The Forum of Complex Injury Solicitors (FOCIS)

Personal Injury Discount Rate - MOJ Call for Evidence - April 2024

Response to the Ministry of Justice's Call for Evidence on Setting the Personal Injury Discount Rate April 2024

About FOCIS

About Us

FOCIS members act for seriously injured Claimants with complex personal injury and clinical negligence claims, including group actions. The objectives of FOCIS are to:-

1. Promote high standards of representation of Claimant personal injury and medical negligence clients;

2. Share knowledge and information among members of the Forum;

3. Further better understanding in the wider community of issues which arise for those who suffer serious injury;

4. Use members' expertise to promote improvements to the legal process and to inform debate;

5. Develop fellowship among members.

See further **www.focis.org.uk**

Membership of FOCIS is intended to be at the most senior level of the profession, currently standing at 25 members. The only formal requirement for membership of FOCIS is that members should have achieved a pre-eminence in their personal injury field. Eight of the past presidents of APIL are members or Emeritus members of FOCIS. Firms represented by FOCIS members include:

Anthony Gold
Ashtons Legal
Balfour + Manson
Bolt Burdon Kemp
Dean Wilson
Digby Brown
Fieldfisher
Fletchers
Freeths
Hodge Jones & Allen
Hugh James
JMW
Irwin Mitchell
Leigh Day
Moore Barlow
Osbornes Law
Serious Law
Slater and Gordon
Stewarts
Switalskis
Thompsons NI

Executive Summary

The methodology for calculating the discount rate is at best a proxy for what a notional claimant might do if they received compensation without any deductions for litigation risk and they lived in a bubble of their claim (with no other financial, health or familial considerations). Whether we stick with a single PIDR or switch to a dual or multiple PIDR it is unlikely to directly change claimant investment behaviour. The only real change will be to the proportion of claimants whose compensation actually amounts to full compensation, by actually lasting to meet their lifetime claim related needs. We do not share the optimism of 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, would end up with less than full compensation even if you artificially ignore the longevity risk they face. The economic conditions that have prevailed since then have meant that claimants who have received damages calculated using the 2019 PIDR will almost inevitably have investment portfolios that have not kept pace with the PIDR assumptions and so we strongly suspect that the proportion that are now at a long-term risk of under compensation exceeds 50%. That sad fact seriously undermines the government's often repeated commitment to the laws of England and Wales providing full compensation.

Whilst institutional defendants like insurers and the NHS can offset any perceived over-compensation of some claimants against under-compensation of others, seriously injured claimants cannot play the numbers game. They only have one claim the result of which needs to provide for their life-long injury related needs. Those with seriously disabling injuries will often be unable to work and will be wholly or very heavily reliant on their compensation, without any other major source of finances.

The consequence of the longevity risks and real earnings inflation on the vast majority of future loss awards is that seriously injured claimants have to take greater investment risk than they otherwise would, reduce their outgoings, or resign themselves to falling back on the State to plug the gap for their care and medical needs. Whichever of these unfair scenarios the claimant selects they are not receiving full compensation, unless and until an appropriate differential discount rate is set for earnings related heads of claim.

The 2019 adjustment of -0.5% to mildly moderate the risk of under compensation was never enough to properly represent full compensation for all claimants. Events since then have already proved its inadequacy. It also ignores the longevity risks that claimants' face and the long-term trend of increasing incidence of taxation. FOCIS propose that it be increased to a reduction of at least 1%.

We remain deeply concerned that any shift to dual rate by duration is unpredictable and may involve overly optimistic assumptions about future low risk investment returns beyond the switching point. This runs the risk of exacerbating the incidence of under-compensation. It would also introduce significant complications, costs and likely delays to the claims resolution process. A dual rate by heads of loss, notably for care claims, would provide a better match for long-term earnings inflation, but without adding significant complexity to preparing schedules of loss. It is also conceptually very similar to PPO indexation. It is, for good reasons, the solution arrived at after careful consideration of the expert evidence, by the common law courts (including the Privy Council) and who were not ham strung by legislation e.g., Guernsey, Ireland and Bermuda. However, we remain of the view that sticking with a single PIDR is the simpler and best option, consistent with the approach of the vast majority of countries around the globe. For such a single rate to be fair it is crucial to apply an inflation assumption to reflect the impact of earnings inflation on the vast majority (83% on our data) of the

heads of future loss which apply PIDR. We contend that this inflationary adjustment should be CPI +1.5%.

The FOCIS/APIL data gathered for this call for evidence had a median longest future loss period (usually life expectancy) of 35 years. However, we contend that most claimants do not invest the majority of their damages for 2 or more years post settlement. Consequently, we propose the assumed investment period for PIDR modelling ought to be no more than 33 years. There is much to be said for aligning this assumed average investment period with the more conservative assumption of 30 years as applies in Scotland under Schedule B1, paragraph 7(2)(b), Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019.

The MOJ has sought evidence on the investment behaviour and taxation of claimants but in our experience this data is somewhere between very difficult and impossible to gather. There are many factors that would cause such behaviour to vary, some unrelated to the claim (for instance other sources of capital or income). In our view to have any chance of successfully gathering such evidence would require a very well-funded and experienced team of researchers working over a period of at least 3 years. The exercise would also need to be repeated periodically as such behaviour may well vary over time.

A claimant's investment behaviour will be impacted by the applied discount rate. The investment risks for claimants who were compensated at 2.5% real and net will be very different to those compensated at minus 0.75% or minus 0.25%. Given that a single discount rate will alter every five years, the cohort available to any researchers may well be insufficient to derive reliable conclusions. In the event of a switch to dual rate by duration this problem would be amplified.

We remain of the view that the principle of looking at past investment behaviour of others to try and determine what would be fair for a future cohort of claimants is flawed and unfair, albeit we appreciate it is what the CLA 2018 prescribes.

We remain of the view that the best available evidence on the scale of investment charges incurred by claimants with serious injuries is the FOCIS dataset as submitted in response to the 2019 call for evidence. It clearly demonstrated that an overwhelming majority, of 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 small minority of Claimants (4.9%) incurred charges below 1%. It has subsequently been corroborated by additional datasets showing very similar levels of charges experienced by clients of FOCIS member firms Irwin Mitchell and Digby Brown.

We contend that the long-term upward trend in the level of taxation (including the downward trend in allowances) is a further reason for the Lord Chancellor to either round up (not down) the tax adjustment to PIDR and/or increase the current 0.5% adjustment to moderate the impact of under-compensation. The tiny tax adjustment when the PIDR was set in 2019 failed to fully consider the extent and impact of tax on claims for serious injuries with damages in excess of £3 million.

The adjustment to the PIDR for investment management charges and taxation was set far too low in 2019. Active rather than passive management is necessary to ensure appropriate investment return whilst mitigating the longevity (and other) risks, as far as possible. Whilst investment charges may reduce slightly as a percentage of the award where the investment sum is larger, taxation typically increases for the higher value awards. The composite deduction for these two issues should reflect claimant investor experience and allow 1.5%-2% for investment expenses on an active basis and a further 0.75% for taxation; as a composite for these two factors we propose a reduction of 2.5%.

The case for the government to make policy decisions which encourage the use of PPOs is compelling, whereas the policy reasons and evidence for a dual rate are, at best, mixed. Any change to the PIDR that makes PPOs less attractive would be a serious backward step and would in any event be contrary to s4(3)(a) of Sch A1 of Civil Liability Act 2018 which mandates that in determining the rate the Lord Chancellor must assume that the relevant damages are payable as a lump sum (rather than under an order for periodical payments).

FOCIS/APIL data

In the short time period allowed by this Call for Evidence FOCIS asked its members to provide anonymised data on future loss periods and breakdown by heads of loss for their serious injury claims concluded in their last complete financial year, 2022 – 2023. APIL also asked select firms to provide the same data and worked with FOCIS to anonymise the data) To provide a reliable cohort for analysis we asked the member firms to apply the following exclusions to the data collected:

- Cases with damages of less than £500,000 that were likely to have little or any future losses and/or also be subject to the next exclusion.

- Cases which settled either so early pre-proceedings prior to preparation of a schedule of loss with a particularised future loss claim and/or for commercial risk-based reasons on such a heavily compromised basis that no meaningful assessment of individual heads of loss could be obtained.

- Damages assessed by reference to foreign law.

9 firms (8 from FOCIS members) were able to provide this data within this short time frame, with a resultant cohort of 114 cases. Whilst this is relatively small cohort, we hope it will prove helpful to the MOJ and inform its consideration of the issues raised in this call from evidence.

In response to the 2019 Call for Evidence and at the request of the MOJ and GAD we sought data via FOCIS members and professional deputies and trustees of personal injury trusts concerning investment charges incurred in relation to investments for their clients. FOCIS collated the attached data set, which relates to the investment portfolios of 389 clients provided by 9 different firms ranging in size between £67,336 and £7,450,000 . We also attach a letter from Ian Gunn of PFP (one of the authors of the MOJ's 2015 expert report) which summarises and comments on this data. We continue to rely on this data gathered from Professional Deputies, trustees and IFAs who all of whom specialise in managing the investments of seriously injured claimants.

RESPONSE TO QUESTIONS

Question 1

Please provide evidence relating to the numbers of claims split by value and length of awards (By length we mean the period damages were awarded for in the damages schedule and therefore the period of time a claimant will invest their award. Preferably split into periods of 10, 20, 30, 40, 50, 60, 70, 80+ years).

From the FOCIS/APIL financial year 2022 – 2023 data the numbers of claims split by the value of future losses were:-

Figure 1

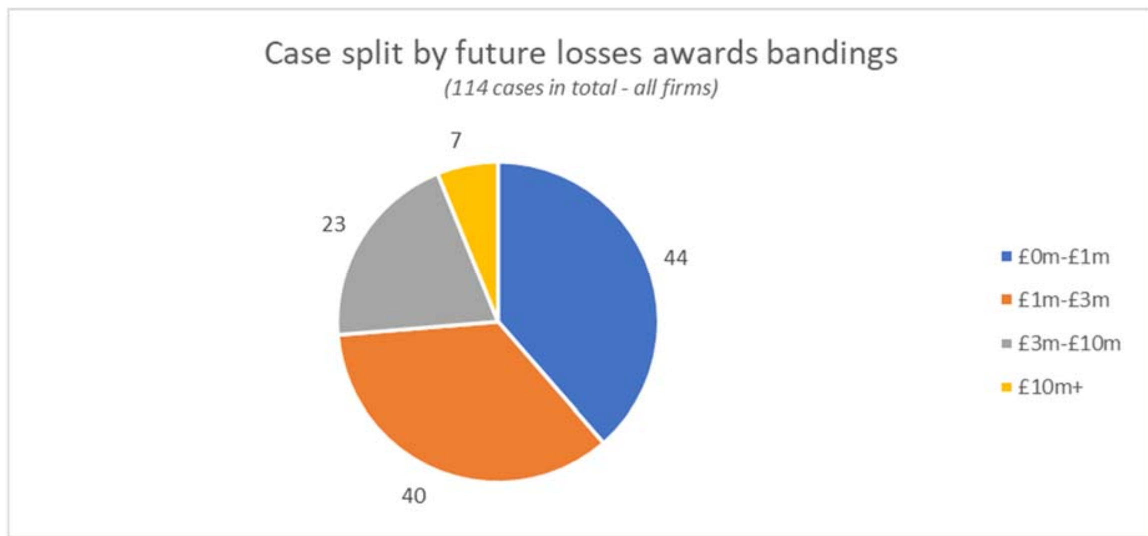
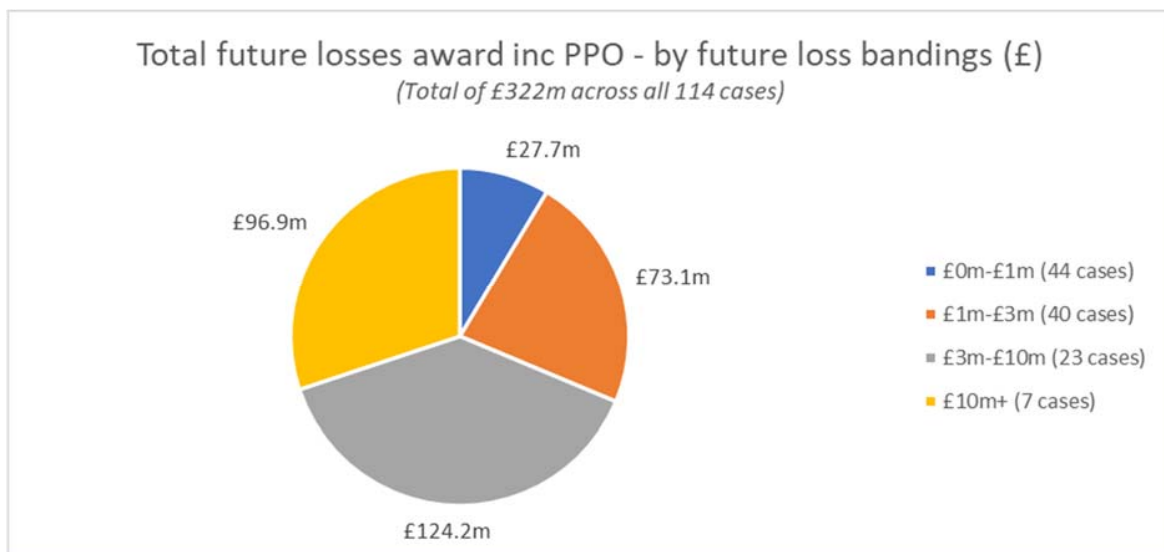


Figure 2

The same data showing the total monetary value of the future losses for all cases within each banding is as follows:-

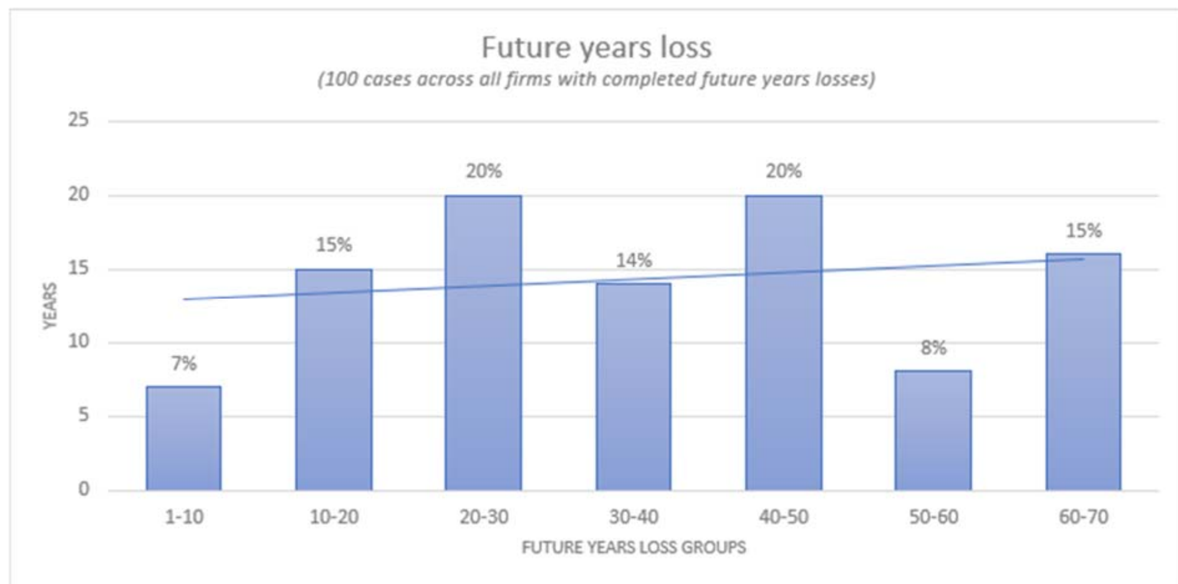


From these charts we observe that:-

- 63% of cases fall into the £0-£1m and £1-3m bandings;
- Whilst the numbers of cases in the £3-10m and >£10m bandings were lower (27%) the total future loss value of the cases in these bandings was much more significant at 69% of the total of all cases.

Figure 3

The contributing firms were asked to provide an estimate for the longest future loss period (usually the life expectancy) in each claim. In many claims for serious injury there will be medical expert evidence on the extent to which the injury has impaired the claimants life expectancy. At times the defendant's and claimant's medical experts will be unable to agree the extent of this impairment and so in this scenario the FOCIS members were asked to estimate the life expectancy they considered to be consistent with their advice to the claimant on the settlement sum. We received estimated future loss periods for 100 cases. During the data analysis we combined the age at date of settlement and the estimated future loss period, then compared it with the unimpaired life expectancy figure from the 0% column of Table 1 (males) or Table 2 (females) of the Ogden Tables. In 10 cases we revised the future loss period estimate down to avoid it inadvertently exceeding the unimpaired life expectancy figure. However, this did not change the resultant mean or median figures once rounded up to whole numbers.



Average future years loss across all cases is 36 years. The median is 35 years.

