STEWARTS

Response to the Ministry of Justice's Call for Evidence on the Personal Injury Discount Rate – Exploring the Option of a Dual/Multiple Rate

Preamble

Stewarts is the UK's largest litigation-only solicitors' firm and specialises in high value and complex disputes. The firm acts for both corporate and individual clients and has leading and specialist departments in aviation and international injuries, clinical negligence, commercial litigation, competition litigation, divorce and family, employment, financial crime, insolvency, international arbitration, investor protection litigation, media disputes, personal injury, policyholder disputes, tax litigation and disputes, and trust and probate litigation.

Stewarts has strategic partnerships in place with other specialist solicitors' firms across the world, enabling its clients to take a global approach to litigation. The firm is top ranked in both the Legal 500 and Chambers and Partners.

Stewarts appreciates the opportunity to respond to the Ministry of Justice's Call for Evidence on exploring the option of a dual or multiple personal injury discount rate. Our submissions below are all focussed on the types of complex and high value injury litigation in which we exclusively specialise.

Executive summary

We agree with the responses of FOCIS and APIL, that it would be preferable to remain with a single PIDR. Should there be a change, the best option is a dual rate to reflect long-term earnings inflation on care needs as it would be fairer, more predictable and simpler than if it were by duration.

A major deterrent to adopting a dual rate by duration is the impossibility of predicting the long-term economic outlook with sufficient precision to set a discount rate for that period. The MOJ refers to 5-15 years being the potential range for a switching point, but anything less than 15 years would in our view would be dangerously short when the timescale for recovery of losses following recessionary economic cycles is considered. There is no widely accepted approach to projecting long-term investment returns. Any projections that are made are liable to change quickly and frequently. Many economists and actuaries are doubtful that the last 15-25 years are a reliable predictor of what will happen in the next 15-25 years, let alone for the majority of Claimants with materially longer life expectancy than that. Setting a long-term PIDR for a period which does not commence for many years is laden with risk, but attempting to commence the "long-term" rate after a dangerously short period would also be too risky. Together these risks vividly illustrate some of the insurmountable problems associated with the concept of dual or multiple rates by duration.

The current economic assumptions made when setting the PIDR also depart from the reality of Claimant investment practices. Most Claimants are not in a position to invest their funds immediately. Funds held for short-term needs are likely to be heavily weighted towards cash, with returns fluctuating frequently based on the immediate economic and inflationary cycle. Any losses in that initial period (against the returns assumed when setting the rate) need to be made up in order to achieve the anticipated returns and avoid under-compensation. This places significant demands on the Claimant's portfolio and is likely to be incompatible with the professional and regulatory obligations of their investment advisors. These risks will be exaggerated when the target rate of return has been set many years in advance. Then, as the Claimant is approaching the latter stages of life, any investment portfolio has to be de-risked, resulting in much lower returns than appear to have been assumed. Consequently, we agree with the submission of Personal Financial Planning Ltd that "*a dual rate based on duration that actually reflects a claimant's investment journey over time is unworkable in practice*".

Introducing dual rates by duration is likely to significantly complicate the preparation of schedules of loss, and the making and appraising of any offers to settle. As in Ontario it is likely to require the involvement of an expert to perform calculations in many claims, adding significant cost and delay. The potential benefit of closer matching offered by a dual rate by duration are unclear, but the greater complexities and cost are obvious and significant. So that approach fails to satisfy a cost-benefit analysis and carries with it considerable uncertainties.

We therefore support the continuation of a single PIDR but taking the opportunity of the upcoming expert panel review to look for refinements to minimise the proportion of claimants who do not receive full compensation. In this review it will be crucial to consider the evidence on the investment advice and management charges incurred by seriously injured claimants, as the evidence points to a much higher allowance for this than was adopted in 2019. In addition, a minimum -0.5% adjustment to reflect taxation on the investment portfolio is required (or higher if a short term rate were adopted).

We suggest that the GAD should include ONS longevity statistics into further analysis and modelling to inform the upcoming review by the expert panel. A final model portfolio and discount rate could then be determined, with longevity factor incorporated, to ensure no less than 5-10% of Claimants are under-compensated. Individual Claimants only have one claim and are not able to spread the economic impact of these changes across many claims and years, like institutional paying parties can.

Alongside the current PIDR review, we also suggest a review of the Periodical Payment regime to increase the use of PPOs. In our experience many Claimants wish to receive part of their compensation for future loss as a PPO (typically future care costs), but most insurers are reluctant to offer them. More can be done to require the parties to frame offers with a PPO option in appropriate cases, and to give the Court a more proactive role in determining the form of award during the case management stages.

The case for the government to make policy decisions which encourage the use of PPOs is compelling. In contrast, the policy reasons and evidence for a dual rate are mixed. If any change to the PIDR were to make PPOs less attractive, it would be a serious backward step.

Response to questions

Q1: Do you have a preferred model for a dual/multiple rate system based on any of the international examples set out in the Call for Evidence paper (or based on your or your organisations experience of operating in other jurisdictions)?

Please give reasons with accompanying data and/or evidence.

Implementing a dual or multiple rate system by duration of loss will increase complexity and cost.

The vast majority of the world favours a single PIDR, though some favour no discount rate at all and simply multiply future loss by the applicable number of years. A survey of members of the Pan-European Organisation of Personal Injury Lawyers (PEOPIL), resulted in responses on behalf of eleven European countries[1]. The responses showed that all of those countries have either no PIDR or a single rate. Seven of the eleven had an important right for the claimant to return to court in the future if their injury related losses materially changed in any way. A further two countries had a right to return to court for further damages, but only if the claimants' medical condition had changed. All 11 countries had versions of a periodical payment regime: some discretionary and some mandatory for some heads of loss.

A dual or multiple rate aims to more accurately reflect the anticipated inflation and investment interest earned on a lump sum for the particular head of loss being claimed and/or for the duration that the loss will be incurred. However, the more bespoke the calculation, the less simple it becomes. Each jurisdiction must therefore make its own adjudication between simplicity and accuracy when establishing a methodology. In England and Wales (and indeed the other home nations), our reservation in moving to a dual rate system is evidenced by the experience in Ontario, Hong Kong and Jersey.

In 1999, legislation was passed in Ontario for the implementation of a dual rate with a 15-year switching point. However, their experience is not supportive of England following their lead. A vastly experienced sub-committee of their Civil Rules Committee submitted detailed reports in 2020 and again in 2021, recommending a return to a single discount rate based on an average of yields from Government of Canada real return bonds, which are indexed to inflation. In doing so they commented that "*in large part, our reasons for opting for a single rate have to do with the difficulty of establishing a rate for a period that will only begin 15 years in the future*". Their hesitation to set a long-term discount rate stemmed from the difficulty in assuming that real interest rates in the future will be consistent with historical performance. The question of what inflation will look like in the future only added to the difficulty of formulating an appropriate discount rate.

The committee stated that *"Inevitably, some individual plaintiffs would be overcompensated and some under-compensated, but our objective was to maximize the chances of full compensation while removing any inherent mechanisms that would produce overcompensation."*

A post-COVID backlog of legislative reform is the main reason that these recommendations have not yet been implemented. It has been suggested that this reform may be merged into a wider review of Ontario's Civil Procedure Rules, but this may cause further delay to the implementation of the proposed reform of the PIDR to a single rate linked to Government Bonds.

Following the decision of Bharwaney J in the case of Chan Pak Ting in 2013[2], Hong Kong adopted a triple-rate by duration. The decision was greatly influenced by the absence of any equivalent to ILGS in Hong Kong. The Hong Kong Law Commission is currently consulting on a draft bill that would legislate for the PIDR in a similar fashion to the Civil Liability Act 2018, but with a greater emphasis on implementing for the first time a periodical payment regime. Hong Kong is a small jurisdiction with a low number of catastrophic injury claims per year. There is no evidence of whether this triple rate has been better or worse at meeting the objective of full compensation than had Hong Kong maintained a regime closer to that in England.

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[1] The eleven countries responding to this survey were Austria, Belgium, Czech Republic, Denmark, France, Greece, Hungary, Poland, Romania, Spain and Switzerland. The survey was led by Julian Chamberlayne, Risk and Funding Partner and Head of Aviation and International Injuries. In addition to being a member of PEOPIL, He is also the Chair of FOCIS. He has for many years been a commentator on the PIDR, notably through a series of articles in the New Law Journal.

