clearly enough benefits arising from the accident. Further information on when benefits are applied for and awarded specifically as a result of an accident would be helpful in ensuring the accuracy of the certificate issued
Forum of Scottish Claim Managers	a) In general, there are no practical problems with the deductibility of social security benefits from awards of damages – this is generally a well understood area. However, we are aware of practical issues arising from the implementation of Universal Credit (UC). b) Universal Credit (UC) does not break down into component parts to allow offsetting against different heads of claim for loss of earnings, care (Section 8. Services in Scotland) and services. This is a UK wide issue and therefore would require UK wide legislation and indeed, widespread overhaul of the UC system.
Direct Line Group	(a) DLG does not consider that there are any problems with the deductibility of social security benefits from damages awards as long as the benefits are properly specified in the injured person's Certificate of Recoverable Benefits (CRB). (b) Problems occur where benefits are not properly specified, for example Universal Credit appears as a single sum on a CRB despite comprising of benefits which are incapable of being offset (child tax credit, housing benefit and working tax credit). It is our view that only those benefits which relate to the injured person (for example, a Universal Credit application does not need to relate solely to the injured person) should be deductible. Again, referring to Universal Credit as an example, only those benefits which are capable of being offset should be included on the CRB otherwise potential detriment to the injured person remains a possibility as the CRB amount may be greater than a loss of earnings claim. The solution is to include: when the benefit was applied for, who applied for the benefit and if the benefit situation changed as a result of the material accident and, only provide details of offsetable benefits on a CRB.

NFU Mutual	(a) NFUM consider the deduction of recoverable benefits as a well understood area in assessing and settling damages for personal injury claims. However, the introduction of Universal Credit (UC) has brought a difficulty into this application. (b) As above, the introduction of UC creates a difficulty in quantifying what the "recoverable benefits" as set out in the Social Security (Recovery of Benefits) Act 1997 are in individual cases. UC includes the following 6 means tested benefits; • Housing Benefit • income-related Employment and Support Allowance (ESA) • income-based Jobseeker's Allowance (JSA) • Child Tax Credit • Working Tax Credit • Income Support This creates a difficulty for compensators to accurately assess what is deductible from an award of damages. The proposed mechanism of an Insurer satisfying the Certificate of recoverable benefit in its entirely and requesting a mandatory review to receive a breakdown is not a practical solution. It creates a barrier to pro-active settlement of damages, generates an additional cost to compensators and may result in a pursuer accepting an "under compensation" to avoid litigation. This is a UK wide issue and therefore would require UK wide legislation and indeed, widespread overhaul of the UC system or how it integrates the benefits assessment with the Compensation Recovery Scheme administration.
Kennedys Law	(a) Yes. (b) Following the introduction of Universal Credit, Certificates provide details of a single payment of Universal Credit which may be paid for a variety of reasons and to make provision to address a variety of needs, as opposed to individual payments of specified benefits, where it is clear what each is being paid for and what need it is intended to provide for. Consequently there have been difficulties identified for compensators seeking to satisfy themselves that all benefits included in the Certificate were paid as a result of the accident complained of. There are difficulties in gathering background information to allow careful consideration of the reasons why the benefit

	is being paid, as it is not possible tor recover records from the Department for Work and Pensions (DWP) under a mandate. Further, although Schedule 2 of the Social Security (Recovery of Benefits) Act 1997 includes Universal Credit in the list of benefits capable of being off set against loss of earnings in its entirety, this may result in benefit being set off against loss of earnings which was paid for reasons other than to provide for lost opportunities to earn income. While the inclusion of Universal Credit in Schedule 2 in this manner creates a degree of certainty over the statutory entitlement for off-setting, it does not do so on the basis of the policy reasons for categorising certain benefits against certain losses which underpinned the 1997 Act at inception. All of this can present a hurdle to parties reaching settlement, particularly when the liability to the Compensation Recovery Unit (CRU) is substantial, as parties need certainty, in agreeing what the net sum payable to an injured party will ultimately be, about the extent of the benefit which should be included in the sum to be set off. Any benefit which it will later be accepted by CRU was paid for reasons other than the accident should not be included in that calculation. Parties and the CRU may not always reach the same conclusion on this. If settlement can be agreed and an appeal to the CRU is required to address whether the benefits were payable as a result of the accident, so whether they ought to be included on the Certificate, the process can be lengthy and therefore leaves the compensator without any finality for some time, despite settlement having being agreed between the parties. The final outcome of any such appeal may alter parties' understanding about the nature and extent of offsettable benefits, which may demonstrate that the agreement reached on the net sum payable to the injured party proceeded on an inaccurate assessment of offsettable sums. Whilst it is ultimately a matter for the Department for Work and Pensions (DWP), it would assist if more information and detail could be provided on the reasons for benefit being paid. This would allow for informed discussion between parties on what should be included in the Certificate, would allow for further understanding between the parties as to what ought to be included and therefore set off, and would allow parties to reach informed agreement on the net damages payment due, increasing the likelihood of the agreed net payment being accurate.
Law Society of Scotland	a) Yes. b) The CRU certificate obtained from the Department for Work and Pensions simply lists benefits which they say have been paid as a result of an accident. It is often wrong and requires to be reviewed.

	Having the CRU reviewed is a lengthy process and deprives an accident victim of part of their settlement for, on occasions, months. The certificate should include details of 1. When the application for benefits was made 2. By whom it was made and 3. Whether benefit entitlement in terms of rates and types of benefit changed as a consequence of the accident. This is likely to result in more accurate certificates being issued or at least permit insurers and a Pursuer's agent to readily identify whether a CRU certificate is accurate and which benefits should be offset against which head of claim.
Medical and Dental Defence Union of Scotland	MDDUS agrees that, in general terms, the deductibility of social security benefits from damages payments is adequately addressed by the existing statutory framework. We do, however, have one comment to make in relation to paragraph 3.20 of the discussion paper, regarding universal credit. This acknowledges that "it may not be possible to separate out deductible and non-deductible benefits" because "the certificates issued by the CRU do not specify the components which make up an award of universal credit." We suspect that this will be a stumbling block to settlement in some cases, although as a relatively new benefit, it is too soon for the impact to be fully seen. The solution proposed (that the responsible person pays the relevant CRU and then asks for a review of the certificate) is unsatisfactory in that this can be a timeconsuming and expensive process. It is unjust that the responsible person is put to this additional effort and expense (and nor, indeed, should the CRU be subject to these additional costs). Relying on a post-settlement review of CRU may, in some cases, incentivise defenders against settlement, with consequent delays in compensation for injured patients, which is clearly undesirable. In addition, it is our experience that the CRU is experiencing significant backlogs of reviews, pre-dating the pandemic, and relying on this review mechanism is not a satisfactory solution. Ideally, as an outcome of this consultation process, there would be a recommendation for Government to bring some pressure to bear on the CRU: (a) to specify on CRU certificates the components of an award of universal credit; and (b) to improve case handling of the review process and ensure it is adequately resourced.
Action on Asbestos	(a) The Social Security (Recovery of Benefits) Act provides for the deduction of named social security benefits that have been paid in consequence of the injury to be deducted from the injured persons compensation and reimbursed by the defender to the Government under the auspices of the Compensation Recovery Unit. The intention is to avoid an injured person being doubly compensated for their injury by receiving social security benefits that are in essence, awarded on a similar basis to the awards given under the three heads of damages. The payments under the Pneumoconiosis etc (Workers Compensation) Act 1979 are rightly deductible as this payment is a payment of compensation, as the title denotes. However, the premise of recovery of social security benefits does not take into account the fact that the amount of benefit paid is usually

	significantly less than the injured person would have received in the workplace, or less than the true costs of living with an illness if they are already in receipt of social security benefits. Each injured persons circumstances will be different; some may be entitled to contractual sick pay, others may not. Some may be entitled to means tested benefits and some may not, and some may be entitled to benefits in relation to care needs. However, in every case, for the duration of the civil case being pursued, the injured person is living with a health problem that is impacting on their quality of life and is trying to live with the additional costs associated with having a health condition. It could be argued that whilst the defender must continue to be held liable for the reimbursement of social security benefits to the Government, the injured party should not be penalised by having their overall award of compensation reduced by the same amount. In other words, this is an additional amount that the defender is required to pay to the Government that comes from their own resources rather than from the compensation of the injured person.

9. Do you consider that benevolent payments, or payments from insurance policies which the injured person has wholly arranged and contributed to, should continue not to be deductible from an award of damages?

(Paragraph 3.35)

Stuart McMillan MSP	Yes
Zurich Insurance UK	Yes, they should continue not to be deducted, for the reasoning set out in the report.
Ronald E Conway	Such schemes tend to involve serious injury cases and acceptance by an insurance company that the employee is no longer fit for any kind of work within the organisation. By far the most common scheme is a Disablement Pension Scheme. My understanding is that the law in England has clarified that such payments should not be deducted from earnings claims. (see *Parry -v- Cleaver* [1970] AC 1) Where an award is made it will typically involve monthly payments to the injured person In a recent client case of a head injury with a somatoform component where a Disablement Pension award was made, the wording is as follows:- “Any continued eligibility for benefit will be reviewed on 1st April in each year”.

	It is difficult to see how such payments could either be capitalised or properly treated in a once and for all settlement. Any agreement or judgement would be bound to give the injured person the right to re-open proceedings in the court if the benefit was withdrawn, or where the insurer was dissolved.
Clyde & Co (Scotland)	Yes.
Association of Personal Injury Lawyers	Yes.
Stagecoach Group plc	Yes
Forum of Insurance Lawyers	FOIL agrees that such payments should continue not to be deductible from an award of damages.
University of Aberdeen Law School	Yes, we consider that benevolent payments and payments from insurance policies that the injured person has wholly arranged and contributed to should continue not to be deductible from an award of damages.
Tom Marshall	Yes
Unite the Union Scotland	We agree in particular with para 3.29 of the Discussion Paper and consider there to be no need for reform of the law in this area.
Senators of the College of Justice	Yes. In relation to benevolent payments, we agree with the rationale set out at paras. 3.24 and 3.25, subject to the exception covered by section 10(f)(iv) of the 1982 Act. In relation to such insurance policies, we agree with the rationale of Parry v Cleaver, at set out at para. 3.34.
Aviva Insurance Ltd	We agree that benevolent payments, or payments from insurance policies which the injured person has wholly arranged and contributed to, should continue not to be deductible from an award of damages. However, in our view insurance premiums should be deductible from the net wage loss contribution
Digby Brown LLP	Yes
Thompsons Solicitors Scotland	We agree in particular with para 3.29 of the Discussion Paper and consider there to be no need for reform of the law in this area.
Drummond Miller LLP	Yes, they should continue not to be deductible from an award of damages. If a person has chosen to pay for such a policy (from their own income) then why should they be punished / prejudiced or to put it another way why should the paying party benefit? It is irrelevant to the true value of the claim. It is a fair approach / principle to say that you cannot be said to benefit from being injured by another.
Faculty of Advocates	In relation to benevolent payments, the Faculty agrees that these should continue to be excluded from any deduction from damages. As the SLC note, even if the result is that the injured party may receive more than he has lost, there is a clear basis in common law and equity to exclude them (*Henderson v*

	Sutherland 2008 SCLR 219 at para 36). The Faculty agrees that there are no grounds for deducting a payment from an insurance policy arranged and contributed to by the injured person. As the authorities note, the basis for the payment is the contract of insurance and not the event that triggers the payment
DAC Beachcroft	Yes. It would be unjust for the party in delict to be able to benefit from the prudence of the injured party if payments from such policies were taken into account when damages come to be assessed.
Horwich Farrelly Scotland	Yes.
Association of British Insurers	We agree that benevolent payments, or payments from insurance policies which the injured person has wholly arranged and contributed to, should continue not to be deductible from an award of damages. However, in our view insurance premiums should be deductible from the net wage loss contribution.
Society of Solicitor Advocates	We agree that they should continue not be deductible from damages.
Forum of Scottish Claim Managers	We agree that benevolent payments, or payments from insurance policies which the injured person has wholly arranged and contributed to, should continue not to be deductible from an award of damages. However, in our view insurance premiums should be deductible from the net wage loss contribution.
Direct Line Group	Yes, as a prudent decision to arrange and contribute towards benefits of this nature should not be penalised by a mechanism that is able to then deduct those benefits from damages. The non-deductible principle should also apply to benevolent payments as to do otherwise reduces the benefit to the injured person, thwarts the intention of the person who makes it and, may even curtail the practice.
NFU Mutual	NFUM agree that benevolent payments, or payments from insurance policies which the injured person has wholly arranged and contributed to, should continue not to be deductible from an award of damages.
Kennedys Law	Whilst there are concerns regarding double recovery, if a person, as an individual, has arranged and contributed to an insurance policy, and has voluntarily met the premiums required to secure that cover, then we consider that the injured party should remain the benefactor under the policy without any deduction from the value of the claim.
Law Society of Scotland	Yes, the status quo should remain.
Action on Asbestos	Yes. Such payments should not be deductible.

10. (a) In the context of payments to injured employees arising from permanent health insurance and other similar schemes, do you consider that clarification or reform of section 10 of the Administration of Justice Act 1982 is required?

(b) If so, could you outline the essential elements of any clarification or reform which you suggest?

(c) In particular, would you favour an approach in which the law was clarified to make it clear that where an employee contributes financially, as a minimum through paying tax and NIC on membership of the scheme as a benefit, then any payments made under that policy should not be deducted?

(Paragraph 3.58)

Stuart McMillan MSP	10(a) – Yes 10(b) – Yes
Zurich Insurance UK	We agree that clarification/reform of section 10 of the Administration of Justice Act 1982 is required. We would favour an approach where if an employee contributes financially, then any payments made under that policy should not be deducted. Conversely, if there is no evidence that an employee has contributed financially, then any payments made should be deducted.
Ronald E Conway	See Answer 9
Clyde & Co (Scotland) LLP	(a) Yes. (b) N/A. (c) We are of the view that, where it can be shown an injured person has contributed financially (whether voluntarily or otherwise) towards a scheme then payments made to them through the scheme should not be deducted from damages. For the avoidance of doubt, we envisage that any such financial contribution would, as a minimum, involve the payment of Income Tax and National Insurance contributions as a consequence of participation in the scheme. The onus should be on the injured person to produce evidence demonstrating that they contributed to the scheme in this way. Converseley, where the injured person has made no financial contribution and their participation in the scheme is instead wholly funded by their employer (to protect the employer against risk), payments made to them through the scheme should be deducted from damages.
Association of Personal Injury Lawyers	(b) There should be clarification of section 10 of the Administration of Justice Act 1982, to ensure that pursuers are not left disadvantaged by payments from insurance schemes to which they have contributed, even indirectly as a result of their contract of employment, being deducted from their damages. We believe that the wording suggested by the Commission in their draft Bill, set out at paragraph 3.57 of the consultation document, should be included in the Act. (c) We suggest that as above, section 10 of the Act should be amended to include the Commission's recommendation at paragraph 3.57 of the consultation paper.

Stagecoach Group plc	(a)Yes (b)Where an employee contributes to the provision of the scheme, any payments made under the policy should not be deducted from damages. Where the benefit is provided as a right of employment, without contribution, such benefit should be offsettable against past wage loss. (c) We believe the approach outlined is fair.
Forum of Insurance Lawyers	(a) Yes. (b) (c) FOIL would support an approach whereby if an employee has contributed financially to such a policy, then any payments made should not be deducted. The converse of this position also applies, namely if it is not evidenced by suitable vouching that an employee has contributed financially, then any payments made should be deducted from an award of damages.
University of Aberdeen Law School	We consider that clarification of section 10 of the 1982 Act is required, to resolve any confusion which may arise from apparently conflicting attempts to achieve the same overarching policy objective in Scots and English law. We consider that s.10(a) should be amended to clarify that where an employee has contributed financially to permanent health insurance or a similar scheme, payments made under that scheme should not be deducted from an award of damages. Further statutory clarification may be necessary on the forms in which financial contributions may take. As the range of available financial products evolves over time any reform to the 1982 Act should leave open the possibility of forms of financial contribution which are not presently contemplated.
Tom Marshall	I do not consider reform is required. It is sufficient to say that payments under these policies are not earnings but payments made on the basis of a contract of insurance. The payments benefit both employee and employer – the employee continues to receive money while incapacitated and the employer can use the money which otherwise it would have paid the injured employee to engage a replacement. This is the case whether or not “consideration” has been given by the employee over and above fulfilling an employment contract until the time of the injury. There is a certain unreality about the discussion because in the circumstances that the responsible person is the injured person’s employer, the likely ultimate paymaster of any compensation will be the employers’ liability insurer, who will also be making a payment on the basis of a contract. It is that insurer who, by restricting the scope of the present section 10, wishes to be the ultimate beneficiary of the premiums paid by the employer to the PHI insurer, rather than either the employee or the employer.

Unite the Union Scotland	(c) We do not agree that clarification or reform of section 10 of the Administration of Justice Act 1982 is required. Sections 8, 9 and 10 of the 1982 Act apply to Scotland only. Deductibility of such damages in England is a matter for their common law principles whereas statute determines the question in Scotland. The decision of the Inner House in Lewicki stands as good law as it determines the application of section 10 of the 1982 Act in Scotland. Legislation can, and here has, overridden the logic of the common law. We submit there is accordingly no "tension" between the leading Scottish and English authorities. There is in our view no compelling reason why 'permanent health insurance' contracts should be exempt from section 10(a) of the 1982 Act.
Senators of the College of Justice	(a) Yes, in order to remove the current uncertainty brought about by the conflicting authorities. (b) In circumstances in which the injured party has given some sort of consideration for their participation in the referable scheme, then, in accordance with section 10 of the 1982 Act, the consequent benefit arising should not be deductible from any damages awarded. In the absence of any such consideration, the resulting benefit should be deductible. (c) Yes. We consider that any payments made under a policy to which the examples set out at para. 3.46 apply, should not be deductible from the referable award of damages. In expressing this view we recognise that, where the "consideration" (for example, by way of a contribution taken directly from wages) is modest a claimant may be advantaged over one whose "consideration" is greater. However, we consider that the benefit of certainty in outcome outweighs the significance of any such imbalance which would otherwise arise in practice.
Aviva Insurance Ltd	(a) Yes, we consider reform of section 10 of the Administration of Justice Act 1982 is required. (b) The essential elements for reform would be consideration that if an employee contributes financially (either directly or indirectly by opting in to a scheme or similar), then any payments made under that policy should not be deducted. Conversely, if an employee receives the benefit of a group income protection policy or similar as an automatic right of their employment, then such benefit should be offsettable against past wage loss.(as found in the case of *Gaca v Pirelli*) Group income protection policies are now more commonplace and an automatic part of an employees contract of employment.

	We have produced a worked example that demonstrates that *Lewicki* can result in a Pursuer receiving far more than their actual loss. (the worked example is actually based upon the workings of the Aviva group income protection policy for our own employees) (c) Yes, we believe this is fair and appropriate.
Digby Brown LLP	(a) We are of the view that there should be clarification of section 10 of the Administration of Justice Act 1982. This is required to ensure consistency with the insurance exception set out in s10(a) of the 1982 Act and to protect pursuers from being disadvantaged by having payments from insurance schemes to which they have contributed, even indirectly as a result of their contract of employment, deducted from their damages. This is in line with the principle that where an injured person has obtained insurance for an event, they should not be deprived of the benefit of this. (b) We believe that the wording suggested by the Commission in their draft Bill, set out at paragraph 3.57 of the consultation document, should be included in the Act. (c) Yes, we would favour such an approach.
Thompsons Solicitors Scotland	(c) We do not agree that clarification or reform of section 10 of the Administration of Justice Act 1982 is required. Sections 8, 9 and 10 of the 1982 Act apply to Scotland only. Deductibility of such damages in England is a matter for their common law principles whereas statute determines the question in Scotland. The decision of the Inner House in Lewicki stands as good law as it determines the application of section 10 of the 1982 Act in Scotland. Legislation can, and here has, overridden the logic of the common law. We submit there is accordingly no "tension" between the leading Scottish and English authorities. There is in our view no compelling reason why 'permanent health insurance' contracts should be exempt from section 10(a) of the 1982 Act.
Drummond Miller LLP	(a) No (b) n/a (c) If reform was to happen, then there could be benefit from clarification as suggested.
Faculty of Advocates	(a) The Faculty considers that clarification would be helpful on this question. (b) As the SLC identify, the main question that arises is factual – whether payments made from a particular scheme should be deducted from damages. Difficulties here may occur more often in considering settlement, and it is unhelpful for there to be a degree of uncertainty that might stand in the way of that settlement. It seems to us that any change would be better if it were easy to apply, notwithstanding the variety of factual circumstance that may pertain to a PHI policy.

	(c) The Faculty agrees therefore that the reform should be restricted to allowing for deduction only where the employee has made no contribution to the scheme. It appears to us that the suggested approach of continuing to allow the exception where the employee at least pays tax on the membership is the correct one.
DAC Beachcroft	(a) We agree with the reasoning set out in the Discussion Paper regarding the apparent reconcilability of the decisions in *Gaca v Pirelli General* [2004] 1 WLR 2683 and *Lewicki v Brown & Root Wimpey Highland Fabricators Ltd* 1996 SC 200. It follows that we agree that, where there has been an opt in to a PHI scheme with direct or indirect contribution by the injured person, then the benefits of such a scheme are not deductible. If there has been no opt in or contribution, then the benefits of the scheme are deductible. (b) We see the point in considering the addition of the missing clause referred to in paragraph 3.57 of the Discussion Paper and believe including this in a revised s10(a) of the Act would provide clarity. (c) Yes.
Horwich Farrelly Scotland	a) Yes b) and c) If payments have been made by the employee towards a scheme that will generate a payment in the event of an accident, that should not be deductible from the damages payable in any negligence claim. However, if the employee has not contributed to the scheme then payments from the scheme should be deductible from wage loss.
Association of British Insurers	(a) We agree that clarification/reform of section 10 of the Administration of Justice Act 1982 is required. (b) (c) We would favour an approach where if an employee contributes financially, then any payments made under that policy should not be deducted. Conversely, if there is no evidence that an employee has contributed financially, then any payments made should be deducted as in the case of *Gaca v Pirelli General [2004] 1 WLR 2683*. In our view, the position in *Gaca* should be adopted in Scotland.
Society of Solicitor Advocates	Payments arising from permanent health insurance and other similar schemes ought not to be taken into account of in calculating compensation following an accident. That should be made clear in any legislation.
Forum of Scottish Claim Managers	(a) Yes, we consider reform of section 10 of the Administration of Justice Act 1982 is required.

	(b) The essential elements for reform would be consideration that if an employee contributes financially (either directly or indirectly by opting in to a scheme or similar), then any payments made under that policy should not be deducted. Conversely, if an employee receives the benefit of a group income protection policy or similar as an automatic right of their employment, then such benefit should be offsettable against past wage loss.(as found in the case of *Gaca v Pirelli*) Group income protection policies are now more commonplace and an automatic part of an employees contract of employment. We have produced a worked example at appendix 1 that demonstrates that *Lewicki* can result in a Pursuer receiving far more than their actual loss. (the worked example is actually based upon the workings of the Aviva group income protection policy for Aviva employees) c) Yes we believe that this is fair and appropriate.
Direct Line Group	(a) Yes, and we direct you to our response to question 10 (b) below. (b) DLG proposes that the Act should confirm that where the employee contributes financially (either directly or indirectly) towards a permanent health insurance, or similar scheme, then the benefit would not be deductible from damages. To do otherwise would penalise prudent decision-making and make scheme membership potentially less attractive. (c) Yes, this proposal aligns with our response to question 10 (b) above.
NFU Mutual	(a) Yes, NFUM consider reform of section 10 of the Administration of Justice Act 1982 is required. (b) The essential elements for reform would be consideration that if an employee contributes financially (either directly or indirectly by opting into a scheme or similar), then any payments made under that policy should not be deducted. Conversely, if an employee receives the benefit of a group income protection policy or similar as an automatic right of their employment, then such benefit should be offsetable against past wage loss.(as found in the case of *Gaca v Pirelli*)

	Group income protection policies are now more commonplace and an automatic part of an employee's contract of employment. (c) Yes, NFUM agree this approach.
Kennedys Law	(a) Yes (b) Our view is that benefits payable in terms of any insurance policies which the insured has opted into and contributed to should not be deducted from the value of the injured party's claim. However, in our opinion, there should be a commensurate deduction from the value of the claim in the scenario where the injured party has not voluntarily opted or paid in to, but is party to, such a policy, and consequently receives a benefit from that scheme or policy without having incurred any prior cost. In the event that the scheme or policy is provided by an employer and the injured party can demonstrate that there were reduced wage payments made to reflect provision by the employer of access to such a scheme or policy as a benefit, this should be considered to be a cost to the injured party, in our view. This still avoids a double cost to any employer who is also a wrongdoer, and who has met the cost of providing a policy or scheme without seeking contribution from the employee or reducing wages to reflect the financial value of providing the scheme or policy. (c) Yes, for the same reasons outlined in Answers 9 and 10(b) above.
Law Society of Scotland	a) Yes. b) and c) If payments have been made by the employee towards a scheme that will generate a payment in the event of an accident, that payment should not be deductible from the damages payable in any negligence claim. It should simply be treated as a separate insurance policy which has no relevance to the compensation claim. If the employee has not contributed to the scheme then payments made to the employee from the scheme should be deductible from wage loss. In this situation it matters not whether their compensation is paid by employer's liability insurance, or a separate policy taken out by the employer to generate a pay out if their employee is injured. One member of the committee expressed his concerns as to how any proposed deduction was to be capitalised against wage loss, particularly where most policies have a clause for a possible recall of any award in the event of a change in medical circumstances.
Action on Asbestos	Action on Asbestos defers to the expertise of those who specialise in this area.

11. Do you agree with the proposition that section 2(4) of the 1948 Act should remain in force?

(Paragraph 3.67)

Stuart McMillan MSP	Yes
Zurich Insurance UK	Yes
Ronald E Conway	Yes for reasons in Discussion Paper
Clyde & Co (Scotland) LLP	Yes. However, we are mindful that, over recent years, concerns have been raised about the substantial awards for care packages that pursuers receive. Assumptions that all care will be provided by the private sector do not necessarily reflect the reality of how such care can or should be provided. services. In clinical negligence matters, the current system creates the diversion of significant sums of money from the NHS. In some instances, the NHS may have seen funding reduced due to the impact of litigation costs. In addition, those individuals who are reliant on state services, but are not able to attribute their injury, illness or disability to a negligent act, may have seen their own access to services reduced due to the impact of these litigation costs. We are therefore conscious that there is a balancing act between ensuring that an injured person's capacity for choice is preserved and the public policy issues highlighted by the NHS and compensators.
Association of Personal Injury Lawyers	We strongly agree that section 2(4) should remain in force. The repeal of section 2(4) of the Law Reform (Personal Injuries) Act 1948 could have catastrophic consequences for both injured patients and the NHS. There are important reasons why a claimant should be able to recover for private health care. Where the claim is against the NHS, claimants may not wish to obtain treatment from an NHS Trust which has already let them down – they may have no confidence in the treatment provided, and relationships with key NHS staff may have been damaged. In addition, claimants may fear or know that the NHS will be unable to meet their needs – for example, the National Institute of Clinical Excellence (NICE) may refuse a treatment for a patient who desperately needs it. The patient will then have to pay for the treatment privately. Further, forcing a claimant to rely on NHS care, where treatment cannot be guaranteed to take place quickly, would have a serious impact on rehabilitation which needs to take place as soon as possible after the injury to achieve the optimum effect. The NHS can be notoriously slow to provide treatment, especially since the Covid-19 pandemic, and the consequential backlog of cases in the NHS. The sooner the patient can return to work, the greater the benefit to the claimant and the greater the likelihood that any loss of earnings claim will decrease.

	Case study: **importance of access to private treatment** One member reported of a [REDACTED] year old client (C) who sustained a brain injury, due to lack of oxygen at birth. C has four-limb cerebral palsy affecting gross and fine motor skills, speech and language issues, poor concentration with some behavioural problems and dyspraxia. Before an admission of liability, which has allowed a care and rehabilitation package to be put in place, C and their family were reliant on NHS services for support; this was extremely limited. Despite a complex presentation, C did not have the benefit of a named paediatrician. Reviews were repeatedly conducted by locums who were unfamiliar with the history, making continuity of care very challenging. C did not receive regular occupational therapy, physiotherapy or speech and language therapy support. Input was limited to reviews that were sometimes once per year, and there were no opportunities for C to become familiar to individual therapists as it was not uncommon for them to leave their posts after a few months. Sessions were on an 'ad hoc' basis which meant there was a real risk that C's progress halted or regressed. Support and education to C's parents on how best to meet their needs was extremely limited. Interim payments now fund a case manager, and therapy in the form of an occupational therapist, physiotherapist, and speech and language therapist. C now has a dedicated team who work together to meet a wide range of goals holistically. The therapists regularly meet in a multidisciplinary forum to monitor and build upon progress and independence skills. The parents are also supported in understanding their child's needs and how to respond to the various challenges that arise. In addition to the hands on therapy, through private intervention, C has through the claim been able to fund a number of extremely important pieces of equipment such as a Lycra suit, bespoke wheelchair, bespoke orthotics and adapted seating. It is unlikely these would have obtained through NHS services. Finally, C has undergone EEG testing privately, which was not made available through the NHS. Possible seizure activity was identified which has led to further investigations for epilepsy. But for this private intervention the activity would not have been detected at an early stage.
Stagecoach Group plc	Yes
Forum of Insurance Lawyers	Yes. FOIL agrees with this proporsition.
University of Aberdeen Law School	Yes, we agree that section 2(4) of the 1948 Act should remain force. We would draw particular attention to the 1999 Report of the Law Commission of England and Wales, which stressed that an injured person should not be required to justify making one choice in relation to their healthcare over another. There may be significant differences between NHS healthcare services and private healthcare services beyond the former being free at the point of use, including differences in waiting times, convenience of facilities and patient autonomy over treatment options. We consider that section 2(4) is properly understood as

	preventing the responsible person from arguing that the injured person's choice not to use the NHS is a failure to mitigate their losses.
Tom Marshall	Yes.
Unite the Union Scotland	Yes, section 2 (4) of the Law Reform (Personal Injuries) Act 1948 should remain in force. The case law is relatively settled and, in practice, no significant problems are encountered. Reasonableness is a well-worn test in the assessment of damages and a concept with which practitioners, Counsel and the judiciary are very familiar. It provides for flexibility and proportionality. Section 2(4) serves an essential purpose. It eliminates the possibility of a responsible party arguing that an injured person ought to have used the NHS, rather than incurring the cost of private medical care. In practice, this is something which remains somewhat contentious with often the responsible party arguing that the injured person is not entitled to recover any expenses incurred in relation to private medical treatment given that if they were to receive this treatment on the NHS then there would be no recovery to be made. Additionally, in our experience as one of the largest personal injury practices in Scotland and the opinion of medical experts we regularly instruct access to rehabilitation treatments (including accommodation, where necessary) is essential at an early stage to maximise the chance of optimal recovery from trauma related injury. In our view it remains an issue of what is reasonable and we consider it is entirely reasonable for injury victims to seek to maximise their recovery. Indeed we also consider this is consistent with the requirement for victims of injury to mitigate their loss as much as possible. Many clients experience difficulties in terms of delay in provision of care or more fundamentally the ability to access the correct level of rehabilitation and care. This is more so in cases where injury victims live in more remote locations. Additionally, private care provides greater options to the injury victim which is more likely to optimise their recovery. The ability to access and recover the financial cost for the provision of private care costs is therefore an essential part of any compensation claim, in our view. The costs of travel and other associated costs incurred, such as accommodation, to access private medical treatment which is of greater benefit to any injury victim is essential.

	Post COVID-19 pandemic, waiting times within hospitals for outpatient treatment is longer than has been for several years. This can be seen in respect of physiotherapy treatment, orthopaedic outpatient clinics, and mental health services. Recent discussions with a Consultant Orthopaedic Surgeon who is based within Greater Glasgow Health Board has highlighted that current waiting times for elective orthopaedic surgery is beyond two years. There are concerns that some of the patients on these lists will simply not receive the surgery required. A recent Public Health Scotland publication on psychological therapies waiting times in Scotland has shown that more than four out of five people waiting for psychological therapies had to wait a minimum of 18 weeks to commence treatment. For an injured person to wait this long, as a minimum, to commence treatment holds no advantage to the injured person or responsible party. The position is the same whether the injured person requires treatment for a physical injury, psychiatric injury, or both. If an injured person has the ability to commence treatment at the earliest possible stage then it bears a better prognosis in terms of recovery and hopefully an ability to get back to the position that they were in before the accident. This is advantageous to the responsible party as if an injured person is back to their pre-accident state at the earliest possible stage then it is likely that a lesser payment of damages will be due, even with the reimbursement of private medical expenses. Notwithstanding the fact that the general premise of damages is to put the injured person back to their pre- accident position as much as possible. As an example, in recent years, the development of immunotherapy drugs for the treatment of mesothelioma has advanced significantly but many remain available only through private sources. Section 2(4) together with the appropriate use of periodical payments and/or Joint Minutes between parties allows for potential future costs to be met by the responsible party where reasonably incurred.
Senators of the College of Justice	Yes, for the reasons set out at paras. 3.63 and 3.66.
Aviva Insurance Ltd	Yes, we agree
Digby Brown LLP	Yes, we consider it essential that s2(4) remains in force. An injured person should have the option to choose whether to seek private treatment or to have treatment through the NHS without concerns over whether they may face an argument that they have failed to mitigate their loss. A very important consideration is the pressure on the NHS, which has been put under additional strain as a result of the pandemic. Waiting times for some treatments have increased as a result and, on that basis, seeking treatment privately may well lead to the injured person recovering more quickly than if they waited for NHS treatment. We come across situations where the waiting time for some treatment and procedures can be as much as two years.