Question 2

In relation to the evidence you have provided for Question 1 above, please provide details on the split between a) The various heads of loss i.e., the value of different components in claimants' damages schedule such as care management and care costs (and how these change over time); b) The shape of these heads of loss before allowing for inflationary increases i.e. flat, increasing or decreasing; and c) the term over which these heads of loss are awarded i.e., for life or a fixed period.

a) **split by heads of loss**

The contributing firms did not have pre-existing records with these splits, because the vast majority of cases settle for global damages figures, without any agreed breakdown for each head of loss. The only exceptions are the rare few cases that are subject to a court determination of quantum issues or in so far as a PPO is agreed for one or more heads of loss (usually limited to care and case management). However, to address this question and to try and inform this call for evidence we asked FOCIS members to estimate the splits by heads of loss of all of their cases for damages of £500,000 or more which they (or the applicable team/department in their firms) concluded in their last complete financial year 2022/2023. Providing a schedule of loss had been prepared to calculate the claim on a head by head basis then they were able to provide informed estimates of the proportion of the claim attributable to each head of loss. In many cases that estimate was also informed by advice from counsel to inform the consideration of offers to settle and accompanying advice to clients. In cases involving protected parties these estimated breakdowns would usually be provided to the court. This data was anonymised and analysed. During that process a small proportion of cases were excluded because of an inconsistency between the estimated total of future losses and the breakdown by head of loss.

Figure 4 – average of future losses by heads of loss

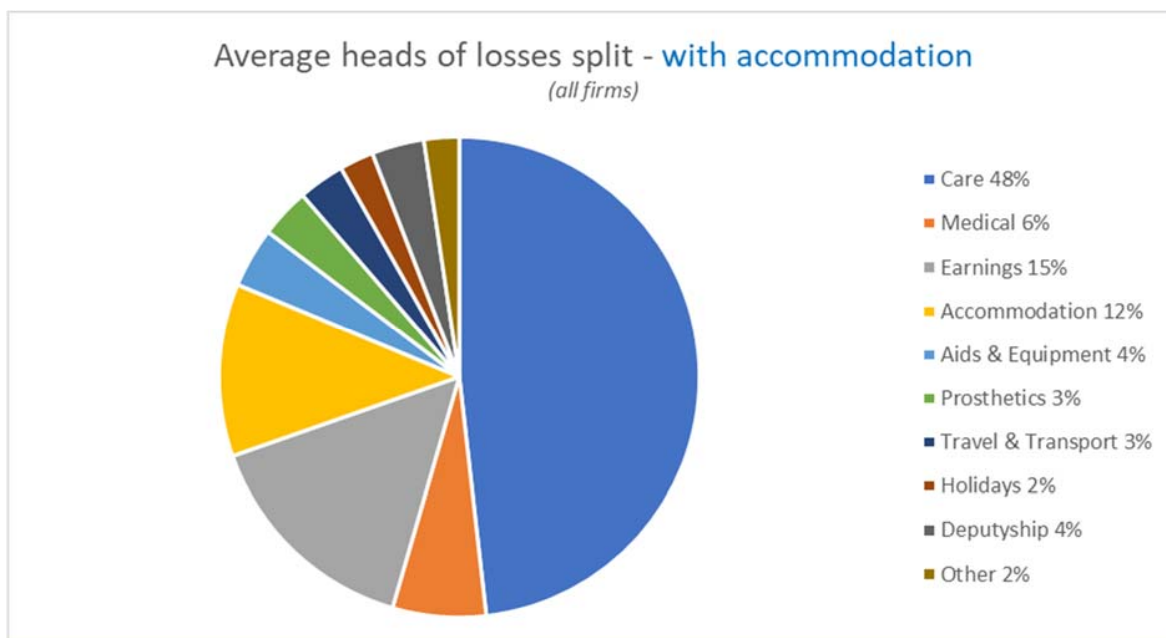
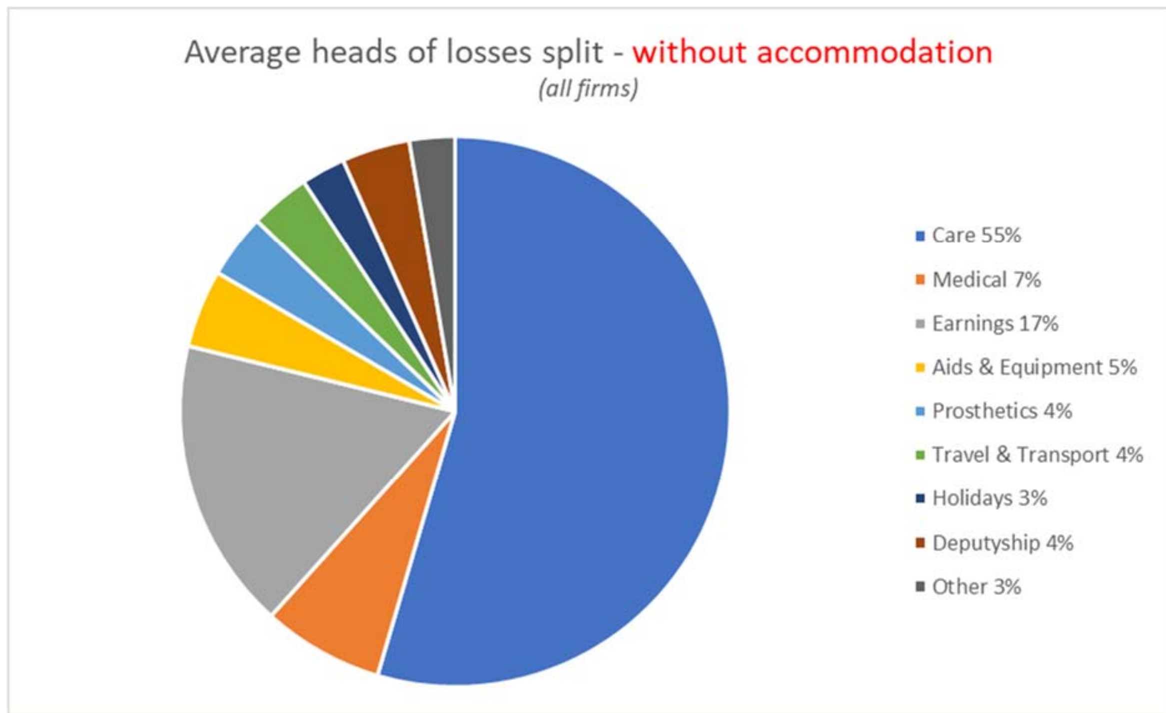


Figure 5 – average of future losses by heads of loss excluding accommodation

Following the Swift v Carpenter decision, the calculation of the cost of purchasing and adapting accommodation to meet disability related needs no longer uses the PIDR. Consequently, we consider that the values attributable to accommodation claims should be excluded from this exercise and accordingly the losses and average percentages of losses shown below, exclude any element of future loss associated with Accommodation. The result is that over 80% of the residual heads of loss relate to earnings inflation as further discussed in response to Q8 below.



b) The shape of these heads of loss before allowing for inflationary increases i.e., flat, increasing or decreasing

Some needs, like care, are an annual expense. Others, like aids and equipment and adapted vehicles, will involve periodic cycles of replacement. In most cases they will then increase in later years as ageing compounds the claimant's injuries.

However, every claimant is different, and the contributing firms did not have data on the shape of these heads of loss.

c) the term over which these heads of loss are awarded i.e., for life or a fixed period.

The largest head of loss is care (usually incorporating case management) which are lifetime losses. Loss of earnings claims are for the working lifetime of the claimant. Most other heads of loss are predominantly for life, although the underlying items of claim may vary. For instance, in a spinal cord injury claim a young and active claimant may, in addition to their main wheelchair, use a sports specific wheelchair until they are, say 50. However, from 50 due to the compounding effects of ageing they may no longer be expected to need the sports wheelchair but might then need a powered wheelchair.

Question 3

Based on the evidence supplied in 2018 / 2019, the Government Actuary's advice to the Lord Chancellor assumed the representative claimant invested over a period of 43 years. Does 43 years remain a suitable assumption (please explain the rationale and evidence for your response)?

If there is to be continuing reliance on the 43 years assumption, then the evidence on which it is based should be published. It was and remains higher than the average in the experience of our members for their clients with significant future loss claims which often relate to severe injuries that impair life expectancy.

As above the FOCIS/APIL data shows an average (mean) future years loss for all injury cases (PI and CN cases combined) of 36 years with a median of 35 years.

We contend the median figures are a fairer benchmark than the mean as each claimant only has one claim and the calculation of compensation needs to be as fair as is possible for each individual, not simply an average across all claimants.

In our experience, it is common for the Claimants that our members represent to keep most or all of their compensation on deposit in the bank, often for several years. The time scale for resolving the costs of their claim can add a further year or two delay to the timing of investment advice and decisions. The timescale for finding, buying, and adapting a home to live in can be a factor feeding into the delay in forming or implementing any investment plan. In theory, the investment returns in these earlier years are crucial to the performance of the fund invested. Therefore, when considering any modelling of the performance of hypothetical portfolios, and their potential applicability to real life behaviour of seriously injured Claimants, this delay ought to be factored in.

We observe that the assumption of the future loss period taken within the Scottish legislation, at Schedule B1, paragraph 7(2)(b), Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019, is 30 years, which we consider to be a reasonable and fair assumption.

Whilst a notional average period of 30 years might on the face of it be workable, it would not be applicable to all Claimants. The key point is that each client deserves full compensation, and this should not be based on a set rate that leaves a cohort of Claimants under-compensated. There would be a significant minority of Claimants with a future loss investment period (allowing for a few years post settlement) of less than 30 years, and the rate should not undercompensate those Claimants.

Factoring in all of the above issues we contend the start point should be a median life expectancy of 35 years less at least 2 years to allow a reasonable period before the majority of the damages are invested. As there are readily available and highly credible statistics concerning longevity, we contend that the GAD should factor them into further analysis and modelling to inform the upcoming review by the expert panel. The final model portfolio and resultant discount rate could then be determined to ensure there would not be under-compensation for more than 5-10% of Claimants, incorporating the longevity risk. Alternatively, recognising that calculating the impact of longevity has complexities, we propose that the under-compensation adjustment be increased by at least 0.5% to mitigate the longevity risk and the risk that funds are required in a different manner than when the award was granted.

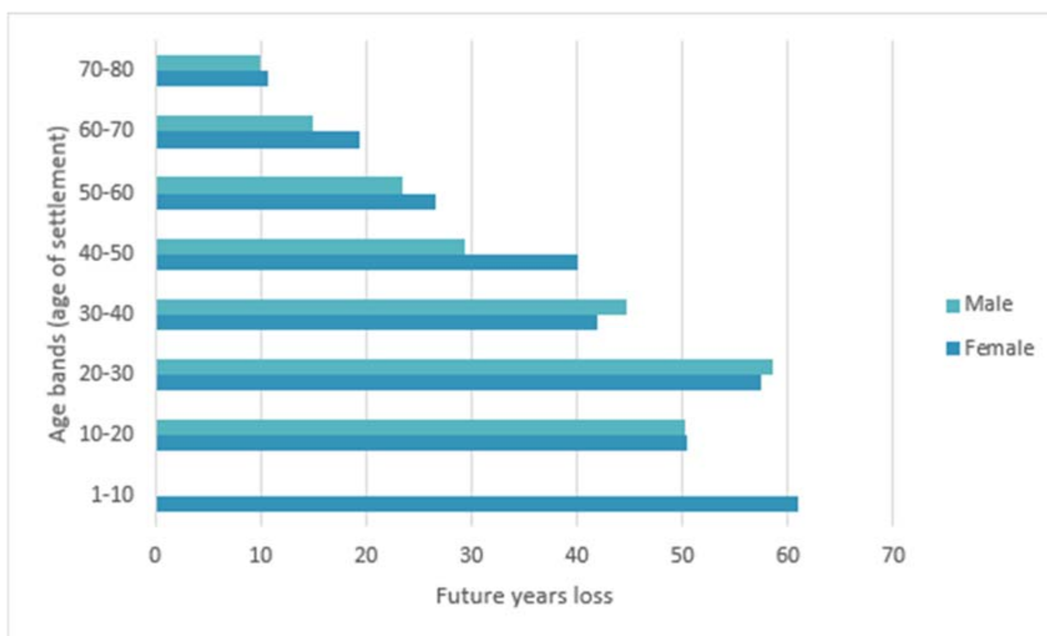
Question 4

Are there any cohorts of 'alternative representative claimants' that you believe have characteristics which are materially different from the representative claimant defined above, and who should therefore be considered separately when modelling claimant outcomes? Please define the characteristics of these cohort(s).

Claimants with claims for high levels of earnings, very high care needs or needs that dramatically change or extend over long periods time (such as children) have characteristics which materially depart from the average.

Female claimants on average have slightly longer life expectancy as is well known from the ONS mortality data and also represented in the data set we gathered for this exercise:-

Figure 6



It would be helpful for variant modelling to be done to consider these alternative representative claimants to ascertain the extent to which they may be at a greater risk of under compensation and consider options for what can be done to reduce that.

Question 5

Where available please provide evidence or data on actual mortality experience relative to claimant life expectancy when awards are granted.

The Civil Liability Act 2018, Part 2, Paragraph 10 s.4(2)(b) and (c) state that the Lord Chancellor is limited to setting the rate to that applicable only to losses that occur within the period for which they are awarded. The schedules and counter schedules in all cases set out calculations of the estimated future loss periods, which are then factored into the resultant settlement or determined by the court. This means that no damages can be awarded for losses beyond a claimant's life expectancy as agreed or assessed within the claim award period.

Our members were unable to provide any data in relation to actual mortality against life expectancy upon which future losses are calculated. We suspect any attempt to gather a reliable body of evidence of this type would take many years and require a well-funded and experienced research team.

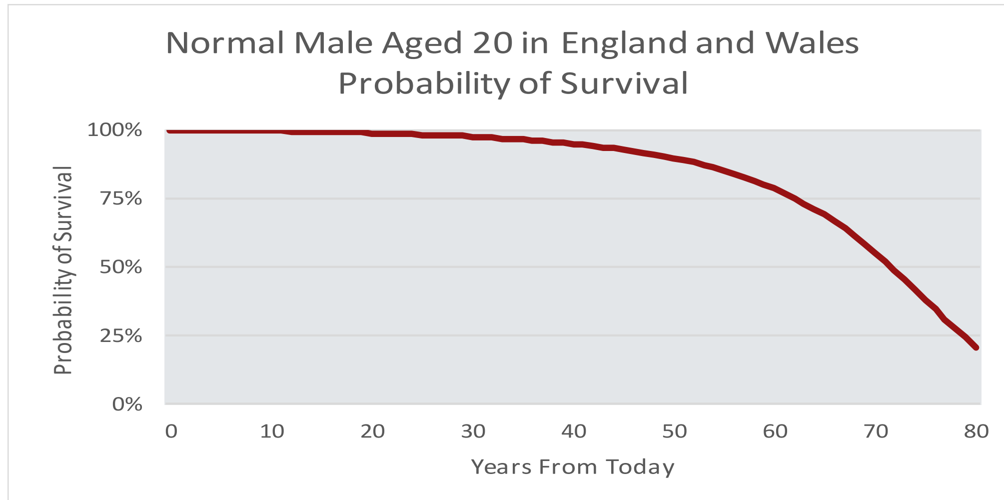
We note and agree with the response to this call from evidence from the expert economist Victoria Wass[1] that "*Without a more robust data base, with basic safeguards in relation to standard research methods, the determination of the PIDR is a political decision rather than the fair and evidence-based decision that it is presented to be*."

Whilst the GAD has acknowledged the significant longevity risk that claimants receiving lump sum awards face, no attempt at modelling has yet been published, nor has any adjustment for that risk been factored into the PIDR. We consider this to be a far bigger issue for the aim of providing full and fair compensation than any shift to dual or multiple rates.

The life expectancy estimates which underpin the Ogden tables are derived using cohort mortality estimates and taking account of the probability-weighted possibilities that the Claimant will live for different periods (e.g., die soon or live to be very old). The Ogden tables therefore incorporate a 'probability-weighted' expected lifespan.

For example, Figure 7 below shows a cohort longevity probability profile for a normal male aged 20 in England and Wales. A prudent investment plan for such a Claimant would strive to achieve a high probability that the Claimant's funds would last to age 100 (given that the Claimant has an approximately 20% probability of living even beyond that age).

Figure 7



It is inherent in the court's approach to life expectancy statistics that about half of all Claimants will live longer than has been predicted, but all prudent Claimants will plan for that possibility. In our discussions with specialist investment advisers, professional trustees and deputies they all said that they routinely advise and adopt an investment strategy that allows for the Claimant living longer, potentially by decades.

The fact that Claimants face this risk, and plan for it, should not be conflated with the very differing concept of appetite for investment risk. Even PPOs do not fully protect

[1] Emeritus Chair at Cardiff University and member of the Ogden Working Party.

Claimants from the life expectancy risk, as they typically only provide for one or two of the heads of future loss.