[2] Chan Pak Ting V Chan Chi Kuen [2013] HKEC 202

Jersey rushed through legislation to introduce a dual rate by duration in 2019, with highly questionable assumptions on investment returns. As a consequence, we consider that both the short and long-term rates are too high to provide anything close to full compensation to claimants. Jersey's dual rates also have a cliff edge that is likely to produce inequitable results for claimants falling on the wrong side of the 20-year dividing line between their short and long-term rates. For example, the term-certain multiplier for a duration of 19 years at a discount rate of 0.5% per annum is 18.13, whereas the term-certain multiplier for a duration of 21 years with a discount rate of 1.8% per annum is 17.51. Put simply, the Claimant with a 21 year loss recovers less than one with a 19 year loss.

Ireland has adopted a dual rate through judicial decision[3] but split by head of loss rather than duration in order to reflect the long-term differential between earnings and prices inflation that affects at least two of the most significant heads of future loss in catastrophic injury claims: care and loss of earnings. Recent expert evidence and anecdotal stories of related settlements suggest much lower discount rates are being applied in practice in Ireland; at effective discount rates ranging from –1.5% to –3.25%.

Q2: What do you consider to be the main strengths and weaknesses of the dual/multiple rate systems found for setting the discount rate in other jurisdictions?

In order to provide a considered response to this question, Julian Chamberlayne, in his capacity as the chair of FOCIS, liaised with a committee from the Ontario Trial Lawyers Association (OTLA)[4], an experienced committee from Hong Kong[5], and a very experienced clinical negligence practitioner in the Republic of Ireland[6]. Please see the FOCIS response to this Call for Evidence for full details.

In summary the main strength of the Irish approach is that it better provides for earnings inflation on care claims. It also has the advantage of not involving speculation about long-term returns on investment portfolios, which is a major disadvantage of the Ontario regime and the key reason why their Civil Procedure sub-committee proposes a return to a single PIDR based on the returns on government bonds.

Both Ontario and Ireland have the disadvantage of a heavy reliance on experts.

The Ontario short-term rate necessarily requires annual reviews, which cause disruption and delay to claims resolution. Their long-term rate has the considerable disadvantage of attempting to speculate on investment returns more than 15 years into the future.

Jersey's legislation imposes patently unfair cliff edges because of its stepped approach. The rates for both short and long-term that are unlikely to be achievable by most Claimants; so, it does not provide full compensation.

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[3] Upheld in 2017 by the Irish Supreme Court in Gill Russell (A Minor) v HSE [2015] IECA 236

[4] The meeting took place on 13 March 2023 and attendees from OTLA were John Karapita (CEO), Maria Damiano (President), Matt Caron (public affairs manager), Ron Bohm (solicitor) and Eli Katz (economist).

[5] The attendees to that meeting on 15 March 2023 were Mohan Bharwaney SC (former judge in charge of the PI List in the High Court of Hong Kong), Raymond Leung SC and Mr. Mark Reeves (solicitor), who are members of the Sub-Committee of the Law Reform Commission of Hong Kong on the topic of Periodical Payment Orders (also dealing with issues of PIDR).

[6] Michael Boylan. Author of *Medical Negligence Litigation*

All of these alternative approaches are more complicated than a single PIDR, but without sufficiently clear-cut advantages.

We also observe that this call for evidence did not provide any comparative analysis with the approach to the discount rate in the USA. The UK and US share the principle of full compensation. They are both sophisticated legal systems with much in common. Our experience of working with US lawyers on complex international injury claims is that the approach to the PIDR varies from state to state. In many states expert reports are commissioned and frequently recommend different PIDR by heads of loss, predominantly to allow for earnings inflation on the applicable heads. We suggest that before embarking on a fundamental change to the PIDR in England, based on the experience small handful relatively small jurisdictions, the MOJ ought to carry out a comparative exercise of the approach adopted by each of the US states.

Q3: What do you consider is the optimal point for the switch-over from a short to a long-term rate on a duration-based dual rate model?

Please give reasons with accompanying data.

We do not believe there is an optimal switching point, but 25 years is in our view the least worst on this approach. See our response to Q4 below for further details.

Q4: What would you consider an absolute minimum and maximum point for the switch-over between two rates to be?

Please give reasons.

The MOJ refers to 5-15 years being the potential range, however in our view, anything less than ten years is dangerously short when the long-term impact of recessionary economic cycles are considered. In his 2019 report, the Government Actuary included a chart to show how simulated returns on the central portfolio vary over time. He observed that it showed the returns settle after around 15 to 25 years, which is a consequence of the modelling assumptions. In that report we observe GAD favoured a 15-year switching point.

Financial experts with experience in dealing with the investment of personal injury damages have indicated that FCA compliance would prevent any investment risk for a claimant with less than a 10-year duration, as their 'capacity for loss' is too low. Even where the duration of loss was 15 years, the capital required to meet needs in the first 10 years could not be invested, meaning that less than one-third of the capital could be invested in the portfolio.

We refer you to the submission from FOCIS which includes insightful data and graphs prepared by Personal Financial Planning Ltd, including a graph to illustrate the performance of portfolios broadly comparable to the 'less cautious', 'central' and 'cautious' portfolios modelled by GAD, relative to CPI plus 1% since the publication of the GAD report to the Lord Chancellor in 2019 (together with the IA sector averages for wider comparison). We agree with the conclusion of Personal Financial Planning Ltd in their answer to this question; "a dual rate based on duration that actually reflects a claimant's investment journey over time is unworkable in practice".

Consequently, we do not favour a switching point at all, but if there were to be one it would in our view need to be a minimum of 15 years. However, 25 years would be more prudent in light of the evidence of low and volatile investment returns on comparable portfolios as mentioned above.

Q5: If a dual rate system were to be introduced, would you advocate it was established on the basis of the duration of the claim with a switchover point, on duration based on length of claim or its heads of loss (or a combination of the two)?

Please give reasons for your choice.

As set out in our response to Q4, a dual rate that truly reflects a Claimant's investment journey over time is unworkable in practice.

However, we believe a dual rate by heads of loss, notably for care claims, would provide a better match for long-term earnings inflation, but without adding any significant complexity to preparing schedules of loss. Conceptually, it is very similar to PPO indexation. If such a rate was introduced, careful guidance would need to be given on how the relevant heads of loss were defined – a care claim can include input from professional support workers, specialist nurses, case managers (a professional who co-ordinates rehabilitation) and compensation for unpaid family carers. In addition, the incidental costs of a professional support package also include the costs of staff training, recruitment, payroll, insurance, expenses and so on. All these items can be the subject of a single PPO for care, but it will be important that any definition of the head of loss to which the rate applies is not inadvertently restrictive so as to cause a significant departure from current practice.

A Stepped Rate (as defined in paragraph 33 of the Call for Evidence) applies a rate depending on the overall duration of the loss – this would likely lead to unfairness for claimants with losses falling just beyond the switching point who would be forced to apply a lower discount rate to the whole loss. This would likely encourage attempts at manipulation by claimants and defendants to frame losses which border the stepping point in the most favourable way, so that the duration claimed falls within a higher or lower rate. Using such an artificial approach to calculating a claimant's losses would lead to additional disputes between the parties (and therefore additional costs). It is unclear how the Stepped Rate would compensate periodic losses such as the regular purchase of equipment every 3 years for the rest of a Claimant's life. Where a Claimant's long-term losses are split into shorter phases, such as where lost earnings or care needs fluctuate, it is unclear whether short-term rates can be applied to the early phases, and long-term rates thereafter. If a Stepped Rate was introduced, careful guidance would need to be given on its application. However, given the complex and variable types of loss that a claim consists of, attempting a rewrite of the current methodology will lead to unintended consequences and additional litigation to clarify any ambiguity.

A Switched rate offers a more balanced approach than a Stepped rate by allowing all losses prior to the switching point to be claimed at the initial rate, though there remains a drop in the rate immediately after the switching point. A Switched rate significantly increases the complexity, particular in a catastrophic injury claim where the majority of the Claimant's losses are lifelong and thus straddle both the initial and long-term rates. This may well lead to a significant amount of additional calculation as all losses lasting beyond the short-term period would need to be split in order to apply the different rates. The experience in Ontario is that experts are usually instructed for this.