	The option to seek private treatment, rather than waiting for this to be provided by the NHS can also have consequences for other heads of claim, such as wage loss. There appears to be no evidence to support the suggestion that there is a risk of abuse by an injured person claiming damages for private care and then making use of free NHS facilities. The option to seek private treatment is also consistent with the principle that the wrongdoer should be responsible for the loss and expense resulting from their negligence and simply because there is treatment available on the NHS should not prevent the pursuer obtaining this on a private basis. It is still open to the court to consider whether the injured person's choice was reasonable in all the circumstances. The importance of the pursuer having this choice is illustrated in many of our cases. One example arose is a claim for damages that we are pursuing for a young boy with cerebral palsy. An interim payment allowed access to private physiotherapy, together with occupational and psychological therapies. The treatment sessions were much more frequent and personalised than the treatment available to him on the NHS. Children with cerebral palsy can suffer from hip/mobility issues, so for this child to be able to access private physiotherapy, particularly with all the delays in the NHS as a result of COVID, meant that his mobility was maximised and further deterioration was avoided.
Thompsons Solicitors Scotland	Yes, section 2 (4) of the Law Reform (Personal Injuries) Act 1948 should remain in force. The case law is relatively settled and, in practice, no significant problems are encountered. Reasonableness is a well-worn test in the assessment of damages and a concept with which practitioners, Counsel and the judiciary are very familiar. It provides for flexibility and proportionality. Section 2(4) serves an essential purpose. It eliminates the possibility of a responsible party arguing that an injured person ought to have used the NHS, rather than incurring the cost of private medical care. In practice, this is something which remains somewhat contentious with often the responsible party arguing that the injured person is not entitled to recover any expenses incurred in relation to private medical treatment given that if they were to receive this treatment on the NHS then there would be no recovery to be made. Additionally, in our experience as one of the largest personal injury practices in Scotland and the opinion of medical experts we regularly instruct access to rehabilitation treatments (including accommodation, where necessary) is essential at an early stage to maximise the chance of optimal recovery from trauma related injury. In our view it remains an issue of what is reasonable and we consider it is entirely reasonable for injury victims to seek to maximise their recovery. Indeed we also consider this is consistent with the requirement for victims of injury to mitigate their loss as much as possible.

	Many clients experience difficulties in terms of delay in provision of care or more fundamentally the ability to access the correct level of rehabilitation and care. This is more so in cases where injury victims live in more remote locations. Additionally, private care provides greater options to the injury victim which is more likely to optimise their recovery. The ability to access and recover the financial cost for the provision of private care costs is therefore an essential part of any compensation claim, in our view. The costs of travel and other associated costs incurred, such as accommodation, to access private medical treatment which is of greater benefit to any injury victim is essential. Post COVID-19 pandemic, waiting times within hospitals for outpatient treatment is longer than has been for several years. This can be seen in respect of physiotherapy treatment, orthopaedic outpatient clinics, and mental health services. Recent discussions with a Consultant Orthopaedic Surgeon who is based within Greater Glasgow Health Board has highlighted that current waiting times for elective orthopaedic surgery is beyond two years. There are concerns that some of the patients on these lists will simply not receive the surgery required. A recent Public Health Scotland publication on psychological therapies waiting times in Scotland has shown that more than four out of five people waiting for psychological therapies had to wait a minimum of 18 weeks to commence treatment. For an injured person to wait this long, as a minimum, to commence treatment holds no advantage to the injured person or responsible party. The position is the same whether the injured person requires treatment for a physical injury, psychiatric injury, or both. If an injured person has the ability to commence treatment at the earliest possible stage then it bears a better prognosis in terms of recovery and hopefully an ability to get back to the position that they were in before the accident. This is advantageous to the responsible party as if an injured person is back to their pre-accident state at the earliest possible stage then it is likely that a lesser payment of damages will be due, even with the reimbursement of private medical expenses. Notwithstanding the fact that the general premise of damages is to put the injured person back to their pre- accident position as much as possible. As an example, in recent years, the development of immunotherapy drugs for the treatment of mesothelioma has advanced significantly but many remain available only through private sources.

	Section 2(4) together with the appropriate use of periodical payments and/or Joint Minutes between parties allows for potential future costs to be met by the responsible party where reasonably incurred.
Drummond Miller LLP	Yes.
Faculty of Advocates	The Faculty agrees that it should remain in force for the reasons set out in paragraph 3.66 of the Discussion Paper. The Faculty would add that, in many higher value cases, the cost of medical treatment and the cost of care can be the most significant elements in terms of the sums involved. In relation to claims for care, the cost of professional long term care may far exceed the cost of such care as the state is able to provide. It is often the case that a higher level of care can be obtained privately. That may not be so in relation to medical treatment. However, the general principle that the injured party should not be penalised for making reasonable choices in relation to treatment or care, would seem to apply to both. In both cases, an injured person also has to prove that as matter of fact they will obtain the treatment or care
DAC Beachcroft	Yes. Section 2(4) of the 1948 Act is intended to ensure that injured parties seeking treatment are not penalised simply by the fact they have sought private care rather than care from the NHS. We can foresee a problem being caused by injured people having to wait for NHS treatment when they could have been treated early and their recovery accelerated by recourse to private medical treatment. The cost of the private care would, either wholly or in part, be offset by the fact that the cost of continuing medical treatment, rehab and perhaps even aids and equipment would be lower than otherwise.
Horwich Farrelly Scotland	Yes.
Association of British Insurers	We agree
Society of Solicitor Advocates	Yes
Forum of Scottish Claim Managers	Yes, we agree that section 2(4) of the 1948 Act should remain in force.
Direct Line Group	Yes, DLG agrees; it allows freedom of choice for injured persons to utilise NHS or private facilities and reflects the court's approach to this issue.
NFU Mutual	Yes, NFUM agree that section 2(4) of the 1948 Act should remain in force. NFUM do not believe that an injured party should be prevented or penalised for seeking the most appropriate and available treatment for their injuries and recovery. Availability of NHS provisions and location may have an influence over the treatment available

	The matter to be considered is the reasonableness of the medical treatment sought on the specifics of the case with the over-riding objecting being to achieve as positive a recovery as possible and avoid unnecessary delays in rehabilitation.
Kennedys Law	Yes , although equally it should remain the case that damages sought for private health care should otherwise be reasonable and incurred in a manner otherwise consistent with the injured party's duty to mitigate losses.
Law Society of Scotland	Yes.
Medical and Dental Defence Union of Scotland	Section 2(4) provides that defendants who pay for the future healthcare and treatment of injured patients must do so on the presumption that such care will be provided by the private sector. We believe this presumption is mistaken and therefore this section should be repealed. Over recent years, concerns have been raised about the substantial cost of care packages factored into damages awards, specifically via the provision of section 2(4). We have long maintained that the outdated provision of section 2(4) leads to the demonstrably false assumption that all – or even the majority of – care will be provided by the private sector. This does not reflect the reality of how such care can or should be provided. Many claimants who receive damages for future healthcare continue to utilise the excellent and readily accessible NHS services. The current system creates the diversion of significant sums of money from the NHS to the small number of individuals who are then able to obtain their own care and rehabilitation arrangements on a private basis. This is to the detriment of both NHS treatment providers, who may have seen funding reduced due to the impact of litigation costs on the NHS, and also those individuals who are reliant on state services, but are not able to attribute their injury, illness or disability to a negligent act. The repeal of section 2(4) would allow the retention of additional funds within the NHS due to the reduction in compensatory sums payable for future healthcare and treatment. These sums would allow the NHS and local authorities to extend the provision of their services, benefitting not only the injured party but also those who are not subject to a negligent act. Furthermore, medical defence organisations like ourselves and other personal injury defendants such as employers, insurers and public bodies would be able to fund a package of NHS and local authority care as part of any compensatory award, effectively further funding the NHS. The repeal of section 2(4) is essential to reduce the pressure on healthcare clinicians and the NHS and to ensure that the size of awards reflect the availability of NHS services, both directly provided and indirectly commissioned. Likewise, assessments of social care needs should start from a presumption of local authority provision and/or commissioning unless there is some specific demonstrable reason, unique to the facts of the case, which clearly renders that unreasonable. Indeed, there seems no reason in principle why courts could not seek to commission assessments and specify

	the precise packages of care to be delivered. By doing so, this would help restore balance to the claims system and allow the harms that have arisen to be addressed through health and social care provision, rather than being treated in a potentially unnecessarily expensive way. It is worth noting that, in England and Wales, the Health and Social Care Committee recently concluded2 that: "123. Compensation should be based on the additional costs necessary to top up care available through the NHS and social care system, rather than the current assumption that all care will be provided privately. Whilst we recognise that additional care costs are difficult to calculate, we recommend that they should be modelled using practice established in international patient injury compensation schemes. We further recommend that Section 2(4) of the Law Reform (Personal Injuries) Act 1948 should be repealed for clinical negligence cases brought against NHS organisations in England."
Action on Asbestos	Yes. It is entirely reasonable for the injured person to seek the healthcare services they need from the provider that best suits their needs. The injured person must have access to those services that offer the best chance of rehabilitation or recovery and should not be restricted to only those services provided by the NHS. To illustrate, at Action on Asbestos, we have known people with mesothelioma to use their savings or their award under the Pneumoconiosis etc. (Workers Compensation) Act 1979 to access new treatments for mesothelioma that were not available through the NHS Scotland. The treatment and management of mesothelioma is evolving, and new trials will inevitably lead to new treatments becoming available in the future. The injured person must have the right to access new treatments through private medical care and must have the right to have these costs recouped.

12. Do you consider that any further reform of the existing regime in relation to the costs of an injured person's medical treatment is necessary?

(Paragraph 3.72)

Stuart McMillan MSP	Yes – that industrial diseases be included in the definition of 'disease' in relation to the 2003 Act, so that medical treatment costs can be recouped from employers
Zurich Insurance UK	No
Ronald E Conway	No
Clyde & Co (Scotland) LLP	There is presently a risk that damages paid to account for treatment yet to be undertaken will not ultimately be spent on treatment by injured persons. In that event, they are in essence double compensated for other heads of their claim. Pre-litigation, some form of mandatory system whereby

	insurers arrange and pay directly for treatment issued and completed prior to ultimate settlement may avoid this.
Association of Personal Injury Lawyers	No.
Stagecoach Group plc	We consider that the existing regime in relation to the costs of an injured person's medical treatment are fair and appropriate and should not be altered.
Forum of Insurance Lawyers	FOIL identifies that there is presently scope for damages paid in respect of future medical treatment (as yet to be undertaken) to not ultimately be spent on that treatment. In such a scenario, injured persons are over compensated.
University of Aberdeen Law School	Following the introduction of section 202 of the Health and Social Care (Community Health and Standards) Act 2003, we consider that no further reform of the existing regime in relation to the costs of an injured person's medical treatment is necessary.
Tom Marshall	No.
Unite the Union Scotland	Section 150 (5) of the Health and Social Care (Community Health and Standards) Act 2003 (the '2003 Act') provides that: ' "injury" does not include any disease' In our view this is an unsustainable omission given the thousands of industrial related diseases diagnosed in Scotland every year caused by negligent working practices and the resultant strain on the NHS which results. We fully support the aims and purpose of the Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill, introduced in the Scottish Parliament by Stuart McMillan MSP on 9th March 2020 and considered by the Health and Sport Committee at Stage 1 on the 3rd and 10th November 2020. The Bill has since been withdrawn on the basis that the Financial Memorandum was not yet robust enough. In our view, this is insufficient reason to abandon the principal aim of the Bill, namely to bring the costs of treating disease in line with that of treating injuries caused by accidents.
Senators of the College of Justice	No. The provisions of the Health and Social Care (Community Health and Standards) Act 2003, in that regard, are appropriate, sufficient, and operate well in practice.
Aviva Insurance Ltd	No we do not. Any argument for further reform of the existing regime could give rise to serious unintended consequences and the should be considered carefully as to the balance between the cost of implementation against the actual amounts expected to be recovered.
Digby Brown LLP	No

Thompsons Solicitors Scotland	Section 150 (5) of the Health and Social Care (Community Health and Standards) Act 2003 (the '2003 Act') provides that: ' "injury" does not include any disease' In our view this is an unsustainable omission given the thousands of industrial related diseases diagnosed in Scotland every year caused by negligent working practices and the resultant strain on the NHS which results. We fully support the aims and purpose of the Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill, introduced in the Scottish Parliament by Stuart McMillan MSP on 9th March 2020 and considered by the Health and Sport Committee at Stage 1 on the 3rd and 10th November 2020. The Bill has since been withdrawn on the basis that the Financial Memorandum was not yet robust enough. In our view, this is insufficient reason to abandon the principal aim of the Bill, namely to bring the costs of treating disease in line with that of treating injuries caused by accidents.
Drummond Miller LLP	No
Faculty of Advocates	Recovery of NHS charges is, as identified in the discussion paper, a question of policy. It does not feature in the calculation of damages (although the reduction of the compensator's liability where contributory negligence is a factor can be an issue in settlement discussions – see section 152(3) of the 2003 Act). It is primarily a matter for the compensator or his insurers, and the Faculty does not have any comment to make in response to this question
DAC Beachcroft	No. The compensator must already contribute to the cost of ambulance services provided and for the injured person's stay in hospital. That the cost of the NHS treatment provided falls on the taxpayer is correct but perhaps misses the point that the "taxpayer" includes insureds and insurers. It might be argued that they are contributing twice over, once as the compensator as the result of an injury and again as an entity paying taxes which are used to fund the NHS. We emphasise that there are no issues with this and we do not advance any countering case on this point.
Horwich Farrelly Scotland	No
Association of British Insurers	No. It should be noted that any changes to the existing regime could have unintended consequences and the cost of administration could be disproportionate to the benefits gained.
Society of Solicitor Advocates	No
Forum of Scottish Claim Managers	No we do not consider that any further reform of the existing regime in relation to the costs of an injured person's medical treatment is necessary. We agree with the consultation paper that issues in relation to medical treatment and who bears the cost of it are being satisfactorily addressed.

	Any changes to the existing regime could have unintended consequences and the cost of administration could be disproportionate to the benefits gained.
Direct Line Group	DLG does not consider further reform is necessary. Recovery of NHS ambulance services and in/outpatient treatment charges (which are reviewed annually) are already allowed from compensators.
NFU Mutual	No, NFUM do not consider that any further reform of the existing regime in relation to the costs of an injured person's medical treatment is necessary. We agree with the consultation paper that issues in relation to medical treatment and who bears the cost of it are being satisfactorily addressed. Any changes to the existing regime could have unintended consequences and the cost of administration could be disproportionate to the benefits gained.
Kennedys Law	No
Law Society of Scotland	No
Action on Asbestos	Yes. Currently, the legislative framework provides for the costs of hospital care and ambulance transport to be recovered from the responsible party where there has been an accident. The same provisions do not apply for industrial diseases and thus, the cost to NHS Scotland for transporting and caring for a person with an asbestos related disease cannot be recovered by the responsible party. Instead, NHS Scotland has to meet the financial burden resulting from the negligence of the responsible party. This is inconsistency cannot stand as it creates inequal access to damages. The provisions of the Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill aimed to address this and the provisions of the Bill can be brought within any reform of the existing regime. It is proposed that consideration ought to be given to including within benefits in kind, not only medical treatment and care and accommodation, but the emotional and psychological support provided by charitable organisations out with private health care or NHS Scotland.

13. Do you agree that the default position should be that the responsible person rather than the state should pay for the cost of care and accommodation provided to an injured person?

(Paragraph 3.93)

Stuart McMillan MSP	Yes

Zurich Insurance UK	Yes - providing the need arises from the actions of the responsible person and was not a pre-existing situation, which the responsible person then exacerbated. The responsible person's liability should be limited to the extent of their proven culpability. For example, where an injured person is already in state-funded accommodation and the state provide a property for them, it should not have to be paid for by the responsible party. This equally applies to care costs. However, if the need solely arises due to the actions of a responsible party, there should be a provision to prevent double recovery. It also needs to be recognised that an injured person as pursuer may be guilty of contributory negligence to some degree, the extent of which should not be visited upon the other party.
Ronald E Conway	Yes, on polluter pays principle
Clyde & Co (Scotland) LLP	Not if the injured person chooses to receive that care or accommodation from the state. An injured person's capacity for choice ought to be preserved, but as highlighted in our response to Question 11, considerations of public policy must also be addressed. We do agree that compensators should only be obliged to compensate the injured person for tangible losses sustained by them. If the state levies charges to the injured person for the care or accommodation provided, we agree that compensators should meet those charges. However, any further cost to the state that is not factored into those charges are not losses suffered by the injured person and should not be borne by compensators.
Association of Personal Injury Lawyers	Yes, we agree. There is not a "state" fund for the injured person to draw on if the responsible person does not pay for the cost of care and accommodation that they now require. There is a postcode lottery of provision, with standards of care available varying widely across Scotland, depending on which local council the injured person falls under. The services for care and accommodation in more rural areas in particular are limited. There are also often arguments between the NHS and local authorities as to who will fund care in a particular situation, which can mean that said care is not forthcoming. For example, where a severely disabled child requires a high level of care to be able to attend a nursery, the level of care required may be such that the local authority says that the NHS should be the body to provide the care, but the NHS may disagree. It is not right that an injured person should have to rely on inconsistent state provision, instead of the responsible person paying for the cost of care that is required as a result of their negligence.
Stagecoach Group plc	We agree in principal that the responsible person should pay for the cost of care and accommodation provided to an injured person. We do, however, have concers regarding how the cost of case and accommodation will be met where there are issues of contributory negligence and any award of damages would not

	cover the full cost of the Pursuer's needs. There will always remain a requirement for local authority funding.
Forum of Insurance Lawyers	FOIL accepts this proposition. However insurers / compensators ought only to be required to pay damages to an injured person for tangible losses sustained.
University of Aberdeen Law School	Yes, we agree that the default position should be that the responsible person rather than the state should pay for the cost of care and accommodation provided to an injured person.
Tom Marshall	Yes.
Unite the Union Scotland	We agree the default position should be that the responsible person, rather than the state, should pay for the cost of care and accommodation provided to an injured person. We consider this approach to be wholly in keeping with the most fundamental delict principle to make reparation and is just, reasonable, equitable and in accordance with the type of anticipated costs which liability insurance policies cover.
Senators of the College of Justice	Yes, we agree with the approach set out at paras. 3.76 – 3.78. That is consistent with the general principles of the law of reparation.
Aviva Insurance Ltd	Our opinion is that the current position remains correct. As highlighted in the discussion paper, contributory negligence poses a particular problem if the default position is that the responsible person should pay for the cost of care and accommodation. If a Defender was found to be 25% at fault and a Pursuer was 75% at fault, 25% of damages is not going to be able to fund anything like an injured Pursuer's needs.
Digby Brown LLP	Yes, we agree. The quality and extent of local authority provision of care and accommodation varies across the country and it is inequitable to expect an injured person to rely on local authority provision when the option of private care and accomodation exists and is often better suited to the injured party's needs. The burden of paying for care and accommodation should fall on the wrongdoer and not on the local authority and, simply because there is a publically funded option available, should not mean that the injured person has no choice but to rely on this.
Thompsons Solicitors Scotland	We agree the default position should be that the responsible person, rather than the state, should pay for the cost of care and accommodation provided to an injured person. We consider this approach to be wholly in keeping with the most fundamental delict principle to make reparation and is just, reasonable, equitable and in accordance with the type of anticipated costs which liability insurance policies cover.

Drummond Miller LLP	Yes. The ability of the state to pay might change and the quality of that care / accommodation might not be suitable or what the client really needs. State care may be very basic and will vary. The injured person should be entitled to pay for the care they reasonably need and to know that they have the ability to meet that standard / level of care for life (if due to the fault of another). It could also place further pressure on the state if the state is expected to look after injured people through negligence of others.
Faculty of Advocates	This again looks to an extent to be a question of policy. The Faculty does however agree with the proposition in the question.
DAC Beachcroft	No. The default position should be that, in each case, an assessment should be made in the injured person's best interests as to what care and accommodation is necessary and how it is best provided. In certain cases that will be NHS/local authority care and accommodation and in other cases it will be more suitably provided by the private sector.
Horwich Farrelly Scotland	We see no reason to depart from the status quo at present.
Association of British Insurers	We agree that if the cause of the provision by the state is the act of a responsible person, then the default position should be that the responsible person should have to pay for such costs, subject to double recovery considerations. However, the immediate needs of the injured person are paramount and meeting them should not be contingent on a potentially successful claim – in that context, the obligation of local authorities to provide care and accommodation remains vital. There are practical considerations as in reality, it can take time to establish who the responsible person is and as the discussion paper highlights, in claims where there is contributory negligence there is a particular problem as an injured person's award of damages will not cover the full cost of their care and accommodation needs.
Society of Solicitor Advocates	Yes
Forum of Scottish Claim Managers	We agree that the default position should be that the responsible person should pay for the cost of care and accommodation provided to an injured person. There are however practical considerations to be considered and the local authority obligation to provide care and accommodation remains vital. In reality it can take time to establish who the responsible person is and as the consulation highlights in claims where there is contributory negligene there is a particular problem as an injured persons award of damages will not cover the full cost of their care and accommodation needs.
FOCIS	We agree that the responsible person should pay for the cost of care and accommodation and not the state. By providing that the responsible person pays for care it will give consistency in care and ensure a higher level of care and in particular geographical areas where the provision of care and

	accommodation is limited. It is also consistent with the civil law principal that wrongdoers should be required to compensate for the losses and damage they cause, plus it reduces the extent to which such costs fall to the state and hence the tax payers.
Direct Line Group	No, we do not agree for several reasons. Firstly, the injured person should continue to have a right a choice to opt for state or private care and accommodation so the state may have no involvement in funding care or accommodation that meets their reasonable needs. Secondly, for matters where there is an element of contributory negligence on the part of the injured person, state funding may be essential for them to meet their reasonable care requirements as the tortfeasor is not liable for the full cost of care and/or accommodation. Thirdly, an injured person may prefer to remain under the care of the NHS to ensure a continuity of care. This is particularly important where a serious injury, such as brain or spinal, has been sustained and involvement in a joined up NHS care regime which caters for regular reviews, capacity for urgent treatment, presence of the same treating Consultant(s) etc will be beneficial to that person's recovery.
NFU Mutual	NFUM agree that the default position should be that the responsible person should pay for the cost of care and accommodation provided to an injured person. However, it is often difficult to assess during the acute recovery phase who the responsible party is and it therefore remains vital that NHS provisions and local authority care and accommodation responsibilities remain. As highlighted within the discussion paper, in cases involving a level of contributory negligence a reduction in the amount of damages shall be agreed which may result in a shortfall in the amount of damages available to cover the cost of care needs. In such cases what should be assessed is what is in the best interests of the pursuer and ensures the greatest level of support for their ongoing needs.
Kennedys Law	Yes, but strictly on the basis that the recoverability of the cost of care and accommodation is subject to the usual test of considering whether the cost was reasonably incurred, was causally connected with the events complained of, and was appropriately mitigated by the injured party
Law Society of Scotland	Yes
Medical and Dental Defence Union of Scotland	Please see our response to question 11 above.
Action on Asbestos	Yes, agree.

14. Do you agree that an injured person should be entitled to opt for private care and accommodation rather than rely on local authority provision?

(Paragraph 3.93)

Stuart McMillan MSP	Yes
Zurich Insurance UK	Yes. We believe that, as in England & Wales, an injured person should have a choice as to how they wish for their care needs to be administered when they arise due to the actions of another and a legal liability to compensate subsequently arises.
Ronald E Conway	Yes. A pursuer will have to show proposals for future care, services, accommodation are reasonable.
Clyde & Co (Scotland) LLP	Yes, but only if it can be shown that the private care opted for will better attend to the injured person's needs than local authority provision.
Association of Personal Injury Lawyers	We agree. Allowing an injured person to opt for private care and accommodation will assist local authorities in managing already stretched budgets for provision of care. It would not be feasible to require all injured people to rely on local authority provision, as there are simply not the funds available to support this. Further, those who have no choice but to rely on local authority provision should not have their access restricted due to budgetary constraints, caused because the local authority is also having to fund care for those people injured by the negligence of another. In those circumstances, the wrongdoer must be the one to pick up the bill. Further, local authority provision is often not geared up to provide for the range of needs of those who are injured as a result of negligence – as highlighted in the case study provided above. For example, local authority care is largely set up for the elderly living in the community, or those who have long-term disabilities but who are able to live independently. Those who are injured through negligence do not necessarily or often slot into the services that are available under the local authority -for example, provision for those who are young and have a brain injury is often lacking, and it is difficult to access state funded services that are suited to their needs.
Stagecoach Group plc	We do not agree that an injured person should be entitled to opt for private care and accommodation where the provision by a local authority is adequate and can be accessed. The award of damages is intended to provide funding to achieve restitution. It should not be expected to meet standards that the Pursuer could not have achieved under their own steam

	but for their loss or injury. In addition, use of local authority funding is likely to be available going forward which may not be the position where care and accommodation os provided by private enterprise. Where there is unavailability of local authority provision, it is accepted that use of a private provider may be considered. Where funding for private care and accommodation is awarded, there should be some mechasism created to ensure that the funds are used for that purpose.
Forum of Insurance Lawyers	FOIL does not consider that an injured person should be entitled to opt for private care and accommodation in place of local authority provision, provided that local authority provision is both accessible and adequate. Any award of damages should be concerned with implementation of the general principle of damages, namely restitutio in integrum. Further, it is reasonable to assume that local authority provision will continue indefinitely and in perpetuity (unlike provision from any given private provider). Utilisation of local authority care reduces the risk of compensation being depleted or inadequate to meet the care requirements of an injured person. FOIL submits that fair and equal care for all injured persons (ie irrespective of fault or litigation) should be the primary focus of policy in this field, rather than a desire to maximise awards of damages. FOIL observes that the adoption of local authority care as the default position largely precludes the possibility of a two tier system of care developing, whereby a division may arise between those injured by a responsible person, and those who are not (or who are unable to demonstrate that they were). However, FOIL also accepts that accessibility of local authority provision may be a particular issue in some parts of Scotland, given issues of geography and remoteness etc. Accordingly, if it can be demonstrated that local authority care is either inaccessible or inadequate (ie on cause shown), then it is accepted in those circumstances private care and accommodation may be a more equitable solution. This however should be the exception, rather than the rule
University of Aberdeen Law School	Yes, we agree that an injured person should be entitled to opt for private care and accommodation rather than rely on local authority provision. In our view it should always be considered reasonable for an injured person to choose private care and accommodation, including in those instances where local authorities

	would otherwise hold a statutory duty to make the same provisions, and injured persons should not be required in an action to justify their choices.
Tom Marshall	Yes. Apart from any other reason, local authority or other social housing may not be available.
Unite the Union Scotland	We agree. We adopt the general propositions summarised in paragraph 3.92 of the Discussion Paper.
Senators of the College of Justice	Yes. We do not consider that a different approach should be taken from that decided in *Peters v East Midlands Strategic Health Authority*, as summarised at para. 3.91, to the effect that the injured person *should* be entitled to opt for private provision of care, subject to the requirement that the costs of the care and accommodation incurred should themselves be reasonable.
Aviva Insurance Ltd	We do not agree that an injured person should be entitled to opt for private care and accommodation rather than rely on local authority provision, provided that local authority provision is accessible and adequate. An award of damages should be concerned with what is reasonable to achieve restitution. In addition, it can be assumed that provision by local authorities will continue in perpetuity (unlike provision by a particular private provider), which reduces the risk of compensation being depleted. However, we recognise that accessibility of local authority provision may be a particular issue in some areas of Scotland, and in those circumstances private care and accommodation may be a more equitable solution to the extent that it is more accessible. This is caveated by the fact that injured persons can be compensated for transportation to access care, so while accessibility of local authority provision may be an issue in some areas it will not always follow that private care and accommodation is the most equitable solution. In addition, should an injured person opt for private care and accommodation rather than rely on local authority provision, we would support a requirement for there to be an undertaking that they will in fact use private provision.
Digby Brown LLP	Yes, we agree. Given the constraints on local authority budgets, it is unreasonable to expect all injured parties to rely on local authority care and accommodation. It must also be borne in mind that the often complex needs of those injured through the fault of another are unlikely to be met by local authority provision. Local authority care and accommodation is not set up to offer the degree of flexibility that is often needed to meet the needs of the injured person. An injured person should not have to compromise in relation to care and accommodation simply to reduce the damages payable by the wrongdoer. The wrongdoer ought to meet the cost of private care and accommodation where it is reasonable for the injured party to opt for this and should not benefit from the fact that there may by local authority provision available, which is not suitable to meet the injured person's needs.

	Care provided by a local authority in the injured person's home often lacks flexibility, with the carers working to a tight schedule and often coming to assist at times that are not necessarily suitable for the injured party. For example, the carers may arrive to get the injured person out of bed late in the morning when the injured person has been awake and ready to get up for several hours, or to put the injured party to bed in the early evening when the injured party would prefer a later bedtime. In almost every case in which the pursuer has suffered catastrophic injury, privately funded care and accommodation is better able to meet the needs of the pursuer than local authority provision. An example arises in a case in which we acted for an elderly client who suffered a spinal cord injury resulting in tetraplegia in an accident in a remote area in the north of Scotland. In line with national procedures, the client's care was transferred from his local general hospital to the National Spinal Injuries Unit in Glasgow. He remained there for a number of months while undergoing a rehabilitation programme to allow him to become as independent as possible. On completion of this programme, he was transferred back to his local general hospital while suitable accommodation was found. His local hospital discharged him into a care home. This was detrimental for 2 reasons. Firstly, the National Spinal Injuries Unit had spent months working on his rehabilitation to teach him how to be as independent as possible. In a care home setting, the gains made with his rehab and independence were soon lost and he was not given the opportunity to be independent. Secondly, although the carers had his best interests at heart, they simply did not have the training necessary to enable them to deliver care to a person with a spinal cord injury. Within care homes, there tends to be a high turnover of staff, so although existing staff can be trained on how to deliver the most appropriate care, it is often the case that training is not repeated when those carers leave and are replaced with new staff. It was agreed by all parties involved in this case that the pursuer's care needs would be best met in his own home supported by a team of specially trained carers. In another case we represented a client in his 40s who suffered a severe traumatic brain injury in a road traffic accident. This resulted in a loss of capacity and his parents were appointed as guardians. He remained in hospital for a considerable period and, when discharged, moved into his parents' house as he could no longer live independently. His parents were both in their 70s and it was not considered reasonable to expect them to provide the care that the client required. Local authority support was arranged and the package included care at home seven days per week, but limited to twice per day, for about 45 minutes in the morning and half an hour at night. This limited care placed a significant burden on his ageing parents as they were left in the situation of having no option but to provide the additional support that their son required.

	We managed to secure an interim payment so that the client could rent suitable accommodation and a private care package that provided much for more flexibility and removed the burden from his family.
Thompsons Solicitors Scotland	We agree. We adopt the general propositions summarised in paragraph 3.92 of the Discussion Paper.
Drummond Miller LLP	Yes. Please refer to answer 13. There could be resourcing issues and you don't know what changes might be implemented in the future in terms of local authority care – why should the injured party have that concern in addition to lifelong injuries caused through no fault of their own. Local Authorities are already stretched.
Faculty of Advocates	Yes. The Faculty notes that Sowden v Lodge was considered by Lord Stewart in *Clark v Greater Glasgow Health Board* 2016 Rep LR 126 in which he said at paragraph [4]: 'The principle derived by the pursuer is that if a claimant proposes a particular care regime it is for the wrong-doer to pay for that regime in damages unless the proposed regime is unreasonable: it is not for the court to decide what is "in the best interests" of the claimant or to stipulate for the minimum acceptable level of care. The principle is correctly stated but does not greatly help in the present case. The cited decisions have to be understood in context.' The Faculty agrees that the injured person should be entitled to opt for private care. The Faculty sees no reason in principle for differentiating between medical treatment and care, even if section 2(4) of the 1948 Act makes the position certain in relation to the former. As observed in response to question 11 above, a crucial hurdle that a claim must pass is proving what care or treatment will in fact be used. By way of illustration, in Clark, the pursuer argued that a (private) care regime should be run by an agency rather than simply arranged by the family. The difference in cost was more than £80,000 a year. The court was not satisfied that such an expensive model would in fact be employed. An identical question would arise when comparing private and public provision – if the likelihood is that the public provision would be used, the award of damages should reflect that. If, due to the nature of public provision of care services and the resources available to them, in the majority of cases an injured person would be better with private care, it would seem wrong to deprive him of that opportunity. The Faculty considers that the principle of reparation answers this question in the affirmative
DAC Beachcroft	Yes. This would make the approach in relation to care and accommodation the same as for medical treatment and provide a consistent approach. We refer to the English Court of Appeal decision in Peters v East Midlands SHA [2009] EWCA Civ.145. In this decision the court decided that there was no reason in policy or principle why a claimant who wished to opt for self-funding and damages in preference to reliance on the statutory obligations of a public authority should not be entitled to do so as a matter of right, provided there was no double recovery.

Horwich Farrelly Scotland	Yes, subject to the caveat that such private care is reasonable, necessary and proportionate. It should not be an unfettered entitlement but one which is assessed based on principles of delivering justice. There will be situations in which local authority provision can meet needs adequately. There will be situations in which there is no local authority provision or what is available is inadequate. The issue should be assessed against the background of the claim.
Association of British Insurers	We do not agree that an injured person should be entitled to opt for private care and accommodation rather than rely on local authority provision, provided that local authority provision is accessible and adequate. An award of damages should be concerned with what is reasonable to achieve restitution. In addition, it can be assumed that provision by local authorities will continue in perpetuity (unlike provision by a particular private provider), which reduces the risk of compensation being depleted. However, we recognise that accessibility of local authority provision may be a particular issue in some areas of Scotland, and in those circumstances private care and accommodation may be a more equitable solution to the extent that it is more accessible. This is caveated by the fact that injured persons can be compensated for transportation to access care, so while accessibility of local authority provision may be an issue in some areas it will not always follow that private care and accommodation is the most equitable solution. In addition, should an injured person opt for private care and accommodation rather than rely on local authority provision, we would support a requirement for there to be an undertaking that they will in fact use private provision – double recovery should be prevented.
Society of Solicitor Advocates	Yes
Forum of Scottish Claim Managers	We do not agree that an injured person should be entitled to opt for private care and accommodation rather than rely on local authority provision, provided that local authority provision is accessible and adequate. An award of damages should be concerned with what is reasonable to achieve restitution. In addition, it can be assumed that provision by local authorities will continue in perpetuity (unlike provision by a particular private provider), which reduces the risk of compensation being depleted.