The greater the lengths of losses, the more Claimants are adversely affected by real earnings growth. Many Claimants who have sustained catastrophic injuries will never work again, so there is no other income they can draw on to assist with funding these needs.

The consequence of the longevity risks and real earnings growth is that Claimants have to take greater investment risk than they otherwise would, reduce their outgoings, or resign themselves to falling back on the State to plug the gap for their care and medical needs. Whichever of these unfair scenarios the Claimant selects they are not receiving full compensation.

Question 6

Please provide evidence of the rates of inflation which apply to claimant's damages overall and split by different heads of loss (including any projection of damages inflation produced for other purposes – such as reserving at an insurance company).

Our members were unable to provide data on how the actual costs that claimants experience after the resolution of their claims increase with inflation. Once again we suspect any attempt to gather a reliable body of evidence of this type would take many years and require a well-funded and experienced research team.

The indexation of PPOs provides a good indicator and was only arrived at after extensive expert evidence and rigorous testing through the courts.

We observe that the Institute and Faculty of Actuaries, Periodical Payments Orders Working Party Update (2021) applies an assumption that claims that are greater in value than £1m are subject to damages inflation at 7% per annum. This inflation assumption is one which the Institute and Faculty of Actuaries has consistently applied since 2011 (p.17) and does not appear to have been challenged by the insurers who are the main readers of this report.

Question 7

Please provide evidence of whether these rates of inflation are linked to defined inflationary measures such as RPI, CPI, CPIH, AWE, ASHE 6115 (or other) and what the reasons for such linkages are.

The only data with which this question can be answered is based on our experience of the indexation of PPOs. This is that:-

- Care and case management PPOs are subject to ASHE SOC2000 6115,
- Loss of earnings to AWE or the closest matching ASHE category to the claimant's career[2];
- Deputyship costs to the relevant ASHE category or RPI;
- Medical treatment and therapies formerly to HCHS and now to RPI.

---

[2] see paragraphs 175 - 177 **Ogden Tables 8th Edition (publishing.service.gov.uk)**

Question 8

Is the 2019 position that the representative claimant's damages are inflated at a rate of CPI +1% (as shown in paragraph 28 above) on average still a suitable assumption and if not, how would you change it (please provide evidence / reasoning for your response).

No.

The impact of earnings inflation and the need for an adjustment has been closely scrutinised and accepted in the context of a periodical payment regime as reflected by the Court of Appeal judgment in *Flora v Wakom (Heathrow) Limited* and *Thompstone v Tameside*. This has resulted in the general practice thereafter being to apply ASHE 6115 indexation to PPOs for care and case management and less frequently, other earnings-related indices for other earnings-related losses.

The application of this adjustment to lump sum for compensation has been considered by the Guernsey Court of Appeal, in the highly regarded judgment of Sumption JA, which was upheld by the Privy Council. It has also been considered by the Chief Justice of Bermuda, and subsequently endorsed by the Court of Appeal in Bermuda in *Colonial Insurance Company Limited v Thomson* (conjoined with *Harvey v Warren*).

Lord Hope in the Privy Council judgment concerning *Helmot v Simon* 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).

Lord Hope at paragraphs 51 - 56 framed the issue as follows:

> *"51. The most difficult issue relates to the earnings-related elements and in financial terms it is undoubtedly the most important. Various points arise under this heading. Is it acceptable in principle for there to be different discount rates for different heads of loss? Is it acceptable in principle to apply a discount rate which is not a discount rate at all, but an adjustment of the lump sum in the reverse direction? Were the Jurats entitled, on the evidence that was before them, to hold that an adjustment to the discount rate was not open to them in the absence of a suitable index and that the evidence before them was of too general a character to be acceptable?*
>
> *52. The answer to the first 2 question is to be found in the premise that the victim of the tort is entitled to be fully compensated.*
>
> *53. Working out of this approach in practice can be seen in Thompstone v Tameside and* Glossop Acute Services NHS Trust *[2008] 1 WLR 2207…Different rates should be used where this can be shown to be justified by the evidence. …*

56. It was Mr Bootle's evidence that was critical, and it was based on a thorough examination of information drawn from many countries over a long period. There was no contrary evidence."

Strongly supported by Lord Brown, Lord Hope's conclusion at paragraphs 75 - 77 was that:

"75. *…if this Claimant is compensated for future loss only on the basis or projected RPI inflation, his award (intended to compensate for increased future losses over the period for his predicted further lifespan of 40 years) will almost certainly prove inadequate to meet his long-term future care needs.*

76. The real question in the Appeal must therefore be this: Which approach is preferable: one which ignores the established claim showing an increase in real earnings and so produces an award of almost certainly less than will be sufficient to meet the Claimant's likely future care costs, or one which uses the best available evidence…

77. The answer must therefore be obvious."

Lord Brown at paragraph 82 referred to *Sarwar v Ali* in which Lloyd Jones J accepted what he described at paragraph 143 as:

"A consensus between the experts that the RPI is not an appropriate index for Periodical Payments in respect of future loss of earnings…The same is true of the future cost of care and case management."

Finally, and pithily from the *Helmot* Judgment, Lord Dyson at paragraph 113 said:

"*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."*

It is worth observing that the Defendants could have served evidence from an Economist in *Helmot*. The same situation arose in the Bermuda case for *Thomson*. In both cases, considerable funds were spent by the Defendants opposing an argument that had significant financial ramifications, not just for the individual case but for other cases that followed. One can only speculate as to whether the Defendants had in fact obtained economic evidence, but that it did not support the case they wanted to run.

These economic factors are not unique to Guernsey or Bermuda, rather they are a long-standing global trend for developed economies.

In *Sarwar v Ali and the MIB*, the Defendant did have an Economist, a Mr Cooper. 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 Cooper (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."*

At paragraph 161 he observes that:

"She (Dr Wass) concludes that all the measures of earnings growth which she examines exceeds the corresponding measures of growth in prices…She concludes that measures of earnings growth in the care sector have consistently exceeded the growth in aggregate earnings over the period 1998-2005."

The Judge then quoted from the evidence of the Claimant's Accountant, Mr Hogg, which had 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 Judge noted at paragraph 163 that:

"Mr Cooper and Mr Hall agree that there is a longstanding pattern showing average earnings rising faster than price inflation."

As can be seen, when this issue has been closely analysed by the courts, the evidence in favour of making an adjustment for earnings heads of loss was on each occasion considered overwhelming and required to achieve full compensation.

Chris Daykin has made a similar submission to the previous Call for Evidence; that costs which are inherently driven by earnings, such as employing carers or paying for consultations with medical professionals, can be expected to go up by more than either RPI or CPI in the long term, possible by 1.5% - 2% per year more on average.

Care and case management, earnings, and related benefits (including pension), medical treatment and expenses and deputyship costs are all heads of claim the principal component of which is the cost of labour (of differing specialities). They are all patently subject to inflation related to earnings growth.

We agree with the observation of Professor Wass in response to this call for evidence that:-

"The UK is ill-prepared to meet the pressures of recruiting and retaining a medical and care workforce of sufficient size to meet increasing demand for health and social care. This is and will continue to be a huge policy issue for the UK. Overall, the drivers and barriers will combine to exert upward pressure on wages in care that we haven't seen before."

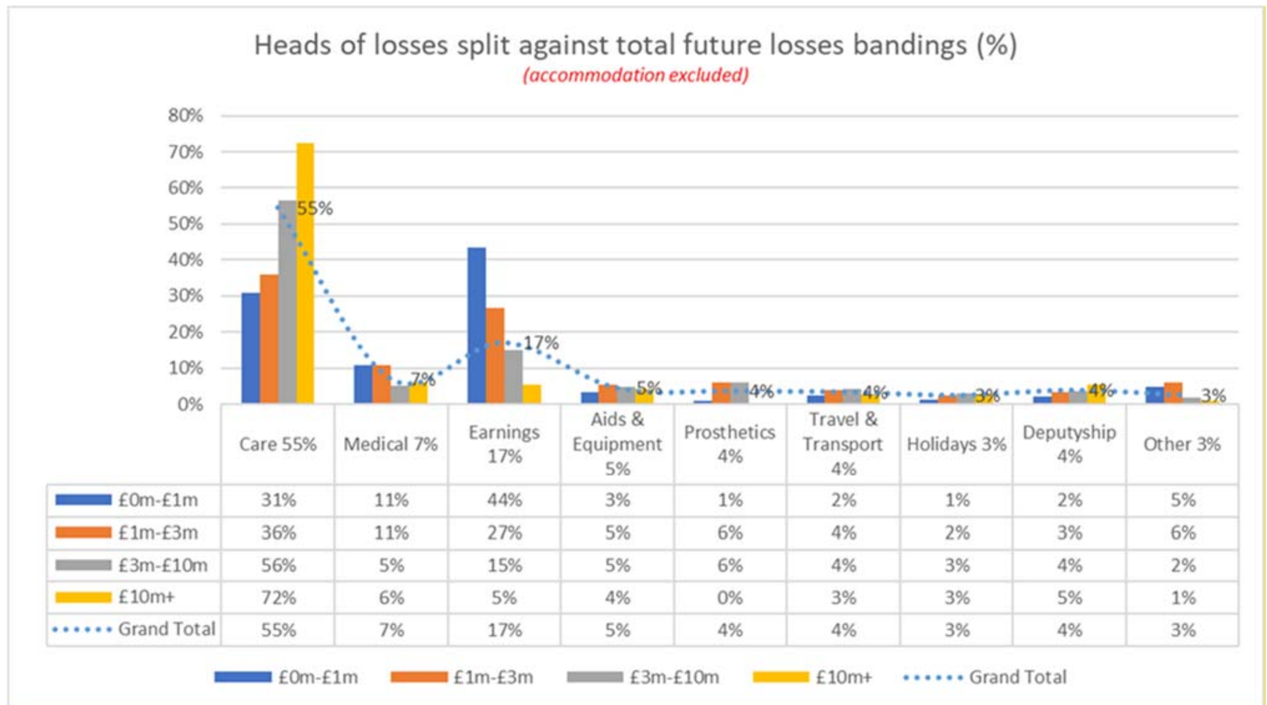
The current long-term (2071-2072) forecast from the Office for Budget Responsibility (OBR) 2022 report predicted real-earnings growth of 1.8% (gross earnings growth of 3.8% less CPI growth of 2.0%). We note that Professor Wass describes the adoption of these OBR projections as "*a straight-forward approach*". This is to our mind the benchmark against which the PIDR should be adjusted to reflect the typical weighting of earnings and prices heads of loss suffered by claimants. She also observes that the OBR "*projects that the costs of social care will double as a proportion of GDP over the next 50 years, from 1.2% of GDP in 21-22 to 2.6% in 71-72. This is a very challenging prospect for a sector which does not meet current demand."*

For seriously injured claimants even the "prices" heads of loss differ significantly from the typical CPI basket of goods and services. For example, disability aids and equipment are constantly developing to better the lives of seriously injured and disabled people. The majority of these are low production specialist goods for which the developer will need to recoup the significant R&D costs from a modest number of sales. After a new model comes out, the previous model tends to go out of production. So even if there is an

element of qualitative change between the new and the old model the claimant has no choice but to buy the new model.

The FOCIS/APIL data for the splits of damages by heads of loss shows that the vast majority of the claim for future losses are for losses subject to earnings growth. For an overview we refer to the pie charts set out in our answers to Q2 above. We also refer to Figure 8 which shows the percentage of the total award represented by each head of loss at the differing damages bandings.

Figure 8



	Care 55%	Medical 7%	Earnings 17%	Aids & Equipment 5%	Prosthetics 4%	Travel & Transport 4%	Holidays 3%	Deputyship 4%	Other 3%
£0m-£1m	31%	11%	44%	3%	1%	2%	1%	2%	5%
£1m-£3m	36%	11%	27%	5%	6%	4%	2%	3%	6%
£3m-£10m	56%	5%	15%	5%	6%	4%	3%	4%	2%
£10m+	72%	6%	5%	4%	0%	3%	3%	5%	1%
Grand Total	55%	7%	17%	5%	4%	4%	3%	4%	3%

Our observations on the FOCIS/APIL data (excluding accommodation as explained in answer to question 2) is as follows.

a) Losses affected by earnings inflation (care and case management, earnings, medical treatment and therapies and deputyship costs) accounted for an average of **83%** of the total.

   Care and case management alone represents on average **55%** of all PIDR related future losses, rising to **72%** in cases where the future losses exceeded £10m.

   Loss of earnings claims demonstrated the opposite effect in that they were **44%** of all PIDR related future losses in the lower damages banding (up to £1m) , as contrasted with **17%** across all bandings. However, when you combine these trends for care and case management and earnings, they tend to balance each other out providing a reasonably reliable overall pattern that earnings inflationary heads of losses are across all damages bandings:-

   - 66-81% of all future losses.
   - 76-89% of all PIDR related future losses (excluding accommodation).

Figure 9 – proportion of heads of loss related to earnings or prices inflation or accommodation by value of all future losses

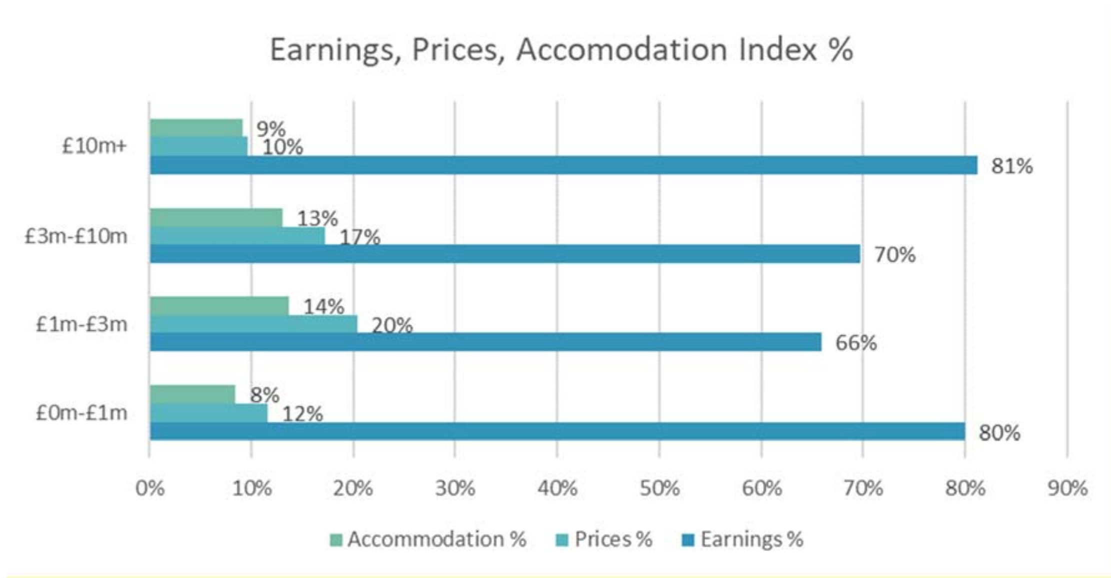


Figure 10 - proportion of heads of loss related to earnings or prices inflation (excluding accommodation) by value of all future losses

As set out above, the courts have repeatedly acknowledged the importance of earnings inflation in determining what is full and fair compensation. It is incumbent on the Lord Chancellor to do likewise and set the PIDR at a rate which fairly accounts for the likely effects of both earnings and prices inflation.

As our data indicated that losses affected by earnings inflation accounted for an average of 83% of the total of future losses that were subject to PIDR. 83% of the OBR long term forecast of a 1.8% differential would be the appropriate adjustment; so CPI + 1.5%. In light of the point, we make above about the very specialist nature of many items of disability aids and equipment even CPI+1.5% may well be an underestimate.

Question 9

What asset classes should be included in a "low risk" portfolio and are there any asset classes that are not generally available and/or suitable for personal injury claimants (please provide reasoning and/or evidence in support of your views)?

We are not financial/investment advisers, so we defer to others in relation to this question.

Question 10

Please provide any evidence you may have on how low-risk claimants who receive lump sum damages awards are both advised to invest and actually invest over the length of their award (including changes over this time). Information should be provided on a) the split between growth and matching assets, as well as specific asset classes; b) The prevalence of active, passive or semi-passive investment approaches and their resulting impact; c) Consideration of liquidity risk and/or the prevalence of matching cashflow approaches with the aim of meeting the claimant's income needs as they fall due, e.g. through purchase of matching bonds' or annuities to provide a more known income stream; and d) The prevalence of risk management strategies as a claimant's investment horizon changes.

As we explain in the data section at the start of this response our members did not have and were unable to obtain data of this type.

We remain of the view that the premise of this question (and s5(b) of Schedule 1A of the Act) is flawed. How claimants have in the past invested their compensation ought to be irrelevant when it comes to determining the policy or level of the discount rate for other future claimants. Whether those past claimants made risky or non-risky decisions and whether those decisions were wise or unwise is a post-claim event, individual to each of them, which should be irrelevant to how the compensation of other future claimants is calculated and indeed to consideration of the 100% compensation principle. Claimants should not be forced or expected to take risk for the benefit of the wrongdoer who caused their injury. Insurers are in a much better position to aggregate their funds and hedge their exposure to fluctuations in the financial markets than individual claimants.