The Blended Rate would avoid the cliff-edge of a Switched Rate. However, this approach is untried in any other jurisdiction, and we note no worked examples have been provided. We suspect that the period over which the short-term rate is blended/tapered to the long-term rate would need to be a set number of years, as to do so over the course of a Claimant's life would make it impossible to produce tables with the blending period built in. It would be extremely complex to calculate this manually and the involvement of an expert would be necessary. We note that the Call for Evidence does not consult on the duration of that blending period, though we make the observation that whilst a long initial period (such as 25 years as we have suggested above) followed by a long blending period will smooth the transition between rates, this makes it even more difficult to predict what the long-term rate should be when it commences so far into the future (see further our response to Q6).

A shift to dual or multiple rates by duration would therefore significantly increase complexity and may require expert input from an actuary and/or forensic accountant for each side, as is the case in Ontario. This will add costs to the litigation as well as delay – if lawyers are unable to calculate quantum quickly and accurately, this would frustrate the parties' ability to make and consider offers in a timely fashion. A typical schedule of loss for a claimant with a catastrophic spinal cord injury will have over ten heads of future loss including phases of future care and earnings, and a substantial amount of equipment and assistive technology to be purchased at varying intervals in the future. Under the current single PIDR methodology, this typical schedule involves the calculation of over 30 unique multipliers which are then applied to around 300 calculations. Adding even one more step to the calculation of each item of future loss to cater for a dual rate by duration will add significant complexity and cost to the production of the schedule.

In summary, whilst it would be preferable to remain with the single PIDR, should there be a change, the best option is a dual rate to reflect long-term earnings inflation on care needs as it would be fairer, more predictable and simpler than if it were by duration.

Q6: In dealing with volatility of markets over the short-term is it a reasonable assumption that short-term rates in a duration-based system should be more variable and set at a lower rate; and long-term rates more stable and set at a higher rate?

If you agree or disagree that this assumption is reasonable, please say why.

We agree that funds held for short-term needs are likely to be heavily weighted towards cash, with returns fluctuating frequently based on the immediate economic cycle including inflation.

The definition of long-term will affect the extent to which long-term rates could be set at a higher rate. A backwards-looking assessment shows there has been significant volatility at any switching point less than 15 years and moderate volatility between 15 and 25 years. Nevertheless, many economists and actuaries are doubtful that the last 15-25 years are a reliable predictor of what will happen in the next 15-25 years, let alone for the majority of claimants with materially longer life expectancy than that[7]. This concern is the primary reason why a return to the single PIDR has been recommended in Ontario.

Assumptions about long-term investment returns must be made within the framework of the Civil Liability Act 2018 which requires the relevant damages to be invested in a way that involves "*less risk than would ordinarily be accepted by a prudent and properly advised individual investor who has different financial aims*".

The Government Actuary's indication of a possible short-term rate of -0.75% followed by a long-term rate from losses exceeding 15 years of +1.5% must be approached with caution. Those rates were premised on 50% prospects of under compensation, ignoring mortality. The extent to which the economic landscape has changed since the Economic Scenario Generator (ESG) was run on 31 December 2018 needs to be considered. In his July 2019 report the

[7] With reference to the 43-year average life expectancy assumed in the GAD's 2019 report.

Government Actuary said that "*Under the assumptions used in my modelling, a claimant settling towards the end of this five years would be expected to be investing in more favourable economic conditions than a claimant investing in the next year. As such, it might be argued that a slightly higher PI discount rate would better reflect the possible investment conditions over the whole period until the next review*". Four years on, we are in a much less optimistic economic climate than that. It also reinforces the Ontario sub-committee's concern about whether we can be confident about making accurate predictions for a long-term rate applicable from 15 years into the future.

We agree with Chris Daykin's[8] response to this Call for Evidence when he comments that "*Assumed higher mean returns on a longer-term investment portfolio from some allocation to equities would be accompanied by much higher levels of potential volatility, so greatly enlarging the funnel of doubt for outcomes and increasing probabilities of running out of money during the claimant's lifetime. Setting a discount rate for periods starting in the medium to long term would be a highly speculative exercise and it may be difficult to arrive at a consensus. Views will be underpinned by a very wide range of different assumptions about returns on different asset classes and what will happen to economic growth – and in particular to inflation – over long future periods.*"

We also agree with the response of Chris Daykin to this call for evidence that: "*Some may argue that an even higher proportion of equities could be assumed in determining a long-term discount rate. I think this would be seriously misconceived and unjustified. Even for a long-term portfolio I consider that 10 to 20% in equities would be the most that could be justified in a model portfolio, accompanied by a modelled safe fund which would maintain up to about one-third of funds in cash and deposits, with the balance in bonds*."

Should the ESG produce more favourable predictions for longer-term claims, it will still remain unclear whether that will result in a materially higher discount rate for the biggest of those claims which typically have a large care component. The long-term rate may be lower than expected if suitable allowance is made for the higher earnings inflation and for the investment strategies (and related charges and tax) that are needed to ensure that these most seriously injured claimants are not exposed to sequencing risk.

The cycle of the economy is irregular, and the uncertainty caused by this lack of stability means that if a Claimant needs funds when the market is low, it will adversely affect their remaining award to their detriment. This could leave them reliant on the state when the money runs out. As outlined in the expert report prepared for the MOJ[9] in 2015, this volatility creates a sequencing risk "*…which occurs where one year of below RPI investment returns is immediately followed by another, which is immediately followed by another etc. Poor investment return sequences combine with portfolio withdrawals in a highly destructive way because more fund units need to be enchased [sic-encashed] to generate the same annual income. The double erosion of capital following a market fall - the market drops and the drawing an equal income at depressed fund value - is what makes sequencing risk potentially destructive. One of the lessons of the technology boom and bust followed shortly by the financial crisis was the importance of the order, or sequence, of extreme investment returns. If a sequence of market drops means the capital of a fund is 50 per cent lower than planned, a 100 per cent gain is needed to return the fund to where it should be…*"

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[8] Expert actuary, member of the Ogden Working Party and former Head of GAD.

[9] *The Discount Rate – a report for the Ministry of Justice prepared by Paul Cox, Richard Cropper, Ian Gunn and John Pollock*, 7 October 2015, Paragraph 4.15. See also Paragraph 4.20 for the downside risk measures used to determine whether an investment portfolio is low risk.

Unquestionably, the long-term rate should be set at a level that provides for active rather than passive investment management. The data on 389 investment portfolios of professional deputies and trustees which was collected by FOCIS in its submission to the 2019 Call for Evidence, the overwhelming majority of those claimants had actively managed funds and incurred investment management charges at around twice the rates ultimately assumed by the GA and Lord Chancellor. This conclusion will need to be revisited in the 2024 review as the Lord Chancellor is obliged by the CLA 2018 to consider actual claimant investor behaviour and its impact on (net real) returns. Further details are in our response to Q14.

Q7: If short-term rates are more volatile, should frequency of review be increased?

Please explain your reasoning.

A significant feature of any shift to duration-based rates is the frequency of review of the PIDR. As accepted by the GA and the MoJ, short-term losses are more volatile. Primarily, this is due to inflationary changes. For example, in the 23 years since the dual rate system was introduced in Ontario, the short-term rate has been amended 15 times[10]. Altering the discount rate for recent changes makes the rate 'more right' on the date it is set, but no more certain of being right tomorrow. Also, as set out in our response to Q4, the short-term rate is the one that persists over time, and it would have to change regularly to minimise the risk of compounding long-term problems.

Although frequent reviews would be necessary if a short-term rate is adopted, they would case disruption and also encourage gaming and delays in ADR. On the contrary should we continue with a single rate, five yearly reviews as stipulated in the Civil Liability Act 2018 (CLA 2018) will be sufficient.

Q8: What would you regard as the advantages of a dual/multiple rate system?