	However, we recognise that accessibility of local authority provision may be a particular issue in some areas of Scotland, and in those circumstances private care and accommodation may be a more equitable solution to the extent that it is more accessible. This is caveated by the fact that injured persons can be compensated for transportation to access care, so while accessibility of local authority provision may be an issue in some areas it will not always follow that private care and accommodation is the most equitable solution. In addition, should an injured person opt for private care and accommodation rather than rely on local authority provision, we would support a requirement for there to be an undertaking that they will in fact use private provision.
FOCIS	We strongly agree with this proposal. Local authorities and some more than others have budgetary constraints and are unable to provide the level of care required for persons with severe and long term injuries which is commensurate with the civil law principle of restitution. This is particularly relevant to the more remote rural geographical areas. The tests for eligibility and provision of local authority care and accommodation are effectively safety nets aimed at preserving life, whereas the civil law test consistent with the principle of restitution is for the provision to be at a level that restores the quality of life of the injured person to as close to their pre-accident position as is achievable. So to take an example, a severely injured person who pre-accident regularly rode horses but who could now only do so with the assistance of a carer might have a strong claim for the private care cost for that within their damages claim, but little if any prospect of local authority care provision to pursue such a leisure activity.
Direct Line Group	DLG agrees; this position reflects the existing position around an injure person's freedom of choice to choose between private or local authority care and accommodation provision which is reasonably required to meet their needs.
NFU Mutual	NFUM do not agree that an injured person should be entitled to opt for private care and accommodation rather than rely on local authority provision. Unless reasonable arguments exist, which would place the

	injured party at a disadvantage, such as that the local authority provision is not accessible or is inadequate An award of damages should be concerned with what is reasonable to achieve restitution. In addition, it can be assumed that provision by local authorities will continue in perpetuity (unlike provision by a particular private provider), which reduces the risk of compensation being depleted. However, we recognise that accessibility of local authority provision may be a particular issue in some areas of Scotland, and in those circumstances private care and accommodation may be a more equitable solution to the extent that it is more accessible. This is caveated by the fact that injured persons can be compensated for transportation to access care, so while accessibility of local authority provision may be an issue in some areas it will not always follow that private care and accommodation is the most equitable solution. In addition, should an injured person opt for private care and accommodation rather than rely on local authority provision, we would support a requirement for there to be an undertaking that they will in fact use the private provision.
Kennedys Law	We do not consider that it should automatically be concluded in all cases that it is reasonable to have recourse to private care and accommodation. However, we accept that, in certain cases and circumstances, the lack of, or nature of, local authority provision to cover all of an injured party's needs may justify recourse to private care providers. This should be subject to the usual reasonableness test and the usual duty on the part of the injured party to mitigate losses. Accordingly, we would not propose that recourse to private care should automatically be precluded, or automatically concluded to be unreasonable, in all cases.
Law Society of Scotland	Yes

Medical and Dental Defence Union of Scotland	Please see our response to question 11 above. For the avoidance of doubt, our position is that the default would be to consider the availability of local authority provision. Only if the injured person's needs could not be fully met through that provision, should there be consideration of topping this up with private care and accommodation.
Action on Asbestos	Yes, agree. The injured person should be given the option of securing care and accommodation that provides their best outcome in relation to recovery and rehabilitation.

15. Do you have any other comments?

(Paragraph 3.93)

Zurich Insurance UK	No
Stagecoach Group plc	No
Forum of Insurance Lawyers	FOIL has no further comment to make on this aspect of the consultation
University of Aberdeen Law School	We consider that it would improve the consistency and clarity of the law in this area if the principles applied to recovery for medical treatment and those applied to recovery for care and accommodation were brought so far as possible into line. This is particularly in light of broader policy and political shifts towards the integration of healthcare, social care and community care services.
Tom Marshall	I have not been able to give this topic detailed consideration.
Unite the Union Scotland	None
Senators of the College of Justice	We note that, as set out at para. 3.63, on the basis of the evidence previously considered by the Law Commission of England and Wales, the risk of abuse and double recovery is not problematic, but that, in any event, the matter, if it arises, could be regulated by the court. We refer to paras. 3.89 and 3.90. We are similarly not aware that the risks of abuse and double recovery, as described, are a real rather than theoretical problem in this jurisdiction.
Aviva Insurance Ltd	No
Digby Brown LLP	No
Thompsons Solicitors Scotland	None
Drummond Miller LLP	n/a

Faculty of Advocates	No
DAC Beachcroft	No
Horwich Farrelly Scotland	No
Association of British Insurers	No
Society of Solicitor Advocates	No
Forum of Scottish Claim Managers	No
Direct Line Group	No, DLG has no additional comments.
NFU Mutual	No
Kennedys Law	No
Law Society of Scotland	No.
Action on Asbestos	No.

16. Do you favour all, some or none of the following options?

(a) the award of damages to an injured person who opts for local authority provision should include the cost of making any payments levied by the local authority for that provision;

(b) where an injured person receives but does not pay for local authority care and accommodation, an award of damages should be made to the local authority to cover the cost of providing it;

(c) where an injured person opts for private care and accommodation, and the award of damages covers the cost of obtaining it, provision should be made to avoid double recovery by, for example, having some procedure equivalent to that in the English Court of Protection.

(Paragraph 3.101)

Stuart McMillan MSP	(a) – Yes (b) – Yes (c) - Yes
Zurich Insurance UK	(a) No (b) No (c) Yes

Ronald E Conway	Option (a) if sums are levied against injured person. they should be recoverable in damages In so far as double recovery is concerned it is true that in most cases there is a preference by the injured person or family to have that accommodation, care etc at home. Problems might arise where there is an element of contributory negligence which would make such provision unrealistic. In catastrophic injury cases there will generally be discounts on various heads of loss, and parties and their advisors can usually reach agreement. It would always be open to a defender to insist on a liability proof, and to ask the court to view the accommodation proposasl through the prism of percentage liability. I am aware that in England in the case of *Peters v East Midland HA [2009] EWCA Civ 145 (QB)* complicated undertakings involving the Court of Protection were involved. Not only do we not have any such oversight, but that procedure has not been generally followed . *See eg Harman v East Kent Hospital NHS Foundation Trust 2015 [EWHC]1662 QB.* I don't believe there is any pressing need for reform in this area.
Clyde & Co (Scotland) LLP	(a) Yes. This would reimburse direct expenditure by the injured person that would not have been incurred but for the accident. (b) No. We anticipate that the cost to insurers of such a development would have an undesirable effect on the insurance market, most particularly the affordability of insurance products, at large. We are of the view that this could also lead the way to unworkable precedents on, for example, the extent to which the CRU can recover the cost of NHS treatment issued to pursuers beyond the immediate post-accident period. (c) Yes.
Association of Personal Injury Lawyers	There should not be a deduction from the pursuer's damages for local authority provision as there will be no control over the quality of this provision, and no accountability from the local authority to provide a certain level of quality for the money charged. The starting point must be that if private provision is required, then this should be paid for by the wrong-doer, and then if local authority provision is required further down the line, the funds will be made available by the defender to make that provision in line with the particular local authority's processes. There may be double recovery in some circumstances, which would be unavoidable, but we suggest that the balance should be that if there is an unavoidable risk of double recovery

	versus double loss, the risk should lie with the wrongdoer's insurer. There should not be a main focus on adapting the law to prevent double loss for the wrongdoer, at the expense of denying the injured person access to the correct services. This approach is in line with the direction of travel in cases such as Swift v Carpenter1 . In Swift, Lord Justice Irwin stated "There are well established examples in the field of tort where a degree of overcompensation has proved unavoidable... If it were to prove impossible here to award a claimant full compensation without a degree of over-compensation, then it seems to me likely that the principle of fair and reasonable compensation for injury would be thought to take precedence."
Stagecoach Group plc	We support option c. We would prioritise two issues here. Firstly, we require that the Pursuer received appropriate and adequate care and accommodation. Secondly, there should not be double recovery.
Forum of Insurance Lawyers	(a) Yes. FOIL accepts this represents the equitable implementation of the general principle of restitutio in integrum, referenced in answer 14 above. FOIL does however note the caveat that any such charges should be reasonable and proportionate, to be assessed by a third party if required, to preclude the temptation of revenue creation. This acceptance is also subject to liability considerations. That is to say that, for example, if liability is split 50/50 between an injured person and a responsible person, then only 50% of the levy should be recoverable. This would be in keeping with the established principle and practice in the case of NHS charges, which are not dissimilar (b) No. Local authority care should be available to all, irrespective of causation. If an injured person has not sustained a loss, and a local authority is not seeking reimbursement, there is no basis to extend the scope of an award of damages (c) Yes.
University of Aberdeen Law School	We generally favour a model where an injured person receives but does not pay for local authority care and accommodation, with an award of damages made to the local authority to cover the cost of providing it, over a model in which damages are awarded to the injured person in respect of any payments levied by the local authority. As noted in the Discussion Paper, this would bring the approach to care and accommodation broadly into line with the regime for medical treatment introduced by Part 3 of the Health and Social Care (Community Health and Standards) Act 2003.

	We consider that where an injured person chooses private care and accommodation, robust procedures should be in place for the prevention of double recovery. This would help to undergird the autonomy of injured persons in selecting care and accommodation best suited to their circumstances. We express no view on the specific form of these procedures, although it is likely that the responsible person will need to be notified if an application for statutory care or accommodation is made.
Tom Marshall	See 15 above.
Unite the Union Scotland	We are in favour of options (a) and (b). As is recognised at para 3.100, there is currently no equivalent of the English Court of Protection in Scotland. The establishment of such an equivalent in our view would require further consultation. Nonetheless, there is potential merit in the introduction of such an equivalent since, at present, the uncertainty over whether an injured person will in fact incur the cost of future care and accommodation more often than not leads to under compensation, rather than any potential for double recovery.
Senators of the College of Justice	(a) Yes (b) Yes (c) We refer to our answer to Q.15.
Aviva Insurance Ltd	We would favour option (c). It is imperative that provision should be made to avoid double recovery by, for example, having some procedure equivalent to that in the English Court of Protection. Option (a) ignores the contributory negligence points raised previously and there would no oversight of the reasonableness of the payments levied by the local authority, whilst option (b) ignores that as a matter of public policy local authority provision should be accessible and adequate in any event (regardless of causation). The main issue is one of avoiding double recovery.
Digby Brown LLP	If a choice had to be made, we would favour option (a), but not (b) or (c). We do not face the issue of double recovery very often in Scotland, although we understand that English lawyers continue to face this battle. We have found that Scottish local authorities apply charging policies which state that the authority can take into account compensation paid for care costs even if the damages are paid into a personal injury trust. This helps to get around the issue of double recovery. We also do not yet have court rules for periodical payment orders. We may see more arguments about double recovery if PPOs become more commonplace in Scotland.
Thompsons Solicitors Scotland	We are in favour of options (a) and (b).

	As is recognised at para 3.100, there is currently no equivalent of the English Court of Protection in Scotland. The establishment of such an equivalent in our view would require further consultation. Nonetheless, there is potential merit in the introduction of such an equivalent since, at present, the uncertainty over whether an injured person will in fact incur the cost of future care and accommodation more often than not leads to under compensation, rather than any potential for double recovery.
Drummond Miller LLP	None - where an injured person receives local authority care then in same way as defenders/insurers must pay certain recoverable benefits [CRU] they ought to pay the local authority back for that care. However, the onus should be on the defenders/insurers and not the injured person to deal with such payments and it should not be relevant to the pursuer's claim [in the same way as CRU is]. It should not form part of the award/value of the claim where the care provided for has not been charged"
Faculty of Advocates	The Faculty is of the view that the abovementioned options are properly matters of policy and not law and so the Faculty does not have any comment to make in response this question
DAC Beachcroft	The issue with options (a) and (b) is that, in reality, claims are more often advanced on the basis of the pursuer seeking private provision of services. Even if local authority provision is sought, it is often mixed in with private provision later in life when, perhaps, the local authority care becomes less suitable for the needs of the injured person. The issues referred to in our response to Q15 regarding double recovery come into play. (c) We are not convinced that the institution of a similar body in Scotland to that of the Court of Protection in E&W will achieve the desired object in this broader context, i.e. scrutiny of the expenditure following an award of damages to ensure that double recovery does not take place. The Court of Protection makes decisions on financial or welfare matters for people who lack mental capacity. The majority of cases do not need the oversight of the Court of Protection and injured persons ordinarily do not and should not have to refer their expenditure decisions to an outside body. As the authors of the Discussion Paper admit, there is no certain way to prevent double recovery in this scenario, given that it is a matter of choice for an injured person whether they opt for NHS/local authority or private provision. Our view is that this is a question for the medical/care or other suitable experts in evidence i.e. whether their opinion is that the needs of the injured person could be provided for by the NHS/local authority or private sources. This will guide the court.
Horwich Farrelly Scotland	a) No. b) We can foresee potential issues with such an approach, albeit it would be preferable and more justifiable than option (a).

	c) No. Such an approach would erode the comfort of the finality of litigation in order for parties to arrange their affairs and would likely protract disputes at increased cost.
Association of British Insurers	We would not favour option (a) as it would appear that there would no oversight of the reasonableness of the payments levied by the local authority. Option (b) would be preferable to option (a), but as a matter of public policy local authority provision should be accessible and adequate in any event (regardless of causation). We would favour option (c) insofar as it is imperative that provision should be made to avoid double recovery and preserve the principle of 100% compensation (neither under nor overcompensation). However, any provision made to avoid double recovery should be proportionate and consideration should be given as to how best to (i) control costs in this area (including for pursuers) and (ii) avoid additional burdens on the courts service. It does not necessarily follow that having some procedure equivalent to that in the English Court of Protection is the most efficient and cost-effective way of avoiding double recovery. The Court of Protection makes decisions on financial and/or welfare matters for people who lack mental capacity. The majority of cases do not need the oversight of the Court of Protection and injured persons ordinarily do not and should not have to refer their expenditure decisions to an outside body. In addition, as the discussion paper highlights, there is no certain way to prevent double recovery in this scenario, given that it is a matter of choice for an injured person whether they opt for local authority or private provision. Our view is that this is a question for the medical/care or other suitable experts in evidence i.e. whether their opinion is that the needs of the injured person could be provided for by the local authority or privately. This should guide the court. However, in the event that there is some procedure equivalent to that in the English Court of Protection with a view to avoiding double recovery, we would make the following suggestions to ensure that it is proportionate: • An option for the court to exercise its discretion only if it regards this as necessary to avoiding double recovery; • An undertaking from the injured person that if their arrangements change, then they will inform the court. The court could then again exercise its discretion only if it regards this as necessary to avoiding double recovery;

	• For any court procedure to conclude where possible without the need for a hearing, with the judge reaching a decision by reviewing the case papers and for there to be no right to an advocate/counsel where the approval is granted by means of paper determination; and • For any court procedure to be supported by a new pre-action protocol and/or changes to existing pre-action protocols, as necessary to drive efficiency.
Society of Solicitor Advocates	a) No b) No c) No
Forum of Scottish Claim Managers	We would favour option (c). It is imperative that provision should be made to avoid double recovery by, for example, having some procedure equivalent to that in the English Court of Protection. Option (a) ignores the contributory negligence points raised previously and there would no oversight of the reasonableness of the payments levied by the local authority, whilst option (b) ignores that as a matter of public policy local authority provision should be accessible and adequate in any event (regardless of causation). The main issue is one of avoiding double recovery.
FOCIS	FOCIS does not consider that there should be a deduction from a pursuer's damages for uncertain future local authority provision. Due to budgetary constraints often the local authority care falls below a standard that is required by the restitutionary principle for persons with complex and long term injuries. It is impossible for local authorities to provide binding assurances to injured persons about their future care provision for what will often be decades. In addition to which the injured person may move to a different region in the future. A further complication is that the damages received by injured persons are often on a less than 100% basis, to reflect any contributory negligence on their part and, in settlements, the risk that they may have lose their case altogether. Consequently if the injured person has recovered damages on say a 2/3 basis from the wrong-doer, then they may still need to rely in part on such local authority provision as exists to make up the 1/3 shortfall.

	We do not agree with the assumption in question (c) that the English Court of Protection has procedures designed to avoid double recovery. A more accurate reflection of the position in England is set out in the case law, that a state funded package does not prevent a finding of a full award for private care, including for example the recent case of *Celine Martin v Salford Royal NHS Foundation Trust* [2021] :- https://kennedyslaw.com/thought-leadership/case-review/high-court-examines-the-issues-of-future-care-double-recovery-and-capacity/ This case highlights that a state funded package does not necessarily prevent a finding of a full award for private care. However, FOCIS, would not object to a change in the law which enabled local authorities, at the point of conclusion of the damages claim, to recover their past expenditure relating to the injuries that were the subject of the claim, providing that financial liability was born by the wrong doer and was at no net cost to the injured person. That could readily be achieved by a similar system to the NHS Injury Cost Recovery scheme:- https://www.gov.uk/government/publications/compensation-recovery-unit-bulletins/recovery-of-nhs-charges-tariff-and-cap-increase-from-1-april-2022
Direct Line Group	DLG's preference is option (c). Established case law from England and Wales sets out the appropriate test for assessing an injured person's needs as to what is reasonable to meet those needs so, if local authority/statutory provision is available at no cost then the injured person suffers no loss. Adopting this approach ensures avoidance of double recovery and preserves the 100% compensation principle.
NFU Mutual	NFUM would comment on the options as follows: (a) This represents an equitable solution, the raising of a schedule of charges however should be reasonable and proportionate and if necessary subject to review by an external expert. Furthermore the requirement to fund shall be limited to the % negligence agreed, ie if contributory negligence is agreed at a fixed amount the account shall be reduced accordingly as per all other heads of damages. (b) This does not represent an attractive option. Local authority care should be available to all, irrespective of causation. If an injured person has not sustained a loss, and a local authority is not seeking reimbursement, there is no basis to extend the scope of an award of damages.

	(c) The issue of avoiding double recovery in this scenario is a complex and challenging one. NFUM agree this should be sought to be avoided where possible, however the intoroduction of a similar body to that of the English Court of Protection may not provide such an assurance in most cases. The Court of Protection makes decisions on financial or welfare matters for people who lack mental capacity. The majority of cases do not need the oversight of the Court of Protection and injured persons ordinarily do not and should not have to refer their expenditure decisions to an outside body. NFUM would opine this is an area the court should exercise their own discretion based on the expert evidence presented and the availability of NHS provisions to meet the injured pursuers needs when making an award of damages.
Kennedys Law	(a) Yes – in the event that a local authority has and chooses to exercise an existing statutory power to levy a charge for services, we consider that the charge levied to the injured party should be recoverable by the injured party from the wrongdoer. We are not proposing that existing local authority powers to levy charges, if any, should be extended. (b) No. Typically any costs which are vouched during pre-litigation or litigation are costs met by the injured party on a privately paying basis, where the injured party is able to evidence a specific cost levied for the care on a commercial footing. It would be difficult to quantify the level of care and cost provided in scenario (b). Compiling the evidence around the precise nature and duration of care or accommodation could place an administrative burden on the local authority in all cases where a claim may follow; in many cases thatadministrative cost would be borne without reparation then being made for this head of claim. Further, where the local authority is not charging published and standardised commercial rates or operating for profit, the appropriate rate to charge for care would be open to question, and the appropriate sum to represent the cost to the local authority of providing that service from time to time could become the subject of dispute in its own right in litigation. Further, the assessment by the local authority of what services are needed and what the local authority is required to provide by statute may be quite different to the assessment of the court on what need for services reasonably arose from the accident in question. We agree that some form of protection against double recovery is needed. The likelihood of all services required being available from the local authority ought in our view to be a factor to be considered in assessing the reasonableness of having recourse to private care.
Law Society of Scotland	a) No, the status quo should remain.

	b) The norm would be to cost care on a private basis. If, after settlement, the injured person chooses to have care provided by the local authority it would be appropriate for the local authority to invoice the injured person for that care on a means-tested basis. c) No, this is unnecessary in Scotland. There is no issue of double recovery.
Medical and Dental Defence Union of Scotland	Option (a) appears to us to be reasonable. Option (b) does not seem appropriate in clinical negligence cases. As regards option (c), we have argued against an injured person being able to opt for private care; however, in the event that this option is to be retained, there should certainly be a mechanism in place to avoid double recovery.
Action on Asbestos	No comments to add

17. Have you any other suggestions for reform in this area?

(Paragraph 3.101)

Zurich Insurance UK	No
Clyde & Co (Scotland) LLP	N/A
Association of Personal Injury Lawyers	No, we do not.
Stagecoach Group plc	No
Forum of Insurance Lawyers	FOIL has no further submission to make in respect of this area
University of Aberdeen Law School	We have no other comments on reform in this area
Tom Marshall	No.
Unite the Union Scotland	None
Senators of the College of Justice	No
Aviva Insurance Ltd	No
Digby Brown LLP	No
Thompsons Solicitors Scotland	None
Drummond Miller LLP	n/a

Faculty of Advocates	No
DAC Beachcroft	No
Horwich Farrelly Scotland	No
Association of British Insurers	No
Society of Solicitor Advocates	No
Forum of Scottish Claim Managers	No
Direct Line Group	No, DLG has no additional suggestions for reform in this area.
NFU Mutual	No
Kennedys Law	No
Law Society of Scotland	No
Action on Asbestos	None

18. (a) Do you agree that, with the exception of asbestos-related disease, there is no general need for reform of the law of provisional damages?

(b) If you disagree, can you describe what needs reformed and, if so, what reforms you would propose?

(Paragraph 4.11)

Stuart McMillan MSP	(a) - Yes
Zurich Insurance UK	We have not identified any issues of concern in this area.
Ronald E Conway	There is no problem with the law on provisional damages. The problems arise because of the current law on limitation. The Consultation document shines a light on the Scots law of limitation in asbestos related cases , with particular regard to the apparently conflicting decisions in *Quinn* and *Kelman*. Both are high value cases involving fatal injury with very similar facts. What is noteworthy are the radically different approaches both to s.17, and perhaps more importantly, to s19A of the Prescription and Limitation (Sc.) Act 1973. It is a signal mistake to believe that the problems on limitation are restricted to asbestos related or even occupational disease cases. Particular areas of difficulty are;

	1. Section 17(2) of the 1973 Act , and the reasonable practicability test for constructive knowledge The test is unduly stringent, leading to situations where a claimant can act reasonably yet be fixed with constructive knowledge at a far earlier date than actual knowledge. 2. The apparent lack of any judicial acceptance that in very many cases, attributability can only be obtained via expert evidence and an acknowledgement that time does not run until such evidence is obtained. This relates both to s.17 and to s. 19A . 3. Lack of coherent guidance on what criteria are to be applied to s19A cases. 4. There is now a clear divergence between Scotland and England on the equitable discretion. See *Cain v Francis* [2009] 3WLR 551 and the comprehensive review of case law undertaken by Smith LJ , and the definitive statement on s.33 of the Limitation Act 1980 discretion. The settled law in England is now that where there is a colourable reason for delay, evidential prejudice is the primary test for exercise of the equitable discretion. The stark differences in *Quin* and *Kelman* are irreconcileable on any principled basis. It is currently well nigh impossible for practitioners to foresee outcomes both at trial and at settlement discussion. We have a judicial lottery. The previous Law Commission Discussion Paper and Report in 2006 and 2007 respectively In the Introduction to the 2007 Report it is stated; “Background to the references 1.1 The first reference arose from concerns expressed by practitioners involved in personal injury litigation in the Scottish courts and others representing people with claims for compensation for occupational diseases that certain provisions of the Prescription and Limitation (Scotland) Act 1973 were not operating fairly. In particular they were concerned that the test for establishing the date from which the limitation period starts to run (known as the "date of knowledge test") was too restrictive, and that the effect of the test was less favourable to claimants in Scotland than the equivalent statutory test in

	England and Wales. A petition was presented to the Scottish Parliament on behalf of the Association of Personal Injury Lawyers calling for a review of sections 17 and 19A of the 1973 Act. 1.2 Practitioners also expressed the view that the judicial discretion provisions in section 19A of the Act were in need of amendment. That section gives the court an unqualified discretion to allow an otherwise time-barred action to proceed. By contrast, in England and Wales the equivalent provision contains a list of factors to which the court must have regard in exercising its discretion. The view of several members of the profession was that the 1 Under the Law Commissions Act 1965, s 3(1)(e). 2 By the Prescription and Limitation (Scotland) Act 1984, Schedule 1, para 2. 3 Scottish Parliament Public Petition PE 836, presented by Mr Ronald E Conway on behalf of APIL, April 2005. 4 Limitation Act 1980, s 33(3). introduction of similar factors in the Scottish legislation would be of assistance and would encourage the court to exercise its discretion more liberally than at present." The problems identified in 2006 and 2007 continue to this day, and if anything have worsened. How did we get here? In the interests of brevity, may I direct the Commission members to paragraphs 2.28 – 2.47 of the 2006 Discussion Paper. These sections persuasively illustrate both the problems with the s.17 reasonable practicablity test, and the possible solutions, far more lucidly than I ever could. But a brief historical overview is instructive. In 1970 the Scottish Law Commission published "Report No. 15 – Prescription and Limitation" which was implemented by the Prescription and Limitation (Scotland) Act 1973. The Scottish Law Commission revisited the matter and a further Report No. 74 was submitted by the Commission in 1980, and the 1973 Act was amended to its present form. (subject to changes for historic abuse cases)

	The 1980 Commission's legislative proposals were adopted word for word in the current s.17 of the Act. However it is revealing to look at the contents of the 1980 Report. It deals with the date of constructive knowledge at paragraphs 3.6 and 3.7. In particular the date of constructive knowledge should be :- 1.6 "The date on which in the opinion of the court it was reasonable for him in all the circumstances to become so aware……." (my italics) Unfortunately this reasonable test seems to have been completely lost in translation, and with one leap we are onto reasonable practicability. 3.7 "A formula along these lines would seem to afford the courts a desired degree of flexibility, and would have the further merit of not attempting to regulate the test of knowledge in too much detail. It would enable the courts to take account of the differing circumstances of individuals and the differing nature of their injuries" The Commission rejected the idea that legislation should refer specifically to the seeking of advice (as in the English legislation) as being unnecessary, although it was contemplated that this would become a part of the judicial development of the law. The Commission then went on to recommend the formula which has been adopted word for word in s.17(2)(b). It is clear that the authors of the report did not envisage any rigid dichotomy between what was reasonable for a person to become aware of, and what was reasonably practicable for him to become so aware. The explanatory note to Section 17(2)(b) states:- "The words "reasonably practicable for him in all the circumstances" are designed to reflect that the test of knowledge is mainly objective but not wholly so. This will afford the courts a certain degree of flexibility in order to take account of the different circumstances of individuals and the differing natures of their injuries". It is this gap between the hand the eye which was then developed by the defender's bar to highlight and extend the difference between what is reasonable and what is reasonably practicable .(See eg Cowan v Toffolo Jackson 1998 SLT 1000; Little v East Ayrshire Council 1998 SCLR 520.)

	I suspect the authors of the 1980 Report would be surprised if they could see the ways in which their law reform has been applied. They clearly expected some element of flexibility in the approach to expert evidence. I rather doubt they foresaw the marked contradiction between reasonable behaviour and what is reasonably practicable. In particular there is no equivalent of the English tests in the Limitation Act 1980 which states at s.14.3 Section 14(3) provides:- "For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire:- a. from facts observable or ascertainable by him or b. from facts ascertainable by him with the help of medical or appropriate expert advice which it is reasonable for him to seek. but a person shall not be fixed under this sub-section with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain and, where appropriate, to act on that advice". (Emphases added). The problem solved—the problem shelved It was anticipated that legislation would follow the 2006 Discussion Paper and the 2007 Consultation document. A draft Bill was produced and incorporated in the Report. Time would not run whilst a pursuer was excusably unaware of the material facts, a test which is much closer to the 1980 Report recommendations and which would have met the criticisms contained in the 2006 Discussion Paper Unfortunately, for reasons which were never clear, the decision was taken by the Law Commission to change the triennium to a quinquennium. I have to say that I had not noticed any particular enthusiasm amongst practitioners on either side of the bar for any such a proposal. It would mean a significant change in the law, a marked divergence from England, (with all kinds of forum shopping opportunities) whilst it would not address the long tail conditions. It is difficult not to speculate that the legislature simply took fright, leaving us with all the difficulties identified in 2006 – 2007, but none of the solutions. There is currently no prospect that the Draft Bill will

	ever be brought onto the statute book. Meantime, we have had the piecemeal reform for historic child abuse, and now a further proposed reform restricted only to asbestos litigation. The problem made worse In 2007, there seemed good prospects for the kind of overhaul the system required. Nothing has eventuated . The case law has again been weaponised with the wholesale adoption of the Australian decision of *Brisbane Regional Health Authority v Taylor* 1996 CLR 541, for 19A cases. The Scottish courts appear to have adopted the premises 1. That there is a presumption against the exercise of the discretion 2. That the passage of time inevitably leads to evidential prejudice against a defender. It creates "unknown unknowns" which are a priori prejudicial to defenders. This is simply a resort to magical thinking of the worst kind. It removes the requirement to exercise any granular analysis of the evidence and inevitably leads to a dismissal eg *Quinn* , a death claim worth £800,000.00, where liability was admitted. There is no other area in Scots Law which operates in this way. The child abuse legislation now asks if there can be a fair trial, and sometimes the answer is no. Pleas of mora for delays of around 20 years have failed. As I write there are newspaper reports of criminal proceedings against a religious order with some events taking place in the 1960's. Proposals for Reform In *B -v- Murray* (No.2) 2005 SLT 982 Lord Hope embedded Brisbane in Scots Law It is not clear whether by "prejudice" in the House of Lords judgement, he meant evidential prejudice, or some other prejudice. It has certainly been interpreted as meaning something other than evidential prejudice and setting up a presumption for dismissal.

	The Scottish Courts have effectively painted themselves into a corner with their wholesale adoption of Brisbane. The clamour of public interest in relation to historic child abuse cases meant that the legislature had to intervene. The only way to sever connections with Brisbane, is to legislate anew. The current problems call once again for the legislature to intervene on the basis of the 2006 and 2007 proposals and draft Bill. (absent quinquennium)
Clyde & Co (Scotland) LLP	(a) In general we agree that with the exception of asbestos-related disease there is no general need for reform of the law of provisional damages itself. (b) Not applicable.
Association of Personal Injury Lawyers	We agree.
Stagecoach Group plc	We agree that there is no general need for reform of the law on provisional damages.
Forum of Insurance Lawyers	(a) Yes (b) N/A
University of Aberdeen Law School	Yes, we agree that there is no general need for reform of the law of provisional damages.
Tom Marshall	Leaving aside cases of asbestos related disease, my observation would be that section 12 of the 1982 Act is little used, or at least rarely litigated. When the provision was first introduced there were cases of orthopaedic injury where provisional damages were sought on the basis of a possible future risk of arthritis. However, this practice has petered out and was not in any event particularly successful. The case of *Bonar v Trafalgar House* is rather illustrative of the difficulties faced by persons facing uncertain prognoses in circumstances where the potential deteriorations are less easy to define or predict. However, it is not obvious that a change in the law will alter the situation since whether or not there is a risk of serious deterioration or serious disease is very much a medical question.
Unite the Union Scotland	We agree there is no general need for reform.
Senators of the College of Justice	(a) Yes. Subject to the exception noted, we consider that the current law on the issue of provisional damages is appropriate and sufficient. (b) Not applicable. We refer to our preceding answer.
Aviva Insurance Ltd	(a) agree
Digby Brown LLP	Yes
Thompsons Solicitors Scotland	We agree there is no general need for reform.

Drummond Miller LLP	(a) Agreed
Faculty of Advocates	(a) The Faculty agrees that, with the exception of asbestos-related disease, there is no general need for reform of the law of provisional damages. (b) Please see answer to question 18 (a) above.
DAC Beachcroft	(a) Yes. It is clearly necessary for the court to be able to award damages not only on a single award basis, but also on a provisional basis. The court must satisfy itself that the case is one where an interlocutor for provisional damages is appropriate and has to take into account a range of issues, not the least of which is whether the risk of an occurrence of a condition or a deterioration in an existing condition in the future is real rather than remote. As is pointed out in paragraph 4.9 of the Discussion Paper, the parties agreeing between them that an award of provisional damages is necessary is not enough. The court must be satisfied in addition. We regard this level of judicial scrutiny as sufficient and therefore see no need for reform of the law on provisional damages. (b) N/A
Horwich Farrelly Scotland	(a) Yes (b) Not applicable
Association of British Insurers	We would welcome clarification on what was intended by the phrases “serious disease” or “serious deterioration” in section 12(1)(a) of the Administration of Justice Act 1982, to reflect the position in England and Wales where the disease or type of deterioration needs to be specified. While this may be a matter for the courts to decide, the current position tends to be that pursuer representatives look to have the decree reflect *any* deterioration rather than a “serious” one.
Society of Solicitor Advocates	a) Yes b) Not applicable
Forum of Scottish Claim Managers	We agree that with the exception of asbestos-related disease, there is no general need for reform of the law of provisional damages.
Direct Line Group	DLG’s exposure to claims of this nature is not large; our responses to questions within Chapter 4 reflect this position. (a) DLG agrees - there is no need for general reform to the law of provisional damages. (b) In light of our response to question 18 (a), we have no additional comments.
NFU Mutual	(a) NFUM agree that with the exception of asbestos-related disease, there is no general need for reform of the law of provisional damages.

	(b) n/a
Kennedys Law	(a) Yes (b) N/A
Law Society of Scotland	a) Yes. b) Not applicable.
Action on Asbestos	We will restrict our comments to asbestos related conditions

19. Do you consider that there is a problem with the way provisional damages operate in cases involving asbestos-related disease claims?