This position is further complicated by any claimant who did not recover compensation on a full liability basis, perhaps because there was a litigation risk of them losing their case, or where there has been a deduction from the global damages for contributory negligence. Some claimants will also have been effectively forced to take investment risk because the cost of meeting their needs increased beyond the basis on which their claim was settled, or their damages awarded by the court. This could happen by the effect of real earnings growth, and/or inflation for disability-related items that due to the specialist nature of the market do not increase consistently with CPI, and the distinct possibility that they will out-live projected life expectancy.

Another important factor is that some claimants either settle or are awarded a lesser sum for any particular head of loss that they seek. This is often because of opposing expert evidence advanced by the Defendant suggesting a lower level of loss, or lack of corroborating evidence. However, in the years that follow the conclusion of the case, the claimant may actually incur expenses at or even higher than his own expert team anticipated. In addition, the claimant's injuries, and consequent needs, may increase beyond the level that had been anticipated when the claim was under consideration, or in a way that had not been identified at the time (such as the development of a secondary medical complication that had not been anticipated).

It is also far less likely that claimants with funds of less than £1 million will even seek investment advice or otherwise make investments of the types assumed by the GADs model portfolios.

In her response to this call for evidence the expert economist Victoria Wass refers to the qualitative data on investment behaviour that she was involved in collecting for the MoJ in 2013. She comments that "*It was able to uncover useful insights into claimant investment behaviour within the particular context that these investment decisions were made. This research included testimony from claimants and their advisors that revealed claimants dealing with a great deal, including:-*

"We only got half of what we knew he needed, therefore we couldn't invest his money in completely safe options, there had to be a modicum of risk that would produce enough money to last a lifetime. It was moderate risk, we didn't go any higher than moderate … Since we got the money we've been through two major stock market crashes, so we've probably wiped off at any one time £800,000 from his portfolio. If we'd have been given enough we could have stuck to low-risk investments." (Parent/ carer of claimant, clinical negligence, MoJ 2013 p49)

"Most of these people have had a really bad deck of cards … They all tend to be aware of how things can go wrong in the blink of an eye and they are not people who are inclined to take risks." (Claimant solicitor MoJ, 2013 p48)

"High risk is not something for people in our position – [you need] the money for house, pain relief and salary not holidays. That's why you don't want high risk – you can't risk these things." (Claimant with spinal injuries, RTA, MoJ 2013 p 48)

Thus, when claimants are observed to expose themselves to investment risk, it is largely to compensate for shortfalls elsewhere in their lump sum and the risk that their lump sum will be exhausted before their death. Claimants are seen to be struggling to manage a range of different risks in order to minimise their overall risk. They are revealed to be ill-equipped to do this but manage as best they can and suffer losses when the value of equities falls. Of risk from different sources. "

The above quotes and commentary from Professor Wass remain just as true today as the FOCIS members continue to hear the same stories from their clients.

Any evidence gathered relating to claimant investment behaviour between 2001, when the rate was 2.5%, and its adjustment to -0.75% in 2017 would also be skewed by the fact that during that time there was massive under-compensation of claimants.

Seriously injured claimants are vulnerable and often worried about finances and adequate provision for their lifelong needs. Many of them will not work again and have no other source of income or wealth to invest. They often have little to no experience of investments at all. The difference between injury claimants and usual individual investors, is that investors generally would have wealth/income to accommodate any losses over their lifetime; injury claimants do not have this income and therefore would take lower risk than an average investor as they do not want to be left short of funds for their needs towards the end of their life. Seriously injured claimants are overwhelmingly investing to meet their disability related needs rather than outperform any investment benchmark, as a usual investor would do. Injured claimants are effectively forced to invest to meet those needs, whereas typical investors only invest when and if they choose to do so. The two investor 'types' are simply incomparable.

Our enquiries within FOCIS and the professional deputies and investment professionals who work with our members' clients suggests that the primary aim of investment advisers is almost always to devise an investment strategy based on meeting the client's

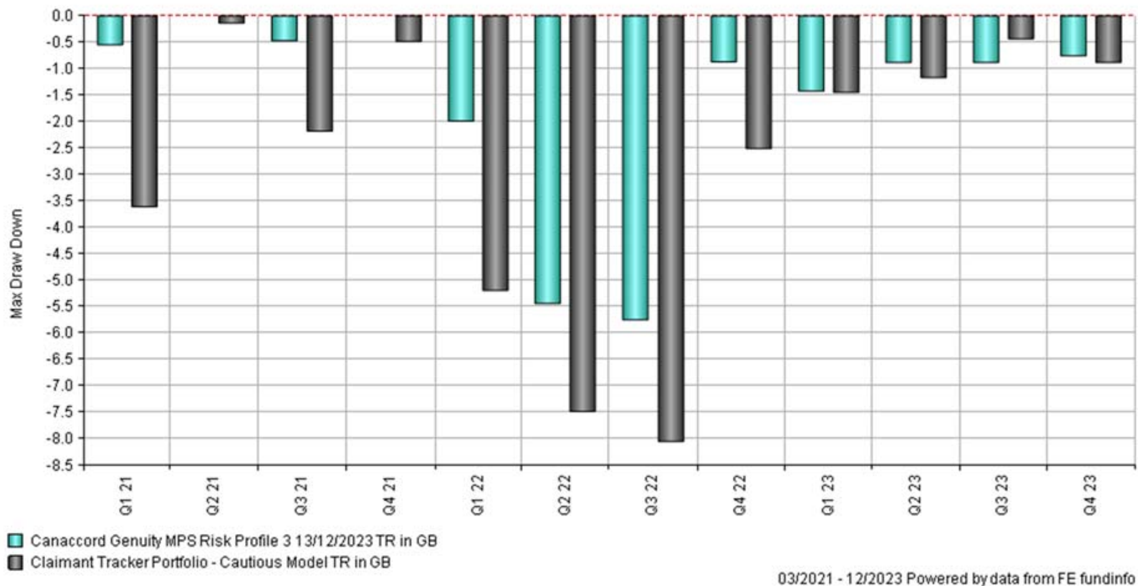
need for their lifetime (including the longevity risk). This requires regular review and reappraisal. Some funds may have an element of 'active' management in so far as a professional may need to review the portfolio bi-annually or annually, at a cost and undertake any necessary re- alignment. The charges revealed by the data gathered in 2018/2019 (see further our answer to question 16 below) 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 following extract from the 2024 response of APIL (assisted by Paul Rosson of Adroit) on this issue. The accompanying graph showing how active management has reduced losses that virtually all claimants will have faced since the PIDR was last set in 2019:-

"*is not necessarily to achieve consistent outperformance as compared against any particular benchmark or strategy; rather it is to provide the claimant with an appropriate and adequate level of downside protection when markets are performing poorly. This has been vividly illustrated by the poor performance (relative to inflation) of the markets since the PIDR was last set in 2019.*

This is illustrated by the chart below. The chart shows the maximum level of drawdown (reduction in portfolio value) each quarter, over the last four years, for a fully passive portfolio[3] versus an actively managed portfolio[4], where the asset allocation of each is broadly in line with the GAD Cautious Model Portfolio:

Figure 11 – Maximum drawdown of active vs. passive portfolio



As can be seen, the passive investment strategy has consistently fallen in value more than the active strategy over this period. The ability of the investment manager in this instance to shelter the portfolio from downside risk is clearly evident and reinforces our view that such a

[3] Comprising 12.5% Vanguard Money Market, 35% iShares UK Gilts All-Stocks, 22.5% iShares Corporate Bond, 22.5% iShares World Equity Index and 7.5% Aviva Target Return.

[4] Represented by Canaccord Genuity MPS Risk Profile 3.

strategy is appropriate for claimants. It should not be forgotten that seriously injured claimants, unlike many other types of investors, do not tend to have any other ways (e.g., wages) to supplement their portfolios. Plus, they need the funds not just to maintain their standard of living but also to meet core disability related needs."

As referred to at Q3 above, in our experience, claimants keep most or all of their compensation in a deposit in a bank, often for several years. This often occurs through one or more factors including: resolving cost issues, finding, buying, and adapting a home to live in and developing trust in the investment advice. These early lost years of investment will inevitably shorten the time-period for investment. This should be factored into the modelling and performance of any hypothetical portfolios to take account of this real-life behaviour of seriously injured claimants.

Additionally, in the last few years of life, a claimant's 'capacity for loss' is insufficient to allow for ongoing investment; acknowledging that in the same way that every long run starts with a short run, every long run also ends with a short run. As a result, claimants are usually advised to begin a disinvestment process as they approach their latter years.

These non-invested periods should be factored into the modelling and performance of any hypothetical portfolios to take account of this real-life behaviour of seriously injured claimants.

Question 11

Do you believe the investment strategy that was assumed to be adopted by the representative claimant in the 2019 Government Actuary's analysis (as described in paragraphs 33 to 36 Table 1 above), remains appropriate? If not, how would you change it for a current view of the representative claimant or alternative representative claimants?

No. We remain of 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. In our members' discussions with IFAs they have repeatedly expressed the view that it would be a breach of their professional responsibilities to a seriously injured client, and their duties under the FCA Code, to recommend such a risk-laden portfolio to such a vulnerable investor. We remind the MoJ of the conclusions of the MOJ's expert panel in their 2015 report that 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 Chris 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".

All of these options are dramatically riskier than the 75% ILGS of Portfolio 2 which was endorsed by the 2015 MOJ panel of experts or even the 50% ILGS weighting in portfolio 3 and 4, which the expert panel considered to be too risky and inconsistent with the full compensation principle.

Victoria Wass, economist, makes a striking analogy between the Claimant's lump sum and that of a pension fund and suggests that in the context of the former, the Lord Chancellor has a role similar to that of a professional trustee of a pension fund. That would require the Lord Chancellor to have regard to the Purple Book published by the Pension Protection Fund and consider asset matching, scenario and sensitivity analysis, particularly in the absence of any equivalent to the employer covenant. That would require a markedly lower risk portfolio than those proposed in this Call for Evidence and so we agree with Victoria Wass that "*The Lord Chancellor and/or the GAD needs to explain why these portfolio selections are so markedly different from those that would be selected by the professional actuaries which advise on pension schemes and from the actuarial guidance provided by tPR*".

Table 7.2 of the Purple Book 2023 shows that the proportion of Defined Benefit assets held in equities has continued to fall to around 18%. However, in practice most of the equities in this aggregate picture are held by open funds and funds which are immature. If you look at Table 7.11, the proportion of equities held against liabilities which are 75-100% pensioners (which is more comparable to a Claimant's portfolio) is about 7%. The duration of these sorts of pensioner liabilities might be on average 15 to 20 years. This is broadly in line with the 2015 MOJ experts Portfolio 2 and markedly less risky that any of the portfolios proposed by GAD in the 2019 Call for Evidence. We cannot see any logical or fair basis for requiring Claimants to take more risk than the trustees of pension funds, many of which have the backing of sponsoring employers, so they are not managing the run-off of the portfolio in complete isolation with no recourse to possible assistance to make up any shortfalls. No insurance company would invest in equities as backing for annuity liabilities and pensions in payment.

We also agree with the response of Professor Wass to this call for evidence that "*The risks to the (pension) fund are also lower than those facing the claimant because the scheme is able to spread risk across members (and life expectancies) and expenditures. The claimant is seeking to meet a single liability, his or her care costs over his/her expected life-time*."

The report of the MOJ expert panel in 2015 discussed above confirmed that any 'notional' portfolio would have to avoid the result that more than a nominal amount of Claimants will be left under-compensated (i.e., no more than 5-10%). However, the GAD analysis in 2017 used two portfolios over 30 years investing £10,000 p.a. This analysis confirmed that there was significant risk/inevitability of the higher proportion of Claimants being under-compensated and the Claimant would be left to revert to the State. As Chris Daykin pointed out in his 2019 submission, "a situation where in 20% or more of possible scenarios the compensation would be expected to run out before the expectations of life could not be regarded as credible implementation of the full compensation principle".

It is crucial that GAD conducts and publish further modelling including analysis of the degree of under-compensation, including full allowance for the probability of claimants

living significantly after average ‘life expectancy’. We contend it is incumbent on them and/or the MOJ to come up with a truly low risk portfolio that would not result in under-compensation for more than 5-10% of Claimants, failing which there will be a significant and unacceptable departure from the 100% compensation principle.

As referred to at Q3 and Q10 above, in our experience, claimants keep most or all of their compensation in a deposit in a bank, often for several years (both at the start of the investment process and at the end). Some of those cash funds may be self-managed in high street bank accounts and hence not accounted for in any data relating to investment management portfolios.

As above we strongly disagree with the GAD assumption that claimants utilise passive versus active investment management. Claimants have been placed into a position of often considerable financial difficulty as a result of the tortfeasors actions. The clients that our members deal with often have life-long disabling injuries, with low prospects of any return to work and needing high-cost care and assistance. They are heavily dependent on this compensation and rarely have any other source of financial income.

They are not, therefore, directly comparable to other categories of investors. As mentioned above even the comparison with recipients of pensions is imperfect. Pensioners mostly have other income, e.g., from state pension and other savings. Claimant investments are only made to ensure that the compensation awarded meets their needs for their lifetime (the duration of which is uncertain).

The main aim of claimants therefore is not to maximise an investment return, but rather to prevent against deterioration or loss which may lead them to requiring state support and care later in their lifetimes and/or unable to purchase appropriate specialist equipment.

The data FOCIS gathered for the 2019 call for evidence (see question 16) demonstrates that virtually all claimants choose to have their investments actively managed, not only to prevent loss but to tailor periodically to meet their needs in any given period of time.

Question 12
To what extent has the way claimants are advised to, and actually, invest been affected by recent changes in economic conditions (e.g., high interest and inflation rates)?

On this question we defer to the response to this call for evidence from Richard Cropper who has significant expertise in advising claimants with life-changing injuries and was a member of the MOJ 2015 expert panel:-

"Since the GAD 2019 report on which the PIDR was based, the average fund in this sector has performed as follows:

One can see that the nominal return is 11.68% over the period shown, but CPI plus 1% inflation is 27.67%. The best and worst performing funds in this sector are included on the following chart, to illustrate the wide range of potential outcome:

In real terms, the average funds have performed as follows:

After 4.75 years, the assumption is that the average claimant will have achieved 0.25% per annum below the CPI plus 1%, that being minus 1.2%, whereas the average fund is currently at minus 12.54%. I have replicated the GAD portfolios used in the 2019 report, assuming that only passive investments would be used. Below is the performance of those funds:

The 'central' portfolio would have realised minus 16.13% in real terms. Holding cash with higher interest rates has been a recent event, rather than having been an option over the past 4.75 years. Taxation would also remove up to 45% of any gross interest return in high value cases. Such rates were not modelled in the GAD report.

Duration remains the most important factor in respect of investment risk.

- *Where the duration is short, the claimant's 'capacity for loss' limits exposure to risk assets, but there is less time for inflation to compound.*

- *Where the duration is long, the claimant's 'capacity for loss' limits allows for greater exposure to risk assets, but there is more time for inflation to compound. I expect that the reality of the recent economic environment fell outside of the range modelled by GAD, but given that the ESG assumptions were not disclosed, this is impossible to know."*

This demonstrates that claimants who have received damages since the PIDR was last set in 2019 will almost inevitably have funds that are now much more less likely to last to meet their anticipated lifetime needs. We contend it is incumbent on GAD to model the likely level of under compensation now faced by 2019 claimants so the lessons to be learnt from that can inform the under compensation adjustment factor for the forthcoming revision of the PIDR.

Question 13

Please provide evidence which demonstrates how the following circumstances and/or characteristics affect claimant investment behaviours in practice: a) Size or length of award (including the effect of any interactions between these two variables); b) Availability of other income, including PPOs; Existence and requirements of financial dependents (e.g. spouse, civil partner, children) and d) Other factors or characteristics you deem relevant.

As we explain in the data section at the start of this response our members did not have and were unable to obtain data of this type.

Question 14

How have historical changes to the PIDR which impact the size of the award, affected how low-risk claimants have been advised to or actually invest their award (please provide evidence and/or reasoning in support of your answer)?

We do not have any data on this point. However, we must stress that the methodology by which compensation is calculated, applying PIDR, is entirely separate from the advice investment professionals subsequently give to those claimants after their claims are settled. Their advice is entirely focussed on how best to manage the residual fund (after deductions for liability risks, costs, accommodation, and other major capital expenditure etc), whether larger or smaller, in ways that will maximise the chances that it will last to meet the claimant's lifetime needs. If the residual fund is too low to meet those needs in full consequent to any of the many factors, including the PIDR historically having been too high, then the claimant is left with the invidious choice of either having to seek State support, go without in relation to some of their needs, reduce the standard of living for them and their family, or try and take more investment risk to plug the gap (a gamble that could make their position even worse).