The Lord Chancellor, in his statement of reasons, expressed interest in the Government Actuary's analysis of the case for a dual rate, commenting that it showed "*some promising indications, particularly in relation to addressing the position of short-term claimants*". With a single PIDR, the underlying problem is the unfairness of the -0.25% rate for very short-life expectancy cases, compounded by the acute longevity risk for such cases, so switching to a dual rate may help alleviate some of the problems short-term claimants face.

However, we contend that PPOs are the superior solution to the real problem of providing full compensation to claimants with short life expectancy and we emphasise that the MoJ ought to put its efforts into incentivising the broader use of PPOs. Further detail can be found in our answers to Q19 and Q21 below. However, there is only a small proportion of Claimants who have claims that are likely to fall into the short-term category[11], as the majority of Claimants who have longer-term losses are likely to be disadvantaged by a shift to a dual rate by duration model (that ignores the investment journey set out in answer to Question 4).

The main advantage of the Irish approach to dual rate by head of loss is that it better provides for earnings inflation on care claims.

[10] Future pecuniary damage awards | Ontario.ca.

[11] Both with reference to our experience and as suggested by the 43-year average life expectancy assumed in the GADs 2019 report.

Q9: What would you regard as the disadvantages of a dual/multiple rate system?

Dual or multiple rates by duration are disadvantageous in that they would require claimants to assume a high level of net real returns in the longer-term, which is highly speculative and would create further risks for seriously injured claimants (most of whom are highly reluctant and risk averse investors).

It is unknown whether a dual or multiple rate system would ultimately work to the favour of most claimants or most defendants, but it is clear that it would add an extra layer of complexity and consequently, costs (see our response to Q5 for further details). Litigation resulting for serious injury is already necessarily complex, as many needs and variables must be accounted for in order to reach the desired outcome for Claimants. It is evidently clear that a shift to dual or multiple rates by duration would significantly add to the complexity of injury litigation, and expert input from an actuary and/or forensic accountant is likely to be required.

As explained in our answer to Q15 below, dual or multiple rates by duration do not address the inflationary issues. Also, frequent changes to the short-term rate cause delays to settlement and notably to the preparation of claims (see Q2).

Defendants such as insurers and the NHS are able to offset perceived over-compensation with under-compensation for other claimants, but seriously injured Claimants cannot do the same as they only have one claim to provide for their life-long injury related needs. Due to their serious injuries, these Claimants are likely to be unable to work and will therefore be heavily reliant on their compensation without any other major source of finances. We agree with the view of FOCIS that the 35% of claimants whose compensation was likely to run out based on the modelling of the assumptions underlying the 2019 PIDR, cannot be considered to be receiving full compensation. We hold concerns that a shift to a dual rate by duration is unpredictable and may involve overly optimistic assumptions about future low risk investment returns beyond the switching point. It runs the risk of worsening the risk of under-compensation for many Claimants.

We note that although the GA has acknowledged the longevity risk that claimants who receive lump sum awards face, no attempt at modelling has been published, nor has the PIDR been adjusted to factor in that risk. In our view, this is a far greater issue for the aim of providing full and fair compensation than any shift to dual or multiple rates.

Considering that the ONS has readily available and highly credible longevity statistics, we believe the GAD should include them in further analysis and modelling to inform the upcoming review by the expert panel. A final model portfolio and discount rate could then be determined, with longevity factor incorporated, to ensure no less than 5-10% of Claimants are under-compensated. One basic way to approach this would be ’to apply a contingency adjustment akin to the 0.5% adjustment which was made to the discount rate to reduce the proportion of claimants who the ESG modelling suggested would be undercompensated.

Q10: What do you consider would be the specific effects on implementing and administering the discount rate if a dual/multiple rate is introduced?

A shift to dual or multiple rates by duration would significantly increase complexity and costs, as further explained in our answer to Q5. It would, in many cases, require expert input from an actuary and/or forensic accountant, as is the case in Ontario.

It is not clear whether new versions of the Ogden Tables could be produced to address switched or blended rates (and/or the speculation about variant rates for PPO claims) and whether the use of those tables would be straight forward for use by most solicitors, barristers and judges. These tables would also need to cater for losses that only commence after a set period of time and those which are periodic (e.g. a new wheelchair every 5 years).

Please also see our response to Q12 below.

Q11: In addition to specific effects, do you consider there will be additional consequences as a result of implementing a dual/multiple rate?

Please give reasons with accompanying data/evidence if possible.

Should the short-term rate be subject to annual review, it is likely that there will be an increase in delays to both the pleading and negotiation of cases, pending any anticipated changes that are likely to benefit both parties. As regards to Part 36 offers, the short-term rate will also add uncertainty that is likely to result in contested hearings and the risk of tough consequences. It would be unjust to impose Part 36 consequences that primarily resulted from any change to a dual/multiple rate. One approach to mitigate unfairness would be for the trigger date for the effect of any such earlier Part 36 offers to be postponed to the end of any transitional period. In addition, there would be added cost to both parties of recalculating the future loss claims annually, because many claims for serious injury take over 3 years to conclude and a large minority take over 5 years. Likewise annual reviews would necessitate recalculation and reconsiderations of any existing offers to settle.

This could also cause problems regarding the availability of interim payments which are essential to claimants who need to pay for care, rehabilitation, equipment and often purchase and adapt a suitable home before conclusion of the case. Only a reasonable proportion of a conservative estimate of a lump sum can be ordered to be paid during the case, so as not to frustrate the court's ability to order a PPO. Volatility in the PIDR will make it difficult to assess the likely end lump sum element of their award and could severely restrict a claimant's ability to meet their needs prior to settlement.

Q12: If a dual/multiple PIDR were to be introduced would it be helpful to provide a lead in period to prepare processes, prepare IT changes etc. and if so, how long should this be?

Please provide reasons for your answer.

We predict the profession would require a transitional period of 6-12 months minimum. This length of time is necessary as all those involved would need to undergo training on the methodology and new versions of the Ogden Tables and PIBA Facts and Figures would need to be produced. This period would also enable parties sufficient time to recalculate their claims and reconsider any existing Part 36 or other offers to settle.

Q13: What do you consider would be the effects of a dual/multiple rate on a claimant's investment behaviour and what would this mean for the design of a model investment portfolio?

To a large extent our answer to this question is "none". The PIDR is used by lawyers and judges to calculate future losses, along with a number of other factors which influence the overall damages. Most cases settle for total sums of damages that do not include a breakdown between general damages, past losses and future losses, nor a breakdown of heads of future loss, let alone an item-by-item calculation of the future losses. After the claimant has received these damages, there is limited consideration by them or any IFA or professional trustee or deputy that is working with them, of what discount rate or multiplier was applied to the future losses.

Assumptions adopted in setting the discount rate do not address all risks the claimant is exposed to, nor are those assumptions accurate for each individual. For example, no adjustment is made in the discount rate to the mortality risk that claimants face, which is bound to limit spending during life, as they may live longer than expected.

Despite PIDR issues, an IFA must not breach their duties under the FCA Code, specifically:

- The FCA Principle 6 - Customers' interests (A firm must pay due regard to the interests of its customers and treat them fairly)[12]
- Code of Business Source Book (COBS) 9.2 – assessing suitability[13]

An IFA's focus is on meeting the claimant's broader needs over their possible lifetime, whilst also factoring in the likelihood that they may live longer than their life expectancy. The methodology for calculating the discount rate is at best a representation for what a hypothetical claimant might do if they received compensation without any deductions for litigation risk and they lived in a bubble of their claim (i.e. with no other financial, health or familial considerations). A shift from a single PIDR to dual/multiple rates is unlikely to directly change claimant investment behaviour. We do not agree with the GAD that a switch to dual or multiple rates by duration would reduce the troubling 35% of claimants who, according to the ESG as of 31 December 2018[14], would end up with less than full compensation even if you artificially ignore the longevity risk they face.

Matching the assumptions underlying the dual rate by duration approach would involve the majority of seriously injured Claimants taking greater risks with their medium and long-term investments. The expert IFA, Richard Cropper[15], has made the powerful observation that *"every long run ends with a short run"*, meaning that whilst it is appropriate to assume a less risk-based investment portfolio for shorter periods, the same applies towards the end of a longer period. In their later years, Claimants with serious injuries cannot afford the risk of a down-turn in investments, which forces disinvestment to cash from even low risk investments. Their reduced 'capacity for loss' leaves them less likely to be able to meet their needs which may at the same time be increasing with the impact of ageing. They and their advisers also must plan for the over 50/50 chance they will outlive their life expectancy.