(Paragraph 4.41)

Stuart McMillan MSP	Yes
Zurich Insurance UK	Yes. Whilst we consider that the current operation of provisional damages in asbestos-related disease claims is sufficient, the issue we foresee in discounting pleural plaques from any limitation period is that it provides pursuers with no impetus to bring claims as timeously as possible. Until a claim is presented, the defender cannot know what future risk it faces, which means insurers cannot make financial provision and defendants cannot begin to explore available evidence (both witness and documentary). This may create a longer-term evidential prejudice to the defender. In our opinion, the finding in Kelman shows that 19A works appropriately to protect the parties, considering all of the facts relevant to each case. It should also be noted that in England & Wales, pleural plaques are not actionable. Zurich would support provisional damages providing specificity as to the disease or type of deterioration contemplated, particularly in asbestos-related injury, in which future risk is readily and openly opined by expert medical evidence.
Ronald E Conway	See 18 and Paper Apart
Clyde & Co (Scotland) LLP	There is no problem in principle with the way provisional damages operate in cases involving asbestos related disease claims. There is a potential issue with asbestos related disease claims and limitation. Many are of the view that a problem arises from the discretionary approach taken by the Court in

	assessing whether or not a subsequent claim for asbestos related disease is time-barred or not, in circumstances where an earlier asbestos related diagnosis has not resulted in a claim being made. Since the 1980s there have been thousands of pleural plaques claims which have been raised and most of them have been settled. Over the years many settled provisionally, although historically the majority of claims settled on a full and final basis. Obviously in claims that settle provisionally, an individual is entitled to come back to seek further damages if he/she goes on to develop a more serious asbestos related condition. In an ideal world there would have been a provisional settlement in appropriate cases which would mean that the raising of a future claim would not be problematic in any way. The issue arises however where a claim in respect of the earlier condition of pleural plaques was not raised, and an individual goes on to develop a more serious asbestos related condition. In those circumstances, depending upon the knowledge of the claimant, a Court may have to determine whether or not the subsequent claim for the more serious asbestos related condition is allowed to proceed. The decision for the Court is potentially complicated by the history associated with asbestos related claims going back many years. Reference is often made to the case of Shuttleton v. Duncan Stewart & Co 1996 SLT517. Mistakenly this decision is often referenced as the basis for there being separate limitation periods for discreet asbestos conditions. Consideration of the full transcript of the Lord Ordinary's Opinion confirms that such an analysis is in fact incorrect. The Lord Ordinary held that pleural plaques were not an injury, foreshadowing the House of Lords Decision in Grieves (Rothwell) v. FT Everard & Sons Ltd [2007] UK HL39. In Shuttleton therefore the Lord Ordinary's decision was that time-bar had never in fact started to run against the pursuer as plaques were deemed not to be an injury. Confusion has arisen ever since in respect of the Shuttleton decision. The House of Lords decision on pleural plaques in 2007 held that there was no actionable injury as a consequence of the development of pleural plaques. If that had been the end of the story then the failure to litigate pleural plaques claims would not have caused any of the confusion that has occurred more recently. One of the unintended consequences of the Damages (Asbestos Related Conditions) (Scotland) Act 2009 is that the Act states that there is an injury following a diagnosis of pleural plaques, asymptomatic diffuse pleural thickening and/or asymptomatic asbestosis. Consequently if an individual wishes to protect their position in relation to developing any future asbestos related condition, they require to raise and settle a pleural plaques claim on a provisional basis.

	The period during which there was possibly confusion as to the position with pleural plaques claims was relatively short (2007 through to 2011). The 2011 date is when the Judicial Review of the 2009 Act was concluded. One other decision of relevance is the case of Aitchison v. Glasgow City Council [2010] CSIH9 which was conjoined with Findleton v. Quarriers. The Inner House in Aitchison/Findleton reached an important decision revisiting the question of whether a claimant can have separate actions for separate injuries resulting from one original act of negligence. A Bench of 5 Judges overruled the previous decision in Carnegie v. Lord Advocate 2001 SC802. The reasoning in these conjoined cases is appropriate in terms of considering asbestos related conditions. The issue with pleural plaques claims, and the failure to litigate those at the appropriate time has been considered in recent decisions – Quinn v. Wrights Insulations Ltd [2020] CSOH21, Madden v. Duncan Anderson Ltd [2021] SC EDIN 56 and Kelman v. Murray Council [2021] CSOH131. The cases on the face of it had similar facts, but reached different decisions on whether or not the Court should exercise its discretion in terms of Section 19A of the Prescription and Limitation (Scotland) Act 1973. A closer analysis of the facts however identifies that the cases could be distinguished on the basis that in Kelman the pursuer was reassured by treating medics that a diagnosis of pleural plaques was not serious and he was reassured he had nothing to worry about. No indication was given to him that he had the right to pursue damages. In Quinn, as well as the similar decision of Madden, the evidence supported the fact that both claimants were aware that they could have raised proceedings, but chose not to. The position that we are currently in is therefore one which applies to all cases involving limitation arguments. Namely, that there is the potential for a case to be held to have time-barred, and then it is for the pursuer to persuade the Court that it should exercise its discretion in terms of Section 19A and allow the claim to continue. Arguably therefore it is not an issue with provisional settlements in asbestos related claims which is causing the problem, but potentially more an issue with the 1973 Act as amended.
Association of Personal Injury Lawyers	We do not consider that there is not a problem with the way that provisional damages operate in cases involving asbestos related disease claims. The issue that arises is caused by the law as it stands following the case of Aitchison, and this decision must be reversed.
Stagecoach Group plc	We agree that there is an issue with the way in which provisional damages operate in relation to asbestos related disease claims and would comment that this is a direct result of the Damages (Asbestos Related Conditions) (Scotland) Act 2009. The issue in Scotland is that a Pursuer may bring a claim for pleural plaques and must protect

	their position in respect of developing any other asbestos related condition when that claim is settled as they may be at risk of any subsequent claim being time barred. This issue only arises because pleural plaques was made an actionable harm by the Act.
Forum of Insurance Lawyers	Whilst not related to what is posed at question 20, FOIL considers there are some practical difficulties with the operation of provisional damages. Whilst these frustrations often occur in asbestos litigation, it is a common feature in other industrial disease litigation and, indeed, other personal injury claims where there is evidence of a risk of deterioration. A Joint Minute for provisional damages will require to specify return conditions. In asbestos litigation this will include the illnesses which can be caused by asbestos which the medical evidence supports there being a risk of developing. Some of those conditions (asbestosis and lung cancer) require heavy exposure to asbestos. Whilst there can be a dispute as to whether the exposure to asbestos was sufficiently heavy to cause these conditions, they are often agreed as return conditions. Despite the return conditions typically being specified as "asbestos related" it is a concern for defenders that by agreeing these return conditions, they would later be prevented from disputing that there was sufficient asbestos exposure to create that risk. Defenders should be free to agree return conditions without prejudicing causation defences in a return claim. There is a lack of clarity around whether an apportionment between defenders agreed in a provisional damages settlement is binding in a return claim. There is no satisfactory way of tendering for provisional damages, particularly in multi-defender claims. Finally, the threshold contained in section 12(1)(a) of the Administration of Justice Act 1982 of suffering a "serious deterioration" leaves significant scope for interpretation and in practice results in return claims where the deterioration appears (to defenders) less than serious. Whilst often resisted by pursuers, some quantification of the threshold required to be reached (for example, a particular percentage respiratory disability) should be the prevailing practice.
University of Aberdeen Law School	Yes, we consider that there are specific policy issues surrounding the nexus of the law on limitation as it stands following Aitchison v Glasgow City and the 2009 Act. While we consider that the equitable discretion under section 19(A) of the 1973 Act is sufficient for most cases where the time limit to raise proceedings has elapsed, we consider that it does not provide enough certainty and consistency in cases

	concerning asbestos-related diseases. This is due to the particular clinical features of these cases in which pleural plaques and other early-stage manifestations of disease are largely aymptomatic and patients may not fully appreciate their long term implications. The 2009 Act also reflects a policy objective of the Scottish Government to recognise the moral weight of the injuries suffered by workers who are exposed to asbestos. We consider that this policy objective is not served by the current operation of rules on limitation.
Tom Marshall	It is less a problem with section 12 of the 1982 Act and more a problem of the law of limitation. In general, provisional damages work well in cases of asbestos related disease. In particular it allows a claimant to establish liability sooner rather than later. This can be a very important consideration for claimants in considering whether or not to seek provisional or full and final damages. They can be concerned that if they take provisional damages and later develop a fatal asbestos related illness their relatives would be faced with having to prove liability after the claimants themselves are no longer available to tell their stories in person. The suggestion mooted in paragraph 4.38 that questions of liability could be deferred should not be accepted. Separately it is quite at odds with the whole thrust of limitation law to ensure that claims are brought as soon as possible before evidence is lost. While it is invariably the case in claims for asbestos related disease that the events giving rise to the claim are already long in the past, it makes absolutely no sense once a claim has arisen to further defer determination of liability simply perhaps to permit claims to be settled. In my experience what frequently occurs is that a person is found to have pleural plaques during investigations for some completely unrelated medical problem. A chest x-ray is an extremely common medical examination either for the investigation of symptoms or preparatory to surgery to ensure the person's fitness for the surgical procedure. The presence of pleural calcification suggestive of past asbestos exposure may be noted (or often not contemporaneously) but because this has no connection with the current medical problem being investigated or treated the issue is not explored with the patient. A copy of an x-ray report may find its way into the patient's GP records to be unearthed at a later date when the existence of pleural plaques is brought to the patient's attention as a result of entirely separate investigations for some other problem. Not infrequently, the report of a later x-ray will refer back to an earlier film in terms like "pleural plaques unchanged from previous x-ray of such and such a date" when the contemporaneous report was entirely silent – the later radiologist has re-examined the earlier film and noted their presence then. Another not infrequent scenario is a report from a consultant to the GP referring, for completeness, to the finding of plaques on x-ray but often not against the background of respiratory investigations and again no clear indication that either the consultant or the GP has ever advised the patient. These

	circumstances are highly commonplace giving rise to enormous amounts of time and effort being expended by solicitors for both pursuers and defenders in pleural plaque cases poring over hundreds or even thousands of pages of medical notes for smoking gun evidence that the patient was told more than three years before the action was raised. The possibility the claim is time-barred then becomes a major bargaining chip when settlement is being explored, with pressure frequently for claimants to accept a full and final settlement rather than go to proof on time bar. Cases such as *Quinn* and *Kelman* are, thankfully, relatively rare. The potential consequences in terms of failure to recover damages are clearly much more significant in such cases as compared to claims for pleural plaques themselves, but in truth the issue in that far larger number of cases is the same – the law of limitation, or at least the application of section 19A of the 1973 Act, is not evenly balanced in the way it should be. The Commission should therefore re-iterate the recommendations from its report of 2007 relating to the amendment of section 19A. I am appending to this response the section dealing with this topic I prepared as part of the response by Thompsons to the Scottish Government 2012 consultation. In my respectful submission the views expressed then remain as valid today. As is pointed out in the present discussion paper at paragraph 4.26, a consequence of the Damages (Asbestos Related Conditions)(Scotland) Act 2009, an unintended consequence it is submitted, is that an individual cannot assert that, in context, a diagnosis of pleural plaques at a particular point did not represent a sufficiently serious injury to justify the bringing of court proceedings (cf *Blake –v- Lothian Health Board* 1993 SLT 1248).
Unite the Union Scotland	We are of the view that on being diagnosed with any asbestos related condition and the conditions of Section 17 of the Prescription and Limitation Act 1973 being met, that an individual should raise proceedings timeously. In all cases involving asbestos related disease, a claim should be made for both provisional damages and full and final damages. Provided the Pursuer is fully informed, legally and medically, of what should be taken into account when choosing between those options, then the operation of provisional damages is broadly satisfactory. As is recognised at Paras 4.24 and 4.25 of the Discussion Paper, however, there are many factors at play in asbestos-related disease claims which impact not only on the decision making process of the Pursuer but also his or her ability to arrive at that position in the first place. Before considering those factors in further detail, it is worth noting that provisional damages are not always an option for the Pursuer. Section 12 of the Administration of Justice Act 1982 is the basis for awards of provisional damages. Section 1 (b) provides that: *"the responsible person was, at the time of the act or omission giving rise to the cause of the action,*

	(i) A public authority or public corporation *(ii) Insured or otherwise indemnified in respect of the claim"* Part (ii) has not infrequently given rise to dispute in asbestos claims as, given the passage of time since the exposure to asbestos took place, there may well be no insurance policy in place or corporate reorganisation may have resulted in a 'live' defender available to be sued but no corresponding insurance policy, as happened with the Cape group of companies. Generally, in order to reach a point of having the choice of provisional or full and final damages, the Pursuer will have had to establish that his or her claim is not out of time and that liability rests with the Defender. In relation to liability, there is very rarely such an admission in asbestos disease claims. Settlement at full value on a full and final basis may imply such a concession rather than an admission however a provisional settlement requires the admission to be recorded in a Joint Minute and may be why it can be difficult to secure provisional offers in these cases. Deferment of that admission would bring its own difficulties, as discussed further in Answer 22. The far more significant issue is in relation to limitation. A time bar defence can be an insurmountable hurdle which will deny the Pursuer any form of compensation, provisional or otherwise. The Discussion paper sets out the current situation in which failure to bring a claim for pleural plaques within three years of diagnosis time bars any subsequent claim for more serious disease. The starting point for the three year 'countdown' is the date of constructive knowledge which, as evidenced by the different outcomes in the cases of *Quinn* and *Kelman*, can prove elusive to establish. In our experience, people react to a diagnosis of pleural plaques in myriad ways. Some think it a 'death sentence', others are re-assured that the plaques cause no immediate harm while others fail to understand what they are being advised, either because of extenuating circumstances or the way in which the information is imparted. It is not unusual for the term 'pleural plaques' not to be used at all by the treating doctor, in a well-intentioned attempt to minimise worry and anxiety. However, the term is used in the medical records, thus forming a prima facie indication that the diagnosis has been made and delivered, and the clock should start ticking. A diagnosis of mesothelioma then made several years later is truly a 'death sentence'. To have to advise a client who has had that diagnosis that they cannot proceed with a claim because they failed to pursue compensation for an asymptomatic finding which they may or may not have fully understood, never mind understanding the legal implications of their failure to act, is heart-breaking.

	The Damages (Asbestos Related Conditions) Act 2009 established that Pleural Plaques are a compensatable injury and as such, we accept that the provisions of the Prescription and Limitation Act 1973 must apply for the purposes of establishing limitation and whilst we have previously set out our wider views on those provisions in our response [i] to the Scottish Government's consultation paper on the Civil Law of Damages: Issues in Personal Injury, we must reiterate here that the single-action rule as applied to asbestos related disease, in our experience, leads to gross inequity not only for the victims of asbestos exposure but also their families. The discretionary provision in Section 19A of the 1973 Act is too uncertain to provide any reassurance to individuals, their families and their legal advisers when pursuing a claim which is prima facie time barred. The most common response when explaining the current law to clients and their families is 'but that cannot be right'. If ever there was a need for a policy-driven change to limitation, it is here.
Senators of the College of Justice	Yes, for the reasons set out at paras. 4.29 – 4.36.
Aviva Insurance Ltd	Yes, there is a problem with the way provisional damages operate in cases involving asbestos- related disease. One of the unintended consequences of the Damages (Asbestos Related Conditions) (Scotland) Act 2009 is that the Act states that there is an injury following a diagnosis of pleural plaques, asymptomatic diffuse pleural thickening and/or asymptomatic asbestosis. Consequently if an individual wishes to protect their position in relation to developing any future asbestos related condition, they require to raise and settle a pleural plaques claim on a provisional basis. If they do not raise an action then they risk being time barred for future asbestos related disease claims. This is exclusively an issue caused by making pleural plaques an actionable harm. A further problem relates to the threshold for return claims contained in section 12(1)(a) of the Administration of Justice Act 1982 of suffering a "serious deterioration" this leaves significant scope for interpretation and in practice results in return claims where the deterioration appears (to defenders) less than serious. Whilst often resisted by pursuers, some quantification of the threshold required to be reached (for example, a particular percentage respiratory disability) should be the prevailing practice to create certainty and consistency for Pursuers and Defenders.
Digby Brown LLP	Not in principle, but the conflict in the case law as identified in the Discussion Paper, and in particular the decision the case of *Aitchison*, means that injustice can arise in cases where there has been a diagnosis of pleural plaques and a claim made on the basis of this. The pursuer then has to decide

	whether to opt for a full and final settlement or provisional damages, and issues can arise in relation to identification of the return conditions. While, in almost all cases, pursuers are advised to seek provisional damages, they are often tempted to accept a slightly higher offer of full and final damages, which then prevents them seeking further compensation for conditions that may develop in the future. Provided the pursuer has been properly advised, however, it may be considered appropriate that they are allowed to make this choice.
Thompsons Solicitors Scotland	We are of the view that on being diagnosed with any asbestos related condition and the conditions of Section 17 of the Prescription and Limitation Act 1973 being met, that an individual should raise proceedings timeously. In all cases involving asbestos related disease, a claim should be made for both provisional damages and full and final damages. Provided the Pursuer is fully informed, legally and medically, of what should be taken into account when choosing between those options, then the operation of provisional damages is broadly satisfactory. As is recognised at Paras 4.24 and 4.25 of the Discussion Paper, however, there are many factors at play in asbestos-related disease claims which impact not only on the decision making process of the Pursuer but also his or her ability to arrive at that position in the first place. Before considering those factors in further detail, it is worth noting that provisional damages are not always an option for the Pursuer. Section 12 of the Administration of Justice Act 1982 is the basis for awards of provisional damages. Section 1 (b) provides that: *"the responsible person was, at the time of the act or omission giving rise to the cause of the action,* *(i) A public authority or public corporation* *(ii) Insured or otherwise indemnified in respect of the claim"* Part (ii) has not infrequently given rise to dispute in asbestos claims as, given the passage of time since the exposure to asbestos took place, there may well be no insurance policy in place or corporate reorganisation may have resulted in a 'live' defender available to be sued but no corresponding insurance policy, as happened with the Cape group of companies. Generally, in order to reach a point of having the choice of provisional or full and final damages, the Pursuer will have had to establish that his or her claim is not out of time and that liability rests with the Defender. In relation to liability, there is very rarely such an admission in asbestos disease claims. Settlement at full value on a full and final basis may imply such a concession rather than an admission however a provisional settlement requires the admission to be recorded in a Joint Minute and may be why it can be

	difficult to secure provisional offers in these cases. Deferment of that admission would bring its own difficulties, as discussed further in Answer 22. The far more significant issue is in relation to limitation. A time bar defence can be an insurmountable hurdle which will deny the Pursuer any form of compensation, provisional or otherwise. The Discussion paper sets out the current situation in which failure to bring a claim for pleural plaques within three years of diagnosis time bars any subsequent claim for more serious disease. The starting point for the three year 'countdown' is the date of constructive knowledge which, as evidenced by the different outcomes in the cases of *Quinn* and *Kelman*, can prove elusive to establish. In our experience, people react to a diagnosis of pleural plaques in myriad ways. Some think it a 'death sentence', others are re-assured that the plaques cause no immediate harm while others fail to understand what they are being advised, either because of extenuating circumstances or the way in which the information is imparted. It is not unusual for the term 'pleural plaques' not to be used at all by the treating doctor, in a well-intentioned attempt to minimise worry and anxiety. However, the term is used in the medical records, thus forming a prima facie indication that the diagnosis has been made and delivered, and the clock should start ticking. A diagnosis of mesothelioma then made several years later is truly a 'death sentence'. To have to advise a client who has had that diagnosis that they cannot proceed with a claim because they failed to pursue compensation for an asymptomatic finding which they may or may not have fully understood, never mind understanding the legal implications of their failure to act, is heart-breaking. The Damages (Asbestos Related Conditions) Act 2009 established that Pleural Plaques are a compensatable injury and as such, we accept that the provisions of the Prescription and Limitation Act 1973 must apply for the purposes of establishing limitation and whilst we have previously set out our wider views on those provisions in our response [ii] to the Scottish Government's consultation paper on the Civil Law of Damages: Issues in Personal Injury, we must reiterate here that the single-action rule as applied to asbestos related disease, in our experience, leads to gross inequity not only for the victims of asbestos exposure but also their families. The discretionary provision in Section 19A of the 1973 Act is too uncertain to provide any reassurance to individuals, their families and their legal advisers when pursuing a claim which is prima facie time barred. The most common response when explaining the current law to clients and their families is 'but that cannot be right'. If ever there was a need for a policy-driven change to limitation, it is here.

Faculty of Advocates	The Faculty considers that there are problems with the way in which provisional damages operate in asbestos-related disease claims. Following upon the Damages (Asbestos-related Conditions) (Scotland) Act 2009 ("the 2009 Act") and Aitchison v Glasgow City Council 2010 SC 411 if a person is told he suffers from pleural plaques and seeks to retain his right of action to sue for mesothelioma he must now sue within three years of his knowledge of the 'relevant facts' under s.17(2)(b) Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act") in relation to the pleural plaques. Should he fail to do so, and should he then develop mesothelioma (even many years later), his claim for mesothelioma will be time-barred, subject to application of s.19A. As noted at 4.23 to 4.25 of the Discussion Paper, there are factors at play in such cases which make this a particularly harsh situation for a potential pursuer. Firstly, absent legal advice, he may be unlikely to make a claim for asymptomatic pleural plaques. Secondly, the medical records might record a diagnosis of pleural plaques, but not answer the question of what (if anything) the person was told about them. Thirdly, the pursuer may or may not have been referred to an Asbestos Action group. Further, if the person diagnosed with pleural plaques, who has failed to litigate within the triennium, has gone on to develop mesothelioma and has then died from mesothelioma, his family's claim for damages for his death from mesothelioma will also be time-barred, by operation of s.18(4) of the 1973 Act. The executors' claim will be time-barred. The relatives' claims as individuals will also be time-barred. See, generally, discussion in Prescription and Limitation, Johnston 2nd. ed. at 10-102 to 10-104. This was the position in *Quinn v Wright's Insulations Ltd*. 2020 SCLR. As set out at 4.27 of the Discussion Paper, one solution might be s.19A of the 1973 Act. This was also the solution suggested in *Aitchison* at para. [41]. However, as noted from cases such as *Kelman v Moray Council* [2021] CSOH 1131 and *Quinn v Wright's Insulations* the application of s.19A in plaques/mesothelioma cases leads to uncertainty and, in some cases, unfairness. In Quinn the Lord Ordinary held: [58]. I do not take the passage in para.41 of Aitchison as indicating that any case in which a more serious disease develops will be a "hard" case meriting the exercise of the court's discretion under s.19A . I consider that the court had in mind a case that was hard for some reason other than the inevitable harshness caused by the operation of the law under ss.17(2) and 18(4) so as to bar a claim… [60]. In relation to claims for childhood abuse, Parliament has recognised that a number of special features justify a different approach to time-bar, notwithstanding

	the existing provision in s.19A : ss.17A–D of the 1973 Act, added by the Limitation (Childhood Abuse) (Scotland) Act 2017 . … Since the decision in Aitchison , Parliament has not made any special provision in relation to mesothelioma or any other lateemerging industrial disease, so far as time-bar is concerned. Alongside the aforementioned uncertainty, the Faculty considers problems can be created by the requirement under s.12(1)(b) for non-public authorities or corporations to be Insured or otherwise indemnified. Historic disease cases predominantly involve asbestos exposure which took place decades ago. Often insurance cannot be found for potential defenders, because, for example, the defender did not have insurance or the details of the insurance they did have are lost due to the passage of time. The interplay between Aitchison and the 2009 Act means any pursuer diagnosed with pleural plaques ought to bring a claim if possible. Where the defender is solvent and trading, but uninsured at the time of exposure (or details of any insurance cannot be traced) a pursuer can pursue his claim but cannot competently obtain an award of provisional damages as the defender does not meet the criteria of s.12(1)(b). Any pursuer who finds himself in that position can claim for the first diagnosed asbestos condition but will be barred from obtaining provisional damages. The pursuer's only statutory remedy is to choose to accept full and final damages and lose the right to any future claims. Secondary victims (e.g. family members whose exposure to asbestos arose from washing clothes covered in asbestos) also face potential problems due to the requirement for insurance under s.12(1)(b). Such cases often fall under the remit of public liability insurance (see Employers' Liability Policy "Trigger" Litigation [2008] EWHC (QB) 2692).) Unlike employer's liability policies, there is no central database for public liability policies. Further, such policies often trigger at the date of diagnosis. This creates a tension with the terms of s.12(1)(b) in which the requirement is for insurance at the "…time of the act or omission giving rise to the cause of the action". As such, for a secondary victim, even where the negligent party may have funds or insurance to meet the current claim, an award of provisional damages cannot be competently made unless the terms of s.12(1)(b) can be satisfied.
DAC Beachcroft	No. As detailed in the discussion paper, in an action for pleural plaques a pursuer has the option to choose between a provisional or full and final settlement award. It is for a pursuer to make this choice and if the pursuer opts for provisional damages then the provision is there for that person to settle on this basis, and thereafter for them (or their executor) to return for further damages under Section 12 of the Administration of Justice Act 1982, should one of the agreed return conditions be satisfied. The issue identified in the Discussion Paper, i.e. that a claim for pleural plaques being time-barred after three years from the date of awareness of that condition means that an individual later developing e.g.

	mesothelioma is precluded from claiming, is in reality no different from any other claim for personal injury where there is a latent condition which becomes apparent only some time later. The Inner House in Aitchison v Glasgow City Council [2010] CSIH 9 specifically excluded, as a matter of law, the possibility that there could be separate limitation periods to cope with separate conditions arising out of the same cause of action. In such a situation, in order to show that the claim for the later condition was time barred with reference to the date of an earlier diagnosis with pleural plaques, a defender would not only need to establish that there was such an earlier diagnosis, but also that a pursuer has sufficient knowledge or the diagnosis and their ability to make a claim arising from this. Furthermore, in terms of Section 19A of the Prescription and Limitation (Scotand) Act 1973, the Court has the discretion to allow claims to proceed, notwithstanding the fact that they are time barred, should it be considered appropriate by the Court. In any event, the scenarios set out in paragraphs 4.24 and 4.25 of the Discussion Paper seem to us to conflate the question of the operation of provisional damages and that of limitation in connection with pleural plaques claims. In our view provisional damages and limitation are distinct issues. If a pleural plaques claim settles on a provisional basis then, in order for it to have done so, action must have been taken and Court proceedings must have been raised. This would have taken place either before the agreed settlement had been reached or after the claim settled pre-litigation and on a 'friendly' basis so as to allow the Court to issue an interlocutor allowing the return claim under Section 12 of the 1982 Act, should one of the return conditions be met. The scenarios set out in paras 4.24 and 4.25 describe situations where a pursuer takes no action to seek damages upon being diagnosed with pleural plaques, either due to a lack of knowledge or appropriate legal advice or because they or their treating physicians are more concerned about another condition being discussed at the same time and the finding of pleural plaques is incidental to this. In our view, the two situations seem to be at odds with one another. For there to have been an award of provisional damages for pleural plaques, a claim must have been raised by the pursuer and resolved either by settlement or following a proof. Either way there would, in this scenario, be an interlocutor for provisional damages. For a pleural plaques claim to be time-barred and, therefore, for any claims for any subsequent asbestos-related condition also to be time-barred, a Court action cannot have been raised in time.
Horwich Farrelly Scotland	Yes.
Association of British Insurers	Please see answer to question 20 below

Society of Solicitor Advocates	Yes. Issues around timebar can arise when pleural plaques develop into another asbestos related disease. Clarification on the law around this area would assist agents to give advice. At the moment, given the caselaw, it is impossible to advise on prospects.
Forum of Scottish Claim Managers	Yes, there is a problem with the way provisional damages operate in cases involving asbestos- related disease. One of the unintended consequences of the Damages (Asbestos Related Conditions) (Scotland) Act 2009 is that the Act states that there is an injury following a diagnosis of pleural plaques, asymptomatic diffuse pleural thickening and/or asymptomatic asbestosis. Consequently if an individual wishes to protect their position in relation to developing any future asbestos related condition, they require to raise and settle a pleural plaques claim on a provisional basis. If they do not raise an action then they risk being time barred for future asbestos related disease claims. This is exclusively an issue caused by making pleural plaques an actionable harm. A further problem relates to the threshold for return claims contained in section 12(1)(a) of the Administration of Justice Act 1982 of suffering a "serious deterioration" this leaves significant scope for interpretation and in practice results in return claims where the deterioration appears (to defenders) less than serious. Whilst often resisted by pursuers, some quantification of the threshold required to be reached (for example, a particular percentage respiratory disability) should be the prevailing practice to create certainty and consistency for Pursuers and Defenders.
Direct Line Group	No, DLG does not consider that there are problems with the way provisional damages operate.
NFU Mutual	NFUM consider there is a problem with the way provisional damages operate in cases involving asbestos- related disease. One of the unintended consequences of the Damages (Asbestos Related Conditions) (Scotland) Act 2009 is that the Act states that there is an injury following a diagnosis of pleural plaques, asymptomatic diffuse pleural thickening and/or asymptomatic asbestosis. Consequently, if an individual wishes to protect their position in relation to developing any future asbestos related condition, they require to raise and settle a pleural plaque claim on a provisional basis. If they do not raise an action, then they risk being time barred for future asbestos related disease claims. This is exclusively an issue caused by making pleural plaques an actionable harm.
Kennedys Law	We do not consider that there is any problem in respect of the manner in which the law of provisional damages operates in cases involving asbestos related disease claims per se, however, some practical difficulties and concerns do arise.

	There is a concern that by agreeing to allow specific future claims after provisional damages as "asbestos related" return conditions, defenders may be precluded from defending those claims on the grounds of medical causation. For example in agreeing to asbestsos related lung cancer as a return condition, is the defender subsequently prevented from arguing that the pursuer's levels of exposure failed to meet the Helsinki criteria or a doubling of the pursuer's risk?
Law Society of Scotland	Yes. Example – the need to make a pleural plaques claim does not become apparent within 3 years and prevents an asbestos claim being made. Failure to pursue a pleural plaques claim should not constitute time bar in pursuing an asbestos claim. The problem does not arise with the operation of provisional damages *per se*. The problem which the cases of *Quinn* and *Kelman* starkly identify is that Scots law on limitation is now so inchoate as to defy analysis. The cases of *Quinn* and *Kelman* each seem to belong to separate legal systems. On very similar facts they disagree fundamentally on the issues of s.17 constructive knowledge and on s19A discretion. The roots of this disagreement go far beyond asbestos cases, although these two high value cases dramatically expose the fault lines. As far back as 2006 the Law Commission in their Discussion Paper commented adversely on the tension between what is "reasonable" and what is "reasonably practicable". The Law Commission at that time proposed legislation which meant that the former behaviour would not start time running if the Pursuer was excusably unaware of material facts. A draft Bill was proposed. If such legislation had been in place it is suggested that *Quinn* would have been decided differently on s.17. But perhaps even more concerning is the decision in *Quinn* on s.19A. It is worthwhile parsing the history of this:- 1. In 1990's pleural plaques were diagnosed. At that time modest final damages were agreed, and in any event did not set time running for a separate disease such as asbestosis or mesothelioma. (*Shuttleton*) *Quinn* is not time-barred. 2. Case of *Rothwell.* 2008 House of Lords decide no actionable injury. *Quinn* is not time-barred. 3. Damages (Asbestos Related Conditions) Scotland Act 2009. Pleural plaques actionable injury, but time does not run *pace Shuttleton. Quinn* is not time-barred.

	4. Case of *Aitchison* Inner House 2010 One action only; *Shuttleton* and *Carnegie* overruled. The effect of 4. is to set time running *retrospectively* for all previous diagnoses of pleural plaques. Liability in *Quinn* was admitted. It would be difficult to imagine a clearer set of circumstances for s.19A, but the judge instead applies the Australian case of *Brisbane,* which almost inevitably forces her down the route to dismissal. The Law Commission previously suggested that there should be a checklist of factors to which judges should be directed. Instead, *pace Brisbane,* there is an automatic presumption of evidential prejudice caused by passage of time. *Brisbane* has had a baleful influence in Scotland. (See the academic criticisms in Johnston "*Prescription and Limitation"* 2nd edition at p.292, and Russell "*Prescription and Limitation of Actions"* 7th edition at p 169 "the critical issue would appear to be evidential prejudice") *Brisbane* has noticeably gained no traction in England, where the s.33 test is actual evidential prejudice. Simply in passing, the one piece of solid ground where agents thought they could stand was that there would be no s.19A equitable discretion exercised if there was a negligence remedy against agents. Even this was removed in the case of *A v Glasgow City Council* (bin lorry claim) where agents failed to raise an action within the triennium, but the case was allowed to proceed under s.19A. The current law on s.19A now fails the basic jurisprudential test of predictability, leaving advisors in an impossible position. It should be reformed.
Action on Asbestos	There are two significant areas in relation to the operation of provisional damages in relation to asbestos related conditions; concluding a case on a provisional or full and final basis and the issue of time bar as determined under the Prescription and Limitation Act 1973. Provisional Damages: As is outlined in the discussion paper, pleural plaques are generally asymptomatic, but their presence may signify an increased risk of developing a much more serious asbestos related condition such as mesothelioma or bronchial carcinoma. Having an opportunity to conclude a case on a provisional basis allows for the injured person to return for full and final settlement should a more serious condition be diagnosed, and is therefore an important legal remedy. Whether it is an effective legal remedy will be determined on the basis of the injured person being in possession of all the facts to make an informed choice about whether they wish to settle on a provisional of full and final basis. The injured person would therefore have to have knowledge of: o whether the responsible party admits liability, given that liability must be admitted for a provisional settlement

	o the possibility that a diagnosis of pleural plaques can signify an increased risk of developing mesothelioma o the difference in the potential value of their case settling on a provisional or on a full and final basis. Feedback from members of our support group network indicated that they had not fully understood the above three factors. This is in no way a reflection on the legal advice that has been given to the members, rather a reflection of the complexities of the legal process. For the injured person to make an informed choice that is appropriate to their circumstances, it is essential that they understand all of the relevant factors. Members attending the support groups in Aberdeen, Edinburgh, Forth Valley, Glasgow, Ayrshire and Inverclyde were asked as part of this consultation whether they had settled on a full and final basis or a provisional basis and the reasons for their decision. The overwhelming majority had settled on a full and final basis. We understand that this is borne out in the overall numbers of those settling on a provisional basis; within one personal injury law firm, only around 5-10 % of pleural plaques cases settle on a provisional basis, a surprising low figure. When asked what had led them to decide to settle on a full and final basis, the responses included 'I wanted to have peace of mind that there was money for my funeral', 'I wanted to be able to help my family financially' and 'I took a full and final settlement as I know my family can go back for damages if I die from another asbestos related condition.' This last comment was a commonly held belief across the support groups and was based on a misunderstanding of the Damages (Scotland) Act 2011, Section 5, which provides that a relative can pursue a case for their loss where an injured person has died of mesothelioma and had previously settled a case on a full and final basis. There was misunderstanding across the support groups that there was a right to return for any asbestos related condition and a general agreement that the full and final settlement had been accepted as they 'knew their family would be ok if the developed any other disease'. Whilst the majority recalled that they had a conversation with their solicitor about their options, there was general agreement that it had been difficult to absorb all the information provided. Where a provisional settlement is likely to be an option in an individual's case, it is suggested that these complexities be addressed. Providing all the relevant information in a fact sheet format in advance of any discussion between the solicitor and the injured person about the basis of their settlement would provide a potential remedy, given the responses from our support group members If it is the case that this figure is so low as so few responsible parties are admitting liability thus preventing the option of a provisional settlement, then this must be addressed.