We note and agree with the response to this call from evidence from the expert economist Victoria Wass that "*All else equal, a PIDR set at +2.5% prior to March 2017 will prompt more risk-based investment than a PIDR set at -0.75% between 2017 and 2019 because the potential for under-compensation is higher. This reverse relationship between the dependent variable (PIDR) and the explanatory variable (claimant investment strategy) is catastrophic for the exercise proposed here*."

As we noted in our answer to Q12, the economy since 2019 has meant that claimants who were subsequently awarded damages on a -0.25% PIDR have residual funds that are now "under water". That position will inevitably be even worse for claimants who were compensated at a PIDR of +2.5% real prior to 2017.

Question 15

To what extent do environmental, social and governance (ESG) considerations shape claimants' investment advice and approaches (please provide evidence to support your view)?

We agree with the submission from APIL, based on the experience of Brooks Macdonald (one of the investment managers that Adroit work with) that ESG considerations are an additional reason why active management is required.

Question 16

Please provide any evidence available on the type and level expenses faced by claimants, assuming a low-risk investment portfolio is adopted. Respondents may wish to follow the grouping at paragraph 39 above and should add any other investment related expenses they believe are relevant. Answers should, where possible, highlight any differences in expenses due to the: a) Size of claimant award; b) Adoption of a passive or active investment approach; and c) Claimant time horizon (and how this changes over time).

In response to the 2018 Call for Evidence and at the request of the MOJ and GAD we sought data via FOCIS members and professional deputies and trustees of personal injury trusts concerning investment charges incurred in relation to investments for their clients.

We collated and submitted a data set, which related to the investment portfolios of 389 clients provided by 9 different firms ranging in size between £67,336 and £7,450,000. It is worth observing that these portfolios relate to a range of clients who received their damages awards over a varying number of years ago and for varying anticipated future loss periods. It is likely that those with lower value residual portfolios received their damages many years ago and vice versa.

The Investment Management charges detailed in the FOCIS data include, where applicable and provided:

- Independent Financial Adviser fees
- Platform Fees
- Fund Manager Fees
- Third Party Fund Charges
- Foreign Stocks
- Broker Commission
- VAT
- Stamp Duty

Each firm's data is then split into the underlying pages on where the discrete data can be viewed.

The average total charge incurred across all 389 cases was 1.58% of funds under management. However, if we restricted the data set 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 worth observing that the average portfolio size of the 169 portfolios is significantly larger than that modelled by the GAD in 2017, which assumed a modest loss of just £10,000 per annum for 30 years. By way of comparison, the 58 portfolios with a known value of over £1.5m have a slightly lower than average investment management charge of 1.53%, but as a counter point it is likely that these portfolios would incur higher levels of capital gains and income tax, so the combined reduction on the investment return is likely to be similar to the portfolios of less than £1.5m.

The FOCIS data clearly demonstrated that an overwhelming majority, 64.3% of 389 portfolios incurred investment charges of 1.5% and above (including 6.4% in excess of 2%). In comparison, only a small minority of Claimants (4.9%) incurred charges below 1%.

We also refer to the response to the 2023 call for evidence from the largest of the FOCIS member firms, Irwin Mitchell. Their Court of Protection team have analysed investment charges over 953 portfolios collected from 22 providers, which showed average fees of 1.51%. This is very similar to the above 2019 FOCIS data set. Collectively this is a compelling body of evidence that actual investment charges faced by claimants are circa 1.5%.

Likewise, FOCIS member firm Digby Brown collated evidence relating to 22 portfolios, arising from Scottish cases, where the funds were received/invested between December 2019 and July 2023. The data was referred to in their submission to the Scottish Government in July 2023, and the data then provided in October. All of the cases involved active management. The average fees in respect of investment advice and management charges were 1.76%. In 20 of the cases, 91% of the cohort, the charges were over 1.6%.

In response to this Call for Evidence we wrote again to professional deputies and trustees, including a few additional firms we had not previously approached. However, the vast majority of them did not have data records of the type sought by the MOJ in questions 9-21 and were unable to answer the questions posed within the specified time frame (which coincided with the end of the tax year). The responses we received related to just 21 cases and so was in our view too small to provide any reliable insights. Those who responded indicated that there had been no material changes to the types or scale of investment management charges since they provided data for the 2018 Call for Evidence. If anything, they thought charges for some claimants had marginally risen since 2019 due to increased transactions resulting from trying to mitigate the market volatility and in an attempt to avoid falling too far behind the high inflation rates seen in the last couple of years. This is consistent with the graph (Figure 4 from Paul Rosson of Adroit) referred to in answer to Q10 above, which showed active management as having assisted in mitigating the losses since 2019.

The experience of our members is that there are a relatively small number of IFAs who specialise in advising seriously injured claimants. Our members caution their clients against seeking advice from the majority of IFAs who lack such expertise and hence do not have a full appreciation of what the claimants lifetime needs are, nor the importance of ensuring that the compensation lasts to meet those needs. The advice is too specialist in nature and too important for claimants to base their decision on who is cheapest.

Question 17

Do the expense groupings, values and approach assumed in the 2019 analysis, as set out in Table 2 above, remain suitable for the representative claimant (or alternative representative claimants)? If not, what do you deem appropriate? Please provide evidence and/or rationale to support your answer.

The approach adopted in the 2019 analysis significantly underestimated the investment charges actually incurred by seriously injured claimants. It remains crucial for the Lord Chancellor to recognise that the vast majority of claimants require actively managed investments to respond to their needs, manage volatility and downside risk. They will incur investment charges ranging between 1.5 and 2%, which cannot be recovered from and do not form part of any compensation.

We refer to our above answer to question 16 and to the FOCIS data, submitted in relation to the 2019 PIDR consultation.

Question 18

What types and rates of taxation typically apply to claimants on their investment returns, and how does the distribution of these vary by size, length of award and remaining claimant time horizon? Please consider a current view of the representative claimant or alternative representative claimants.

Taxation is inherently individual. Two Claimants receiving the same awards will have differing personal, financial and familial backgrounds that affect the amount of tax they pay. We do not have any data on the actual incidence of taxation on past claimants.

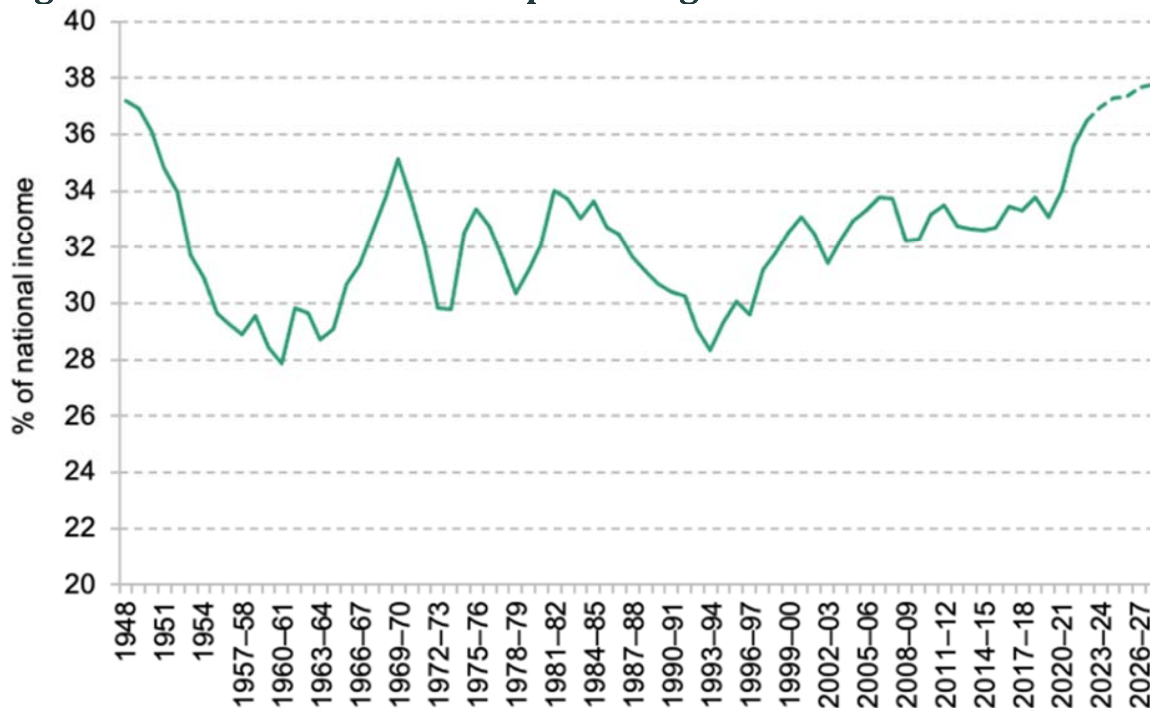
The impact of taxation in the GAD's 2019 report was based on a range of size of awards, but the highest was just £3million, whereas many claims are far in excess of that sum. In the FOCIS/APIL data set 27% of cases had future loss values of in excess of £3m with the highest at over £22m. That percentage increases to 69% when viewed by the loss values rather than case numbers.

We note the example (premised on a single PIDR) given by Chris Daykin in his 2019 Call for Evidence response that "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%". In preparing this response we have again liaised with Chris Daykin who confirmed to us that applying the same simplified methodology (For simplicity he did not allow for tax on capital gains.) as he had in 2019 "I obtain about 0.1% deduction from the discount rate for a lump sum of £1m, 0.6% for £5m, 0.9% for £10m and 1.0% for £20m."

We also refer to the calculations by Paul Rosson of Adroit as set out in APIL's response to this call for evidence. He adopted a more complex methodology incorporating illustrative calculations of the potential impact of both income tax and capital gains tax. He arrived at a 0.22% adjustment to PIDR for tax on a £1m fund rising to 0.66% on a £3m fund. He assumed the fund was invested in line with the GAD cautious portfolio and observed "*if this exercise is repeated using the GAD Central Model Portfolio then the tax drag would increase due to the higher equity content of, and therefore greater overall returns from, the portfolio*".

The PIDR once applied to the calculation of a claimant's losses has ramifications that usually endure for many decades (GADs assumption has been an average of 43 years). Consequently in setting the PIDR the issue of changing tax rates, particularly in times of economic uncertainty, such as post-Covid or where there is a change of government, needs to be considered. As reported by the Institute of Fiscal Studies[5] this has been the biggest tax-raising parliament since records began, pushing UK tax revenues to historically high levels. The IFS refer to the freezing of income tax thresholds as being a notable cause of the overall increased level of taxation as a percentage of income as illustrated by their below graph which is sourced from OBR data:-

Figure 1. UK tax revenues as a percentage of national income



[5] https://ifs.org.uk/articles/will-be-biggest-tax-raising-parliament-record

Note: Calendar years prior to 1955–56. Values denote national account taxes. Dotted line denotes March 2023 forecast.

Source: Office for Budget Responsibility, public finances databank (accessed September 2023).

This graph shows variability but overall, a consistent upward trend in the level of taxation on income.

The allowance amount for Capital Gains Tax has increased steadily over time, from £1,000 for individuals in 1977 through to £5,000 in 1990/91, £7,200 in 2000/01 and £12,300 in 2020/21. However, this was reduced to £6000 in 2023/24 and will be reduced further to £3,000 in 2024/25.

We also agree with the following observations of Victoria Wass in response to this consultation relating to tax:-

"..*future demographic trends (60 years ahead) are likely to require an increase in the tax take, including through the taxation of assets*."

"*Increased rates of taxation are the most likely response to these population pressures. This is already evident in the freezing of allowances in recent years and the recent reviews into Capital Gains Tax. Given that population ageing is certain, and its effects almost certain, provision for future increases in taxation ought to be factored into the PIDR."*

Changes of this type during the future loss period will patently impact upon the adequacy of the compensation received by claimants.

Question 19

How might your answer to Question 18 change if a claimant had other annual taxable income of at least an amount to meet the threshold for personal income tax, or other reasonable level of taxable income? Please support this with any evidence or data on what other taxable income claimants typically have.

Clearly the incidence of income tax would increase the more personal income the claimant has. The same would apply for capital gains if the claimant had gains from other assets unrelated to the investment of damages. Claimants with future loss awards at the lower end of the damages range are far more likely to have earnings income, either because of a shorter period of loss of future earnings or a significant residual earning capacity. This counterbalances the lower assumed rates of taxation purely from investment of their damages funds. Consequently, this ought to be factored into the modelling of likely tax for such claimants.

Question 20

Do you consider that the 2019 deduction for taxation of between 0.0% and 0.5% per annum (based on the initial award value) remains suitable in regard to the representative claimant or alternative representative claimants (please provide evidence and/or reasoning to support your position)?

No, the tiny tax adjustment when the PIDR was set in 2019 failed to fully consider the extent and impact of tax on claims for serious injuries with damages in excess of £3 million. It appears to have been based on examples of future loss awards of £100,000,

£1m and £3m. We refer to the FOCIS/APIL data in answer to question 1 above. The average damages for the cases in the FOCIS data set was £2,825,889 and 27 % of cases (69% by value) had damages of in excess of £3 million. 6% of those cases had damages well in excess of £10 million, which accounted for 30% of the total future losses.

Consequently, we conclude that the current (single) PIDR ought to be reduced by at least 0.75% to allow for taxation. We suspect that the tax adjustment on any dual or multiple rate ought to be at or above that level. For short-term investments that will be heavily weighted in tax it is likely the interest earned will be immediately taxable as income, but this may be counter balanced by lower investment management charges.

Question 21

In 2019, a total deduction for tax and investment management expenses over the term of the award of 0.75 per cent was applied (derived from a range of 0% - 0.5% based on the initial award value for tax and 0.6%-1.2% for investment management expenses. Do you think this total deduction and how its elements are combined remain appropriate (please provide evidence and /or reasoning to support your answer)?

Whilst investment charges may reduce slightly as a percentage of the award where the investment sum is larger, taxation typically increases for the higher value awards. The composite deduction for these two issues should reflect claimant investor experience and allow 1.5%-2% for investment expenses on an active basis and a further 0.75% for taxation; as a composite for these two factors we propose a reduction of 2.5%.

For the associated reasoning we refer to our answers to Q10-20 above.

Question 22

How much additional complexity or difficulty would implementing a dual rate by duration approach add to the litigation process (please provide evidence to quantify this either by time to settlement, additional legal costs and/or any other relevant factors)?

FOCIS considers that implementing a dual/multiple rate system by duration of loss will add significant complexity and cost. It also carries enhanced risk of unintended consequences which might well further deviate from the full compensation principle[6]. It would be risky to accept the uncertainty and instability that would inevitably be precipitated by any move to dual rate by duration without clear and compelling evidence for the net benefit of any proposed change.

In preparation of our response to the 2023 Call for Evidence our Chair[7] spoke with a committee from the Ontario Trial Lawyers Association (OTLA)[8]. They informed us that:

---

[6] FOCIS takes the view that the circa 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.

[7] Julian Chamberlayne, who is also the Risk and Funding Partner and Head of Aviation and International Injuries at Stewarts Law LLP. He has for many years been a commentator on the PIDR, notably through a series of articles in the New Law Journal.

[8] 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).

- It is standard practice for both parties to instruct an accountant or economists to calculate the multipliers and the future loss claims when preparing cases for trial. The lawyers on the call expressed the view that there was too much risk for them to attempt these calculations themselves as that could result in error and professional negligence claims. However, to explore settlement in the early stages of the case they may attempt their own rough and ready calculations.
- Annual reviews and frequent changes to the short-term rate cause delays to settlement and notably to the preparation of claims. The expert economist Dr Eli Katz made the point that if he was working as an expert on a case, he would not be able to calculate the final schedule of loss until after the annual rate announcement in August (of each year). During the life cycle of a long running case, he may have to recalculate the multipliers several times. This adds cost and causes delay.

In preparation of our response to this call for evidence our Chair liaised again with the committee from OTLA for confirmed that in both 2023 and 2024 the short-term rate had changed (in 0.5% increments). They also confirmed that the proposed changes to their approach to PIDR was likely now to be wrapped into a wider review of civil procedure rules in 2025.

A Stepped Rate which applies a rate depending on the overall duration of the loss would likely lead to unfairness for claimants with losses falling just beyond the switching point. That would likely encourage attempts at manipulation by claimants and defendants to frame losses which border the stepping point in the most favourable way (i.e., so that the duration claimed falls within a higher or lower rate). This artificial treatment of a claimant's identified losses would be an unfortunate departure from the actuarial approach and would lead to additional disputes (and therefore costs) between the parties. It is also unclear how the Stepped Rate methodology would compensate periodic losses, such as the regular purchase of equipment every say 3 years for the rest of a claimant's life.

Where longer losses are split into smaller phases with varying levels of loss (e.g., where the level of the Claimant's lost earnings or care needs fluctuate) it is unclear whether the short-term rates could be applied to the early phases prior to the stepping point, with the long-term rates applicable after. Clearly 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 make up a claim, attempting a complete rewrite of the current methodology is likely to lead to unintended consequences and additional litigation to clear up any ambiguity.