A dual rate by head of loss applying earnings inflation to care claims would, as in the PPO regime, be a closer match for what is the largest component of most serious injury claims and hence would reduce under compensation. We doubt that it would have a material impact on investor behaviour and would instead likely reduce the scale and extent of claimants falling back on the State to meet or supplement their care needs when their compensation runs out.

We continue to take the view that the GAD's central portfolio, as adopted when fixing the current PIDR, carries more risk than is appropriate under the Civil Liability Act 2018. This concern has been further illustrated by the significant volatility and sub-inflationary returns since 2019. We remind the MoJ of the conclusions of their expert panel in the 2015 report that

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[12] https://www.handbook.fca.org.uk/handbook/PRIN/2/?view=chapter

[13] https://www.handbook.fca.org.uk/handbook/COBS/9/?view=chapter

[14] This 35% of under compensated Claimants is now probably a material underestimate for Claimants who invested in 2019 because the net real rate of return since then has been significantly below -0.25%, whether they largely held cash or invested in something like the central portfolio.

[15] Who is also a Member of the Ogden Working Party.

any truly low risk portfolio would require at least 75% ILGS, with the remaining 25% invested in a split between UK corporate bonds, global government inflation-linked bonds and global equities. We agree that any other asset classes pose unacceptable levels of risk.

We continue to endorse the 2019 submissions of Richard Cropper and Ian Gunn of PFP, that all 3 of the model portfolios in the 2019 Call for Evidence were too risky to meet the criteria of providing full compensation. Notably the risk of deviation is too high and so the proportion of Claimants likely to see their fund run out during their lifetime is far too high.

We also agree with Christopher Daykin's 2019 submission that:

"*In my opinion none of these portfolios meet the criteria for low risk in the sense laid down under the Civil Liability Bill (now Act). Even the least risky of them (portfolio (i)) has 42½% in equities and 'other', which is defined as including hedge funds, structured products and private equity, whilst portfolio (iii) has 65% in risky asset classes…*

These sorts of investment might be used by a properly advised individual investor (not a Claimant), but only where they have significant levels of investment and do not have close dependence on the performance of the portfolio for their daily living requirements, in other words in general for well-heeled investors. The situation of the vast majority of Claimants is completely different to this, with usually a very high level of dependence on the proceeds of the investment portfolio and therefore a need to adopt a materially lower risk profile".

In Table 7.2 of the Purple Book 2022[16] shows that the proportion of Defined Benefit assets held in equities has continued to decrease and has been approximately 19% in the last two years. Yet in practice, most of the equities are held by open and/or immature funds. Table 7.9 demonstrates that the proportion of equities held against liabilities which are 75-100% pensioners (which is more comparable to a Claimant's portfolio) is about 7%. On average, the duration of these sorts of pensioner liabilities might be on 15 to 20 years, which is broadly in line with the 2015 MOJ experts' Portfolio 2 and distinctly less risky that any of the portfolios proposed by GAD in the 2019 Call for Evidence. There is no logical or fair reason why Claimants should be required to take more risk than the trustees of pension funds, many of which have the additional comfort of an employer covenant.

In Thomson v Thomson and Colonial Insurance Company Limited[17], a case in the Supreme Court of Bermuda, Chief Justice Kawaley observed at paragraph 38 that the case appeared to be the first occasion in which a common law court has been required to consider the respective merits of an assumed investment of the entire lump sum to be awarded in ILGS as opposed to in a mixed basket of investments. It was observed that Mr Gorham, a Canadian Actuary whose expert evidence was relied upon by the Defendants:

> "*…conceded under cross-examination by Mr. Harshaw that on his investment model between 50 and 33% of plaintiffs would not have sufficient funds. He viewed his approach as fair to both Claimants and defendants.*"[18]

Chief Justice Kawaley commented:

[16] Published by the Pension Protection Fund in December 2022.

[17] Colonial Insurance Company Limited v Thomson (conjoined with Harvey v Warren) Court of Appeal for Bermuda CIVIL APPEAL No. 13 of 2015

[18] At paragraph 93 of the *Thomson* Judgment

> "*I viewed his approach as a stunning dilution of the prevailing legal policy preference, in the future loss discount rate calculation context, for a hypothetical investment in an instrument likely to generate a risk-free rate of return.*"

The above concession of 33-50% of claimants being under-compensated was considered by Chief Justice Kawaley, to be an unacceptable dilution of the full compensation principle. However, we observe it is very close to the assumed outcome of the -0.5% adjustment made by our Lord Chancellor in 2019 that, on more positive economic predictions than subsequently occurred, around 35% of claimants would see their damages fund run out and therefore be under compensated.

At paragraph 100 in *Thomson*, Chief Justice Kawaley referred to the evidence of the Claimant's Actuary, Christopher Daykin, as follows:

"*As Mr. Daykin explained, institutional investors are able to safely invest in a wider range of investment instruments because they are investing on behalf of multiple ultimate investors whose needs to redeem their investments stretch out over multiple lifetimes. Such investors are also able to hedge against short-term risks in ways which are generally impossible for the typical individual personal injury Claimant. I find that there is a fundamental distinction between the investment goals of the hypothetical prudent investor, especially an institutional investor, (who is not investing sums received by way of compensation for tortious injury), and the investment goals of the hypothetical prudent plaintiff*."

The Bermuda Court of Appeal fully endorsed the Judgment of the Chief Justice. Bell JA commented at paragraph 23 that:

"*What Mr. Daykin was saying is essentially that Mr Gorham's theory of sufficiency demonstrated that, using his model, there is approximately a 50% chance of a Claimant receiving a fund sufficient to meet expenses and losses, with the other side of the coin being that 50% of Claimants would not have sufficient assets to do so. Consequently, Mr. Daykin concluded that these figures come nowhere near meeting the principle of full compensation which has been accepted over many years by the courts. What Mr. Daykin said in relation to the 90 to 95% figures was not that these represented over-compensation on the basis of the Chief Justice's ruling, but that if one were to test a model proposed in place of the Wells mechanism (as advocated by Mr Gorham), then there would have to be a demonstration that the payments were sufficient for the Claimants in at least 90 to 95% of cases in order to come close to providing full compensation*."

Whether the PIDR remains at a single rate or is changed to a dual or multiple rate, it is vital that it is set at levels that are premised on the full compensation of over 90% of claimants. Should it be any less, it cannot be seen to be upholding the full compensation principal.

Q14: What do you think would be the effects of a dual/multiple rate on drawing up assumptions for tax and expenses when setting the discount rate?

In collaboration with FOCIS, we previously gathered data for our response to the 2019 Call for Evidence. At the request of the MOJ and GAD, we also collected data from FOCIS members and professional deputies and trustees of personal injury trusts in relation to investment charges incurred in relation to investments for their serious injury clients.

The data set we submitted alongside FOCIS was in relation to investment portfolios of 389 clients provided by 9 different firms ranging in size between £67,336 and £7,450,000. On average, across all 389 the total charge incurred was 1.58%. If the data set was restricted to portfolios known to be up to £1.5m, as per the question posed by the MoJ at that time, then the residual data set (169 Claimants) demonstrates an average charge of 1.77%, with the range of averages per firm being between 1.66% and 1.93%. It is also important to note that out of the 169 portfolios, the average size is significantly larger than that modelled by the GAD in 2017, which assumed a modest loss of £10,000 per annum for 30 years.

The data also demonstrated that an overwhelming majority (64.3%) of the 389 portfolios incurred investment charges of 1.5% and above (including 6.4% in excess of 2%). In comparison, only a tiny minority of Claimants (4.9%) incurred charges below 1% and only 35.7% of the portfolios incurred charges of 1.5% and below. Additionally, when looking solely at the 169 portfolios whose value falls below £1.5m, 74% portfolios incurred charges between 1.5% and 2.0%, only 12.5% incurred lower charges and 13.6% incurred charges of 2% or more.