	Time Bar: Any discussion about the operation of provisional damages for pleural plaques must inevitably include the issue of time bar. It is an issue that Action on Asbestos receive many enquiries about. The most common scenarios are: o The injured person is told at the point of the diagnosis of a more serious asbestos related condition that there is a previous medical entry relating to a diagnosis of pleural plaques that the had not been informed of, o where medical notes indicate they were advised, the information was lost in the broader discussion of the more serious health problem that was being investigated when the incidental finding of pleural plaques was made, o they were informed but were assured that the finding of pleural plaques was 'nothing to worry about', and that pleural plaques would not cause health problems. All of the above are problematic in pursuing civil compensation and there is an inherent injustice to an injured person being unable to access damages due to an early entry in their medical records that they did not know about or if they did, they were reassured that it would cause no harm. This is particularly so for those who are diagnosed with mesothelioma and find that they are unable to pursue compensation. A reasonable person would not seek legal advice in the pursuit of damages for a condition that does not cause physical harm when the very basis of the case is that harm has been caused that was foreseeable. The reasonable person could not be expected to understand the background to, and the provisions of The Damages (Asbestos Related Conditions) Act 2009. It is often the case that the early entries date back some years, to a time when it was less usual for a respiratory physician to advise their patient of the diagnosis and explain to them that they can pursue compensation for pleural plaques. Simply increasing the limitation from three to five years would not address this situation. Section 4.27 refers to Section 19A of the Prescription and Limitation (Scotland) Act 1973. This section provides the court with discretion to allow an action to be taken out with the limitation period where it is equitable to do so. Anecdotal evidence from our service users indicates that a significant number are advised by their solicitor that an action cannot be pursued due to time bar, leaving the impression that requesting the court to use discretion is not a common practice. If this is the case, it supports the need for reform further.

	Protecting Rights of Relatives: With regard to protecting the interests of those with mesothelioma, at present, those who did not pursue a case within three years of any previous diagnosis of an asbestos related condition will be time barred from pursuing a case for damages. Their relatives may have the right to pursue damages for their own loss when the injured person dies from mesothelioma. There is a long history of the insurance industry trying to find legal remedies to thwart the right of those with mesothelioma to pursue compensation. There must be provision made within any reform that where a person who is diagnosed with mesothelioma is unable to pursue a civil case for compensation for their own case because of time bar issues of any kind, that their relatives retain the right to pursue a case for their own loss upon the death of that person.

20. If so, do you favour:

(a) providing that a diagnosis of pleural plaques would not, on the basis of time bar, preclude further action at any future time;

(b) providing that a claim for asbestos-related pleural plaques (or pleural thickening or asbestosis) itself would become time-barred 3 years after diagnosis but that claims for any subsequent related disease such as mesothelioma would not be so time-barred;

(c) creating a provision parallel to the Limitation (Childhood Abuse) (Scotland) Act 2017; or

(d) another solution, and if so, what?

(Paragraph 4.41)

[REDACTED]	There should be no time limit for this condition. It is very unfair specifically for pleural plaques condition. I was diagnosed with pleural plaques in 1996 but was not made aware that I could claim compensation for this condition, in 2018 after an angina attack I was diagnosed with asbestosis but after consulting with lawyers I was informed that the claim had time lapsed due to the diagnosis in 1996 and I should have put in a claim by 1999 for pleural plaques. This I consider to be unjust and unfair to any claimant as the condition is progressive and uncureable.

Midori Courtice	I am not sure which option of question 20 I would prefer; one part that I can't quite understand is the reason for why there is a "time bar", or time restriction at all. I guess, very simply, I would prefer for them to be treated as the separate diseases they are, and for an allowance of separate compensation claims.
Stuart McMillan MSP	Option (a)
Wendy Kempler	As a family who have been personally impacted by the failings in the current law. We would be in favour of any new provision which protects anyone who goes onto develop Mesothelioma, regardless of whether they had previously acted on a Pleural Plaques diagnosis or not. A diagnosis potentially years later with a terminal illness such as Mesothelioma should have no bearing on whether or not a claim had been previously made for Pleural Plaques. The Pleural Plaques diagnosis should be treated separately with regards to any claim being raised.
Zurich Insurance UK	Further to our response to Question 19, if revisions where considered, we fould favour option (a).
Ronald E Conway	See 18 and Paper Apart
Clyde & Co (Scotland) LLP	Any potential problem with asbestos related claims is not necessarily due to the nature of the claim itself, but the unintended consequences of the Damages (Asbestos Related Conditions) (Scotland) Act 2009. As things stand the Act requires the raising of an action on diagnosis of pleural plaques, asymptomatic diffuse pleural thickening or asymptomatic asbestosis. Unless a claim has been raised, it is not currently possible to protect yourself in respect of having a future claim for a more serious asbestos related condition. The cause of this problem is not asbestos related claims or the settlement of those claims on a provisional or full and final basis. It is the fact that the 2009 Act requires a claim to be made as the Act states that the three conditions represent an injury. The most straightforward way to remove the whole issue of asbestos claims potentially being time-barred due to a failure to raise a claim for the original diagnosis, is to repeal the 2009 Act. One of the other options to resolve this issue would be to adopt a similar approach as has been taken with historical abuse and introduce separate legislation removing limitation in respect of all asbestos related claims. It is our view that this is inappropriate for these types of claim. Historical abuse cases are a different category of claim and legislation in respect of those claims was appropriate. It is not sufficient to remove the diagnosis of pleural plaques from time-bar considerations, if that is the ultimate decision reached. The 2009 Act also refers to two other asymptomatic conditions, asymptomatic diffuse pleural thickening and asymptomatic asbestosis. If it is the intention to legislate to protect future claims for serious asbestos related conditions, in circumstances where an individual

	has developed pleural plaques and not raised proceedings, then that legislation would require to be extended to include the other two asymptomatic conditions.
Association of Personal Injury Lawyers	We favour option (b). The law as it stands following Aitchison is extremely unfair. Many people choose not to claim compensation for pleural plaques, which is often symptomless, as they see no need to do so. As a result of Aitchison, a terminally ill mesothelioma victim will be prevented from receiving compensation for this devastating disease if he knew that he had symptomless pleural plaques but decided not to bring a claim when he became aware of them. Many people will be unaware, as detailed in the Scottish Law Commission's paper, that they will need to bring a claim upon learning about the existence of the plaques, to preserve their ability to bring a further claim should their condition worsen in the future. As detailed in the Scottish Law Commission's paper, their doctor may simply be unaware of the law surrounding this area, and the patient may not be properly directed to the right support such as Action on Asbestos. Some people may not even properly acknowledge that they have pleural plaques at the time they are told (if they are also given more serious diagnoses at the same time), and most will certainly not understand the importance of the diagnosis without further explanation. Even if they are aware, it is unlikely that they will consider the diagnosis as the subject of a negligence claim, given that pleural plaques are most often symptomless. We welcome that the Scottish Law Commission is looking at this issue again, and suggest the correct approach would be to maintain the three-year time bar for a diagnosis of pleural plaques, but to allow subsequent claims for asbestos related disease in the future, even if a claim is not brought for the plaques. We acknowledge that this section of this particular paper is limited very specifically to limitation in relation to asbestos related disease. There are wider implications of Aitchison in other areas, e.g. industrial disease claims, which will need to be considered in due course – we will address these in our response to the Scottish Law Commission's 11th Programme of Law Reform.
Stagecoach Group plc	Our preference is Option d. Section 19A of the Prescription and Limitation (Scotland) Act 1973 should be amended to allow the court power to disregard a claim for pleural plaques and to allow any subsequent asbestos related disease to proceed as if no claim had been brought in respect of pleural plaques
Forum of Insurance Lawyers	FOIL agrees that the current position creates uncertainty and harsh results for pursuers. That position is created because pleural plaques and other asymptomatic asbestos related conditions are now actionable in Scotland. The injustice would be cured by removing that actionability.

	There is accepted medical consensus that pleural plaques do not cause injury or any symptoms and are not a precursor to a more serious asbestos related condition. If Scotland also followed the House of Lords decision in Rothwell and removed pleural plaques as an actionable harm the current significant issues with provisional damages and time-bar would be removed. It would be a contradiction if a diagnosis of pleural plaques were to be excluded from an application of limitation but remained an actionable harm. The Damages (Asbestos-related conditions) (Scotland) Act 2009 in so far as it relates to claims for pleural plaques could be repealed. Assuming that the Act is not going to be repealed, we consider option (b) to be the most equitable and efficient to operate. Removing any timebar could significantly prejudice defenders. A new three year clock for a new disease would remove the most serious mischief. It would bring Scotland in-line with other jurisdictions.
University of Aberdeen Law School	We favour option (c).
Tom Marshall	While each of the options (a) to (c) has its attractions, I favour the wider reform of limitation law as proposed in the SLC 2007 report, as modified by the proposals contained in my 2012 submissions. If (b) was adopted, a claimant could also still attempt to have the court exercise discretion in favour of allowing a plaque claim and seeking provisional damages. It has to be accepted there will be some cases where an individual has not taken clear opportunities to prosecute a claim within a reasonable time and where application of general principles of limitation means the claim cannot be prosecuted. The proper course is to find a formulation for both a general rule of limitation and the discretion to override it which allows the individual circumstances of each case to be fully taken into account, so that neither the rule nor the discretion are effectively rendered dead letters. Scots Law states that personal injury claims do not prescribe. Any limitation law must bear this in mind. Cutting off the right to enforce the obligation ought properly to balance the actual prejudice to both parties and providing the court with a check list of factors to consider would assist that process. In the context of pleural plaques, while the Scottish Parliament has legislated that they are more than a minimal injury, the actual circumstances in which an individual came to learn of the diagnosis and what has happened subsequently should be capable of being fully considered.
Unite the Union Scotland	(a) No. If an individual is diagnosed with pleural plaques and has constructive knowledge for the purpose of Section 17 of the 1973 Act then he or she ought to raise proceedings within three

	years and will have the option of settling on a provisional basis to protect the position in the event of a more serious disease developing. However, if that individual fails to do so, for whatever reason, then that failure should time bar only the pleural plaques claim and not future claims for any other asbestos-related disease. (b) Yes. Essentially, the approach taken in *Shuttleton v Duncan Stewart & Co Ltd* should be reinstated, and each distinct asbestos-related condition have its own limitation period which starts on the date of constructive knowledge of that particular condition. The circumstances surrounding the diagnosis of pleural plaques are particularly unusual in terms of giving rise to thoughts of compensation. Individuals should not be disproportionately penalised for failure to raise court proceedings for relatively minor injury when they later go on to develop a serious and potentially life-threatening illness as a result of the same negligent act. (c) No. The situations are not analogous. The trauma which accompanies childhood abuse and is often the reason why action is not taken cannot be compared to the multitude of reasons why an individual may not raise proceeding for pleural plaques. Our position is that there should be a limitation period in relation to asbestos related diseases however it should be applied separately to each disease. (d) It is worth noting that whilst mesothelioma is by far the most devastating of the asbestos-related diseases, it is not unusual for individuals to have a 'time barred' pleural plaques case but to then develop asbestosis, diffuse pleural thickening or asbestos-related lung cancer, and that they should not be denied access to compensation because of their failure to raise proceedings for pleural plaques.
Senators of the College of Justice	We do not consider it appropriate to offer a view on this point, for the reasons set out in more detail in our response to question 21.
Aviva Insurance Ltd	Option (d) - We would prefer to amend Section 19A of the Prescription and Limitation (Scotland) Act 1973 with a wording that means the court could have the power to disregard a claim for pleural plaques and allow an action for any subsequent asbestos-related disease to proceed as if no prior claim for pleural plaques had been made.
Digby Brown LLP	Our preferred option would be (b) where the conditions that would not be time barred would be both mesothelioma and asbestos related lung cancer.
Thompsons Solicitors Scotland	(a) No. If an individual is diagnosed with pleural plaques and has constructive knowledge for the purpose of Section 17 of the 1973 Act the/n he or she ought to raise proceedings within three years and will have the option of settling on a provisional basis to protect the position in the event

	of a more serious disease developing. However, if that individual fails to do so, for whatever reason, then that failure should time bar only the pleural plaques claim and not future claims for any other asbestos-related disease. (b) Yes. Essentially, the approach taken in *Shuttleton v Duncan Stewart & Co Ltd* should be reinstated, and each distinct asbestos-related condition have its own limitation period which starts on the date of constructive knowledge of that particular condition. The circumstances surrounding the diagnosis of pleural plaques are particularly unusual in terms of giving rise to thoughts of compensation. Individuals should not be disproportionately penalised for failure to raise court proceedings for relatively minor injury when they later go on to develop a serious and potentially life-threatening illness as a result of the same negligent act. (c) No. The situations are not analogous. The trauma which accompanies childhood abuse and is often the reason why action is not taken cannot be compared to the multitude of reasons why an individual may not raise proceeding for pleural plaques. Our position is that there should be a limitation period in relation to asbestos related diseases however it should be applied separately to each disease. (d) It is worth noting that whilst mesothelioma is by far the most devastating of the asbestos-related diseases, it is not unusual for individuals to have a 'time barred' pleural plaques case but to then develop asbestosis, diffuse pleural thickening or asbestos-related lung cancer, and that they should not be denied access to compensation because of their failure to raise proceedings for pleural plaques.
Faculty of Advocates	It is submitted that (b), providing that a claim for asbestos-related pleural plaques (or pleural thickening or asbestosis) itself would become time-barred 3 years after diagnosis but that claims for any subsequent related disease such as mesothelioma would not be so timebarred, would operate to avoid the unfairness noted above
DAC Beahcroft	As above, while we do not consider there to be a problem with the way provisional damages operate in cases involving asbestos-related disease claims, if selecting from the above options we would favour option (b).
Horwich Farrelly Scotland	The solution proposed in paragraph 20(a) would be our preference.
Association of British Insurers	We do not agree that there is a problem with the way provisional damages operate in cases involving asbestos-related disease claims – it is more an issue with asbestos-related disease claims and limitation, given the unintended consequences of the Damages (Asbestos Related Conditions) (Scotland) Act 2009. Of the options presented, we would favour 20(a): providing that a diagnosis of pleural plaques

	would not, on the basis of time bar, preclude further action at any future time. However, it should be noted that s19A of the Prescription and Limitation (Scotland) Act 1973 already works appropriately to protect the parties, as the court has discretion to decide whether to allow a claim to proceed
Society of Solicitor Advocates	a) Yes – the current position of requiring a pursuer to raise an action for asymptomatic pleural plaques to preserve timebar is unsatisfactory (c) Would also provide clarity and more certainty around this issue.
Forum of Scottish Claim Managers	Option (d) - We would prefer to amend Section 19A of the Prescription and Limitation (Scotland) Act 1973 with a wording that means the court could have the power to disregard a claim for pleural plaques, symptomatic diffuse Plural thickening and/or asymptomatic asbestosis and allow an action for any subsequent asbestos-related disease to proceed as if no prior claim for pleural plaques had been made.
Direct Line Group	In light of our response to question 19, we have no additional comments to question 20.
NFU Mutual	Option (d) - We would prefer to amend Section 19A of the Prescription and Limitation (Scotland) Act 1973 with a wording that means the court could have the power to disregard a claim for pleural plaques (or other asymptomatic asbestos-related conditions) and allow an action for any subsequent asbestos-related disease to proceed as if no prior claim for pleural plaques had been made.
Kennedys Law	We consider that the limitation period for pleural plaques claims should remain. Option (a) seeks to disregard the knowledge that a pursuer has in respect of his condition of pleural plaques at the time of diagnosis and what he may have been told by the medical practitioners treating him.This is inequitable and prejudicial to the defender. We consider that option (c) is not appropriate as the choice made to not progress a claim for pleural plaques is very different to not pursuing an abuse claim, where the psychological impact of the abuse can lead to the victim not being able to disclose the abuse for some time. In abuse claims, the onus is on the defender to establish substantial prejudice or lack of scope for a fair trial. If similar provisions were to be introduced for asbestsos related claims it seems likely that the onus would shift to the defender in any long tail disease claim which follows on from and is connected to an earlier diagnosis of pleural plaques. However, with abuse claims, there is more scope to argue substantial prejudice or a lack of scope for a fair trial. Abuse by its very nature is normally carried out behind closed doors. Following the lengthy passage of time there are unlikely to be any factual witnesses available or any documentation that would allow the defender to fully investigate the claim.

	In contrast, with asbestos claims, exposure to asbestos will have taken place in open view. There may well be witnesses available through colleagues or friends who have worked alongside the pursuer. There may be factory inspectorate reports or documentation from health and safety meetings retained at local offices etc. Therefore, it is likely to be more difficult to bring the defender within the ambit of provisions whereby it can be argued that the defenders will be prejudiced due to lack of evidence resulting in not being able to have a fair trial. Accordingly, to introduce provisions parallel to the Limitation (Childhood Abuse)(Scotland) Act 2017 for asbestos claims would in reality have the effect of removing the limitation argument entirely in almost all cases. If a change is considered to be necessary then option (b) is preferred as it accounts for the practicalities in assessing the pursuer's requisite knowledge at the point of diagnosis. This option would afford certainty for defenders with regard to claims for pleural plaques or mild/asymptomatic conditions but not restrict pursuers in making a further claim in relation to a fatal disease such as mesothelioma. It would allow a pursuer with asymptomatic pleural plaques to decide not to embark on litigation in that regard, but to take a different decision later If and when a more serious condition develops.
Law Society of Scotland	Again there is divided opinion on the extent of change needed. Everyone is in agreement that the current position requiring a Pursuer to raise an action for asymptomatic pleural plaques to preserve the position regarding limitation is unsatisfactory. Pursuers' agents argue that solutions a) and c) will provide a quick fix for asbestos cases where a fair trial is possible. Diffuse pleural thickening should also be added. The real solution lies in reviving the proposals provided by the previous Law Commissions but keeping the basic triennium. The s.19A acid test should be actual evidential prejudice and right to a fair trial for all parties. Defenders' agents see no reason why the solution proposed in paragraph 20(a), which would essentially take us back to the position in *Shuttleton*, would be inadequate. They do not consider the circumstances are akin to the unique circumstances of historic child abuse cases which would justify another exception to limitation and certainly do not see any basis for revisiting the meaning and impact of Section 19A in respect of a singular type of claim. If this was to be revisited, Defenders' agents consider it ought to be done in the context of a review of the application of the Section and the 1973 Act as a whole. The solution proposed at paragraph 20(a) in their view resolves the issue identified.
Action on Asbestos	(a) No. Although a diagnosis of pleural plaques may not be relayed to the injured party or action not initially taken on the basis that the injured person has 'nothing to worry about', the aim of having access to justice would be to protect those who go on to develop a more serious asbestos related

	conditions. This would not necessarily be achieved by entirely excluding pleural plaques from time bar. (b) Yes. This would prevent those with the most serious asbestos related condition from being denied access to justice. (c) No. This legislation was introduced to address the very specific and complex area of child abuse and there are more suitable options that can be introduced for asbestos related conditions.

21. Please give reasons for your choice in question 20.

(Paragraph 4.41)

Ken Campbell	See above Question 20
Midori Courtice	My only thought as I read this was, it seemed like an assumption was being made that PPs are always a precursor to mesothelioma. In my understanding, they are two different diseases. PPs are absent in many proven cases of mesothelioma attributable to asbestos exposure (https://thorax.bmj.com/content/56/4/250). PPs do not necessarily place you at a higher risk of developing mesothelioma but the very same exposure that led to the development of the PP, does place you at a higher risk of the more severe ARDs later on. Or, am I missing the point... does the problem here stem from the fact that both conditions arise from, in theory, the "same" exposure, so the two outcomes have to be connected by one claim? It just seems to me, like if someone develops mesothelioma, and they would like to make a claim for compensation, being a distinct disease not necessarily connected to the PP, they should be able to do so at the point of diagnosis of that disease, and the fact that they had a previous diagnosis of PPs at any point in the past, should just provide further evidence for the validity of the present, new diagnosis; additional proof of a history of exposure to asbestos.
Stuart McMillan MSP	Ensures that a person diagnosed with pleural plaques, but doesn't go on to develop a more life-threatening illness, can still claim for damages. Clearly, many people diagnosed with pleural plaques often don't realise their right to claim damages, so keeping the time bar could still prohibit injured persons from making claims.
[REDACTED]	I lost my Dad to Mesothelioma on May 11th 2017 and due to the current law the family are still looking for justice and for Dad's former employers to be held accountable for their negligence.

	The loss of my Dad has left me totally devastated. Dad was only a young man of 68yrs old when he lost his life to this needless, cruel and devastating disease. He should have had a long number of years ahead of him and we as a family have been robbed of making more lasting and loving memories. Our 13 year old daughter Jayla (8yrs old when dad died) will miss her grandad being there to support her during different milestones in her life like her Prom, Graduation, Engagement, Wedding and the lost opportunity of being a Great Grandad to the possibility of her having her own children one day in the future. After my dad was diagnosed with Mesothelioma in late 2016, he started a claim and gave a personal statement against his former employers but sadly passed away within 6 months before the claim could progress. As executor of my Dad's estate, I tried to pursue my Dad's claim against his former employers to hold them accountable for their negligence but sadly this proved very difficult with the current law. The current law as it stands only add's further anxiety and stress to a family already struggling and grieving for the loss of a loved one, when trying to pursue a claim to find that insurer's / former employers are using the Pleural Plaques 3yr limitation time bar ruling as a loophole to avoid wrongful death / negligence claims in court for a more serious illness such as Mesothelioma. I found that my Dad's medical records showed a letter saying that the hospital had found pleural plaques during an x-ray in January 2010. I also found that my Dad did not pursue a claim for Pleural Plaques, which I found very strange and none of the family knew anything about this diagnosis as Dad attended the appointment himself in 2010. The family are of the belief that Dad did not fully understand what he was apparently told, regarding the Pleural Plaques condition, the 3 year limitation period regarding a claim and any consequences of not claiming if he was to later be diagnosed with a more serious asbestos disease such as Mesothelioma, Dad obviously did not believe it to be serious enough to tell any of his family, after all you can live a relatively normal life with Pleural Plaques. In November 2016 while being diagnosed for Mesothelioma the Doctor at the hospital detailed that Dad was aware of the Pleural Plaques but that he was not told to claim compensation. This made the whole process of pursuing the claim under the current law even more frustrating as I now had two conflicting letters within the medical records regarding the pleural plaques diagnosis, one saying that Dad was advised about making a claim and the other being a personal statement from Dad to the Doctor saying he was unaware of being able to make a claim for compensation.

	However, when following the current law, the letter from January 2010 relating to the Pleural Plaques diagnosis would allow the insurers / former employers to raise the arguement of time bar as no claim was pursued within 3yrs of the Pleural Plaques diagnosis. I find it utterly ridiculous that a law introduced for Pleural Plaques can then be used as a loophole by insurers / former employers to not be held accountable for their negligence when it leads to a terminal illness such as Mesothelioma. To make matters even more frustrating, if my dad lived in England or Wales then there would be no issue, I would have been pursuing the negligent employer for the wrongful death of my dad to Mesothelioma. My dad's claim was set for court in July 2020 but I was advised by [REDACTED] solicitors that it would be best to withdraw the case for the time being as there was a risk of losing the claim under the current law. I took their advice and 5yrs after my Dad's death our family are still looking for justice and for Dad's former employers to be held accountable for their negligence while he was employed by them as a young man with no protective clothing or being made aware of the potential risk to his health in later life. My dad originally pursued the Mesothelioma claim shortly after his diagnosis, which I continued as executor but after having to withdraw the case in 2020 due to the poor state of the current law. I am now left with the prospect of my dad's case still being time barred if the 3yr limitation from date of diagnosis or death is still considered in any new provision being made, even although the original claim was done within the appropriate limitation time scale and was only withdrawn because of the potential time barring linked to Pleural Plaques. I can only hope that common sense prevails and that the current law is reformed and provisions are made to cover all the victims and their families who have suffered due to the failings in the current law. No wrongful death from Mesothelioma should be allowed to pass without the negligent party being held accountable and no family should be left suffering both emotionally or financially from the loss of a loved one due to the impact of an employer's negligence. I look forward to the necessary change in the law being made to allow our family to pursue my Dad's case and get the justice that he and the family deserves.
Zurich Insurance UK	Once the pursuer develops a demonstrable condition, such as asbestosis or pleural thickening, there can, in our view, be no reasonable excuse for delaying pursuit of a claim to a later date.
Ronald E Conway	See Paper Apart
Clyde & Co (Scotland) LLP	It is relatively clear that the issue that is being considered here involves two components – the asbestos related claims themselves and then the overlay of the 1973 Act. The introduction of the 2009 Act to

	specifically allow for claims in respect of asymptomatic conditions by deeming them an injury, has to remain relevant in considerations as to how to overcome the issue of those with serious asbestos related conditions potentially being unable to raise proceedings as their claims are time-barred. It is our view that if the 2009 Act is to remain, then the most appropriate way to deal with the situation is to revisit past considerations of the law surrounding limitation. It is anticipated that this is more likely to avoid further potential unintended consequences as opposed to looking to legislate specifically to deal with asbestos related conditions.
Stagecoach Group plc	We have suggested a potential soluction at 20 above. We consider that options a and b may be workable as long as the subsequent cause of action was subject to its own Limitation period from diagnosis. We consider that amendment to Section 19a of the Act may be a simpler way to achieve the result that is required.
Forum of Insurance Lawyers	As above
University of Aberdeen Law School	We consider that the Limitation (Childhood Abuse) (Scotland) Act 2017 has functioned well. In particular we consider that the discretion of the court under section 17(D) of the 1973 Act (as inserted by section 1 of the 2017 Act) not to allow an action to proceed if it is satisfied that it is not possible for a fair hearing to take place, or that the defender would be substantially prejudiced if the action were to proceed, strikes the right balance between the interests of pursuers and defender s in cases where abuse is often not disclosed until many years after the fact. While we appreciate that asbestos-related disease involves very different factual situations from childhood abuse, it shares the characteristic that for reasons for which the pursuers are not at fault, actions are often not brought until many years after they become aware of their injury. We also consider that creating a parallel category of pursuer exempt from limitation will help to preserve the normal operation of provisional damages outside the special context of asbestos-related disease.
Tom Marshall	See 20 above
Unite the Union Scotland	Same as above
Senators of the College of Justice	We take the view that the question of whether, and if so in what way, to address any perceived iniquities in the operation of the law on provisional damages so far as it relates to asbestos related disease is essentially a matter of policy, and thus not a matter on which it would be appropriate for us to offer a concluded view. That said, we suggest that any consideration of this question would have to take place against a backdrop of the established legal rule on the question of single actions as enunciated in

	Aitchison. On that analysis, of the options put forward in question 20, it might be thought that option (a) best achieves the desired result without offending against that rule. We also observe, in passing, that the statutory provisions of section 5 of the Prescription (Scotland) Act 2018, coming into force on 1 June 2022 , setting out the 'discoverability' test in relation to latent contractual claims, might serve as a useful comparator as to how this matter might be addressed.
Aviva Insurance Ltd	Options (a) to (c) all have retrospective tendencies and therefore, may not appropriately balance Pursuers and Defenders interests in this matter or indeed, could fall outwith legislative competence. Option (a) may work as long as as the 'further action at any future time' is subject to it's own limitation period rather than no limitation period at all and perhaps our suggestion would be a simpler way of achieving this objective .
Digby Brown LLP	This would bring the position in Scotland and England into line and lead to more consistency in the way in which claims are dealt with. We sometimes come across claims where the pursuer has received a diagnosis of pleural plaques in England, but has a right of action in Scotland where the exposure to asbestos occurred. The diagnosis of pleural plaques may not have been flagged up as significant on the basis that this is not actionable in England, and it would be inequitable if the pursuer were to be barred from recovering damages in those circumstances. Irrespective of where the diagnosis of pleural plaques is provided, a pursuer receiving a subsequent diagnosis of mesothelioma or asbestos related lung cancer should not be prevented for claiming damages for these severe conditions simply on the basis that they were aware that they had been diagnosed with pleural plaques. This is a symptomless condition and is often identified during the course of investigations in relation to more serious health conditions. On that basis, it is unreasonable to expect the pursuer's focus to be on the diagnosis of pleural plaques. In addition, due to the nature of pleural plaques, it is unreasonable to expect a pursuer to be aware that, in order to preserve their entitlement to make a claim if their condition worsens in the future, they must make a claim in respect of pleural plaques within the limitation period. We agree that asymptomatic asbestosis and asymptomatic pleural thickening should also be provided for to reflect the operation of section 2 of the Damages (Asbestos-related Conditions) (Scotland) Act 2009. A possible solution would be the creation of an exception akin to that provided for in s17(3) of the Prescription and Limitation (Sc) Act 1973, in terms of which, for claims arising from mesothelioma or asbestos related lung cancer, any period during which the pursuer was aware of the diagnosis of pleural

	plaques, asymptomatic asbestosis or asymptomatic pleural thickening, but not the diagnosis or either of the other two conditions, would be discounted in the computation of the limitation period.
Thompsons Solicitors Scotland	Same as above
Faculty of Advocates	Considering the uncertainty and, sometimes, unfairness, facing pursuers, discussed in the response to Question 19 the Faculty considers that the alternative outlined above ((b)) is preferable to relying on s.19A as the safeguard to the Aitchison rule, whereby a diagnosis of a benign condition can so significantly prejudice a pursuer and his family in the event that he develops a malignant condition in the future. The current law forces pursuers to make a claim for asbestos related conditions at the earliest opportunity to protect their position. This leads to cases being raised where the pursuer is only seeking a provisional decree, and where the actual award of damages may be small. This can arise in various circumstances but most frequently in cases where there is a significant Holtby discount for unsued exposure or where the pursuer has received a PWCA payment that outweighs, or is a substantial proportion of, any award of compensation. Were the law to be altered so that such a diagnosis would not bar future claims this would remove the need for pursuers to bring such claims before the court. However, the Faculty does not consider that such claims should be open ended. A balance must be struck between the interests of pursuers and defenders. Simply exempting asbestos conditions from the usual limitation rules would not be equitable. As such, the Faculty is in favour of retaining the 3-year limitation period for claims for Pleural Plaques, Diffuse Pleural Thickening and Asbestosis. The reason for this is that in any asbestos related claim there are significant evidential difficulties caused by the passage of time and it is best that any such claims are brought at the earliest stage to limit the deterioration of evidence. The retention of the three-year period would allow defenders certainty after the triennium in respect of claims for Pleural Plaques, Diffuse Pleural Thickening and Asbestosis and not move the balance too far in favour of the pursuers.
DAC Beachcroft	Removing time bar completely would be a significant prejudice to defenders. Maintaining a three year limitation clock for pleural plaques remains appropriate, but introducing a new three year limitation period commencing from the date of diagnosis with any future asbestos related condition would seem most appropriate of the options detailed above. The similarities to the rationale for the legislation dealing with historical abuse cases are superficial in our view. In those cases, the issue was the understandable reluctance of the victims of abuse to come

	forward even many years after the abuse was suffered. The legislation, by removing the time bar for most such cases, allowed the victims to seek due and just recompense. In our view the circumstances surrounding a claim for pleural plaques are different. In these cases the issue is not usually about the reluctance of the person suffering the condition to make the claim, it is usually that the person either knew that they had pleural plaques and took no steps to claim or that they had no idea they originally had asymptomatic pleural plaques until a serious disease such as mesothelioma manifested itself. If the pleural plaques claim is brought in time, i.e. up to three years since the date of awareness then the pursuer can ask the court to make an award of provisional damages, which would protect the pursuer from time-bar should they fall victim to a serious disease later on. In the circumstance that the pleural plaques claim is not made in time, then S19A of the Prescription and Limitation (Scotland) Act 1973 would operate and the court would have discretion to decide whether to allow the claim to proceed.
Horwich Farrelly Scotland	We consider this would address the principal mischief which arises. We do not consider the circumstances are akin to the unique circumstances of historic child abuse cases which would justify another exception to limitation and do not see any basis, as we understand some may feel, to revisit the meaning and impact of the Section 19A test in the Prescription and Limitation (Scotland) Act 1973 Act in respect of a singular type of claim.
Association of British Insurers	In our view, it is not equitable for the current position to be that (as set out in the discussion paper) although pleural plaques are nearly always asymptomatic, nonetheless from the date of awareness of pleural plaques the limitation period starts to run against any future claim a person may have; for example, in respect of mesothelioma. The discussion paper also highlights other issues such as potential pursuers not necessarily receiving appropriate legal advice (potentially resulting in them ultimately not being able to access any remedy) and medical records not necessarily noting what potential pursuers were told or actually understood. We agree that the uncertainty and possible unfairness with regard to how the law operates in this area should end and of the options presented, 20(a) provides clarity and is in our view the most equitable and straightforward solution to the issue of asbestos-related disease claims and limitation (given the unintended consequences of the 2009 Act). However, it would not be sufficient to remove the diagnosis of pleural plaques from time bar considerations. This is because the 2009 Act also refers to two other asymptomatic conditions: asymptomatic diffuse pleural thickening and asymptomatic asbestosis. If there is legislation to protect future claims for serious asbestos-related conditions, then it would also need to be extended to include these two other asymptomatic conditions.