A Switched rate moderates the worst impact of a cliff-edge drop in the discount rate immediately after the switching point. However, this methodology adds in additional complexity with multiple rates needing to be split into smaller phases prior to, at and beyond the switching point.

The Blended Rate would also avoid the cliff-edge in a way that might be fairer than a Switched Rate, but we anticipate 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 render it impossible to produce tables with the blending period built in. A manual calculation would be extremely complex and would necessitate the involvement of an expert.

A shift to dual, let alone multiple rates by duration would therefore significantly increase complexity and may well require expert input from an actuary and/or forensic accountant, as in Ontario.

To give a sense of scale, a schedule of loss for a claimant with a spinal cord injury will often have ten or more heads of future loss including a vast array of equipment and assistive technology to be purchased at varying intervals in the future. In such a claim, the basic calculation of future losses under the current single PIDR involves the calculation of around 300 multipliers. Even adding one more step to the calculation of each item of future loss to cater for a dual rate by duration will add significant levels of complexity and cost to the production of the schedule.

It is unclear 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 even if they could whether the use of those tables would be sufficiently straight forward for use by most solicitors, barristers, and judges. Such tables would also need to cater for claims that only commence after a period of time and those which are periodic (e.g., a new wheelchair every 5 years).

As the short-term rate is likely to need to be changed annually, there is likely to be an increase in delays to both the pleading and negotiation of cases, pending any anticipated change that is likely to be beneficial to one or other party. In relation to advising on Part 36 offers, it will also add uncertainty that is likely to result in contested hearings and the risk of harsh consequences. Consideration should be given to publishing guidance to the judiciary that it would be unjust to impose Part 36 consequences that primarily resulted from any change to a dual/multiple rate or to cause the trigger date for the effect of any such earlier Part 36 offers to be postponed to the end of any transitional period.

There would also be additional cost to both parties of recalculating the future loss claims annually as many claims for serious injuries last for in excess of 3 years and a significant minority continue to 5 years or more.

The MoJ's 2023 Call for Evidence referred to injury litigation already being overly complex, although we would say to a large extent necessarily so when it comes to trying to cater for the many needs and variables in achieving a fair outcome for catastrophic injury claims. But what is clear is that a shift to dual, let alone multiple rates by duration would significantly increase complexity and would in many cases require expert input from an actuary and/or forensic accountant.

This significant degree of complexity, cost and uncertainty to all cases would not be warranted to try and address the relatively modest number of short life expectancy cases. We refer to the FOCIS/APIL data in answer to question 1 above which showed that only 7% of our members' serious injury cases involved a future loss period of 10 years or less. For that small cohort we consider PPOs to be a much better solution, so governmental efforts ought to focus on improving the availability of PPOs (see our answer to question 30 below).

Nor would the introduction of such a rate would address the inflationary issue which it is attempting to address. It would lead to delay to settlement and a need for frequent recalculation of the short-term rate as has been a necessary feature of the short-term rate in Ontario (including in 2023 and again in 2024). The high and volatile period of inflation since 2017 amply demonstrates why any short-term rate would have to be subject to annual reviews to avoid unfairness.   A move to change to a dual rate is likely to be unpredictable and may involve over optimistic assumptions about future low-risk investment returns beyond a switching point which could significantly worsen the position for the claimant with an increased risk that they will not recover 100% compensation, as intended.

Question 23

Should a dual rate mechanism be implemented, different asset returns would be assumed for the short and long-term. Under this mechanism, what changes to the following characteristics of the representative claimant (or alternative representative claimants) would apply: a) Investment period; b) Damage inflation; c) Investment portfolio; and d) Tax and Expenses assumptions.

On one level our answer to this question is "none". The PIDR is simply used by lawyers and judges to calculate future losses. There are numerous other factors which influence the overall damages agreed by settlement or awarded by the court. 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 those damages are received by the claimant there is little if any consideration by them, or any IFA or professional trustee of deputy that is working with them of what discount rate or multiplier was applied to the future losses.

It is important to remember that the assumptions adopted in setting the discount rate do not address all of the risks the claimant is exposed to nor are those assumptions likely to be accurate for each individual. For example, no adjustment is made in the PIDR to the mortality risk that claimant's face, which is bound to limit spending during life, just in case they live longer than was expected.

For an IFA to allow their advice to be coloured by PIDR issues would probably 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)[9]
- Code of Business Source Book (COBS) 9.2 – assessing suitability[10]

Rather their focus is on meeting the claimant's broader needs over their possible lifetime (factoring in the likelihood that they may live longer than their life expectancy). The methodology for calculating the discount rate is at best a proxy for what a notional claimant might do if they received compensation without any deductions for litigation risk and they lived in a bubble of their claim (with no other financial, health or familial considerations). Whether we stick with a single PIDR or switch to a dual or multiple PIDR it is unlikely to directly change claimant investment behaviour. The only real change will be to the proportion of claimants whose compensation actually amounts to full compensation, by actually lasting to meet their lifetime claim related needs. We do not share the optimism of 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[11], would end up with less than full compensation even if you artificially ignore the longevity risk they face.

To match 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. As mentioned in our response to question 11, the expert IFA,

---

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

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

[11] 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.

Richard Cropper[12], has made the observation that *"every long run ends with a short run"*. His persuasive point is that just as it is appropriate to assume a less risk-based investment portfolio for shorter periods the same applies towards the end of a longer period. Seriously injured claimants in their later years 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 more than 50/50 chance they will outlive their life expectancy.

The MOJ has previously referred to 5-15 years being the potential range. Anything less than ten years strikes us as dangerously short when you consider how long the impact of some recessionary economic cycles can last. It is notable that in the Government Actuary's 2019 report he included a chart to show how simulated returns on the central portfolio vary over time and commented 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.

However, in our view it is not possible to predict future real investment returns with any reliable accuracy.

Therefore, it is not possible to produce a reasonable test to produce a minimum or maximum switch-over point that has any credibility.

Funds held for short-term needs are far more likely to be heavily weighted to cash with returns varying frequently to reflect the immediate economic cycle including inflation.

The extent to which long-term rates could be set at a higher rate is heavily dependent on the definition of long-term. As above, 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. However, many economists and actuaries are deeply sceptical 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[13]. We observe that this concern is the primary reason for the recommendation for a return to a single PIDR in Ontario.

We agree with the response to the 2023 Call for Evidence from the expert actuary Chris Daykin[14] when he commented 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.*"

Even if the ESG produces more favourable predictions for longer-term claims it remains unclear that should result in a materially higher discount rate, for the biggest of those claims which inevitably have a large care component. If proper allowance is made for the higher earnings inflation and for the investment strategies (and related charges and tax)

---

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

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

[14] Member of the Ogden Working Party and former Head of GAD.

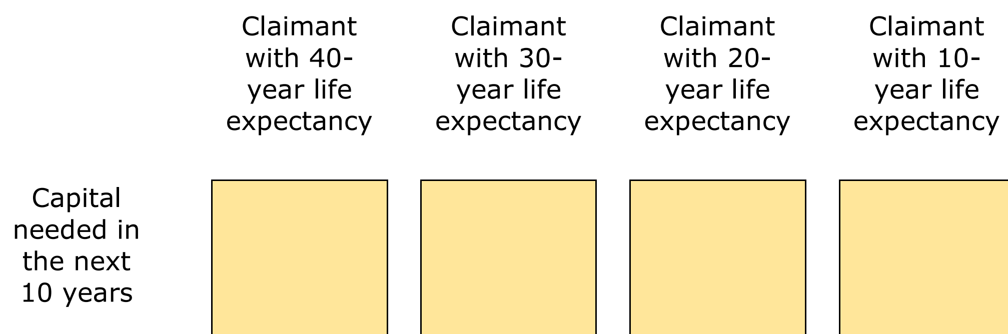
that are needed to ensure that these most seriously injured claimants are not exposed to sequencing risk, then the long-term rate may be lower than expected. Due to the boom-and-bust cycle of the economy the uncertainty caused by this lack of stability means that if a Claimant is in need of funds when the market is low, it will adversely affect his remaining award to his/her detriment and could therefore leave them reliant on the state when the money runs out.

It is crucial that further modelling of the alternative approaches to setting the PIDR both acknowledges the importance of, and factors in, the impact of 'sequencing risk', i.e., the impact of having bad years at the start, on the appropriateness of the assumption that claimants will be advised to invest all of their capital upon receipt. Phasing in and out of investments over time helps reduce this risk but taking this real investment behaviour into account in the discount rate is very difficult. Due to the boom-and-bust cycle of the economy the uncertainty caused by this lack of stability means that if a Claimant is in need of funds when the market is low, it will adversely affect his remaining award to his/her detriment and could therefore leave them reliant on the state when the money runs out. This volatility, as outlined in the expert report prepared for the MOJ[15] in 2015, 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…*"

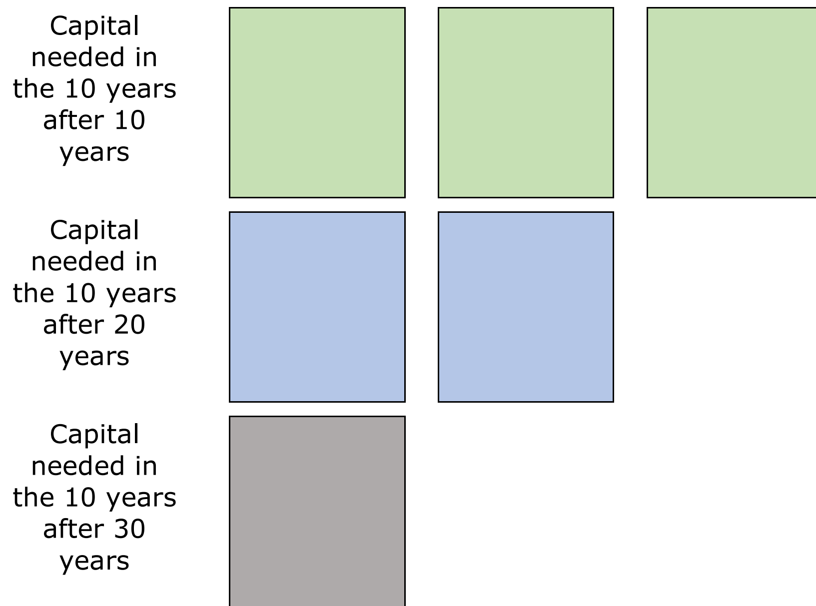
Furthermore, it is important to note that even if the initial duration is 15 years, after five years, the remaining capital then has an investment horizon of less than ten years; meaning that at that point, disinvestment would have to commence. In other words, the one-third that is invested at the outset, cannot remain appropriately invested for 10 years.

Therefore, from a financial advice perspective there is not only a switch-over duration from short-term rates to long-term rates, but there is also a switch-back from long-term rates to short-term rates over time.

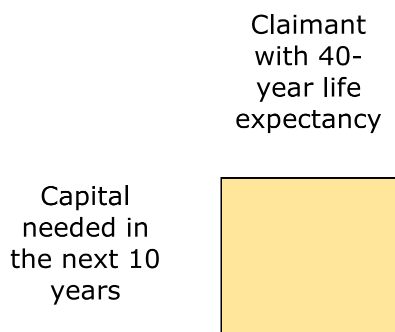
Personal Financial Planning Ltd have prepared the following to illustrate this point.



[15] *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.



After another 10 years, which is now within 10 years of the life expectancy of claimants originally projected as having a 40-year life expectancy, all the remaining capital is held on 'no risk' (yellow) basis.



One can see from the above that the only investment colour the claimant holds through every decade is the 'yellow', no risk, investment. The 'grey' investments are only held for 25% of the claimant's life expectancy.

The above illustrates that if the discount rate is to better-reflect the investment journey over time, there would need to be multiple switchovers that would simply make the resulting calculations too complex and unworkable in practice.

This would be even more complex with regard to deferred needs, or replacement of capital needs (which may occur every 3, 5 or 10 years).

If a dual rate by duration is introduced, the short-term rate will apply not just to short life expectancy but also to the initial periods of cases where there is a far longer life expectancy. The changes required will be heavily dependent on how short the short-term rate period is and when the switching point arises.

In Ontario, legislation was passed in 1999 for a dual rate with a 15-year switching point. However, their experience is hardly supportive of England following their lead 25 years later. In 2020 and again in 2021, a very experienced sub-committee of their Civil Rules

committee submitted detailed reports 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*". They were hesitant to set a long-term discount rate based on the notion that real interest rates in the future will be what they were in the past. The question of what inflation will look like in the future only added to the difficulty of coming up with an appropriate discount rate.

They insightfully commentated that *"Inevitably, some individual plaintiffs would be overcompensated and some undercompensated, but our objective was to maximize the chances of full compensation while removing any inherent mechanisms that would produce overcompensation."*

In our view the concept of dual or multiple rates that actually reflect the very wide variance in claimants' investment journeys over time is unworkable in practice.

Question 24

Should a discount rate by heads of loss be implemented, different damage inflation assumptions would be assumed for different heads of loss. Under this mechanism, what changes to the following characteristics of the representative claimant (or alternative representative claimants) would apply: a) Investment period (under the single rate methodology, 43 years was previously assumed); b) Investment portfolio (under the single rate methodology, a 57.5% allocation to matching assets and 42.5% allocation to growth assets was previously assumed. Please refer to Table 1 for full details); and c) Tax and Expenses assumptions (under the single rate methodology, a range of 0%-0.5% based on the initial award value for the former and 0.6%-1.2% for the latter, with a total modelled assumption of 0.75% was previously assumed).

We are not aware of any material changes to characteristics of the representative claimant based on the above assumptions a-c.

The investment period would usually be the life expectancy with the one notable exception being for loss of earnings claim which would usually be until retirement age.

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. As above we are doubtful it would have a material impact on investor behaviour, but it would 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.

It is unlikely that the investment portfolio or taxation assumptions would differ from those required under a single PIDR to ensure that the compensation provides for their future needs.

Question 25

How much additional complexity or difficulty would this approach add to the litigation process, and would this be greater / lesser / about the same as if a dual rate by duration were implemented? Please provide evidence to quantify this either by time to settlement, additional legal costs and/or any other relevant factors.

As has been repeatedly accepted by the courts, 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. Also, 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. However, the remaining major heads of loss differ significantly from the typical CPI basket of goods and services.

Future loss of earnings is a head of loss which demonstrably rises in line with earnings inflation. It would be surprising if any reputable expert economist would argue otherwise and defendant's experts in the common law jurisdiction cases in which this point has featured have not even attempted such an argument. It was accepted by the Privy Council in Helmot v Simon[16] and by the Courts of Appeal in Bermuda (Thomson v Colonial Insurance)[17] and Ireland (Russell v HSE)[18]. Any argument to the contrary would be departing from full compensation and would relegate seriously injured claimants to a dwindling standard of living when compared with their but for position. 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.

A multiple rate approach per head of loss is unlikely to significantly increase the complexity and costs associated with drafting a schedule of loss / counter schedule and subsequent negotiations because the parties already need to consider whether a PPO would be more appropriate for each head of loss, which engages similar concepts (e.g., the appropriate indexation to address inflation). If and when differential PIDRs by head of loss were prescribed it would be relatively straight forward to select the appropriate multiplier from the Ogden tables. Unlike the position for multiple rates by duration (aside from the small cohort of short life expectancy cases), each item of claim would only require one multiplier.

The head of loss of disability aids and equipment is predominantly related to purchasing goods. However, 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. This means that producers will need to recoup significant research and product development costs across a relatively small number of customers A key example of this is the comparative cost of a prosthetic knee. The cost has more than doubled (131%) in 25 years, whilst CPI inflation has increased by 78%. Likewise, the associated fees of the treating prosthetist have also risen at CPI + 1%. The position for a lower limb amputee Claimant who was compensated in 1998 is even starker than that, as most of them will have subsequently been prescribed more recent models of prosthetic and now incur costs that are 200-500% more than that assumed by the calculation of their future loss claim[19]. A further major head of claim for seriously

---

[16] Helmot v Simon [2012] UKPC 5

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

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

[19] Figures provided by Richard Nieveen, expert prosthetist. See Stewarts' submission for further details.

injured claimants is housing costs. We are neutral on this point because most funds are quickly spent on purchasing and adapting a property to suit the claimants' needs, and therefore there is no significant balance left to invest. The Supreme Court recently reconsidered the law relating to compensating future accommodation expenses in Swift v Carpenter and the court 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. The PIDR therefore has no direct bearing on this head of loss and as such it is unnecessary to consider a separate discount rate for its calculation.

The cost of a professional deputy is a significant head of loss for claimants who lack mental capacity. This is an earnings-related cost as it mainly relates to the cost of time spent by that professional (in most cases, a solicitor). Consequently, in cases whether periodical payments terms are agreed for this head of loss they are usually indexed to the appropriate category of ASHE or RPI[20].

One point of potential complexity which might cause disputes between the parties could relate to what items can properly be included in a head of loss to which an earnings inflationary PIDR and hence multiplier is applied. There could for instance be arguments about what PIDR and multiplier to apply to a case manager's travel expenses which commonly features as a very small part of the care and case management head of loss.