It is vital that the Lord Chancellor recognises that the vast majority of Claimants with significant future losses incur charges of circa 1.5% per annum in investment management charges and that those charges are not, and cannot be, included in the damages claim. Therefore, they do not feature in the damages award. We contend that a composite reduction in the discount rate of at least 2% is required once the further allowance for capital gains and income tax liabilities is made, prior to factoring in a further adjustment for longevity and other risks.

In their submission for the 2019 Call for Evidence, Richard Cropper and Gunn of Personal Financial Planning ("PFP") indicated that *"The financial climate is dynamic and constantly changing: constant reappraisal of plans is therefore necessary in order to ensure that Claimants have the best opportunity to meet their expected cash flow needs, taking account of their need to take risk (including the discount rate applied to their lump sum) and their ability and willingness to do so."*

We are aware that enquiries within FOCIS and the investment professionals who work with their clients revealed that the primary aim of investment advisers is almost always to devise an investment strategy based on meeting the client's need for their lifetime (including the longevity risk), which is something that requires regular review and reappraisal. Certain funds may have an element of active management as a professional may need to review the portfolio annually and undertake any necessary re-alignment (at a cost). These charges would not have been incurred unless they were necessary to maximise the prospects of the investments lasting to meet the client's needs. We agree with the 2023 response to this question from PFP that "*Additionally, claimants do not and would not be advised to invest in a portfolio of passive investments, with a fixed asset allocation over a 43-year duration, with annual rebalancing back to the original proportions*". We also agree with the suggestion of FOCIS that in the 2024 review the expert panel and the Lord Chancellor should carefully consider the FOCIS dataset relating to actual investment advice and management charges so that the Lord Chancellor makes an informed decision considering this actual investor behaviour as he is bound to do under the Civil Liability Act 2018.

Due to its nature, the issue of taxation is individual. Two Claimants receiving the same awards will have different personal, financial, and familial backgrounds that affect the amount of tax they are liable to pay, as well as cultural considerations that may impact the type of investments that they are able to make. We do not have any data on taxation rates. Christopher Daykin, in his response to the 2019 Call for Evidence, said *"In a recent large compensation case involving investment of the damages in the UK, the impact of taxation on some proposed portfolios amounted to a reduction in the discount rate of ½% to ¾%".* We contend that the current discount rate ought to be rounded down by at least 0.5% to allow for taxation. Tax adjustment on a dual or multiple rate ought to be at, or above, that level. For short-term investments it is likely the interest earned will be higher than 0.5% because most will be immediately taxable as income, but this may be counter balanced by lower investment management charges.

In the GAD's 2019 report, the impact of taxation was based on a range of size of awards, the highest of which was £3million, whereas many claims are far higher in value.

There is evidence that investment charges reduce as a percentage of the award for very large awards (e.g. those over £3 million). However, it is likely that those larger awards will incur a higher amount of tax. Accordingly, we assert that a combined reduction to the PIDR ought to be at least 2% in order to allow for both investment management and taxation.

Q15: What do you consider would be the effects of a dual/multiple rate on analysing inflationary pressures and trends when setting the discount rate?

Short-term rates would be more heavily impacted by inflationary pressures. A dual rate for the care head of claim would achieve closer matching for inflation. Further details are in our response to Q19.

If a dual rate by head of loss approach were adopted, then the differential could be based on the OBR long term forecasts (see further in response to Q19 below).

Q16: What do you consider would be the effects on claimant outcomes of a dual/multiple rate being adopted for setting the discount rate?

Claimants with the most serious injuries would be significantly disadvantaged if dual/multiple rates by duration were adopted. With a short-term rate that is frequently under review, Claimants with short life expectancies will likely face uncertainty as it will delay the preparation of their final schedule of loss and settlement of their cases. Consequently, this will reduce the already limited period for which they can use their damages to meet their needs and regain their previous quality of life. Also, a short-term rate would not address the longevity risk faced by these Claimants.

There is also a risk for Claimants with smaller financial settlements or longer-term losses. In comparison to a single PIDR, it is likely that these Claimants will be much worse off under a dual rate[19] (should the rates be like those projected by GAD in 2019). This group of claimants would need to take greater risk with their money to have any chance of making it last for their lifetime. Inevitably some of those risks will not work in their favour and therefore they will end up being under compensated. That being said, most Claimants are risk averse and would not take the level of assumed investment risk and would see their damages fund run out prematurely or not be used to meet all their needs. Neither way is full compensation for them. It is neither helpful nor comforting for a claimant in that situation to know that another unrelated claimant had excess damages left over at the end of their lives.

Q17: If a dual/multiple rate was adopted would it be possible to return to a single rate in future reviews, or would a move be too confusing and complex and seen as irrevocable?

[19] *Dual discount rate* by Edward Tomlinson, J.P.I. Law 2022, 3, 169-175

Please give reasons.

Given that the PIDR was set relatively recently in 2019 and the majority of serious injury claims take 3-7 years to resolve, we believe a period of certainty is in the best interests of claimants. Rather than implementing a dual/multiple rate system, it would be preferable to instead refine the single PIDR following input of the expert panel. In our view, it would be a mistake to change the system so soon, especially when the merits and consequences of such a shift are uncertain. Should the Lord Chancellor be in doubt following the review of this Call for Evidence, we would suggest upholding the single PIDR which is tried and tested, rather than risking unpredictable consequences with dual/multiple rates.

If a dual/multiple rate was adopted, although it would not be impossible to change back to a single rate in future reviews, it would be of no assistance to claimants whose claims had been determined under a dual/multiple rate, as it is rare for such changes to be applied retrospectively.

Q18: What do you consider the respective advantages and disadvantages of adopting multiple rates would be, when compared with either a:

- **single rate; or**
- **dual rate.**

A shift to dual rates based on duration would significantly increase complexity, as explained in our answer to Q5. As a result, expert input from an actuary, economist and/or forensic accountant would be required in many cases.

If, the medium-term rate was to apply as early as 5 years, like in Hong Kong, then both the medium and short-term rate would have an enhanced version of the disadvantage of volatility and requirement for annual reviews and change. As previously detailed, that would cause delays and further complicate the pleading and negotiation of claims.

Q19: If a heads of loss approach were adopted, what heads of loss should be subject to separate rates – care and care management costs, future earnings losses, accommodation, or any other categories?

In the event that a heads of loss approach is adopted, we believe that there should be a separate rate for care and care management costs only because the impact of change should be limited as far as it can. and this head of loss often makes up over half of the total award of damages in catastrophic injury claims. Care and care management costs are subject to earnings growth and over the medium-to-long-term they can be expected to rise at a rate in excess of prices inflation. This has been repeatedly accepted by the courts. Consistency with the approach to PPOs is important, and experience has shown that the vast majority of PPOs are for care and case management only. PPOs are predominantly made for care and case management costs, and rarely for other heads of claim. However, the remaining major heads of loss differ significantly from the typical CPI basket of goods and services.

Evidently, the future loss of earnings rise in line with earnings inflation. We would be very surprised if any reputable expert economist argued otherwise. In fact, this argument has not even been attempted by Defendant’s experts in the common law jurisdiction cases in which this point has featured. It was accepted by the Privy Council in Helmot v Simon[20] and by the

[20] Helmot v Simon [2012] UKPC 5

Courts of Appeal in Bermuda (Thomson v Colonial Insurance)[21] and Ireland (Russell v HSE)[22]. We contend that any argument to the contrary would be departing from full compensation and would disadvantage seriously injured claimants to the extent that their standard of living would significantly decrease. Such a change would be wholly unprincipled and would place an unfair burden of risk on claimants who are seriously injured by the defendant's wrongdoing. If earnings losses are to be treated differently, then they would warrant a lower rather than higher discount rate.

In the Privy Council judgment concerning Helmot v Simon, Lord Hope quoted favourably from the judgment of Sumption JA as follows:

"…*if an adjustment could be made which would serve to compensate the respondent more exactly for his losses there was no legal reason why it should not be made" (paragraph 40) and "having considered the evidence, Sumption JA said that it seemed to him to constitute strong unchallenged evidence of both the existence of a gap between price and earnings inflation in Guernsey of the order of 2%, and the likelihood that over time it would persist*" (paragraph 41).