	As above, it should also be noted that s19A of the Prescription and Limitation (Scotland) Act 1973 already works appropriately to protect
Society of Solicitor Advocates	See comments regarding question 20
Forum of Scottish Claim Managers	Options (a) to (c) all have retrospective tendencies and therefore, may not appropriately balance Pursuers and Defenders interests in this matter or indeed, could fall outwith legislative competence. Option (a) may work as long as as the 'further action at any future time' is subject to it's own limitation period rather than no limitation period at all and perhaps our suggestion would be a simpler way of achieving this objective
Direct Line Group	In light of our response to question 19, we have no additional comments.
NFU Mutual	Options (a) to (c) all have retrospective tendencies and therefore, may not appropriately balance Pursuers and Defenders interests in this matter or indeed, could fall outwith legislative competence. Option (a) is more favourable than the other options and appears to offer an equitable solution, however the 'further action at any future time' would be required to have its own limitation from the awareness period of a more significant disease.
Kennedys Law	Please see our response to Question 20
Law Society of Scotland	Reasoning given at Comments on Question 20.
Action on Asbestos	As above

22. Additionally, do you consider that the establishment of liability should be capable of being deferred, by agreement between the parties, to a later point should a subsequent more serious condition emerge? (Paragraph 4.41)

Ken Campbell	Yes
Stuart McMillan MSP	Yes
Zurich Insurance UK	We are uncertain as to how this would work in practice and would re-emphasise the risk that evidence and witnesses become lost over time, and indeed a pursuer's own recollection may weaken. However, if the deferment were to be mutually agreed by the parties, we envisage no objection, though each matter would need very careful consideration on a case-by-case basis.
Ronald E Conway	I don't believe it is generally helpful Ito leave files open, and the proposal is unnecessary
Clyde & Co (Scotland) LLP	Deferring the establishment of liability is not appropriate. In practice it is also likely to make little difference to the position in any event. These claims regularly involve allegations of exposure to

	asbestos going back to the 1960s, 1970s and 1980s. The carrying out of investigations to allow a view to be taken on liability is extremely difficult. Deferring that to another date in the future is not going to assist anyone. The position with a provisional settlement should be that there is an acceptance that there was exposure to asbestos which has caused the original condition. That exposure to asbestos will also be relevant if the individual goes on to develop a more serious condition.
Association of Personal Injury Lawyers	No. In our experience, establishment of liability in asbestos cases is not usually an issue. It is also difficult to see how agreement between the parties would be satisfactory to the pursuer. It is unlikely in our view, that pursuers could be given the confidence that they could bring a claim at a later date without the defender challenging them on why they did not bring such a claim sooner. We appreciate that the following is outside of the remit of the Scottish Law Commission's project, but for completeness wish to flag our wider concerns relating to the law of limitation. Again, we will raise these issues further in our response to the Scottish Law Commission's 11th Programme of Law Reform. Despite the Scottish Government agreeing to make changes to the law on limitation, following their 2012 consultation on a draft Bill on the Civil Law of Damages, such changes have yet to be introduced. We would urge the Scottish Government to bring forward a replacement of the "reasonably practicable" assessment in the date of knowledge test, with a more subjective assessment of whether or not the pursuer was "excusably aware". The Scottish Government must also follow through on its commitment to amend the 1973 Act to provide a detailed non-exhaustive list of factors for the courts to take into account when they decide whether to exercise discretion on whether limitation should be disapplied. It is very disappointing that these changes have yet to be introduced. APIL firmly believes that the introduction of the proposed non-exhaustive list would help to offer protection to pursuers who are too often unfairly disenfranchised by the courts, which often attribute to them medical and legal knowledge that they simply do not possess. We strongly recommend, however, that the proposed wording around the list should be changed from "to which the courts may have regard" to "to which the courts shall have regard", if there is to be real confidence that the courts will, in fact, take the list into consideration. We would also suggest that it should be made clear that there is no presumption in law either for or against the exercise of this discretion. We feel this is necessary, given the way in which the Scottish courts have interpreted the equitable discretion in the past. This has left many deserving claimants without a route to redress, for example, in the case of Cowan v Toffolo Jackson (1998 SLT 1000). In practice, the courts' attitude appears to be that the exercise of discretion is an exceptional indulgence to pursuers, which is simply not the case and should be made clear in legislation to avoid any prejudice against the claimant in the exercise of discretion.

Stagecoach Group plc	Yes. Where a claim is received for pleural plaques, a Defender may take the view that it should be settled on the basis of economics without significant investigations. A more serious condition may prompt the Defender to carry out more in depth investigation. Similarly, a Pursuer may not pursue a claim for pleural plaques to avoid a claim for a more serious condition becoming time barred under the current process.
Forum of Insurance Lawyers	FOIL sees the attraction to defenders of deferring a liability admission. Taking a liability defence to proof may not be attractive compared to settling on a provisional basis for, say £7,000. The considerations may be different for a £700,000 mesothelioma claim. Deferring a liability admission would allow pragmatic resolution of cases on a provisional basis. That said, we appreciate why this would be deeply unattractive for pursuers who may not survive to give evidence to prove their case if developing a serious return condition. If the establishment of liability was deferred it would need to be made clear if this was applicable to pleural plaques and asymptomatic diffuse pleural thickening and asymptomatic asbestosis or whether this extends to asbestos related conditions causing a respiratory disability.
University of Aberdeen Law School	Yes, we consider that the establishment of liability should be capable of being deferred by agreement of the parties.
Tom Marshall	No. See 19 above.
Unite the Union Scotland	No. The question of liability in asbestos related disease claims is not usually directly related to the type of disease which has developed. If negligent exposure to asbestos is established then whilst causation may remain a 'live' issue in, for example, asbestos related lung cancer cases, then that can be provided for in the wording of any provisional joint minute which is agreed between parties. It is of significant advantage to the Pursuer to be able to explore the issue of negligence whilst he or she is well enough to do so and to defer that to a stage where he or she may be dealing with a terminal illness would not be acceptable. Moreover, it is surely in the interests of Defenders to be able to investigate claims against them at as early a stage as possible whilst there remains the possibility of contemporaneous evidence. Cogency of evidence, after all, is one of their main arguments deployed in support of their limitation defence. If the proposal to delay an admission of liability is with a view to encouraging provisional settlements, then it is our view that the price to be paid for that is too high.

Senators of the College of Justice	Yes, on the basis that, in the circumstances of any particular case, such a matter was capable of agreement, we see no reason to frustrate that.
Aviva Insurance Ltd	Yes, there are different considerations and economics involved. A Defender may look to settle a pleural plaques claim on an economic basis at an early stage, where a more serious condition may warrant further investigations. Equally a Pursuer may choose to drop a claim for pleural plaques rather than fail to establish liability should a more serious condition emerge.
Digby Brown LLP	No, we would not be in favour of the establishment of liability being deferred. The nature of asbestos related conditions means that those with claims are almost always elderly when they receive their diagnosis and many years have already passed since their exposure to asbestos. This leads to issues over gathering evidence due to the passage of time, which would only be exacerbated if establishing liability were to be deferred. In addition, pursuers in these cases are often suffering from age related conditions such as dementia, which adds to the challenge of obtaining the information required to pursue a claim. The establishment of liability should be undertaken as soon as possible and we would question who benefits from this being deferred. --- Although not addressed in the Consultation, we would suggest that an area for future reform would be the extension of section 5 of the Damages (Scotland) Act 2011 to include asbestos related lung cancer, so that this condition is subject to exception in the same way as mesothelioma.
Thompsons Solicitors Scotland	No. The question of liability in asbestos related disease claims is not usually directly related to the type of disease which has developed. If negligent exposure to asbestos is established then whilst causation may remain a 'live' issue in, for example, asbestos related lung cancer cases, then that can be provided for in the wording of any provisional joint minute which is agreed between parties. It is of significant advantage to the Pursuer to be able to explore the issue of negligence whilst he or she is well enough to do so and to defer that to a stage where he or she may be dealing with a terminal illness would not be acceptable. Moreover, it is surely in the interests of Defenders to be able to investigate claims against them at as early a stage as possible whilst there remains the possibility of contemporaneous evidence. Cogency of evidence, after all, is one of their main arguments deployed in support of their limitation defence. If the proposal to delay an admission of liability is with a view to encouraging provisional settlements, then it is our view that the price to be paid for that is too high.

Faculty of Advocates	The Faculty does not consider that the establishment of liability should be capable of being deferred until a more serious condition emerges. Such a move would tend to promote uncertainty in the litigation, and generate more litigation at a later stage. The question of liability should not be contingent upon the size of the award of damages. All issues of liability should be determined at or before the award of provisional damages. The Faculty commends the approach taken in *Boyd v Gates (UK) Ltd*. 2015 SLT 483 at [11]: "[11] It is clear to me that the whole scheme of s.12 proceeds on the basis that in the particular case liability is no longer in issue. Section 12(1)(a) uses the words "as a result of the act or omission which gave rise to the cause of action" and s.12(1)(b) refers to "the responsible person". An act or omission can give rise to a cause of action only if it is wrongful, either at common law or under statute. Moreover, the section uses throughout the word "damages". A court does not make an award of damages for personal injuries unless liability has been admitted or proved. … It would be strange indeed if, the court having made an award of damages against a defender and allowed the pursuer to apply to the court for a further award of damages, it would be open to the defender nevertheless to contest the issue of liability when an application for a further award of damages was made." and in *Fraser v Kitsons Insulation Contractors Ltd*. 2015 SLT 753 at [29]: "[29] It is regrettable that there was disagreement between the parties in the present case as to the basis upon which provisional damages ought to be awarded. It is highly desirable that parties resolving a litigation strive to avoid future potential disputes as to the terms of settlement." The Faculty acknowledges that obtaining technical liability reports dealing with exposure to asbestos can be expensive. That might appear to be a disproportionately high cost in a low value pleural plaques claim. However, it is important that a clear view is obtained on liability before any offer is made to settle a claim, whether on a provisional basis or on a full and final basis (under the approach set out in *Harris v AG for Scotland* 2016 SLT 572). This is particularly important when considering the apportionment of damages in pleural plaques cases. The courts treat pleural plaques as a divisible/dose-related injury. In cases where the pursuer has been negligently exposed to asbestos with more than one employer (each with a traced insurer) there will be multiple defenders. The defenders will need to agree, or the court will need to determine, the apportionment of damages between them. There have been instances of defenders agreeing to pay a high percentage contribution for provisional damages for pleural plaques and then seeking to negotiate a lower percentage for return conditions of asbestosis or mesothelioma. This is undesirable and should be discouraged. There is one related point in connection with provisional damages for pleural plaques and litigation for the return condition of mesothelioma. As above, pleural plaques are treated as divisible/dose-related. Further, pursuers and defenders can agree to settle

	plaques claims on a basis whereby there is a period of unsued for exposure. This may be so when a former employer has been struck off the register, or where no insurer can be traced. In that event, damages for pleural plaques can be paid under deduction of the percentage of unsued for exposure. That can be done when pleural plaques claims are settled on a provisional basis. If, however, the pursuer then litigates for the return condition of mesothelioma there can be no deduction for unsued for exposure. That is on the basis of s.3 Compensation Act 2006 which provides that the responsible person shall be liable for the whole of the damages caused by the mesothelioma (subject to a right to claim contribution from other wrongdoers). s.3(4) Compensation Act 2006 provides that responsible persons may agree to apportion responsibility (for damages for mesothelioma) on any basis. The alternative is to assume that the relative length of periods of exposure goes to determine the extent of contribution. In practice, defenders might choose to increase their respective percentages pro-rata. However, there may be merit in seeking to make legislative provision to cover the gap between (i) unsued for exposure in provisional damages for pleural plaques; and (ii) the shortfall to be made up by defenders when the pursuer (or his family, if deceased) litigate for the return condition of mesothelioma.
DAC Beachcroft	No. In our view liability is a difficult area at the best of times in claims involving asbestos-related conditions. The availability of evidence is often limited or non-existent and the employer(s) over the period of exposure could have ceased to exist many years before the claim is brought. The parties to an action, once liability is agreed or decided, do not want to re-visit this question perhaps many further years later, e.g. when a pursuer who originally had asymptomatic pleural plaques condition has now developed mesothelioma. It would mean uncertainty being re-introduced and the parties would incur further expense in re-opening and re-investigating a question which had hitherto been resolved.
Horwich Farrelly Scotland	No.
Association of British Insurers	We do not agree that establishment of liability should be capable of being deferred, by agreement between the parties, to a later point should a subsequent more serious condition emerge. In our view, there should be no need for the establishment of liability to be deferred as the basis for a provisional settlement should already be set out; for example, there has been exposure to asbestos, the pursuer has an asbestos-related condition, and they can return to court if necessary.
Society of Solicitor Advocates	It is not appropriate to defer establishment of liability as suggested.
Forum of Scottish Claim Managers	Yes, there are different considerations and economics involved. A Defender may look to settle a pleural plaques claim on an economic basis at an early stage, where a more serious condition may warrant further investigations.

	Equally a Pursuer may choose to drop a claim for pleural plaques rather than fail to establish liability should a more serious condition emerge.
Direct Line Group	No, DLG does not agree with the proposal to defer liability for subsequent conditions. Liability should continue to be established for the condition first presented as this is both fair and equitable for all parties involved for several reasons. Witness evidence – both oral and documentary – will be more readily available and not tarnished by the passage of time resulting in less prejudicial investigations and the injured person, who may later be of poor health, may encounter additional difficulties in engaging with further liability investigations years after the initial agreement which related to a less serious condition. A mechanism is available to injured persons now by agreeing an award of damages for the first presented condition and settling the matter or, alternatively seeking an award for that condition on a provisional basis thereby preserving the opportunity to reopen to discussions at a future time.
NFU Mutual	NFUM do consider that liability determination could be deferred until a later point by agreement of all parties. The reason for this is that vast variance in the value of the compensation claims and therefore there are different considerations and economics involved. A Defender may look to settle a pleural plaques claim on an economic basis at an early stage and avoid lengthy litigation, however where a more serious condition is basis if the action fuller investigations may be warranted. Equally a Pursuer may choose to withdraw a claim for pleural plaques rather than fail to establish a liability finding to protect their position should a more serious condition emerge.
Kennedys Law	Deferral of liability would be beneficial to defenders. It may make economic sense to be able to settle a provisional claim, on a without prejudice basis, rather than incurring the costs of defending matters to proof due to concerns of potential future liabilities for future claims. Settlement on a provisional basis may be secured more quickly for a pursuer, where the defender is secure in the knowledge that liability may be be disputed should a more valuable claim such as mesothelioma arise. In the circumstances it is likely that more claims would be settled on a provisional basis, while still securing the pursuer and their family's right to seek further damages should a more serious or fatal condition arise. However, we acknowledge that such a move potentially places a greater burden on the pursuer or his/ her family to prove their case when significant time has passed and as such, evidence may be more difficult for the pursuer to identify and access.

	We consider that deferral of liability would be unlikely to increase life cycle times or reserves for insurers, as all provisional claims settled would, in either event, result in the claim being held open pending the claimant's possible return for final damages.
Law Society of Scotland	This leaves cases on the books for both Pursuers and Defenders. Accordingly we do not consider this to be an appropriate solution.
Action on Asbestos	No. The issue of liability should be addressed at the earliest point. Those with mesothelioma or at the end stage of an illness such as asbestosis will not, in some cases, have the energy or inclination to become involved in a case that will have protracted legal arguments about liability. An unintended consequence of deferring the establishment of liability may be that those with the most serious illnesses decide that they do not wish to spend their limited time embroiled in a case where liability is being disputed when the responsible party has already awarded compensation for pleural plaques.

23. Are there any problems at present with the operation of section 13? If so, please describe them and give examples where possible.

(Paragraph 5.10)

Zurich Insurance UK	Payment directly to a child does not happen in practise. Zurich is uncomfortable with the position that awards of damages in respect of children are always made subject to parental indemnity. We consider it would be preferable if they followed a Court approval process whereby damages are paid into Court or a Trust so to ensure that the award is retained for the benefit of the injured child.
Ronald E Conway	As a practitioner I found the Discussion Paper extremely informative and instructive. The comment below is general but I believe covers most of the areas traversed in the Discussion Paper. I wonder if Commission is looking at both the problem and solution in the wrong place. As Lord Carloway states in *I v Argyll and Clyde Health Board* 2003 SLT 231 it will normally be safe to make payment to the parent or guardian, perhaps reminding them of their duty in terms of s.10 of the Children Act to act as a reasonable and prudent person. For cases say up to £10k that is all that is required.

	For modest value cases say £10k - £50k the Sheriff Clerk should be the preferred option. As observed in the Discussion paper interest rates are unattractive but at least the principal sum will be preserved for the child on majority. The problem arises for cases above £50k. For substantial sums most agents will make arrangements for financial advice. In catastrophic injury cases eg cerebral palsy a Case Manager may be appointed. In the overwhelming majority of cases that is all that will be required. But despite the arguments in the Discussion Paper I do not believe there is adequate protection against the rare occasion where a parent or guardian is squandering funds. There may be cases where problems advertise themselves before settlement (eg parents with addiction issues, bankruptcy etc) Where those issues are identified before settlement the court has the battery of powers identified in the Discussion Paper and conditions may be imposed as suggested there. In particular there could be a referral to the Accountant of Court who would have the role identified in the Discussion Paper of managing the portfolio. But in other cases any problems may well arise completely unsuspected and unannounced, and at a time where currently there is no straightforward locus to intervene. The danger relates to the very small number of cases where, as is cited in the Discussion Paper, “the horse has bolted”. The case is over, the parents or guardian have been sent the funds, but then do not act prudently . Any obligation on them to account after the fact will generally be worthless.

	I did have experience where the grandparent of a young woman settled a six figure claim for the death of her mother. The child sued in the name of a grandparent, and monies were paid to that person. A financial advisor was appointed informally. Absolvitor was granted. Within 6 months or so the IFA contacted me with his concerns about the rate of withdrawals, (approximately £50k) and for purposes not obviously connected with the child. The grandparent was confronted. He responded that I was no longer instructed and that the matter was none of my business. Threats were made to bring the matter back to court, although any locus to do so was questionable. The case had settled, I was no longer instructed by anyone. Title to sue? The nobile officium? Amicus curiae? Was I a person with an "interest" in terms of the Children Act 1995 s11(1)(d) ? This is without prejudice to any question of funding or expenses for such proceedings. In the event the grandparent instructed new agents who negotiated a reasonable withdrawal scheme. The child reached majority with around 2/3rds of the principal sum intact. May I make a tentative suggestion that there might be a role for the Office of Public Guardian or the Accountant of Court, analogous to the Adults with Incapacity Act. I understand that both offices operate under the auspices of Scottish Courts. There would then be some kind of register, a supervision and reporting requirement, and most importantly, there would be an opportunity for concerned individuals, not necessarily possessed of parental rights, to report those concerns for investigation without having to establish title and interest to sue. In the example given, obvious candidates would be the IFA or previous agent.

	It would avoid the need for litigation where expenses would have to come out of the fund, even if an answer could be found for who was to fund a litigation in the first place. The Public Guardian/Accountant of Court would be able to investigate without the necessity of court proceedings. There would be an increased administrative burden, but there would be no duties to manage the fund or set up portfolios. To keep matters proportionate it could be restricted to cases of damages over £50k. If the above is felt to be unduly burdensome on the Public Guardian/Accountant of Court, there should be a statutory provision in the Children Act to enable third parties to request the Accountant of Court to carry out an investigation into an alleged abuse of funds, and powers to the Accountant of Court to initiate proceedings, report to the court and take over the management of the fund if appropriate. Similar to the powers already contained in the Children Act 1995 s.11(2)(g) but crucially not requiring an initial court proceeding, and investing the Accountant of Court with the same powers to initiate proceedings etc as the Public Guardian. (See Adults with Incapacity Act 2000 s.6.(2)(da))
Clyde & Co (Scotland) LLP	We are not aware of any significant problems with the operation of section 13. The number of cases where section 13 is invoked is nominal. In our experience, in the vast majority of cases involving damages awarded to children, the damages are paid to the parent/guardian without any concerns raised by any party to the litigation. One potential problem is that in the absence of such concerns being raised or requests for intervention by the court, the defenders are typically unaware of the arrangements in place, if any, for the damages payment. s13 is invoked only in cases where one or more parties request the court's involvement and therefore there may be instances of cases where there would be a concern as to misappropriation if there was knowledge of the circumstances but the knowledge is not able to be obtained. That being said however, the vast majority of claims raised by children are where there is representation and therefore it would be expected that the legal representatives of the family would assess any concerns and take appropriate action in the interests of the child.

	In the case of unrepresented children, our view is that there ought to be an obligatory referral to the court in order to protect the interests of the child.
Association of Personal Injury Lawyers	The critical issue with the system in Scotland at present is that it puts the pursuer's solicitor in a position of conflict – the solicitor is required to go to court and say that they do not trust the person who is instructing them (the child's parent) to look after the child's compensation. Instead, there should be a mandatory step for all cases where damages are awarded to a child, regardless of whether the case was settled in or out of court, and regardless of the value of the award. In cases of children's compensation, there should be approval by the court of the amount and protections put in place to ensure that the money is retained for the child until they reach majority. Protection is required to ensure that the child is not undercompensated, and also that their money is properly protected for them until they are able to access it. Most parents will mean well, but will not have the knowledge and experience to invest the money properly, and even if well intentioned, parents may not make decisions which are in the best interests of the child, and which may mean that the child will have no money left for them when they reach 16. It is particularly important that this protection is in place for children's compensation, regardless of the value of the award. Even a couple of thousands of pounds could have a huge impact on a child's life, and should not be permitted to be spent by the parents without very careful consideration and scrutiny by the courts. Any amount of money will be significant to the child who has been injured, otherwise it would not have been awarded in the first place. Indeed, it could even be argued that the smaller the award, the more important court approval and protection of the award is – a smaller sum of money may need to be more skilfully invested, and there may be a greater temptation to some to fritter it away on day-to-day expenses, rather than save it until the child turns 16.
Stagecoach Group plc	We are not aware of any issues.
Forum of Insurance Lawyers	FOIL does not have any evidence or indication of any issues with the operation of section 13. The section does not appear to be used extensively. Whilst there is no objection to the court having input if requested, if the child is legally represented, it would be anticipated that the representatives will act in the child's best interest / welfare. If a child was not legally represented, we would consider that court intervention would be appropriate.
University of Aberdeen Law School	We are not presently aware of any difficulties in practice with the operation of section 13.
Unite the Union Scotland	We currently have experienced no problems
Senators of the College of Justice	We are not aware of any such problems. In particular, we are not aware of any specific examples of tension having arisen in practice between the broad discretion afforded to the Court in terms of section

	13 and the necessary application of the principles in section 11(7) to an order for administration under section 11(1)(d). That said, we observe that there may be considerations arising in the case of a child nearing the age of 16 who becomes entitled to, or is awarded, damages and for whom the provisions of section 13 do not apply once they attain the age of 16 years. Thus a child of, say, 15 years 10 months without the benefit of parents or guardians, might become entitled to an award of damages but can no longer be the subject of an order under section 13 once they turn 16. We recognise that concerns about the ability of any particular child to manage any funds to which they might become entitled must inevitably, and properly, be balanced against A1P1 considerations (see question 29 below). Nevertheless, it may be appropriate to consider whether there might be built into the existing legislation provision for a discretion to be exercised to continue an order made under section 13 beyond the age of 16 in such a situation as that described.
Aviva Insurance Ltd	We have no knowledge of any practical problems with the operation of section 13.
Digby Brown LLP	On an annual basis, we deal with around 500 claims for damages for children who have been injured. This does not take into account claims for damages for children arising from the death of a relative. In dealing with both types of claim, we have not come across any problems with the operation of s13. It is appropriate to have provisions in place that can be used if the child's parent or guardian would like support in managing the damages, particularly where the sum involved is significant, and also in the event that there are any concerns over safeguarding the damages for the child's benefit. However, in our experience such concerns rarely arise as there is nothing to suggest that the child's parent or guardian is anything other than reliable and trustworthy.
Thompsons Solicitors Scotland	We currently have experienced no problems
Drummond Miller LLP	No
Faculty of Advocates	The Faculty has no comment to make in relation to the matters discussed in Chapter 5 of this Discussion paper – Management of damages awarded to children. Such matters tend to be within the remit of solicitors and financial advisors instructed by solicitors.
DAC Beachcroft	None in the context of our answers which are formed from our experience in acting for insurers in damages claims for minors.
Association of British Insurers	Please see answer to question 24 below.
Society of Solicitor Advocates	We do not consider that there are problems at present with the operation of section 13.
Forum of Scottish Claim Managers	We are not aware of any problems with the operation of section 13

Direct Line Group	DLG is not aware of any reported issues relating to safeguarding an award of damages to a child and therefore the operation of section 13
NFU Mutual	NFUM are not aware of any problems with the operation of section 13, however we note from the consultation document that this is seldom used (14 referrals made to the Accountant of the Court for the period 207-2021).
Kennedys Law	We believe that one of the present issues with the operation of section 13 is the very general discretion awarded to the Court. Particularly, section 13 permits the court to make an order relating to the payment and management of the sum for the benefit of the child, but does not require the court, in all such cases, to consider whether any such order is appropriate. This section provides no guidance or obligatory factors to consider when making an order under the provision. In particular, the usual tests applicable to making of an order under section 11 of the Children (Scotland) Act 1995 do not apply, being that the welfare of the child should be the paramount consideration, that no order should be made unless that order would be better for the child than there being no order made at all, and that, depending on the maturity of the child, the views of the child should be taken into account. Further, experience shows that the court is unlikely to consider such a motion ex proprio motu, but a defender may not feel best informed about the child or parent's circumstances, so as to propose an order in specific terms, and the parent or guardian may feel confident, before embarking on management of the sum awarded, about their ability to do so, and may therefore not seek an order related to that management.This may explain why the provision is rarely utilised.
Law Society of Scotland	The problem with Section 13 is that its engagement is not compulsory. This may be partly due to agents for the Child Pursuer forming a view themselves on how best to protect the child's award and may be partly due to ignorance (or ambivalence) as to the terms of Section 13. Judges and Sheriffs very rarely raise Section 13 in a child's damages claim. In relation to pre-litigation settlements the only protection afforded to a child is when insurers insist on a Parental Discharge and Indemnity form being signed by the recipient of the child's award, acknowledging that the payment is being made in full and final settlement of the claim and an undertaking is given by the parent that they will apply the funds for the sole benefit of the child. The form includes an agreement to indemnify the insurers if the undertaking is breached and the child tries to make any claim against the insurer for paying the settlement to the parent. Whilst such Parental Discharge and Indemnity forms are a sufficient safeguard for lower value claims (which we would define as £10,000 or less) they are inadequate for any higher award.

24. If there are problems, how do you consider these might be resolved? Specifically, do you think the court should have regard to the same matters that it has to consider when determining an application under section 11(1) of the 1995 Act, or are there other or additional matters that the court should consider?

(Paragraph 5.10)

Zurich Insurance UK	Please refer to the comments made in response to Question 23.
Ronald E Conway	See 23
Clyde & Co (Scotland) LLP	In the event of there being any problems, whilst the court has a general discretion to make "such order relating to the payment and management of the sum for the benefit of the child as it thinks fit", it seems sensible to provide that the court has regard to the three fundamental principles which inform many other decisions affecting children. As above, we consider there should be an obligatory referral to court in cases involving unrepresented children.
Association of Personal Injury Lawyers	We suggest that where there is settlement for a child, the money should be held with the Accountant of Court until the child reaches 16. There could be discretion with the Accountant at Court to release money if they are satisfied that there is a good reason. In cases of higher value where money is held in a personal injury trust, there should be a number of independent persons involved in the administration of the child's trust, and family members should be in the minority. The must be consideration of how the trust will be managed on an ongoing basis.
Stagecoach Group plc	We consider that the interests of the child claimant are the most important issue when considering settlement of child claims. We take the view that the requirement for Judicial Approval and payment of the settlement into a protected account is a good model which protects the interests of the child. We acknowledge that the introduction of a process such as this may result in additional cost and administration.
Forum of Insurance Lawyers	FOIL considers the current provisions appear to address any potential problems. We do not have any objection in principle to the three fundamental principles being considered by the court.
University of Aberdeen Law School	We generally consider that the existing discretion of the court to make an order under section 13(1) "for the benefit of the child" is sufficient. We do consider however that where a child has suffered an injury,

	it may be beneficial for the court to seek out and have regard to the views of the child on the management of sums of money payable for their benefit, taking account of their age and maturity.
Senators of the College of Justice	Since we are not convinced that section 13 presents any current difficulties in practice the question may not be thought to arise. That said, it is difficult to envisage circumstances in which the court, when making an order under section 13, would not have regard, as a paramount consideration, to the welfare of the child most nearly concerned or give consideration to the question whether it would be better for the child that a section 13 order should be made than none at all. We are unaware of any evidential basis to suggest otherwise. Consideration of, and giving effect to, the views of the child seem to us to be matters which can, and should, properly be left to the discretion of the court taking into account all of the circumstances of the case.
Aviva Insurance Ltd	Whilst we have no knowledge of any problems with the operation of section 13, we do not have any objection, in principle, with the court being required to have regard to the same matters that it has to consider when determining an application under section 11(1) of the 1995 Act, namely the three fundamental principles which inform many other decisions affecting children: the welfare of the child, the no order principle and the views of the child. While we note that if the extent of the work of the Accountant of Court were to be increased, there could be cost implications in relation to resources and additional training needs, we do not have any objection in principle to the three fundamental principles being considered paramount.
Digby Brown LLP	N/A
Drummond Miller LLP	N/A
Faculty of Advocates	The Faculty has no comment to make in relation to the matters discussed in Chapter 5 of this Discussion paper – Management of damages awarded to children. Such matters tend to be within the remit of solicitors and financial advisors instructed by solicitors.
DAC Beachcroft	See above
Association of British Insurers	We do not have evidence of any problems at present with the operation of section 13. However, we do not have any objection, in principle, with the court being required to have regard to the same matters that it has to consider when determining an application under section 11(1) of the 1995 Act, namely the three fundamental principles which inform many other decisions affecting children: the welfare of the child, the no order principle and the views of the child. While we note that if the extent of the work of the Accountant of Court were to be increased, there could be cost implications in relation to resources and

	additional training needs, we do not have any objection in principle to the three fundamental principles being considered paramount.
Forum of Scottish Claim Managers	Whilst we have no knowledge of any problems with the operation of section 13, we do not have any objection, in principle, with the court being required to have regard to the same matters that it has to consider when determining an application under section 11(1) of the 1995 Act, namely the three fundamental principles which inform many other decisions affecting children: the welfare of the child, the no order principle and the views of the child. While we note that if the extent of the work of the Accountant of Court were to be increased, there could be cost implications in relation to resources and additional training needs, we do not have any objection in principle to the three fundamental principles being considered paramount.
Direct Line Group	Given our response to question 23, we have no additional comments to make here.
NFU Mutual	Whilst we have no knowledge of any problems with the operation of section 13, we do not have any objection, in principle, with the court being required to have regard to the same matters that it has to consider when determining an application under section 11(1) of the 1995 Act, namely the three fundamental principles which inform many other decisions affecting children: the welfare of the child, the no order principle and the views of the child. It is noted and reasonable to assume that if the extent of the work of the Accountant of Court were to be increased, there could be cost implications in relation to resources and additional training needs, however NFUM believes that it is paramount that where significant sums of damages are awarded and designed to ensure the injured minor has their needs supported in the longer term any such cost in securing certainty of appropriate management of these funds is a necessary expense to be borne.
Kennedys Law	We consider that requiring the court to consider whether some order should be made under section 13 in any case where damages are being paid to a child would increase the use of these provisions. At present, section 13 is only considered where a party to the action make a motion in that regard. Requiring the court to consider this in each case would ensure that the question of whether a child would be best protected by an order is not dependent on this question being asked by the defender, who likely has limited knowledge about the child's circumstances, or the parent or guardian, who would otherwise be administering and managing the award. Parties could reflect their views on whether any order under section 13 is required when submitting a Joint Minute for disposal of an action; the court could accept those views or set a hearing for the court to be addressed on any questions arising. We believe that the

	court should, in considering whether an order under section 13 is required, have regard to the same matters which would require to be taken into consideration in addressing a motion for an order under section 11. That would necessarily involve considering such factors as age of the child, size of the award, and the specific needs/circumstances of the child. This would give the Court clearer guidance on when to consider, and potentially make use of, the orders available under section 13, and remove some of the uncertainty about where such use is appropriate described above.
Law Society of Scotland	Many higher value settlements are placed in a Personal Injury Trust ("PIT"). This is however left to the Pursuer's agent or counsel to consider whether it is appropriate. If a PIT is set up with a professional trustee in place (with or without a parent) with the right to take the final decision and override the wishes of the parent or at least where there are measures in place for a contentious issue to be determined by say the Accountant of Court, it is considered this provides adequate safeguards for such awards. The real problem arises in a) the lower value claims where no Parental Discharge and Indemnity form is signed by a parent; and b) the higher value cases where no PIT or other trust with a professional trustee is set up. There should be a compulsory procedure, promulgated in the rules of court, requiring the Pursuer's agent to complete a form for submission to the court outlining details of the proposed settlement for the child, how the funds are to be invested and protected until the child's 16th birthday and specifically outlining how any capital expenditure decisions will be taken. Details of any individual or organisation who will have control of the funds should be included. When lodged with the court and assuming the opponent does not wish to make representations, the court would either administratively pronounce an interlocutor approving the proposals or fix a hearing. This would apply to all children's claims whether the settlement arises as a result of litigation or negotiation. Those claims where settlement is for £10,000 or less and a Parental Discharge and Indemnity form is signed by the child's parent or where a trust is set up with a professional trustee (solicitor or regulated financial adviser) who has a controlling interest should be exempt from this procedure.

25. Do you consider that it should be mandatory for the parents or a guardian to report to the Accountant of Court, especially where a child will be largely dependent upon an award of damages for the rest of their life? Or do you consider that the imposition of such a reporting requirement is a matter best left to the discretion of the court?