Question 26

Should a discount rate by heads of loss be implemented, do you believe that the concept of modelling one representative claimant remains appropriate or is modelling a representative claimant for each head of loss a better approach?

We are content that modelling should be based on a single representative claimant as to attempt otherwise would be to attempt an unachievable level of precision.

Question 27

Please provide any additional evidence you or your organisation may have on the practical implementation of such a heads of loss rate model.

As we refer to our answer to question 25, some of our member firms have first-hand experience of calculating claims involving a multiple rate approach by head of loss for claims brought in a number of differing jurisdictions.

Question 28 Please provide evidence and/or data to support what heads of loss should be separately identified in such a model.

We refer to our response to question 25 above. If there are to be separate assessments based on different heads of loss, in our view the most appropriate head of loss for its own rate would be care and case management. The claims for loss of earnings, medical treatment/therapies and deputyship costs are also predominantly subject to earnings inflation, so would either need to be separately modelled or their weightings (see our answer to Q2 above) factored into the inflationary factor for all other heads of loss.

---

[20] 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.

Question 29

How readily available are PPOs to claimants in practice and how does this vary by groups of claimants (additional data on groups that are less likely to have a PPO made readily available would be helpful)?

Paragraph Part 2, paragraph 4(3)(a) of the Civil Liability Act 2018, prescribes that the assumption when setting the PIDR rate is that the damages will be payable as a lump sum rather than an order for periodical payments. Accordingly, the important issue of availability of PPO's cannot be allowed to influence the PIDR rate. However, as set out in our response to the 2019 Call for Evidence we urge the MOJ to take separate steps to make PPOs more accessible to claimants with serious injuries.

An increased utilisation of PPOs by insurers would, to an extent, reduce uncertainty for Claimants and reduce the impact of the risks inherent in managing and investing a lump sum. The PPOs would be agreed for the Claimant's life and be linked to the appropriate index to address real earnings growth.

However, it should be appreciated that PPOs are not a complete solution, as even in the small number of cases in which they are made that is typical only in relation to future care, less frequently future earnings and on very rare occasions some but not all other heads of future loss. Consequently, even in a case with a PPO, many heads of future loss will still be compensated for with a lump sum, applying the discount rate. In such cases the lump sum will be smaller than it would otherwise be and hence a greater proportion will be utilised to meet the accommodation needs and prove a cash contingency fund, reducing the scope for generating investment returns.

Our experience is that PPOs are not widely offered by the insurance industry. A number of insurers are reluctant to make offers, because they know that carrying the investment, earnings inflation and longevity risks is far more expensive than paying a lump sum at the current -0.25% discount rate, let alone the pre-2017 rate of 2.5%. Insurers are businesses with duties to their shareholders, so naturally they negotiate aiming for the cheaper option of a lump sum. The cost to insurers and re-insurers in meeting their PPO liabilities illustrates the real market cost of taking those risks. Insurers are clearly much better placed to take and meet those risks than are individual seriously injured Claimants.

An increased utilisation of PPOs by insurers would, to an extent, reduce uncertainty for Claimants and reduce the impact of the risks inherent in managing and investing a lump sum. The PPs would be agreed for the Claimant's life and be linked to the appropriate index to address real earnings growth.

The NHSLA and the MIB are notable exceptions to the above point in that they have from the outset endorsed the PPO option and made PPO related offers in most claims involving serious lifetime losses. That in part is due to the funding of those organisations. However, the same cannot be said about the majority of insurers who have adopted policies of either not offering periodical payments at all, or only doing so when faced with the near inevitability of such an Order being made through the determination of the Claimant and their legal team and a very credible threat of the case being taken to Court if the insurer would not make an adequate periodical payment offer. Notwithstanding the threat of a Court hearing, it is still commonplace for some insurers to attend Joint Settlement Meetings ('JSMs') or mediations even close to trial and refuse to make any periodical payment offers at all.

It is commonplace for insurers to 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. 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 at Court. Such lump sum Part 36 offers are usually a complete 'take it or leave it' package. This means the Claimant cannot choose to accept the underlying sub-components and can only go to Court on the form of award. However, the insurer in that scenario would then put the Claimant at risk of litigating all or most issues in the hope of bettering the Part 36 offer. This position exposes the Claimant to the full risks of what could be a 1, 2 or even 3-week High Court trial. If the Claimant did not then better the offer the insurers had previously made during said trial, they may be faced with a costs order against them running into 6 figures. To address this problem, Part 36 of the Civil Procedure Rules should be amended to require any offer to settle in cases involving significant injuries and future losses to be put on PPO terms as well.

According to the Institute of Actuaries' latest research[21] on PPOs, the uptake of PPOs in personal injury claims is very low despite the change to the discount rate in 2019. The research indicated that against all cases valued over £1m[22], the weighted average PPO propensity for 2009-2020 is 24%, but has been just 5-12% in the years 2017-2020. 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 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 above Institute of Actuaries data mirrors the experience of our members in showing that most insurers still see lump sum settlement as their preferred (cheaper) option, undermining their claims that either the -0.75% (2017-2019) or -0.25% (2019 onwards) discount rates are unfair for them. In fact, the IoA data shows the prevalence of PPOs declining during the era of negative discount rates. Unless and until insurers proactively seek to settle the majority of cases on a PPO basis it is safe to assume that the current discount rate is too high.

We acknowledge that there are a small number of insurers who adopt a more even-handed approach when dealing with seriously injured Claimants and who do offer periodical payments from the outset, but they are unfortunately in the minority. In addition, more insurers are prepared to offer PPOs for cases involving protected parties with significant care needs, unless there is a significant litigation risk/contributory negligence discount, because they know the Court is far less likely to approve a settlement based on a lump sum.

Data from a YouGov poll commissioned by APIL suggests over 50% of respondents would prefer to receive some or all of their compensation in the form of a PPO should they be seriously injured as a result of someone else's actions. The poll also found that just 35% would prefer to receive compensation in a lump sum payment. APIL also conducted a survey of its members in 2020, which revealed that:

a. 88% said that, in their experience, insurers always or very frequently sought to undertake negotiations on a lump-sum only basis.
b. 82% said that insurers, in their experience, rarely or never proactively offer a PPO.

[21] Institute of Actuaries' 2021 report

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

c. In stark contrast 79% found it easy to obtain a PPO from NHS Resolution.

We believe that more should be done to increase uptake of PPOs. There is a strong claimant appetite for PPOs, as evidenced by the polling mentioned above and the more extensive use of PPOs in cases involving NHSR[23] (and MIB).

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.

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 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) pro-active case management by the courts of the PPO issue at a much earlier stage in proceedings (e.g., CMCs).

The above points were acknowledged by the Justice Select Committee in 2017 during its scrutiny of the Bill for CLA 2018. They expressed the hope the Civil Procedure Rule Committee would look at the Pt 36 point made by the Forum of Complex Injuries Solicitors, in its submission to the inquiry, that insurers should not be allowed to put financial pressure to settle on seriously injured claimants without offering them periodical payment order (PPO) terms. Over 6 years later this has not yet happened.

By contrast, this Call for Evidence worryingly suggests consideration of a higher differential PIDR for cases involving a PPO. Such a move would discourage their use without any associated clear-cut policy benefit. We are unaware of any other jurisdiction in the world that has adopted such an approach.

In addition, it would also add further complexity. When drafting the schedule of loss and counter schedules, the parties would not know whether the court would award a PPO. The parties would have to produce variant calculations applying the standard and PPO variant PIDR for 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 case for the government to make policy decisions which encourage the use of PPOs is compelling, whereas the policy reasons and evidence for a dual rate are, at best, mixed. Any change to the PIDR that makes PPOs less attractive would be a serious backward step.

[23] 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.

Question 30

What factors influence the take up of lump sums versus PPOs. This could include the preferences and behaviours of one or more of the parties involved in the settlement process and associated litigation strategies?

Please see our answer to question 29 above, most insurers are less likely to offer to settle claims on a PPO basis than the NHS and MIB.

There are also a significant proportion of claims in which PPOs are not even an option because the defendant either :-

a) Has no insurance (non-motor claims)

b) has purchased insurance with insufficient indemnity limits;

c) is an overseas insurer who does not fall within FSCS protection.

We urge the MoJ to take action to address the above scenarios to ensure claimants with serious injuries are fully compensated. For employers' liability and public liability claims one major progressive step would be to adopt a similar approach to motor insurance and require unlimited insurance and set up a fund of last resort, similar to the MIB.

Question 31
Please provide any evidence of how the setting of the discount rate may affect persons with protected characteristics.

Most claimants who have a significant claim for future losses have suffered injuries with long-term disabling effects. Consequently they have a protected characteristic under the Equality Act and must be treated as 'vulnerable' under FCA guidance.

We agree with an adopt the response of Professor Wass to this question that the change to in the law requiring claimants to invest in risk assets "*came within the remit of the Public Sector Equality Duty (2011) (PSED) because claimants are predominantly disabled people. The broad purpose of the PSED is to integrate consideration of equality and good relations into the day-today business of public authorities….. The change is potentially a breach of the PSED which requires that organisations including government departments: advance equality of opportunity between people who share a protected characteristic and those who do not; take steps to meet the needs of people from protected groups where these are different from the needs of other people*."

We also agree with Professor Wass that "*There is also the unequal treatment of claimants who are suing insurers (see question 30) where they have reduced access to a PPO which would allow them to avoid the investment risk and mortality risk inherent in the current determination of the PIDR*."

A significant proportion of claimants with claims for seriously disabling injuries are children or adults who lack capacity to manage their own financial affairs, thus requiring more extensive financial advice and assistance with investing their compensation. The Lord Chancellor's acceptance of the GA recommendation of making an allowance for investment management charges at the bottom of the range identified, and assuming a passive management approach, fails to reflect the prevalence of IFA advice fees and active management of the funds of seriously disabled Claimants as shown by the FOCIS 2019 data set of investment charges. Consequently, it could be regarded as directly discriminatory against a class with a protected characteristic.

We reiterate a concern from our 2019 response that Claimants are being treated less favourably than similarly placed pensioners in defined benefit or defined contribution schemes, whose exposure to investment risk would be less than in the GAD central portfolio through a combination of regulation and professional advice.

In 2017, as part of the scrutiny of the bill for the CLA 2018, the Justice Select Committee was critical of the Government's impact assessment and made the important observation that: `*We do not think there is sufficient evidence for the Government conclusion that its proposed legislation is a proportionate means of achieving a legitimate aim, so as to justify possible disadvantages to those with protected characteristics. Indeed, without adequate evidence about the potential characteristics of claimants, or the cost to claimants, it is hard to see how the Government can draw any sound conclusion about proportionality*`. That observation remains valid today.

We would encourage the MoJ to carry out an impact assessment on the model portfolio to ensure that it does not result in under compensation for a significant minority, who in large part are disabled and have no other income to rely on and could therefore be disproportionately affected by a change in the discount rate. In doing so the MoJ or GAD should publish the methodology and all assumptions applied in the ESG modelling to ensure transparency and allow expert scrutiny both by the MOJ's expert panel and externally. Most ESGs are developed for very different purposes and some experts regard them as inappropriate for the claimant investment portfolio requirements.

Institutional paying parties would be able to spread the economic impact of these changes to them across many claims and many years, but in stark contrast each individual claimant only has one claim and no opportunity to spread the risks in that way.

The 2019 adjustment of -0.5% to mildly moderate the risk of under compensation was never enough to properly represent full compensation for claimants with disabling injuries. Events since then have already proved its inadequacy. It also ignores the longevity risks that claimants' face.

The difficulty in properly accounting for the uncertainties outside of the claimants control, such as mortality, changes to interest rates and taxation is aptly captured in an article published in the Variance journal:

"In a more recent study, Chan, Chan and Li (2012) investigate how the uncertainty surrounding mortality and interest rate assumptions affects the precision of actuarial multipliers, using stochastic mortality and interest rate models for the UK. They draw attention to the lack of any information in the Ogden tables about the underlying uncertainty. They conclude that if both mortality and interest rate risks are taken into account, then the confidence interval for a multiplier can be as wide as 31% of its best estimate, indicating a significant level of uncertainty involved in the actuarial approach to calculating damages"[24].

FOCIS therefore propose that it be increased to a reduction of at least 1%.

[24] **Sahin, Sule and Gary Venter (2023), The Actuary Takes the Stand: Compensation for Personal Injury | Published in Variance Journal**

FOCIS' Response to the Ministry of Justice Call for Evidence on the Discount Rate 2024

APPENDIX 1:

FOCIS data in relation to investment charges

FOCIS Data on Investment Management Charges
Discount Rate - MOJ Call for Evidence

Total Investment Management Charges (average and range)

Firm	Average % charges			Lowest % Charge	Highest % Charge	Number of portfolios
	<£1.5m	≥£1.5m	Total			
Firm 1	DNP[1]	DNP	1.38%	0.85%	1.75%	131
Firm 2	DNP	DNP	1.52%	1.36%	1.88%	31
Firm 3	1.81%	1.53%	1.72%	1.30%	1.99%	15
Firm 4	1.78%	1.64%	1.77%	1.31%	2.02%	29
Firm 5	1.70%	1.58%	1.65%	1.09%	1.95%	11
Firm 6	1.66%	1.68%	1.66%	1.37%	2.02%	14
Firm 7	1.78%	1.56%	1.70%	1.03%	2.03%	19
Firm 8	1.77%	1.43%	1.68%	0.59%	2.57%	129
Firm 9	1.93%	2.19%	1.96%	1.25%	3.32%	10
Simple Average/Total	**1.78%**	**1.66%**	**1.67%**	**0.59%**	**3.32%**	**389**
Weighted Average	**1.77%**	**1.53%**	**1.58%**			

[1]DNP = Data Not Provided

Number of portfolios by investment management charge range (all portfolios)

Firm	Very low	Low	Mid	High	Total
	<1%	≥1.0% - <1.50%	≥1.5% - <2.00%	≥2%	
Firm 1	13	56	62	0	131
Firm 2	0	22	9	0	31
Firm 3	0	2	13	0	15
Firm 4	0	3	25	1	29
Firm 5	0	3	8	0	11
Firm 6	0	3	10	1	14
Firm 7	0	3	14	2	19
Firm 8	6	25	81	17	129
Firm 9	0	3	3	4	10
Total	**19**	**120**	**225**	**25**	**389**
As a %	**4.9%**	**30.8%**	**57.8%**	**6.4%**	**100.0%**

Number of portfolios by portfolio size

Firm	<£1.5m	≥£1.5m	DNP[1]	Total
Firm 1	0	0	131	131
Firm 2	0	0	31	31
Firm 3	10	5	0	15
Firm 4	26	3	0	29
Firm 5	6	5	0	11
Firm 6	10	4	0	14
Firm 7	12	7	0	19
Firm 8	96	33	0	129
Firm 9	9	1	0	10
Total	**169**	**58**	**162**	**389**

[1]DNP = Data Not Provided

Number of portfolios by investment management charge range (portfolios <£1.5m)

Firm	Very low	Low	Mid	High	Total
	<1%	≥1.0% - <1.50%	≥1.5% - <2.00%	≥2%	
Firm 1	0	0	0	0	0
Firm 2	0	0	0	0	0
Firm 3	0	0	10	0	10
Firm 4	0	2	23	1	26
Firm 5	0	1	5	0	6
Firm 6	0	3	6	1	10
Firm 7	0	1	10	1	12
Firm 8	3	8	68	17	96
Firm 9	0	3	3	3	9
Total	**3**	**18**	**125**	**23**	**169**
As a %	**1.8%**	**10.7%**	**74.0%**	**13.6%**	**100.0%**

Total Investment Management Charges include (as applicable) IFA fee; platform fee; fund manager fee; 3rd party fund charges; foreign stocks; broker commission; VAT and stamp duty.

Setup charges have been excluded.