"*As for the question whether there should be more than one rate this seemed to him to be correct in principle in a case where there was a significant difference between elements representing loss of earnings and care costs*" (paragraph 42).

As was expressed by Lord Dyson in Helmot at paragraph 113:

"*There can be no justification for holding that, on these admittedly bare and rather crude facts, damages should be assessed using a discount rate based on RPI inflation. Such an assessment would be bound to lead to under-compensation.*"

Similarly, in Sarwar v Ali and the MIB, at paragraph 142 of the judgment, Lloyd Jones J stated that:

"*In considering this aspect of the case I am assisted by the fact that there is near unanimity on the part of the experts in relation to certain of the issues. Dr Wass (Economist), Mr Hogg (Accountant), Mr Copper (Economist) and Mr Hall (Accountant) all agree that average earnings generally increase at a faster rate than prices, that on the balance of probabilities average earnings growth is likely to exceed growth in prices in the future and that, on the basis of historical data, linking Periodical Payments to loss of earnings for RPI would be very likely to under-compensate the Claimant*."

Quoting from the Claimant's Accountant, Mr Hogg, the Judge confirmed that:

"*For the whole period 1963-2006 earnings (AEI) increased on average at 1.9% per annum faster than prices (RPI) but over the last 20 years the rate increase has been lower at 1.53% above price inflation as mentioned by RPI.*"

The latest equivalent figures are from the 2022 Office For Budget Responsibility (OBR) report, which shows a long-term (2071-2072) forecast of real earnings growth of 1.8% (gross earnings growth of 3.8% less CPI growth of 2.0%.

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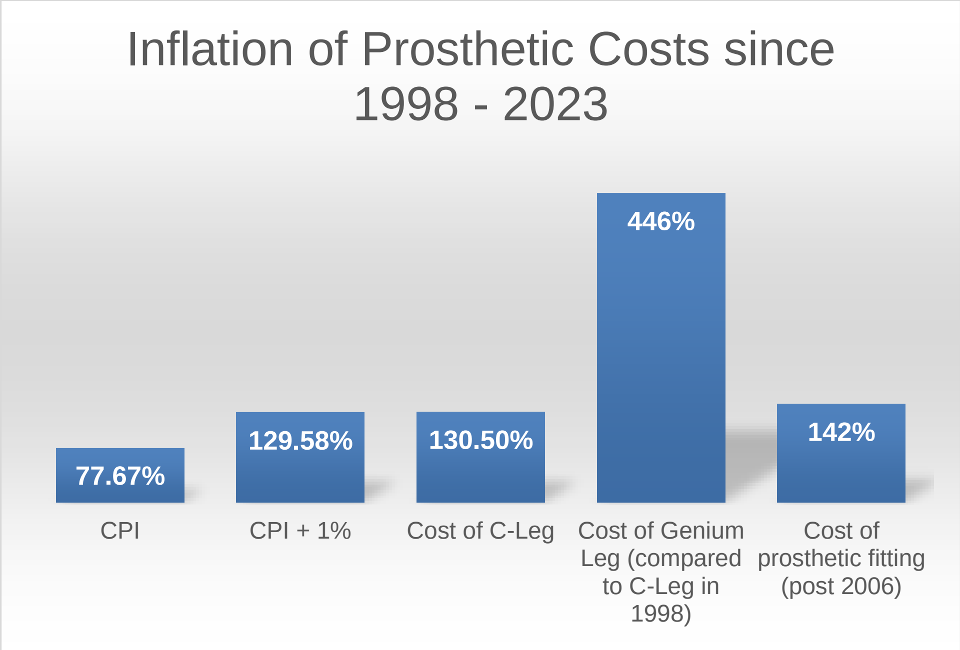
[21] Thomson v Colonial Insurance Company Limited [2016] CA (Bda) 6 Civ

[22] Gill Russell (A Minor) v HSE [2015] IECA 236

Future medical treatment and therapies, another major head of loss for seriously injured claimants, is earnings-related and historically, inflation is on average materially higher than CPI.

It must be noted that the head of loss of disability aids and equipment is predominantly related to purchasing goods, but the majority of aids and equipment are low production specialist equipment, of types which are not included in the CPI basket and are not subject to a fully competitive market for goods. As such, producers of these goods will need to recoup the significant costs related to research and product development across a small number of customers. A clear example of this is the comparative cost of a prosthetic that a prosthetist would recommend today when contrasted to one the same clinician recommended 20 years ago to a claimant with the same level/type of amputation.

For example, the cost of a C-Leg (a prosthetic knee) in 1998 was £12,150, and the cost of the same prosthetic today is £28,000. That is a cost increase of 130.5%. However, in the meantime many claimants who were originally prescribed a C-Leg and received compensation on that assumption have now switched to a more recently released model; the Genium which costs £66,345. The price increase between the cost of a C-Leg in 1998 and the cost of a Genuim in 2023 is a staggering 446%. As this example shows, when compared to the increase in CPI since 1998 (77.67%), it is clear that setting the PIDR based on the indexation of CPI alone would be woefully insufficient. The increase in CPI+1% over the same period is 129.58%, which is almost exactly in line with the increase in cost of a C-Leg, so would be adequate if one ignored the technological advancement and resultant higher (but unanticipated) costs now born by claimants who have switched to the Genium leg. It is also interesting to note the increase in the associated prosthetists costs. Whilst we do not have data from 1998, the increase in costs (using the example of prosthetist fees associated with a transfemoral socket) since 2006 is 142%. This is almost double the percentage increase of CPI but is again much closer to the increase in CPI+1%. See the comparison in the graph below. This evidence supports our suggestion that indexation by CPI+1% is more consistent with the rise in cost of many items of specialist disability related needs and therefore will ensure better alignment with the full compensation principle. In addition, the change in needs consequent to technological advancement is, like the longevity risk, a real world factor. Whilst we acknowledge that losses are calculated on the basis of the known needs as of the date of the final award, this phenomenon should be born in mind when making a broad-brush adjustments to the PIDR to minimise the risk of under-compensation.



Another significant head of claim for seriously injured claimants is the cost of housing. However, we are neutral on this point. As a claimant's housing funds are quickly depleted by the purchase and adaptation of a property, there is no significant balance left to invest. In the relatively recent case of Swift v Carpenter, the Supreme Court reconsidered the law relating to compensating future accommodation expenses and set a methodology for calculating the lump sum compensation based on the Claimant's remaining life expectancy and the set value of a reversionary interest in the property. Therefore, as the PIDR has no direct bearing on this head of loss, it is not necessary to consider a separate rate for its calculation.

Furthermore, for claimants who lack mental capacity, the cost of a professional deputy is a significant earnings-related head of loss as it mainly relates to the cost of time spent by that professional, which in most cases is a solicitor. Consequently, in cases where periodical payment terms are agreed for this head of loss they are usually indexed to the appropriate category of ASHE or RPI[23].

To conclude, we believe there is merit in a separate PIDR to match earnings inflation for care and care management costs only, but that the current CPI+1% is an appropriate inflationary measure for the PIDR for all other heads of loss, including when there is a PPO for the care claim.

Q20: Introducing a dual/multiple PIDR could result in increased levels of complexity for both claimants and compensators. Do you agree with the assumption that this complexity will stabilise and ease once the sector adapts to the new process?

Please give reasons.

Given that catastrophic injury claims take, on average, 3-7 years to conclude, it is likely that annual review of the short-term rate will cause complexity and uncertainty to the ongoing litigation.

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[23] Which historically has been equivalent to CPI+1% but over the last couple of years has been more than 2.5% a year in excess of CPI.

Although specialist solicitors, barristers and experts advising in such claims would adapt, it is likely that the complexity (and sheer number of calculations) presents a higher long-term risk of error and negligence claims for the solicitors, barristers and their clients.

Q21: The Government remains interested in exploring the use of PPOs in relation to high value personal injury settlements. We would therefore welcome any submissions, data and/or evidence stakeholders may have in relation to the effective use of PPOs.

If more insurers readily offered PPO settlement terms this would reduce uncertainty for Claimants and reduce the impact of the risks inherent in managing and investing a lump sum. The PPOs agreed would continue for the Claimant's life and be linked to the appropriate index to address the appropriate level of growth.