(Paragraph 5.22)

Zurich Insurance UK	Yes it should be mandatory. If a minor is awarded a large sum of money which they will be dependent on, there should be involvement from the Court of Protection. It is surely not in the best interests of the child for the parent/guardian to have full access to the money and decide how it is spent.
Ronald E Conway	See 23
Clyde & Co (Scotland) LLP	No, we do not consider it should be mandatory to report to the Accountant of Court. To do so would be too prescriptive, costly and unnecessary in the vast majority of cases involving damages payments to children, particularly in cases of low value. The current system whereby the Court, if requested, exercises its discretion is adequate and in our view best serves the interests of parties. This ensures that parents or guardians who wish assistance when faced with the task of investing and managing large sums of money for the child can request assistance.
Association of Personal Injury Lawyers	There should be a report to the Accountant of Court in every case, but we do not believe that this responsibility should rest solely with the parents or guardians. Where there is no trust in place, the parents or guardians should have professional help and support to fulfil the reporting requirement. As above, where a trust is in place, the majority of trustees should be professionals and not family members, to ensure proper and fair administration of the trust in the best interests of the child. In these cases, the report should be prepared by the professional trustees.
Stagecoach Group plc	We agree that, where a child has suffered a significant injury and will be dependant on the damages awarded, it should be mandatory for use of damages awarded to be overseen and the Accountant of the Court appears the obvious vehicle to do so. It is less clear whether mandating such activity is necessary where a lower award is made and we do not express any view as to the level at which mandatory reporting should be set.
Forum of Insurance Lawyers	No, this should be a matter of discretion for the parties involved in the action. If the child is legally represented this will be given due consideration. As per ans 23, if the child is unrepresented, the court intervention ought to be mandatory.
University of Aberdeen Law School	We consider that the imposition of a reporting requirement should generally be left to the discretion of the court. However such reporting requirements appear to us to be good practice where large sums are involved and/or the child is likely to be dependent on an award of damages into adulthood.
Unite the Union Scotland	It should be mandatory to report to the Accountant of Court.
Senators of the College of Justice	We consider that the general imposition of such a requirement has the potential to be unduly onerous on parents/guardians and will not be justified in many cases. Acknowledging, however, the possibility

	that there may be some cases in which conditions might require to be attached to the payment of sums to the child's parent or guardian, we consider that the circumstances in which that might arise would be best left to the discretion of the court on a case by case basis.
Aviva Insurance Ltd	This is outwith our expertise.
Digby Brown LLP	No, we do not consider that this should be mandatory in any particular category of case. In our view, this is a matter best left to the discretion of the court where the solicitor instructed determines that an order under s13 may be appropriate in the specific circumstances of the case. There may be cases where it is considered prudent to require the parent or guardian to report to the Accountant of Court, particularly where the sum involved is significant and the child will be dependent on this for the rest of their life, but this condition should not be imposed automatically. This would, in our view, involve unnecessary intervention in private family life. The issue of resources is also an important consideration and whether the Accountant of Court has the resources required to deal with a significant increase in reports received.
Thompsons Solicitors Scotland	It should be mandatory to report to the Accountant of Court.
Drummond Miller LLP	We agree that these matters are best left to the discretion of the Court.
Faculty of Advocates	The Faculty has no comment to make in relation to the matters discussed in Chapter 5 of this Discussion paper – Management of damages awarded to children. Such matters tend to be within the remit of solicitors and financial advisors instructed by solicitors.
DAC Beachcroft	A mandatory report to the Accountant of Court would neither be welcome nor necessary where, in most actions raised for damages, the guardians will be legally represented, have the advice of counsel, and in many cases of injuries of utmost severity have a curator appointed, normally experienced counsel. Similarly in these cases awards will include significant amounts for the cost of investment of damages/Office of Public Guardian costs for the benefit of the injured child. Only in those rare cases where these factors were not present would referral to the Accountant of Court be justified.
Association of British Insurers	We consider that this is a matter best left to the discretion of the court; for example, the court might require the parents or a guardian to report to the Accountant of Court (i) where a child will be largely dependent upon an award of damages for the rest of their life and (ii) there is a real risk that funds might be misappropriated or not properly invested. Any reporting requirement should not be onerous, as it is important to control costs and avoid additional burdens on the courts service.
Society of Solicitor Advocates	We do not consider that it should be mandatory for parents or guardians to report to the accountant of court. Should a court find it necessary, a reporting requirement could be set out. Use of Personal Injury

	Trusts in particular when there are significant awards to children are a useful protection to make sure that funds are managed appropriately.
Forum of Scottish Claim Managers	We agree that it should be mandatory for the parents or a guardian to report to the Accountant of Court in cases where a child will be largely dependent upon an award of damages for the rest of their life. This seems proportionate in such cases however clear direction should be given on at what point this becomes mandatory, for lower value claims it would be a disproportionate in terms of costs and the courts time .
Direct Line Group	Our view is the injured child, parents or guardian and representative should consider who and how an award of damages is best managed for the benefit of the child, not the defendant/compensator. However, DLG suggests it is prudent for the court to retain the discretion to report an award to the Accountant of Court where it believes this would be in the best interests of the child. Any resulting discussion would solely be a matter for the child, parent/guardian, representative and the court.
NFU Mutual	We agree that it should be mandatory for the parents or a guardian to report to the Accountant of Court in cases where a child will be largely dependent upon an award of damages for the rest of their life. Whilst this seems proportionate in such cases it may be wholly disproportionate an unnecessary in lower value claims. NFUM would recommend consideration in terms of when this becomes mandatory in relation to the factors which may impact the need, i.e. • Level of damages award • Future care and accommodation needs of the injured minor • Age of the pursuer • Capacity (due to Injury not age) of pursuer Whilst it is not assumed that the courts in Scotland should mirror the other UK Jurisdictions, it is noted that in both England & Wales and Northern Ireland there are provisions in place for the court to approve damages settlements in cases involving minors. This provides a secure safeguard for the injured pursuer and ensures their needs are met by the financial support approved in settlements. This process can lengthen the time to settle cases due to the demands on the court and increases legal expenses in actions so it is not without drawbacks and for lower value claims whereby any risk is low at most this is not a mandatory approach NFUM would recommend.

Kennedys Law	A reporting requirement could be seen as a burden being placed upon the parents/guardians which may not be necessary or justified in all cases, and we consider that the "no order" rule in section 11(7) should be applied by the court in considering whether to impose such a requirement. We believe there is merit in a reporting requirement in cases where a large settlement sum is involved or where a child may be largely dependent upon the award for the rest of their life as in serious injury cases . By applying the same tests to an order under section 13 as are applicable to an order under section 11, the Act would only impose a particular reporting requirement in the event that such an order was of greater benefit to the child than making no order at all. We are of the opinion that this is more likely to apply to larger sums or where a child is likely to remain dependent on the award. It could therefore, by means of an order under section 13, be established that parents/guardians are required to report to the Accountant of Court, where damages reach such a significant level, and where the paramount consideration of the welfare of the child requires the involvement of an independent officer of the Court. We consider that the question of when such a reporting requirement should be imposed is a matter best left to the discretion of the court, as any specific financial limit triggering a reporting requirement would be arbitrary and there may be specific facts and circumstances necessitating an order below any limit set, or offering sufficient protection over that limit. However, in the event that it is mandatory for the court to consider whether an order under section 13 is appropriate or warranted, guidance could propose a reporting requirement as one of the potential orders to be considered.
Law Society of Scotland	This should be left to the discretion of the court who will have regard to the proposals set out in our Comments on Question 24. If the proposals are deemed inadequate the court can exercise its wide discretionary powers in making it a requirement that reports are submitted on an annual basis to the Accountant of Court. It is envisaged that such a condition will be rarely imposed as it will rarely be the only proportionate and necessary safeguard.

26. (a) Do you consider that a court should have a duty, when about to grant decree in a claim for damages for a child, to make inquiries about the future administration of any funds and property to be held for the child, and, if the court considers it necessary, to remit the case to the Accountant of Court for a report in terms of section 13?

(b) If so, should such a duty be expressed in a Practice Note/Direction; in a Rule of Court; or in some other way?

(Paragraph 5.22)

Zurich Insurance UK	(a) Yes. (b) Yes – A well drafted rule would keep everything simple.
Ronald E Conway	See 23 above. The answer is yes.
Clyde & Co (Scotland) LLP	No, we do not consider this necessary. This may be seen as too intrusive, prescriptive and demeaning to parents/guardians to suggest that they are not capable of managing the damages payment in the best interests of the child.
Association of Personal Injury Lawyers	(a)Yes, we agree. (b) Yes, this duty should be expressed as either a Practice Note/Direction or in a Rule of Court, to provide structure and ensure compliance with this duty. It is sensible to have an overall structure and clear procedure in place.
Stagecoach Group plc	We have no comment here, the issue being outwith our knowledge.
Forum of Insurance Lawyers	No, in line with ans 25 this ought to be a matter of discretion. If parties request input, the court can provide this. Failing which, the requirement for this is overly cumbersome and will add unnecessarily to costs.
University of Aberdeen Law School	We do consider that the court should have a duty in these circumstances to make inquiries about the future administration of any funds or property to be held by the child, and if necessary to remit the case to the Accountant of Court. We consider that this duty is best expressed in a Rule of Court.
Unite the Union Scotland	(a)In high value cases where the funds are necessary for the long term future of a young child then this would seem sensible. (b) They should be expressed in Rules of Court, to ensure consistency across courts.
Senators of the College of Justice	(a) Yes, we agree that there is nothing controversial, and indeed merit, in the court being obliged, prior to granting decree, to inquire into the future administration of the child's damages and, if it is considered necessary, to remit the case to the Accountant of Court, in terms of section 13, for advice. (b) We consider that a Rule of Court would be most appropriate for such a duty to be expressed.
Aviva Insurance Ltd	This is outwith our expertise.
Digby Brown LLP	(a) We do not consider that imposing such a duty on the court in all cases involving a claim for damages for a child is necessary, or desirable. Presumably, such a duty would extend not only to cases where damages are sought because a child has been injured, but also to fatal cases where a child has a claim following the death of a relative, which would mean that a significant number of cases would

	be affected. In addition, we anticipate that awards of interim damages would be affected. This step would place an unnecessary burden on the courts and the Accountant of Court, and would inevitably lead to delays in payment of damages to children. Delays would be of particular concern in the case of interim awards, which are often required to meet urgent and immediate needs. The SCTS would require additional resources to deal with the increase in oversight and court time would need to be allocated to making the relevant enquires. The Accountant of Court is also likely to require further resources if required to provide reports more frequently, and it is not clear who would meet the cost of such reports. We are not satisfied that there is evidence that such a duty and the resulting steps are required and we are of the view that the question of whether intervention from the court is necessary is a matter best left to the solicitor instructed, who has the option to seek an order if considered appropriate or necessary. (b) N/A
Thompsons Solicitors Scotland	(a)In high value cases where the funds are necessary for the long term future of a young child then this would seem sensible. (b) They should be expressed in Rules of Court, to ensure consistency across courts.
Drummond Miller LLP	(a) The difficulty with answering this questions relates to the fact that the value of any claim will be relevant. If the sum is substantial it would be desireable for the Court to make inquiries about the future administration of any funds. However, in cases of low value the desireability of that imposition becomes decreased – particularly where the cost / time involved outweigh the potential risk of funds not being held / administered appropriately. There should probably be a duty at or above a certain level of claim / award but I'm not sure that that level should be. It will involve a cost (and perhaps delay) and so it is important to only be above a certain level where that cost is jusitifed and appropriate. (b) A Practice Note / Direction or Rule of Court would provide clarity
Faculty of Advocates	The Faculty has no comment to make in relation to the matters discussed in Chapter 5 of this Discussion paper – Management of damages awarded to children. Such matters tend to be within the remit of solicitors and financial advisors instructed by solicitors.
DAC Beachcroft	No, as in practical terms many cases are settled extra-judicially and such intervention, standing the observations identified in our Answer 25, would be pointless, delay settlement and add extra cost which inevitably would be borne by the defender's insurers.

Association of British Insurers	(a) We consider that this is a matter best left to the discretion of the court, as it is important to control costs, avoid additional burdens on the courts service and not delay settlement. (b) N/A.
Society of Solicitor Advocates	A Practice Note/Direction would be useful to provide guidance on the administration of funds in cases where the court considers it necessary, would be appropriate.
Forum of Scottish Claim Managers	This is outwith the area of our expertise.
Direct Line Group	(a) No, and in line with our response to question 25, the court's duty should be discretionary rather than absolute and be utilised where the court needs to satisfy itself that the child's award will be adequately protected. The provision of an absolute duty will result in the process becoming overcomplicated through unnecessary prescriptive additional steps which in turn will further add to existing pressures upon the court and its limited resources. (b) For clarity, DLG believes that the discretionary duty should be expressed in a Practice Note/Direction
NFU Mutual	NFUM have no comment to make in response to this question
Kennedys Law	The current operation of section 13 is such that an order is only likely to be made if a specific motion is raised by a party to the action; the provision is entirely discretionary and there is no obligation on the court to consider any order under section 13. In our view, it would be appropriate for the court to have an obligation to consider whether an order should be made under section 13 where an award of damages is made to a child. We consider that the court, in assessing whether an order should be made, should consider the welfare of the child to be paramount, should take into account the views of the child, and should only make such an order as is better for the welfare of the child than no order being made at all. With regard to management of funds or property, especially when the settlement is particularly large and/or the child is likely to be dependent on it for the rest of their life, we consider that one of the potential orders which should be considered is whether the Accountant of Court should produce a report with advice on how the damages award should be administered. In England & Wales Infant Approval Hearings take place following settlement regardless of whether a case is litigated or not. This allows a judge to speak to the parents/guardians as to their wishes. Were the court to require, in considering potential need for an order under section 13, to obtain further information from parents or indeed to take into account the views of the child, a similar form of hearing

	could fulfil that purpose. We would respectfully suggest that it would be legitimate and necessary, in considering the paramount issue of welfare of the child, and addressing whether an order is needed with reference to the "no order" principle, for either representations to be made in a Joint Minute, or for a similar hearing to be covened to allow parents or guardians to express views, whether on oath or on an ex parte basis. Awards of damages to children can be made in any local Sheirff Court, in the All Scotland Personal Injury Court, or in the Court of Session, and so numerous Practice Notes would be necessary to give effect to this, and we would suggest that incorporating this into Rules of Court, or indeed into the terms of section 13 itself, would be the most effective means of making this change.
Law Society of Scotland	a) Please see our Comments on Question 24. Yes, the court should have the power to obtain a report from the Accountant of Court but there should be no cost implications for the Pursuer in circumstances where the court decides to do so. b) It is not a duty on the part of the court to obtain a report from the Accountant of Court, it should be a discretionary power and should be exercised only in a situation where the court has concerns about the potential maladministration of the settlement.

27. Where the court orders an award of damages to be paid directly to the child, do you consider that the wide discretion afforded to the court remains appropriate, or ought this discretion be curtailed by requiring the court to consider factors such as the amount of the award and the capacity of the child?

(Paragraph 5.27)

Zurich Insurance UK	We do not consider is remains appropriate and feel that the discretion should be curtailed as suggested, unless the payment is made into a Trust for the benefit of the child.
Ronald E Conway	Yes.
Clyde & Co (Scotland) LLP	There are few circumstances (we are not aware of any) in which the exercise of the current discretion of the Court has been appealed on the basis that the court did not take into account such factors. It is arguably implicit that the court, in the exercise of its discretion already does take into account such factors. That being said, there would be no foreseeable negative consequence with such factors being enshrined to avoid ambiguity.

Association of Personal Injury Lawyers	We believe that all awards of damages should be held by the Accountant of Court until the child reaches 16, subject to exceptional circumstances. It is important that all awards, regardless of value, are protected for the child until they reach majority. Smaller awards are more likely to be unintentionally frittered away, leaving the child with no damages by the time they come of age, so the value of the award alone is not reason enough to pay the award directly to the child.
Stagecoach Group plc	We have no comment here, the issue being outwith our knowledge.
Forum of Insurance Lawyers	FOIL is not aware of any instances of the court's use of discretion being called into question. We anticipate that the court takes into consideration the factors mentioned above.
University of Aberdeen Law School	We consider that the wide discretion of the court in these generally remains appropriate, although it would be good practice for the court to have regard to the child's age and stage of development.
Unite the Union Scotland	Depending on the circumstances the court should take into account amount and the capacity of the child.
Senators of the College of Justice	We consider that the extent of the discretion presently afforded to the court remains appropriate, and we are unaware of any evidential basis to justify a departure from that position.
Aviva Insurance Ltd	This is outwith our expertise.
Digby Brown LLP	We are of the view that, where the court makes an order in terms of section 13 that damages be paid directly to the child, the court's discretion should not be restricted and it is not necessary to set out factors that the court requires to consider. This should remain a matter for the court to determine based on judicial knowledge and experience. It would be surprising if factors such as the amount of the award and the age of the child were not taken into account in any event. It has not been demonstrated that the current provision is not being applied appropriately, nor that the courts require further guidance on how to do so.
Thompsons Solicitors Scotland	Depending on the circumstances the court should take into account amount and the capacity of the child.
Drummond Miller	There should be discretion but above a certain level the Court should be required to carry out some basic checks and / or to ask parties to provide some basic information – again it must be proportionate so should only be above a certain level of damages.
Faculty of Advocates	The Faculty has no comment to make in relation to the matters discussed in Chapter 5 of this Discussion paper – Management of damages awarded to children. Such matters tend to be within the remit of solicitors and financial advisors instructed by solicitors.
DAC Beachcroft	This will happen rarely and we agree with the provisional view as identified at paragraph 5.23.

Association of British Insurers	We agree with the provisional view at paragraph 5.23 of the discussion paper that this is best left to the discretion of the court in the circumstances of each particular case.
Society of Solicitor Advocates	We consider that the court would likely have cognisance to the factors described before making such an award.
Forum of Scottish Claim Managers	This is outwith the area of our expertise.
Direct Line Group	DLG believes that the court should be able to apply its discretion in a manner which it believes is appropriate to adequately protect the child's award of damages. Introducing additional factors may result in additional layers of delay and cost to the litigation process.
NFU Mutual	NFUM considers the discretion of the court remains appropriate in cases where an award of damages is made payable to a child. It is assumed the capacity of this minor pursuer and the level of damages shall be taken into consideration in such cases by the court without the need for further mandatory procedures
Kennedys Law	We consider that the Court should retain a wide discretion on the nature of potential orders to be issued, but consider that the court should be required, in making this assessment, to consider certain factors such as the age and specific immediate needs of the child, the size of the award, the extent to which the child is likely to remain dependent on that award on reaching adulthood, whether the child has capacity to manage the sum or is likely to have that capacity once they reach 16 years old, and the ability of the child's parent or guardian to assist the child to manage the sums effectively.
Law Society of Scotland	The same procedure as outlined in our Comments on Question 24 should be adopted in relation to a situation where the award is potentially going to be paid direct to the child. As no Parental Discharge and Indemnity form is to be signed in this situation it is appropriate that the proposal to pay the money direct to the child should be considered by the court in all cases regardless of value.

28. If you consider that the court ought to be required to take account of specific factors, are there any other factors, other than the amount of the award and the capacity of the child, that the court ought to have regard to?

(Paragraph 5.27)

Zurich Insurance UK	The Court should also consider the future costs of caring for the child.

Ronald E Conway	A child living at home will still be very much under the influence of parents or guardians, and opportunities for abuse may still arise. There should be some kind of supervisory oversight, and scope for report by concerned individuals. The Accountant of Court/Office of the Public Guardian should have a role.
Clyde & Co (Scotland) LLP	The best interests of the child.
Association of Personal Injury Lawyers	As above, we believe that damages should not be paid directly to the child, but instead held by the Accountant of Court until the child reaches majority.
Stagecoach Group plc	We have no comment here, the issue being outwith our knowledge.
Forum of Insurance Lawyers	FOIL contends that the court ought to take account of the following factors • Best interests of the child • The welfare of child • The views of the child
University of Aberdeen Law School	N/A
Unite the Union Scotland	Legal capacity of the child on reaching 16. Contingencies where Guardians pre decease the child that does not have capacity beyond the age of 16.
Senators of the College of Justice	We refer to our answer to Q.27
Aviva Insurance Ltd	This is outwith our expertise.
Digby Brown LLP	N/A
Thompsons Solicitors Scotland	Legal capacity of the child on reaching 16. Contingencies where Guardians pre decease the child that does not have capacity beyond the age of 16.
Drummond Miller LLP	Should be restricted to the value of the award. There would be concern about this widening so that the Court starts to look at the individual family circumstances too much and almost pre-judging the families ability to make decisions.
Faculty of Advocates	The Faculty has no comment to make in relation to the matters discussed in Chapter 5 of this Discussion paper – Management of damages awarded to children. Such matters tend to be within the remit of solicitors and financial advisors instructed by solicitors.
Association of British Insurers	N/A
Forum of Scottish Claim Managers	This is outwith the area of our expertise.
Direct Line Group	In light of our response to question 27, DLG have no additional comments to make.
NFU Mutual	No
Kennedys Law	See Answer 27 above.

Law Society of Scotland	Based on the procedure outlined in our Comments on Question 24 there should be no constraints on the court limiting the factors it takes into account when exercising its wide discretion on whether to approve the Pursuer's proposals or to fix a hearing/impose conditions on how the settlement should be administered.

29. (a) Do you consider that section 13 allows the court to direct payment of damages into a trust?

(b) If so, do you consider that such payments may be made into a bare trust or a substantive trust or both?

(c) Do you have any examples? Can you give details?

(d) Do you consider that section 13 should permit transfer to persons other than those listed in section 13(2)(a) and (b)? If so, to whom?

(e) To what extent do you consider that a court is able to define the purpose of such a trust, and the powers of the trustees, in particular in the context of directions or restrictions concerning the beneficiaries or the residue of the trust estate?

(f) Do you consider that there is a need for reform? If so, what needs to be reformed, and do you have any solutions to suggest?

(Paragraph 5.27)

Zurich Insurance UK	(a) Yes (b) We are unsure (c) No (d) This would depend on the circumstances. The money should be available for the pursuer during their lifetime. The expectation is that the amount in Trust decreases over the years and that any residue is openly paid to beneficiaries upon death. (e) We are unsure (f) If the child will never have capacity, the funds should be looked after by an independent trustee who will only pay sums out for items needed for the pursuer and not for example to pay for the parents' needs. In England & Wales, these types of claims are normally dealt with by an appointed Deputy, the costs of which are included in the valuation of the claim.
Ronald E Conway	Cannot comment

Clyde & Co (Scotland) LLP	Clyde & Co make no comment on s13 or the types of trust.
Association of Personal Injury Lawyers	(a) There is uncertainty around this, and we suggest that the whole area of trust provision must be reviewed and clarified. (b) Different types of trust will be suitable in different circumstances.
Stagecoach Group plc	We have no comment here, the issue being outwith our knowledge.
Forum of Insurance Lawyers	FOIL has no comment on the types of trust
University of Aberdeen Law School	We consider that section 13 must be given effect to in a way which is compatible with article 1 of the First Protocol to the ECHR. It is therefore unlikely that section 13 would allow the court to direct payment of damages into a substantive trust. This is because any legitimate objective that might justify depriving a child of their possessions in this manner may equally be achieved by other means expressly provided for, such as a judicial factor (as cumbersome as those means may be). It may be that the court is allowed to use its discretion under section 13 to direct payment into a bare trust. We do not consider that section 13 should permit transfer to persons other than those listed in section 13(2)(a) and (b).
Unite the Union Scotland	(a) In terms of s13(1) yes (b) Both and it may be determined by the capacity of the child beyond that age of 16, sum of money and whether they are in receipt of means tested benefits (c) We represented a child injured in an RTA who, even though she was under 16 she would not be deemed to have capacity when she reached the age of 16 due to her injuries. Her damages were placed into a Personal Injury Trust with a professional trustee. She was in receipt of means tested benefits that we were keen to ensure would continue beyond settlement hence the use of the PI Trust. (d) A professional trustee (e) If you have a professional trustee appointed, then their professional duty to the beneficiary of the trust ought to supersede the judicial control referred to above. (f) We agree that the recent formation of the All Scotland Personal Injury Court is reason enough to retain the power to make an order that money be paid to the Sheriff Clerk. There has not been enough time for proper consideration to be given to the use of this function given the relatively short time this Court has been in existence.
Senators of the College of Justice	(a) We do not consider that we are in a position to express a concluded view on each of the questions in this section of the Discussion Paper. However, that the Paper identifies doubts on the matter

	of whether the general discretion afforded by section 13 is such as to confer on the court the power to direct payment of damages into a trust – whether a bare trust or a substantive trust – is sufficient to indicate that clarification is necessary, and that any such clarification, which should specify the extent of any power to direct payment of damages into a trust arrangement, should be effected by statute. The extent to which the Court should have power to direct payment of damages into a trust will necessarily be informed by the terms and effect of Article 1 of the First Protocol to the ECHR. For our part, we share the concern that a substantive trust, involving a direction as to the identification of the person or persons who are to be beneficiaries of the residue of the trust, or which otherwise might benefit different beneficiaries, other than the child awarded damages, may not be appropriate in A1P1 terms. (b) We repeat the concern that, in this context, a substantive trust, involving a direction as to the identification of the person or persons who are to be beneficiaries of the residue of the trust, or which otherwise might benefit different beneficiaries, other than the child awarded damages, may not be appropriate given the terms of Art.1 of the First Protocol to the European Convention of Human Rights. (c) We have nothing to add. (d) No, we consider the terms of section 13(2)(a) & (b) to be sufficient in their scope. (e) We refer to our answer to Q.29(a) and (b). (f) Reform which resolved the uncertainty relating to the extent of the court's discretion to direct payment of damages to a substantive trust may be thought desirable.
Aviva Insurance Ltd	This is outwith our expertise.
Digby Brown LLP	(a) Yes, we do consider that s13 allows the allows the court to direct payment of damages into a trust on the basis that, in terms of subsection (1), the court may make such order as it thinks fit and the options in subsection (2) are simply examples of the possible orders open to the court. (b) We consider that the discretion is wide enough to allow the court to order that payments be made into a bare trust, or a substantive trust, or both.

	(c) No, we do not have any examples of this (d) No (e) We consider that the court should be able to define the purpose of the trust, but in our view, the remaining matters go beyond the scope of the court's role and would be more appropriately dealt with by the professional advisor assisting in the setting up of the trust. (f) No
Thompsons Solicitors Scotland	(a) In terms of s13(1) yes (b) Both and it may be determined by the capacity of the child beyond that age of 16, sum of money and whether they are in receipt of means tested benefits (c) We represented a child injured in an RTA who, even though she was under 16 she would not be deemed to have capacity when she reached the age of 16 due to her injuries. Her damages were placed into a Personal Injury Trust with a professional trustee. She was in receipt of means tested benefits that we were keen to ensure would continue beyond settlement hence the use of the PI Trust. (d) A professional trustee (e) If you have a professional trustee appointed, then their professional duty to the beneficiary of the trust ought to supersede the judicial control referred to above. (f) We agree that the recent formation of the All Scotland Personal Injury Court is reason enough to retain the power to make an order that money be paid to the Sheriff Clerk. There has not been enough time for proper consideration to be given to the use of this function given the relatively short time this Court has been in existence.
Drummond Miller LLP	(a) Yes (b) Both (c) No (d) Yes – to include Trustees (e) Our interpretation is that this should be covered by the existing power under Section 13(1) i.e. the Court already can Notwithstanding our interpretation, it would be very helpful to have clarity on whether section 13 does apply to bare trusts and substantive trusts
Faculty of Advocates	The Faculty has no comment to make in relation to the matters discussed in Chapter 5 of this Discussion paper – Management of damages awarded to children. Such matters tend to be within the remit of solicitors and financial advisors instructed by solicitors.

Association of British Insurers	We do not express a view on the operation of the law in this area and do not have any relevant examples. However, it is clear from the discussion paper and the case law which preceded the 1995 Act that it may be useful to clarify the scope of the discretion conferred upon the court in terms of trusts. It would also appear reasonable that the effect of A1P1 is to restrict the discretion of the court to the approval of trusts only where the trustees cannot use the funds to benefit persons other than the child during the child's lifetime.
Forum of Scottish Claim Managers	This is outwith the area of our expertise.
Direct Line Group	We will respond to these questions in the round; we reiterate our response to question 25 as it is for the injured child, parents or guardian and representative to consider how an award of damages is best managed for the benefit of that child (including consideration of whether or not a trust, of any type, is appropriate), not the defendant/compensator. In addition, we suggest that the court should retain the discretion to intervene as appropriate to ensure adequate protection of the child's award.
NFU Mutual	NFUM have no comment to make in response to this question
Kennedys Law	We consider that section 13 allows the Court to direct payment into a bare trust . We consider that there is some uncertainty surrounding any power of the court to create substantive trusts. It would be beneficial for this uncertainty to be clarified. However, at the present time, the power is open to the court to appoint a judicial factor, in the event that a bare trust is insufficient. This does not involve issues around Article One of Schedule One of the Human Rights Act 1998.
Law Society of Scotland	a) Yes, in relation to a Bare Trust, possibly in relation to a Substantive Trust, albeit there could be a strong Human Rights challenge. We would urge the Commission not to go down the route of seeking to empower the court to impose a requirement to set up a Substantive Trust or Personal Injury Trust. This should be kept simple – if there needs to be a hearing to determine conditions for how the child's award is to be dealt with the court should adopt a case management/interventionist role to encourage parties to agree a course of action e.g. voluntarily setting up a Personal Injury Trust or Bare Trust. Where that cannot be agreed the court should order either that the funds are paid into a Bare Trust or consigned. The award would be consigned into the hands of the Sheriff Clerk or transferred to the Accountant of Court. b) There does not seem to be a clear answer to whether the court's powers would extend to both a Bare Trust and a Substantive Trust – the untested law is currently unclear on the issue. Applying the principles which are most consistent with minimal interference of a person's proprietary rights,

	proportionality and the Human Rights considerations, it seems most likely that challenge could be made to an order for a Personal Injury Trust or Substantive Trust. c) We do not have any examples. d) No, indeed we would argue for removal of Judicial Factor as an option given the costs and bureaucracy involved with such an appointment. e) The trustees' powers should be similar to those which apply when a Financial Guardian is appointed. A default list of powers can easily be devised to be used where a Trust is to be set up and amended to suit the particular case if appropriate. f) Yes, as outlined above.

30. Do you agree that the power to make an order that money be paid to the sheriff clerk should be retained meantime?

(Paragraph 5.29)

Zurich Insurance UK	Yes
Ronald E Conway	Yes for cases under £50k
Clyde & Co (Scotland) LLP	No, as evidenced by the lack of instances of this occurring it appears to be a redundant power
Stagecoach Group plc	We have no comment here, the issue being outwith our knowledge.
Forum of Insurance Lawyers	FOIl observes that this section does not appear to be regularly utilised, but we see no difficulty in retaining it as an option
University of Aberdeen Law School	Yes, we agree that the power to make such orders should be retained while the impact of the ASPIC is assessed.
Unite the Union Scotland	We agree that the recent formation of the All Scotland Personal Injury Court is reason enough to retain the power to make an order that money be paid to the Sheriff Clerk. There has not been enough time for proper consideration to be given to the use of this function given the relatively short time this Court has been in existence.

Senators of the College of Justice	Yes. While we doubt whether the transfer of business from the Court of Session to the All Scotland Sheriff Personal Injury Court *per se* will result in a greater exercise of the power contained in section 13(2)(b)(i), there is merit in the suggestion that the possibility of consigning funds with the sheriff clerk should not be foreclosed pending further assessment.
Aviva Insurance Ltd	This is outwith our expertise.
Digby Brown LLP	Yes, we see no reason to remove this. While we note from the Discussion Paper that in the years from 2014 to 2020, there were no instances of such orders being made, we agree that there is a possibility of this option being used more for cases progressing through ASPIC.
Thompsons Solicitors Scotland	We agree that the recent formation of the All Scotland Personal Injury Court is reason enough to retain the power to make an order that money be paid to the Sheriff Clerk. There has not been enough time for proper consideration to be given to the use of this function given the relatively short time this Court has been in existence.
Drummond Miller LLP	Yes
Faculty of Advocates	The Faculty has no comment to make in relation to the matters discussed in Chapter 5 of this Discussion paper – Management of damages awarded to children. Such matters tend to be within the remit of solicitors and financial advisors instructed by solicitors.
Association of British Insurer	We agree that this should be retained as it is possible that, in personal injury cases, sheriff clerks may come to provide services similar to those currently provided by the Accountant of Court. This can be revisited at a later date.
Society of Solicitor Advocates	Yes
Forum of Scottish Claim Managers	This is outwith the area of our expertise.
Direct Line Group	We agree. Whilst the power may not be exercised at this time, we believe that the recent Scottish court reform programme requires time to become fully established and be subject to a review before any existing powers are abolished
NFU Mutual	NFUM agree that the power to make an order that money be paid to the sheriff clerk should be retained, as highlighted in the consultation document the impact of the cases being progressed with ASPIC has not yet been established.
Kennedys Law	In our opinion, this power is almost never exercised but we consider that there is no requirement to remove the power, and that instead this could be left open to the court to consider as one of the potential orders to be made in the exercise of discretion under section 13. This leaves open the possibility that greater use is made of this power, along with others, if the usage of available provisions generally

	increases. The question of removal of this power could best be reviewed afresh when this can be assessed in the context of the impact of the other changes currently under consideration.
Law Society of Scotland	Yes. If a compulsory procedure is introduced as per our Comments on Question 24 it may well be that the most appropriate condition that a court can impose is to have the settlement consigned into the hands of the Sheriff Clerk.

31. Do you consider that any other reform is necessary in this context? If so, what?

(Paragraph 5.29)

Zurich Insurance UK	No comment
Ronald E Conway	See Answer 23
Clyde & Co (Scotland) LLP	No.
Stagecoach Group plc	We have no comment here, the issue being outwith our knowledge.
Forum of Insurance Lawyers	No
University of Aberdeen Law School	We do not have any other proposals for reform in this area.
Senators of the College of Justice	We have nothing to add.
Aviva Insurance Ltd	This is outwith our expertise.
Digby Brown LLP	N/A
Drummond Miller LLP	N/A
Faculty of Advocates	The Faculty has no comment to make in relation to the matters discussed in Chapter 5 of this Discussion paper – Management of damages awarded to children. Such matters tend to be within the remit of solicitors and financial advisors instructed by solicitors.
DAC Beachcroft	No
Association of British Insurers	No.
Forum of Scottish Claim Managers	This is outwith the area of our expertise.
Direct Line Group	DLG has no additional comments to make.
NFU Mutual	NFUM have no comment to make in response to this question
Kennedys Law	N/A
Law Society of Scotland	No, not beyond what is outlined above.

32. Do you consider that there is adequate provision to enable application to be made in court proceedings for an appropriate order relating to the management of sums already paid in respect of damages awarded to a child? If not, please give reasons or examples.