The NHSR and the MIB are notable exceptions as they have, from the outset, embraced the PPO regime and made PPO related offers in most claims involving serious lifetime losses. This is mainly due to the funding of these organisations. The same cannot be said of the majority of insurers who have adopted the stance of either not offering periodical payments at all, or only doing so when faced with the near inevitability of such an Order being made if taken to court. It is also commonplace for insurers to attend Joint Settlement Meetings ('JSMs') or mediations close to trial and refuse to make PPOs at all.

Insurers often attempt to force a lump sum settlement on a Claimant by making 'lump sum only' Part 36 offers, even though the Claimant had expressed a clear preference for a periodical payment package and/or has actually made offers themselves on that basis. We agree with FOCIS that it takes a brave Claimant and a supportive legal expenses insurer, to turn down a lump sum Part 36 offer purely on the basis that they would prefer a periodical payment if all other components of the offer may not be bettered. There is also a risk of insurance withdrawal in this scenario, as well as heavy professional responsibility which comes with a risk of claims against the Claimant's legal team advising on the rejection of a large lump sum offer. Such Part 36 offers are usually 'take it or leave it', meaning that the Claimant cannot choose to accept the underlying sub-components and can only go to Court on the form of award. However, in that scenario, the insurer would put the Claimant at risk of litigating all or most issues in the hope of bettering the Part 36 offer, exposing the Claimant to the full risks of what could be a long trial in the High Court. If the Claimant did not better the offer the insurers had previously made at or before trial, they may be faced with a very high costs order against them. Part 36 of the Civil Procedure Rules should be amended to address this problem. We suggest that Part 36 should require any offer to settle in cases involving significant injuries and future losses to be put on PPO terms as well.

The latest research on PPOs conducted by the Institute and Faculty of Actuaries[24] shows that the uptake of PPOs in personal injury claims is very low despite the change to the PIDR in 2019. The research indicated that against all cases valued over £1m[25], the weighted average PPO propensity for 2009-2020 is 24%, but has been just 5-12% in the years 2017-2020. This is in line with the experience of our personal injury department. Insurers report that the driving force behind the decision to have a PPO was overwhelmingly the claimant's preference (75%) and in only 24% of cases did the claimant and defendant have a shared preference for

[24] Institute of Actuaries' 2021 report

[25] As of 2011, with this report and assuming 7% claims inflation from then onwards. We observe that is materially in excess of CPI+1%.

PPOs. In just 1% of cases a PPO was awarded by the court. Therefore, defendant insurer settlement behaviour is a large factor behind the very low rates of PPOs for personal injury claims, which can readily be contrasted with the materially higher rate of PPOs for clinical negligence claims against the NHS. The data in the Institute and Faculty of Actuaries mirrors our own experience.

We strongly believe that the government should do more to increase the uptake of PPOs. As evidenced by the polling mentioned above and the extensive use of PPOs in cases involving NHSR[26] and MIB, it is clear that there is a strong claimant appetite for PPOs.

The government published its response to the Solvency II consultation[27] in November 2022 and it stated that it would ensure the risk margin is changed to reduce the risk margin for long-term life insurance business, including PPOs. It was hoped that this would make available substantial amounts of capital, safeguard against the risk margin becoming too large and too volatile during future periods of low interest rates and retain a risk margin that ensures that insurers hold sufficient assets to transfer their liabilities to another insurer if required. The changes may help insurers, but not enough to make a real difference. Claimants have a counterbalancing concern as to whether the insurer will remain solvent to keep making the periodical payments for the decades ahead. Despite this recent change the experience of the 27 catastrophic injury specialist solicitors in our personal injury department remains that most insurers are resistant to offering PPOs. That stance is very difficult to change unless and until faced by a claimant who feels so strongly about the issue that they are prepared to reject a lump sum offer in the millions and go to trial.

PPOs provide regular payments which enable seriously injured claimants to meet their needs, particularly in relation to care. In comparison to lump sums calculated using PIDR, PPOs remove from the claimant the very significant risks posed by:-

a. longevity;
b. inflation; and
c. tax.

We agree with FOCIS that the Government should make it a policy objective to take steps to encourage the use of PPOs in appropriate cases, such as:

(1) requiring Part 36 lump-sum offers in cases involving future care claims of greater than £500,000 to include a PPO variant, or detailed written explanation of why such an offer would not be possible or not be in the Claimant's best interests; and
(2) proactive case management by the courts of the PPO issue at a much earlier stage in proceedings (eg CMCs).

By contrast, this Call for Evidence suggests consideration of a higher differential PIDR for cases involving a PPO. Such a move would discourage the use of PPOs without any associated distinct policy benefit. We are not aware of any other jurisdiction in the world that has adopted this approach.

It would also add further complexity, because at the time of drafting the schedules, the parties would not know whether the court would even award a PPO. Adding to legal costs, the parties would have to produce variant calculations applying the standard and PPO variant PIDR for

[26] Data obtained by APIL through a FOI confirmed that 219 claims with a value of > £1.7 Million were settled by NHSR in 2019/2020, 160 (73%) of those were settled by PPO.

[27] https://www.gov.uk/government/consultations/solvency-ii-review-consultation

each item of claim. If combined with the suggestion of a dual rate by duration, then at least four variant calculations would be required for every item of future loss claim.

The concept of a variant PIDR for PPO cases appears to be contrary to s4(3)(a) of Sch A1 of CLA 2018 which mandates that in determining the rate the Lord Chancellor must assume that the relevant damages are payable as lump sum (rather than under a PPO).

As evidenced above, the case for the government to make policy decisions which encourage the use of PPOs is compelling. In contrast, the policy reasons and evidence for a dual rate are mixed. If any change to the PIDR were to make PPOs less attractive, it would be a serious backward step.

Question 22: Do you agree that using a higher PIDR to calculate the real rate of return in settlements which include a lump sum element would result in a more appropriate way to adjust nominal investment returns for future inflation?

Please give reasons.

We suspect there is a typographical error in this question. We are firmly opposed to the suggestion of a higher PIDR for loss of earnings or for cases involving a PPO. See our response at Q19 for further detail.

We note that at paragraph 121 of the Call for Evidence, the MoJ commented that the wider issues of inflation are best left for the expert panel and full review in 2024.

Q23: What impact would a dual/multiple rate system have on protected characteristic groups, as defined in the Equality Act 2010?

The vast majority of claimants who have suffered a serious injury and therefore have a sizable future loss claim, will also have a protected characteristic under the Equality Act 2010.

There is a risk that by implementing a dual or multiple rate system, these claimants would suffer discrimination in the form of lower compensation, the expectation to take greater investment risk and an increased risk of under compensation. This departs from the full compensation principle that the government is committed to.

One of our concerns of this type contained within this call for evidence is the suggestion that compensation for the loss of future earnings could be linked to a prices rather than earnings related inflationary measure. Such a change would likely be discriminatory against the many seriously injured claimants whose entries meet the criteria or a disability. Had they not suffered their accident they would have continued to receive their earnings which patently would have risen in line with earnings inflation and would have enabled them to maintain their standard of living alongside the general population. Any change to the PIDR should not condemn claimants to a lowering standard of living as the years go by.

A considerable amount of serious injury Claimants lack the capability to manage their finances on their own, so they need more extensive financial advice and assistance with regards to investing their compensation. Although the Lord Chancellor has accepted the GA’s recommendation of making an allowance for investment management changes at the bottom of the range identified, assuming a passive management approach, it does not reflect the prevalence of IFA advice fees and active management. This is evidenced in the data set of investment charges for seriously disabled Claimants prepared by FOCIS in 2019.

Compared to similarly placed pensioners in defined benefit or defined contribution schemes, claimants are being treated less favourably as their exposure to investment risk is less than in the GAD central portfolio due to a combination of regulation and professional advice.

As such, in order to ensure that the model portfolio does not result in under compensation for Claimants (the majority of which are disabled) we encourage the MoJ to carry out an impact assessment on the model portfolio. It is important to that the MoJ ensures these Claimants are not unreasonably affected by a change in the discount rate. Furthermore, to ensure transparency, the MoJ or GAD should publish all assumptions applied to the ESG modelling transparency and in turn allow expert scrutiny both by the MOJ's expert panel and externally.