(Paragraph 5.34)

Zurich Insurance UK	We are not aware of any experience of this situation and so cannot meaningfully comment.
Ronald E Conway	The current provisions are inadequate. See earlier answer.
Clyde & Co (Scotland) LLP	Yes.
Association of Personal Injury Lawyers	We do not believe that there is adequate provision at present to enable application to be made in court proceedings for management of sums already paid in respect of damages awarded to a child. The current process relies on the solicitor coming forward to voice concerns about the parent/guardian's ability to manage the fund. This puts the solicitor in a difficult position, as the parent/guardian will have been the one to instruct the solicitor in the first place.
Stagecoach Group plc	We have no comment here, the issue being outwith our knowledge.
Forum of Insurance Lawyers	We do consider there to be adequate condition
University of Aberdeen Law School	Yes, we consider that there is adequate provision in these circumstances.
Unite the Union Scotland	We consider that section 11 provides adequate opportunity to allow application to be made during Court proceedings for an appropriate order relating to the management of sums.
Senators of the College of Justice	Yes, we consider that section 11(1) provides an adequate mechanism for applications to be made in court proceedings for an appropriate order to be made in respect of sums already paid by way of damages.
Aviva Insurance Ltd	This is outwith our expertise.
Digby Brown LLP	Yes, we do consider that there is adequate provision on the basis of the powers provided in s11 of the 1995 Act.
Thompsons Solicitors Scotland	We consider that section 11 provides adequate opportunity to allow application to be made during Court proceedings for an appropriate order relating to the management of sums.
Drummond Miller LLP	Yes

Faculty of Advocates	The Faculty has no comment to make in relation to the matters discussed in Chapter 5 of this Discussion paper – Management of damages awarded to children. Such matters tend to be within the remit of solicitors and financial advisors instructed by solicitors.
DAC Beachcroft	Yes
Association of British Insurers	We agree that there would appear to already be adequate provision for this.
Society of Solicitor Advocates	Yes
Forum of Scottish Claim Managers	This is outwith the area of our expertise.
Direct Line Group	Taking a step back, it appears that money is rarely paid to the court, for example paragraph 5.15 of the discussion paper confirms that the sheriff clerk received no funds between the 2014 and 2020 calendar years. Assuming monies paid into the court are therefore made only in exceptional circumstances, there appears little need for reform of this area, save that the court should retain the discretion to intervene as it believes appropriate. We also refer you to our response to question 29; management of damages is a matter for the child, parents or guardian and their representative, not the defendant/compensator. If one or more of those parties seek an order relating to damages already paid on behalf of the child, then it for them to do so. The time and cost involved however need not involve the defendant/compensator.
NFU Mutual	NFUM agree that there would appear to already be adequate provision for this.
Kennedys Law	Yes, on the basis of the wide discretion afforded by section 11, but the existence of powers which are at present not well used does not of itself offer protection to chldren, unless such powers are appropriately invoked. The present powers available at the time of a settlement or judicial award are little used, and it appears that the availability of powers under section 11 is ont reflected in orders being well used after the point of a settlement sum being paid.
Law Society of Scotland	Yes, for the reasons outlined in the Discussion Paper.

33. What do you think might explain the low usage of the provisions that involve the Accountant of Court?

(Paragraph 5.46)

Zurich Insurance UK	No comment beyond the possibility that parental involvement may explain it.

Ronald E Conway	See earlier answer . Speaking personally I don't believe widely known that Accountant will manage portfolio taking independent advice. Generally a suspicion not an attractive option for overwhelming majority of cases because of low interest rates.
Clyde & Co (Scotland) LLP	This may be due to the low number of qualifying settlements involving damages payments to children; a lack of awareness of the function/advantages of the Accountant of Court; and/or a lack of need for such involvement.
Association of Personal Injury Lawyers	The fact that the onus is on the solicitor to raise concerns about the ability of parents or guardians to manage the child's funds is likely to be one factor to explain the low usage of provisions. A second factor will be that as there is low usage, there will be wide-spread uncertainty/under-confidence about how the provisions work, which will exacerbate the low take up.
Stagecoach Group plc	We have no comment here, the issue being outwith our knowledge.
Forum of Insurance Lawyers	FOIL is not in a position to comment on this due to lack of information / evidence
University of Aberdeen Law School	We consider that the low usage of provisions involving the Accountant of Court in terms of section 9(3) is likely due to low awareness among those who hold property owned by or due to a child. The low number of referrals in terms of section 13(2)(b)(i) may simply be due to court preference for alternative orders, such as payment to a parent or guardian under section 13(2)(b)(ii).
Unite the Union Scotland	In scenarios where levels of damages justify, firms generally obtain independent advice for clients and this extends to those cases involving children. There are many benefits to personal injury trusts which can achieve proper management of funds on behalf of a child. This may be a route which advisors use as opposed to those provisions which involve the Accountant of the Court.
Senators of the College of Justice	We have no basis on which to comment
Aviva Insurance Ltd	This is outwith our expertise.
Digby Brown LLP	We are not in a position to offer comment on the reasons for the low usage of the provisions involving the Accountant of Court specifically, but we can say that we have rarely considered it necessary to seek orders under either section 11 or section 13 of the 1995 Act generally. This is because, in the vast majority of cases, we are satisfied that the child's damages will be safeguarded without resort to an order from the court. We have on occasion sought directions under section 9(3) of the 1995 Act in claims settled without litigation, and have found this to be a very straightforward and effective option.

	One possible explanation for the low usage of the provisions involving the Accountant of Court may be simply a lack of awareness of the provisions in the 1995 Act.
Thompsons Solicitors Scotland	In scenarios where levels of damages justify, firms generally obtain independent advice for clients and this extends to those cases involving children. There are many benefits to personal injury trusts which can achieve proper management of funds on behalf of a child. This may be a route which advisors use as opposed to those provisions which involve the Accountant of the Court.
Drummond Miller LLP	High value cases are usually dealt with by specialist solicitors and on settlement appropriate legal/financial advice is provided or at least recommended. On one view this seems to work and hasn't caused any issues that we are aware of. The family (and legal team) have the option of involving the Court/Accountant of Court or not. Defenders do not insist on or raise this. The family/legal team therefore have a choice of doing as they wish or being potentially told what to do – almost all will choose the former unless there are real concerns and so it's pretty much self-policed. If/when solicitors and legal teams do have concerns, appropriate advice (legal and financial) is given to protect their position and the option of the Accountant of Court is there should it be needed. The vast majority of clients take and accept the advice given and end up with professional advisers [Private Client in terms of a Trust or Financial Guardian, and separately financial advisors] if the award justifies that and sometimes even if it doesn't. The Court could do more to ensure all are protected but it's important not to go too far when the system as it is seems to work – mainly because of the specialist nature of the work and legal teams involved.
Faculty of Advocates	The Faculty has no comment to make in relation to the matters discussed in Chapter 5 of this Discussion paper – Management of damages awarded to children. Such matters tend to be within the remit of solicitors and financial advisors instructed by solicitors.
DAC Beachcroft	For the reasons identified in our answer to Question 25
Association of British Insurers	Please see answer to question 34 below.
Society of Solicitor Advocates	Other mechanisms are in place rather than using the Accountant of Court. Guidance in the form of a Practice note or directions would provide clarification.
Forum of Scottish Claim Managers	This is outwith the area of our expertise and is perhaps best answere by Pursuers agents.
Direct Line Group	DLG does not believe that it is best placed to comment.
NFU Mutual	NFUM have no comment to make in response to this question
Kennedys Law	The court is not under any obligation to consider an order under section 13 unless moved to do so. The parent or guardian to whom payment is being made may consider that it is preferable to retain the

	freedom to seek professional advice on investment and administration out with the court setting. Defenders may well consider that the question of good practice in management of the award of damages after payment is a matter for the parent or guardian. If neither party raises the issue, the court can allow settlement, or payment of a judicial award, to proceed without giving close consideration to whether an order should be imposed.
Law Society of Scotland	Agents do not consider it necessary as they have formed a view as to how best to deal with a child's award. Concerns that the Accountant of Court is overly bureaucratic and costly. Ignorance of the provisions involving the Accountant of Court.

34. What might increase use of these provisions?

(Paragraph 5.46)

Zurich Insurance UK	A clear and established set of rules around when to refer to the Accountant of Court.
Ronald E Conway	Law Society Guidance on availability where any suspicion funds might be squandered.
Clyde & Co (Scotland) LLP	Greater awareness of the provisions.
Association of Personal Injury Lawyers	We suggest that all damages for children, regardless of value and regardless of whether there was settlement pre-litigation or following proof, should be subject to approval and protections, whereby the money is held for the child until they reach 16.
Stagecoach Group plc	We have no comment here, the issue being outwith our knowledge.
Forum of Insurance Lawyers	See answer 33 above
University of Aberdeen Law School	In our view this is largely an issue of awareness, particularly within the legal profession – that is to say, among those who provide advice to those who may hold property owned by or due to a child.
Unite the Union Scotland	If it were to be considered that mandatory involvement of the Courts to determine what is in the best interests of the child were invoked
Senators of the College of Justice	We have no basis on which to comment
Aviva Insurance Ltd	This is outwith our expertise.
Digby Brown LLP	Raising awareness of these provisions and the benefits that they offer in appropriate cases. It would also be helpful it the monetary limits set out in section 9 of the 1995 Act (in terms of which the value of the damages must be not less than £5,000 and must not exceed £20,000) were removed so

	that, irrespective of the value of the damages, a direction could be sought from the Accountant of Court if considered appropriate. This would be of assistance where the damages have been agreed without the need for litigation, which means that an order under section 13 can not be sought.
Thompsons Solicitors Scotland	If it were to be considered that mandatory involvement of the Courts to determine what is in the best interests of the child were invoked
Drummond Miller LLP	Probably only if it becomes mandatory (beyond say a certain value) to involve the Court/ Auditor.
Faculty of Advocates	The Faculty has no comment to make in relation to the matters discussed in Chapter 5 of this Discussion paper – Management of damages awarded to children. Such matters tend to be within the remit of solicitors and financial advisors instructed by solicitors.
Association of British Insurers	Low usage of these provisions is likely explained by the fact that in most actions raised for damages, the parents/guardians will be legally represented, have the advice of counsel and, in many cases of the utmost severity, have a curator appointed (normally experienced counsel). The provisions that involve the Accountant of Court are therefore likely not necessary in most cases.
Forum of Scottish Claim Managers	This is outwith the area of our expertise and is perhaps best answere by Pursuers agents.
Direct Line Group	DLG does not believe that it is best placed to comment.
NFU Mutual	NFUM have no comment to make in response to this question
Kennedys Law	We would suggest increased awareness, and more direction of court discretion, may increase the use of these provisions. In the event that it is mandatory to consider whether an order should be issued in terms of section 13, so that the court requires either to consider and seek views on the terms in which an order should be issued, or to express a view on why no such order was necessary or appropriate, this would be likely to increase the use of these provisions by requiring parties in most or all cases to offer submissions on their use.
Law Society of Scotland	Mandatory forms as outlined in our Comments on Question 24 as this will lead to a greater understanding of the options open to the court. However, as and when the legislative reform is finalised, extensive publication of the new legislation/rules/guidance with seminars to explain what is involved is a fundamental requirement.

35. Do you consider that there is a need for independent oversight when it is proposed to set up a trust for damages for personal injury awarded to a child?

(Paragraph 5.62)

Zurich Insurance UK	Yes
Ronald E Conway	No comment
Clyde & Co (Scotland) LLP	Yes – however arguably this would be covered by the trustees. It would be beneficial to provide that at least one neutral, professional trustee be appointed.
Association of Personal Injury Lawyers	Yes. As set out above, the majority of trustees should not be family members.
Stagecoach Group plc	We have no comment here, the issue being outwith our knowledge.
Forum of Insurance Lawyers	FOIL does not consider this is required as a mandatory imposition. There is provision for appointing a curator ad litem as required. Further an independent professional trustee could be appointed. Therefore nothing further ought to be needed.
University of Aberdeen Law School	Yes, we consider that independent oversight when it is proposed to set up trusts in these circumstances would be beneficial.
Unite the Union Scotland	We consider that in appropriate cases independent oversight may be necessary, however this should not be the norm as it could be considered an interference in a private matter.
Senators of the College of Justice	We note that in the circumstances discussed the Advisory Group favoured a form of independent oversight of the terms of the trust, and of the choice of persons to be appointed as trustees. However, to what extent the risk of misappropriation or misinvestment of funds is actual or theoretical, is unclear. Experience suggests that the preponderance of actions to which this issue might be thought to relate achieve settlement on the basis of substantial funds being placed in trust for the injured party with at least one of the appointed trustees being a professional (frequently through the firm acting for the pursuer or their representative). It is not apparent to us that these kinds of arrangements, effected by agreement between parties to the court proceedings, are not working in practice. Since we anticipate that the introduction of a system of oversight would likely involve the office of the Accountant of Court, there are likely to be implications not just for that office (in terms of cost – a point made in the Discussion Paper) but also for the settlement of court proceedings (in terms of both cost and complexity). In short, we are not convinced that there is a pressing need for independent oversight of the kind contemplated by this question. Whether the introduction of independent oversight should be regarded as an “unwelcome interference”, in a matter which is essentially a private one, raises an issue of policy, upon which we consider it inappropriate to comment.
Aviva Insurance Ltd	This is outwith our expertise.

Digby Brown LLP	In our experience, this step is not necessary. In the majority of trusts, the child's parents, or a parent and another relative, are appointed as trustees, together with a professional person, for example a solicitor. This third trustee provides a sufficient degree of independence and we consider that, if there was additonal independent oversight, this could make the effective operation of the trust unwieldy. In our experience, family members are acutely aware of the requirement to use the funds for the child's benefit. They take their responsibility in this regard seriously and tend to welcome the input of an impartial professional trustee.
Thompsons Solicitors Scotland	We consider that in appropriate cases independent oversight may be necessary, however this should not be the norm as it could be considered an interference in a private matter.
Drummond Miller LLP	No – in fact the opposite. If a Trust is set up then that is a strong indication the family/pursuer is taking protective steps and following advice.
Faculty of Advocates	The Faculty has no comment to make in relation to the matters discussed in Chapter 5 of this Discussion paper – Management of damages awarded to children. Such matters tend to be within the remit of solicitors and financial advisors instructed by solicitors.
Association of British Insurers	We agree with the Advisory Group that this may be beneficial, but only in certain specific circumstances.
Forum of Scottish Claim Managers	This is outwith the area of our expertise.
Direct Line Group	DLG suggests that this is a consideration for others rather than a defendant/compensator.
NFU Mutual	NFUM have no comment to make in response to this question
Kennedys Law	Yes, we believe it is important for there to be independent oversight when setting up a personal injury trust for a child. It is important that the trustees appointed appropriately manage and invest the funds, especially when large sums are involved. It is also important for the terms of the trust to be considered by someone with the requisite knowledge and experience, to ensure the trust is being/will be managed correctly with the child's best interests in mind.
Law Society of Scotland	An independent, professionally regulated person should be appointed as a trustee and should have a controlling interest or alternatively there should be a mechanism written into the Trust Deed to independently resolve disputes with other trustees. This is something that could be canvassed in the form to be submitted to the court as outlined in our Comments on Question 24.

36. Should such oversight be necessary in all cases, or only in certain specific circumstances? If the latter, what type of circumstances?

(Paragraph 5.62)

Zurich Insurance UK	Zurich considers that the oversight should only be there in cases where: a) legal capacity is lacking and will never be obtained; b) there is a large award for care and/or accommodation, and c) subject to a financial limit. Zurich does not consider oversight necessary in modest cases where the risk of misappropriation or dissipation of the fund is low.
Ronald E Conway	See earlier answer. I think there should be oversight by Accountant of Court / Public Guardian for cases over £50k. This is not the same as lodging with Accountant and having them administer the fund, but analogous to duties of Public Guardian.
Clyde & Co (Scotland) LLP	Such oversight would be of assistance in cases where there were concerns as to misappropriation.
Association of Personal Injury Lawyers	Oversight should be necessary in all cases.
Stagecoach Group plc	We have no comment here, the issue being outwith our knowledge.
Forum of Insurance Lawyers	See above answer 35
University of Aberdeen Law School	We consider that it should be necessary in all cases, although it will be especially important where the proposed trust would have beneficiaries other than the child to whom damages have been awarded.
Unite the Union Scotland	Independent oversight may be most appropriate where there are obvious concerns regarding the possible misappropriation or mis investments of funds which will be necessary to protect the long term financial stability or care provision of a child.
Senators of the College of Justice	We refer to our preceding answer.
Aviva Insurance Ltd	This is outwith our expertise.
Digby Brown LLP	We do not consider such oversight necessary.
Thompsons Solicitors Scotland	Independent oversight may be most appropriate where there are obvious concerns regarding the possible misappropriation or mis investments of funds which will be necessary to protect the long term financial stability or care provision of a child.
Drummond Miller LLP	No, but if it were mandatory then only above a certain value and if there were major concerns about the use of the funds.

Faculty of Advocates	The Faculty has no comment to make in relation to the matters discussed in Chapter 5 of this Discussion paper – Management of damages awarded to children. Such matters tend to be within the remit of solicitors and financial advisors instructed by solicitors.
Association of British Insurers	In our view, such oversight is only necessary in certain specific circumstances; for example, where there is a real risk of funds being misappropriated or not properly invested. We again note that if the extent of the work of the Accountant of Court were to be increased, there could be cost implications in relation to resources and additional training need. Oversight should therefore be proportionate, and consideration should be given as to how best to control costs in this area (including for pursuers), avoid additional burdens on the courts service and not delay settlement.
Forum of Scottish Claim Managers	This is outwith the area of our expertise.
Direct Line Group	DLG does not believe that it is best placed to comment.
NFU Mutual	NFUM have no comment to make in response to this question
Kennedys Law	If a trust is being utilised, it is likely that large sums of money are involved and/or the aim is to invest funds for the child's future. We would therefore believe it would be beneficial for oversight to be necessary in all personal injury cases which involve a trust.
Law Society of Scotland	Only those cases where the Trust does not have an independent, professionally regulated person appointed as a trustee as outlined in our Comments on Question 35.

37. If oversight is necessary, should it be achieved by:

(a) providing that a draft of the proposed trust deed be sent to the Accountant of Court for consideration and approval of its terms, including the suitability of the choice of trustees; and

(b) such oversight by the Accountant of Court also being triggered by any significant change in circumstances such as where there is a substantial increase in the assets held in trust following a final settlement, or where there is a change of trustees; or

(c) another process? If so, what?

(Paragraph 5.62)

Zurich Insurance UK	(a) Yes

	(b) Yes
Ronald E Conway	See Answer 23. Extend powers of Office of Accountant of Court/Public Guardian
Clyde & Co (Scotland) LLP	(a) and (b) are sensible oversight triggers.
Association of Personal Injury Lawyers	We suggest oversight should be achieved by a mix of options (a) and (b). The choice of trustees must be scrutinised, and there must not be a majority of family members. There should also be oversight by the Accountant of Court where there is a significant change in the circumstances of the trust. Initial scrutiny about the choice of trustees would be pointless if the trustees were then free to remove certain trustees and select others without oversight once the trust was set up.
Stagecoach Group plc	We have no comment here, the issue being outwith our knowledge.
Forum of Insurance Lawyers	FOIL does not consider it is necessary but if so, any additional oversight ought to be proportionate
University of Aberdeen Law School	We consider that the necessary oversight would be achieved by involving the Accountant of Court, both in the consideration and approval of the proposed trust deed and following a significant change in circumstances.
Unite the Union Scotland	(a) This seems like a reasonable step in the process if oversight was deemed to be necessary (b) These material changes in circumstances would warrant addressing if oversight was deemed appropriate.
Senators of the College of Justice	We refer to our answer to Q.35
Aviva Insurance Ltd	This is outwith our expertise.
Digby Brown LLP	We do not consider that any of the suggested steps are necessary.
Thompsons Solicitors Scotland	(a) This seems like a reasonable step in the process if oversight was deemed to be necessary (b) These material changes in circumstances would warrant addressing if oversight was deemed appropriate.
Drummond Miller LLP	(c) as part of the Court process on conclusion of the action by the Court when there is a settlement over a certain level - but such work will require to be paid for and so it's important that this is proportionate.
Faculty of Advocates	The Faculty has no comment to make in relation to the matters discussed in Chapter 5 of this Discussion paper – Management of damages awarded to children. Such matters tend to be within the remit of solicitors and financial advisors instructed by solicitors.
Association of British Insurers	We agree that where necessary, oversight should be achieved by a combination of (a) and (b), including consideration (where appropriate) of whether an additional, neutral, trustee should be appointed. As above, in our view oversight is only necessary in certain specific circumstances; for example, where

	there is a real risk of funds being misappropriated or not properly invested. Oversight should therefore be proportionate, and consideration should be given as to how best to control costs in this area (including for pursuers), avoid additional burdens on the courts service and not delay settlement. Suggestions include: • For the court procedure to conclude where possible without the need for a hearing, with the judge reaching a decision by reviewing the case papers and for there to be no right to an advocate/counsel where the approval is granted by means of paper determination; • For the court procedure to be supported by a new pre-action protocol and/or changes to existing pre-action protocols, as necessary to drive efficiency; • The courts service to commit to key performance indicators, again as necessary to drive efficiency; and • Exploring whether the development of a secure online portal system to host key case documents would help to control costs in this area.
Forum of Scottish Claim Managers	This is outwith the area of our expertise.
Direct Line Group	We have no additional comments to make
NFU Mutual	NFUM have no comment to make in response to this question
Kennedys Law	We support options (a) and (b). However, this would depend on the resources being made available for an increased workload for the Accountant of Court.
Law Society of Scotland	If oversight is necessary it should only arise where there is no independent professionally regulated person appointed as a trustee with a controlling interest. In that situation paragraphs (a) and (b) should apply.

38. Are PITs the only type of trusts used for managing awards of damages to children or are there others? If you have experience of other types of trust being used could you give examples?

(Paragraph 5.62)

Zurich Insurance UK	In England & Wales, the usual method is for a Deputy, usually a solicitor, to be paid the damages. They will then deal with the fund and all payments made from that fund, rather than setting up a PIT.
Ronald E Conway	No experience of any other kind.

Clyde & Co (Scotland) LLP	Our experience is that Personal Injury Trusts are typically used (albeit this is still not a frequest occurrence) and we are not aware of any other types of trust being used.
Association of Personal Injury Lawyers	We understand that PITs are the only type of trusts used for managing awards of damages to children.
Stagecoach Group plc	We have no comment here, the issue being outwith our knowledge.
Forum of Insurance Lawyers	Our experience is that PITs are used. We do not have experience of any other types of trusts
University of Aberdeen Law School	We are not aware of other types of trusts being used to manage awards of damages to children.
Unite the Union Scotland	There are a number of other types of trusts which may be considered however the benefits of using a Personal Injury Trust are such that it is likely the one most often considered in a scenario where damages are paid to a child.
Senators of the College of Justice	We are not in a position to comment
Aviva Insurance Ltd	This is outwith our expertise and is perhaps best answered by Pursuers representatives.
Digby Brown LLP	We only have experience of setting up PITs in cases where damages are recovered for children.
Thompsons Solicitors Scotland	There are a number of other types of trusts which may be considered however the benefits of using a Personal Injury Trust are such that it is likely the one most often considered in a scenario where damages are paid to a child.
Drummond Miller LLP	If the damages are being paid to the child as a consequence of an injury that they have suffered then it would seem very unlikely that it would be appropriate to use a Trust that did not qualify as a PIT. If however an award was being paid to a child as a consequence of a fatal claim then a trust may still be appropriate (in certain circumstances) but that would not qualify as a PIT.
Faculty of Advocates	The Faculty has no comment to make in relation to the matters discussed in Chapter 5 of this Discussion paper – Management of damages awarded to children. Such matters tend to be within the remit of solicitors and financial advisors instructed by solicitors.
Association of British Insurers	We do not have experience of other types of trust being used.
Society of Solicitor Advocates	PIT only
Forum of Scottish Claim Managers	This is outwith the area of our expertise.
Direct Line Group	Defendants/compensators are not involved in the decision-making process relating to trust types and so are not best placed to comment.
NFU Mutual	NFUM have no comment to make in response to this question
Kennedys Law	N/A

Law Society of Scotland	Bare Trusts are commonly used when it is felt that the invariably higher costs of a PIT are best avoided. Bare Trusts are more common in lower value cases where the pot of money is usually less than that in a PIT. However, they can be used because they are often simpler to set up and less onerous than a PIT.

39. Are there any other issues that arise in relation to the Accountant of Court or to the courts' management or to the courts' management and safeguarding of awards of damages to children? If so, please describe those issues and how they may be resolved.

(Paragraph 5.76)

Zurich Insurance UK	No comment
Ronald E Conway	See earlier answers.
Clyde & Co (Scotland) LLP	We consider that the current measures are largely appropriate to achieve the ultimate aim of managing and safeguarding the awards of damages to children, evidenced by the lack of reported issues. There are various appropriate options where there is at least some basis for supposing that the parents or guardians might misappropriate or misapply the child's funds and the proposed introduction of an equivalent Court of Protection seems to be an extreme and costly remedy. However there is scope to improve the current system and bring it in line with current personal injury trends e.g. PITs.
Stagecoach Group plc	We have no comment here, the issue being outwith our knowledge.
Forum of Insurance Lawyers	No
University of Aberdeen Law School	We are not aware of any other issues arising in relation to the Accountant of Court or to the courts' management and safeguarding of awards of damages to children.
Senators of the College of Justice	We are not aware of any such issues
Aviva Insurance Ltd	This is outwith our expertise and is perhaps best answered by Pursuers representatives
Digby Brown LLP	If it is considered necessary to have independent oversight of the setting up of a trust for damages awarded to a child, or in relation to the administration of damages awarded to children generally, one option that we think may be worth further consideration is the expansion of the role of the Office of the Public Guardian (OPG). The OPG has been carrying out an oversight and accountability role in respect of incapable adults for several years and has developed considerable experience in this area. There may be an attraction in having a single body responsible for oversight of financial affairs. The central concern of the OPG is to safeguard the best interests of the incapable adult, and the same consideration applies to awards of damages made to children.

Drummond Miller LLP	No
Faculty of Advocates	The Faculty has no comment to make in relation to the matters discussed in Chapter 5 of this Discussion paper – Management of damages awarded to children. Such matters tend to be within the remit of solicitors and financial advisors instructed by solicitors.
Association of British Insurers	We do not have any comments in response to this question.
Forum of Scottish Claim Managers	This is outwith the area of our expertise.
Direct Line Group	The court and its resources are finite; necessary court processes that protect an injured child's award of damages must be straightforward and uncomplicated and they should not add additional layers of delay or cost. In addition, the defendant/compensator should not be responsible for additional costs incurred in matters which do not concern them. As DLG is not aware of any reported issues relating to the management of a child's award, we suggest that the current system works well and in favour of the injured child. We therefore see little need for reform other than allowing the court a discretionary duty to intervene as and when it is appropriate to protect the child's interests.
NFU Mutual	NFUM have no comment to make in response to this question
Kennedys Law	N/A
Law Society of Scotland	None.

General comments

Zurich Insurance UK	No comments
Ronald E Conway	Nothing to add
Clyde & Co (Scotland) LLP	None.
Association of Personal Injury Lawyers	APIL welcomes the opportunity to respond to the Scottish Law Commission's (SCL) consultation on damages for personal injury. We are supportive of the proposals throughout the SLC's paper, including amendments to the definition of "relative" in the 1982 Act, to reflect the realities of modern society. We strongly agree that section 2(4) of the Law Reform (Personal Injuries) Act 1948 should remain in force, and welcome reform of the law surrounding pleural plaques as a step in the right direction to address some of the outstanding issues relating to limitation.
Stagecoach Group plc	We have no further comment to add.

Forum of Insurance Lawyers	FOIL has no further comment to add
Tom Marshall	By way of note, I am a recently retired solicitor advocate, who spent the last 20 years of his career working almost exclusively on cases of asbestos related disease. I was a partner in Thompsons until 2017 and latterly operated my own solicitor advocate practice. I appeared for the Pursuer in *Boyd v Gates UK Limited* and many other reported cases involving asbestos related disease. I have given advice to many hundreds, perhaps thousands, of clients on the subject of provisional damages and a considerable number on the subject of time bar. I was a member of the Advisory Group for the Scottish Law Commission Report (No 213) on Damages for Wrongful Death.
Senators of the College of Justice	We have nothing to add
Aviva Insurance Ltd	We have nothing further to add.
Horwich Farrelly Scotland	Thank you for preparing a detailed and thought-provoking discussion paper on potential reform of the law relating to damages in personal injury claims for consideration. It is with pleasure that I enclose my firm's response to the questions posed. We have deliberately not responded to questions 23 to 39 as other than providing anecdotal accounts from discussions we have had with claimant agents, we do not feel we are in an appropriate position to comment in detail on the issues that arise and any proposed solution. We would say that if it is considered appropriate and necessary, we would be in favour of the principle of protecting awards of damages paid to those representing children if this can be achieved proportionately and reasonably. (From cover email)
Association of British Insurers	N/A
Forum of Scottish Claim Managers	We have nothing further to add.
Direct Line Group	DLG's exposure to claims of this nature is not large; our responses to questions within Chapter 4 reflect this position.
Kennedys Law	N/A
Law Society of Scotland	We wish to avoid a system based on the bureaucratic and costly English Court of Protections. We consider it to be a fundamental requirement to keep any new proposals simple and cost neutral to the Pursuer. If the Accountant of Court or Sheriff Clerk are to be used in the administration of funds this should only come about if the court makes such an order on consideration of the Pursuer's proposals as to how the settlement should be administered.

	The Commission will no doubt bear in mind the existing requirements under Section 6 and in particular SS 6(6) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 which imposes a requirement for the court to be satisfied that paying a claimant's damages as a lump sum as opposed to periodical payments is in the claimant's best interests where future damages are more than £1million. This applies to all claims handled under a Success Fee agreement.
Medical and Dental Defence Union of Scotland	The cost of clinical negligence in the NHS has been rising exponentially over recent years, placing enormous financial pressure on an already stretched healthcare system. Clinical negligence litigation is now one of the biggest drivers of increasing costs across healthcare. That pressure is felt also in the private sector. Contrary to this, we know that clinical practice is safer than ever before. The National Audit Office for England and Wales (NAO)1 reported in 2017 that there is no evidence of doctors and dentists' practice deteriorating in standard and there is nothing to suggest that the position in Scotland is any different. These unsustainable and growing costs form the backdrop to our assessment of the measures considered in the Discussion Paper. At a time when the NHS is attempting to build back from the peak impact of the pandemic, facing tough financial pressures and must make difficult decisions about how it allocates its limited resources, it is imperative that we start to ask some difficult questions about the appropriateness of the existing heads of loss and, indeed, take considerable pause for thought before further expanding their scope. Services Claims: Awards of damages in respect of services provided TO an injured person (section 8 of the Administration of Justice Act 1982) and BY an injured person (section 9) Before addressing some of the specific consultation questions in chapter 2, we wish to make a number of general observations in relation to the current operation of these provisions. The principal objective of clinical negligence litigation is that patients who are harmed by the negligence of regulated healthcare professionals can access appropriate compensation. Our claims' handling philosophy is centred around ensuring that, in the right cases, injured patients have timely access to appropriate compensation. A claim for services rendered to the injured person under section 8, however, does not meet this principal objective (it being a claim made on behalf of the relative, rather than for the direct benefit of the injured person). For the reasons outlined above in relation to the impact of spiralling clinical negligence costs, we question its continued inclusion as an appropriate head of loss in such cases. It is our experience that services claims are on the increase (both in terms of number and scope) and the evidence to support them is so limited that there is clear scope for them to be easily over-inflated. While the injured person is technically under an obligation to account to the relative who provided past necessary services (under section 8(2)), we see little evidence that this is actually happening in practice and there are no consequences for non-

	compliance. There is no corresponding obligation on a pursuer's solicitor to ensure that the relevant damages awarded under section 8 are forwarded to the individuals on behalf of whom such claims have been made. In addition, there is no requirement on the injured person to account to the relative in relation to damages paid for future services under section 8(3). It is an unfair anomaly that the pursuer is entitled to retain those damages (which were intended to compensate their relative). Whilst our position, as outlined above, is that this head of loss can no longer be justified in clinical negligence cases, at the very least the pursuer should be under an obligation to account to the relative for any such damages. There is, moreover, the potential for significant overlap between this head of loss and future care costs, leading to double counting. There are also often difficulties in separating out the services that were provided to the injured person by a relative before the relevant injury and would have continued to be provided but for the injury, and those that are provided only as a direct consequence of the injury (only the latter being within the scope of a valid claim). We turn now to claims for services rendered by the injured person to a relative under section 9. Such services are even more remote and less easily justified in the context of today's clinical negligence litigation landscape. At a time when there are significant issues as to how healthcare services are funded, is it right that these funds should be diverted to pay for the gardening requirements of an injured person's relative? Again, there is no obligation to account to the relative in relation to any such damages (indeed, there is no requirement to even tell the relative that a section 9 claim has been made on their behalf). There are also evidential issues in relation to services claims (both section 8 and section 9), which are often poorly articulated and not elaborated on by way of witness statements until a relatively late stage in Court proceedings, if at all. The very nature of these services, which are almost always provided on a gratuitous basis prior to Court proceedings being raised, is such that there is ordinarily no accurate record kept of the extent of any services provided. In addition, it is a system without appropriate checks and balances and claimants' solicitors are in a similarly difficult position to defenders in this regard – they have simply the word of the injured person / their relatives to go on. Properly interrogating these claims comes with significant costs for defenders, particularly in high value claims where private investigators may require to be instructed. This can incentivise compromises being made for economic reasons in some cases, but it can also be a stumbling block to settlement, thus impacting on the expedient resolution of cases and resulting in delays for injured patients in receiving fair compensation in respect of the balance of their claim. Under the present system, all of the factors identified above can result in damages that outstrip the actual value of the services provided. We now turn to the specific

	consultation questions, but it will be clear that we caution against any further expansion of services claims, for all the reasons given above.

[i] https://www.webarchive.org.uk/wayback/archive/20150220013755/http://www.gov.scot/Publications/2013/08/5509/downloads
[ii] https://www.webarchive.org.uk/wayback/archive/20150220013755/http://www.gov.scot/Publications/2013/08/5509/downloads