Firm 1

Client Portfolio /Investment Company	Portfolio Value (£)	Over £1.5m (Y/N)	Total Investment Management Charges (%)[2]	Number of portfolios based on
Investment Co 1	DNP[1]	DNP	1.15%	31
Investment Co 2			1.65%	29
Investment Co 3			1.15%	25
Investment Co 4			1.75%	16
Investment Co 5			1.75%	8
Investment Co 6			1.70%	9
Investment Co 7			0.85%	13

Average % Charge			Lowest % Charge	Highest % Charge	No. of client portfolios
<£1.5m	≥£1.5m	Total[3]	0.85%	1.75%	131
DNP	DNP	1.38%			

[1]DNP = Data Not Provided

[2]Average of the ranges provided

[3]Total % charge is the weighted average

Firm 2

Client Portfolio /Investment Company	Portfolio Value (£)	Over £1.5m (Y/N)	Total Investment Management Charges (%)	Number of portfolios based on
Investment Co 1	DNP[1]	DNP	1.36%	2
Investment Co 2			1.78%	7
Investment Co 3			1.55%	1
Investment Co 4			1.88%	1
Investment Co 5			1.43%	20

Average % Charge			Lowest % Charge	Highest % Charge	No. of client portfolios
<£1.5m	≥£1.5m	Total[2]	1.36%	1.88%	31
DNP	DNP	1.52%			

[1]DNP = Data Not Provided

[2]Total % charge is the weighted average

Firm 3

Client Portfolio /Investment Company	Portfolio Value (£)[1]	Over £1.5m (Y/N)	Total Investment Management Charges (%)
Client 1	2,000,000	Y	1.68%
Client 2	4,000,000	Y	1.43%
Client 3	750,000	N	1.95%
Client 4	750,000	N	1.81%
Client 5	250,000	N	1.81%
Client 6	7,000,000	Y	1.30%
Client 7	2,000,000	Y	1.68%
Client 8	1,000,000	N	1.87%
Client 9	800,000	N	1.91%
Client 10	1,400,000	N	1.73%
Client 11	1,100,000	N	1.60%
Client 12	200,000	N	1.92%
Client 13	2,500,000	Y	1.55%
Client 14	1,200,000	N	1.99%
Client 15	870,000	N	1.55%

Average % Charge			Lowest % Charge	Highest % Charge	No. of client portfolios
<£1.5m	≥£1.5m	Total	1.30%	1.99%	15
1.81%	1.53%	1.72%			

[1]Data provided was for monies available for investment

Firm 4

Client Portfolio /Investment Company		Portfolio Value (£)[1]	Over £1.5m (Y/N)	Total Investment Management Charges (%)
Investment Co 1	Client Portfolio 1	350,000	N	1.89%
	Client Portfolio 2	1,000,000	N	1.89%
	Client Portfolio 3	300,000	N	1.89%
	Client Portfolio 4	1,385,000	N	1.62%
	Client Portfolio 5	500,000	N	1.89%
Investment Co 2	Client Portfolio 1	850,000	N	1.46%
	Client Portfolio 2	200,000	N	1.58%
Investment Co 3	Client Portfolio 1	3,282,293	Y	1.35%
	Client Portfolio 2	650,000	N	1.78%
	Client Portfolio 3	190,000	N	1.85%
Investment Co 4	Client Portfolio 1	460,000	N	2.02%
Investment Co 5	Client Portfolio 1	600,000	N	1.51%
Investment Co 6	Client Portfolio 1	328,089	N	1.96%
	Client Portfolio 2	115,487	N	1.31%
	Client Portfolio 3	778,510	N	1.72%
	Client Portfolio 4	1,400,000	N	1.94%
Investment Co 7	Client Portfolio 1	122,734	N	1.85%
	Client Portfolio 2	278,584	N	1.83%
	Client Portfolio 3	171,374	N	1.82%
	Client Portfolio 4	897,927	N	1.79%
	Client Portfolio 5	390,274	N	1.82%
	Client Portfolio 6	2,284,148	Y	1.83%
	Client Portfolio 7	495,196	N	1.82%
	Client Portfolio 8	174,177	N	1.85%
	Client Portfolio 9	287,334	N	1.82%
	Client Portfolio 10	240,776	N	1.79%
	Client Portfolio 11	744,197	N	1.78%
	Client Portfolio 12	208,917	N	1.87%
	Client Portfolio 13	1,873,981	Y	1.75%

Average % Charge			Lowest % Charge	Highest % Charge	No. of client portfolios
<£1.5m	≥£1.5m	Total	1.31%	2.02%	29
1.78%	1.64%	1.77%			

[1]Data provided is either monies available for investment or monies currently invested

Firm 5

Client Portfolio /Investment Company	Portfolio Value (£)	Over £1.5m (Y/N)	Total Investment Management Charges (%)
Client 1	1,762,558	Y	1.80%
Client 2	1,396,849	N	1.92%
Client 3	5,955,290	Y	1.10%
Client 4	611,999	N	1.71%
Client 5	158,036	N	1.95%
Client 6	518,294	N	1.73%
Client 7	458,094	N	1.09%
Client 8	2,125,984	Y	1.40%
Client 9	1,700,000	Y	1.78%
Client 10	1,788,357	Y	1.83%
Client 11	1,335,000	N	1.83%

Average % charges			Lowest % Charge	Highest % Charge	No. of client portfolios
<£1.5m	≥£1.5m	Total	1.09%	1.95%	11
1.70%	1.58%	1.65%			

Firm 6

Client Portfolio /Investment Company	Portfolio Value (£)	Over £1.5m (Y/N)	Total Investment Management Charges (%)
Client 1	140,000	N	1.37%
Client 2	1,285,582	N	1.45%
Client 3	1,942,425	Y	1.80%
Client 4	1,250,000	N	1.80%
Client 5	480,500	N	1.70%
Client 6	1,119,334	N	1.75%
Client 7	400,000	N	1.80%
Client 8	2,910,193	Y	1.75%
Client 9	1,160,015	N	2.02%
Client 10	1,565,000	Y	1.55%
Client 11	1,680,000	Y	1.60%
Client 12	290,000	N	1.75%
Client 13	526,933	N	1.40%
Client 14	340,560	N	1.52%

Average % Charge			Lowest % Charge	Highest % Charge	No. of client portfolios
<£1.5m	≥£1.5m	Total	1.37%	2.02%	14
1.66%	1.68%	1.66%			

Firm 7

Client Portfolio /Investment Company	Portfolio Value (£)	Over £1.5m (Y/N)	Total Investment Management Charges (%)
Client 1	6,500,000	Y	1.03%
Client 2	1,100,000	N	2.03%
Client 3	616,000	N	1.63%
Client 4	2,400,000	Y	1.94%
Client 5	1,000,000	N	1.96%
Client 6	1,600,000	Y	1.65%
Client 7	440,000	N	1.90%
Client 8	385,000	N	1.71%
Client 9	2,000,000	Y	2.02%
Client 10	3,750,000	Y	1.10%
Client 11	600,000	N	1.73%
Client 12	1,000,000	N	1.89%
Client 13	220,000	N	1.91%
Client 14	220,000	N	1.99%
Client 15	680,000	N	1.83%
Client 16	460,000	N	1.23%
Client 17	1,250,000	N	1.58%
Client 18	7,450,000	Y	1.55%
Client 19	4,350,000	Y	1.60%

Average % charges			Lowest % Charge	Highest % Charge	No. of client portfolios
<£1.5m	≥£1.5m	Total	1.03%	2.03%	19
1.78%	1.56%	1.70%			

Firm 8

Client Portfolio /Investment Company		Portfolio Value (£)	Over £1.5m (Y/N)	Total Investment Management Charges (%)
Adviser A	Client 1	715,420	N	2.05%
	Client 2	2,515,109	Y	1.77%
	Client 3	409,497	N	1.74%
	Client 4	1,366,409	N	1.89%
	Client 5	934,548	N	1.90%
	Client 6	1,412,451	N	1.82%
	Client 7	423,057	N	2.07%
	Client 8	459,307	N	1.72%
	Client 9	2,973,135	Y	1.70%
	Client 10	770,645	N	2.08%
	Client 11	939,022	N	1.91%
	Client 12	3,057,697	Y	1.61%
	Client 13	1,399,491	N	1.80%
	Client 14	398,157	N	1.96%
	Client 15	1,217,246	N	1.92%
	Client 16	6,154,627	Y	1.60%
	Client 17	774,012	N	2.03%
	Client 18	929,204	N	1.99%
	Client 19	673,885	N	1.92%
	Client 20	2,582,700	Y	1.66%
	Client 21	447,177	N	1.76%
	Client 22	1,448,830	N	1.65%
	Client 23	2,733,267	Y	1.70%
	Client 24	2,019,492	Y	1.77%
	Client 25	2,026,639	Y	1.69%
	Client 26	845,226	N	2.03%
	Client 27	532,611	N	1.95%
	Client 28	215,915	N	1.98%
	Client 29	360,611	N	1.34%
	Client 30	3,075,934	Y	1.74%

Average % charge			Lowest % Charge	Highest % Charge	No. of client portfolios
<£1.5m	≥£1.5m	Total	0.59%	2.57%	129
1.77%	1.43%	1.68%			

Firm 8	Client Portfolio /Investment Company		Portfolio Value (£)	Over £1.5m (Y/N)	Total Investment Management Charges (%)
	Adviser B	Client 1	3,740,034	Y	1.14%
		Client 2	2,251,695	Y	1.31%
		Client 3	1,568,188	Y	1.44%
		Client 4	2,255,688	Y	1.31%
		Client 5	1,078,372	N	1.45%
		Client 6	498,063	N	1.72%
		Client 7	1,709,366	Y	1.39%
		Client 8	1,342,936	N	1.46%
		Client 9	1,059,836	N	1.54%
		Client 10	450,000	N	1.64%
		Client 11	1,129,115	N	1.52%
		Client 12	1,182,697	N	1.51%
		Client 13	821,934	N	1.60%
		Client 14	4,134,375	Y	1.10%
		Client 15	261,444	N	1.69%
		Client 16	3,195,179	Y	1.23%
		Client 17	1,565,393	Y	1.41%
		Client 18	2,264,065	Y	1.25%
		Client 19	5,920,971	Y	0.99%
		Client 20	6,019,080	Y	0.93%
		Client 21	1,078,402	N	1.50%
		Client 22	1,706,003	Y	1.36%
		Client 23	6,584,956	Y	0.97%
		Client 24	2,743,013	Y	1.25%
		Client 25	4,941,638	Y	1.04%
		Client 26	1,637,220	Y	1.37%
		Client 27	1,093,836	N	1.53%
		Client 28	1,284,174	N	1.48%

Firm 8	Client Portfolio /Investment Company		Portfolio Value (£)	Over £1.5m (Y/N)	Total Investment Management Charges (%)
	Adviser C	Client 1	866,655	N	1.81%
		Client 2	387,235	N	1.91%
		Client 3	2,343,516	Y	1.73%
		Client 4	862,008	N	2.03%
		Client 5	765,169	N	2.11%
		Client 6	2,376,826	Y	1.73%
		Client 7	652,628	N	2.14%
		Client 8	748,877	N	2.12%
		Client 9	860,124	N	2.03%
		Client 10	1,107,105	N	1.91%

Firm 8	Client Portfolio /Investment Company		Portfolio Value (£)	Over £1.5m (Y/N)	Total Investment Management Charges (%)
	Adviser D	Client 1	301,604	N	2.02%
		Client 2	38,972	N	1.96%
		Client 3	408,018	N	1.96%
		Client 4	472,447	N	1.89%
		Client 5	592,037	N	2.00%
		Client 6	1,890,588	Y	1.82%
		Client 7	1,240,595	N	1.80%
		Client 8	650,001	N	1.75%
		Client 9	47,088	N	1.69%
		Client 10	364,930	N	1.49%
		Client 11	279,030	N	1.59%
		Client 12	235,140	N	1.59%
		Client 13	275,142	N	1.90%
		Client 14	468,233	N	1.61%
		Client 15	258,525	N	1.61%
		Client 16	733,515	N	1.96%
		Client 17	696,567	N	1.90%
		Client 18	424,286	N	1.91%
		Client 19	637,551	N	2.05%
		Client 20	162,500	N	1.90%
		Client 21	448,133	N	1.96%
		Client 22	525,983	N	1.90%
		Client 23	873,292	N	1.96%
		Client 24	153,275	N	2.24%
		Client 25	545,264	N	2.05%
		Client 26	887,024	N	2.07%
		Client 27	710,407	N	2.01%
		Client 28	672,016	N	1.92%
		Client 29	837,735	N	1.90%
		Client 30	466,342	N	1.77%
		Client 31	505,931	N	2.57%
		Client 32	439,664	N	1.96%
		Client 33	187,163	N	1.61%
		Client 34	438,911	N	1.90%
		Client 35	332,033	N	1.96%
		Client 36	571,557	N	1.77%
		Client 37	1,998,927	Y	1.72%
		Client 38	730,128	N	1.59%

Firm 8	Client Portfolio /Investment Company		Portfolio Value (£)	Over £1.5m (Y/N)	Total Investment Management Charges (%)
	Adviser E	Deputy for client 1	465,868	N	1.65%
		Deputy for client 2	722,539	N	1.60%
		Deputy for client 3	2,955,109	Y	1.20%
		Deputy for client 4	859,416	N	1.60%
		Deputy for client 5	1,607,164	Y	1.42%
		Deputy for client 6	1,650,338	Y	1.41%
		Deputy for client 7	1,181,080	N	1.52%
		Deputy for client 8	206,610	N	1.60%
		Deputy for client 9	849,338	N	1.59%
		The client 10 Trust	67,336	N	1.80%
		The client 11 Trust	197,077	N	1.71%
		The client 12 Trust	443,262	N	1.63%
		The client 13 Trust	261,988	N	1.64%
		The client 14 trust	456,716	N	1.66%
		The client 15 Trust	2,235,967	Y	1.40%
		The client 16 Trust	569,132	N	1.46%
		The client 17 Trust	87,650	N	1.91%

Firm 8	Client Portfolio /Investment Company		Portfolio Value (£)	Over £1.5m (Y/N)	Total Investment Management Charges (%)
	Adviser F	Client 1	108,144	N	1.69%
		Client 2	334,051	N	1.45%
		Client 3	97,145	N	1.44%
		Client 4	197,447	N	0.59%
		Client 5	271,831	N	0.80%
		Client 6	136,896	N	0.87%

Firm 9

Client Portfolio /Investment Company	Portfolio Value (£)	Over £1.5m (Y/N)	Total Investment Management Charges (%)
Client 1	300,000	N	2.18%
Client 2	500,000	N	2.30%
Client 3	500,000	N	1.72%
Client 4	1,500,000	Y	2.19%
Client 5	1,000,000	N	1.45%
Client 6	1,000,000	N	3.32%
Client 7	1,000,000	N	1.48%
Client 8	700,000	N	1.75%
Client 9	1,000,000	N	1.94%
Client 10	300,000	N	1.25%

Average % charge			Lowest % Charge	Highest % Charge	No. of client portfolios
<£1.5m	≥£1.5m	Total	1.25%	3.32%	10
1.93%	2.19%	1.96%			

FOCIS' Response to the Ministry of Justice Call for Evidence on the Discount Rate 2024

APPENDIX 2:

Letter from PFP dated 21 January 2019

10 Riversway Business Village
Navigation Way
Ashton-on-Ribble
Preston, PR2 2YP

Tel: 01772 776 990
Fax: 01772 776 991

Stewarts Law
Solicitors
5 New Street Square
London
EC4A 3BF
For the attention of Julian Chamberlayne

21st January 2019

Your ref: SL-ACTIVE.FID1117754
Our ref: IGG/JLR

Dear Julian

MoJ call for evidence: summary of responses by FOCIS member firms

You have asked for my comments on the further evidence received from firms providing professional deputyship/trustee services to clients with personal injury awards. As previously, the responses provide information about the cost of investment, including financial advice, investment management, transaction costs, custodianship and collective fund management costs.

You have now received evidence from nine firms who have provided anonymised data about 389 individual claimants. Seven firms reported the monies available for investment on behalf of each claimant, which may include cash as well as investments. That data is for 225 clients and the total reported value is £275 million. The average reported value is around £1.2 million.

The maximum award considered in the call for evidence is £1.5 million. A total of 169 claimants in the reported sample have monies available up to this limit, with a total reported value of £108 million. The average reported value of cases up to the £1.5 million limit is around £636,000.

The evidence shows a clear and unsurprising inverse relationship between investment costs and the amount of capital invested. In other words, as a percentage of the capital invested, investment costs decline as the amount of capital invested rises.

For the main sample of 169 claimants with available damages of up to £1.5 million, the average total annual investment cost is 1.78%. No allowance has been made for the initial set up costs for a portfolio, or for the withdrawal of capital and income from the portfolio over the relevant time horizon to meet the expected cash flow needs. Neither the FOCIS data nor the figures in this letter include any allowance for tax on investment income or capital gains incurred by each claimant.

Authorised and Regulated by the Financial Conduct Authority. Registered in England No. 3836346
Registered office: St George's Court, Winnington Avenue, Northwich, Cheshire CW8 4EE

The two firms which did not report the monies available provided total investment cost data for 162 claimants, at an average of 1.50% pa. It should be noted that this statistic is distorted by one outlier in the sample, and in this instance the median may provide a more accurate reflection of costs. The median is 1.60%

The first observation to be made is that, on average, the 169 portfolios in the main sample above are significantly larger than those modelled by GAD for the MoJ. For the latter, GAD was instructed to model portfolios to provide for a loss of £10,000 per annum for 30 years (therefore £300,000 +/- depending on the discount rate applied). The average portfolio in the sample referred to above is therefore around double the value of the assumed model portfolio. Averaging the cost data provided in the sample is therefore bound to understate the real-world cost for such an assumed claimant, and this is an important caveat to the comments below.

Respondents indicated that:

- Annual fees for independent financial advice to manage cash flows and overall risk parameters were largely in the range 0.25% to 0.75% of the capital invested, with the majority in the middle of that range, i.e. around 0.50%. These fees are exempt from VAT.
- Some respondents use individual discretionary fund managers to construct a tailored portfolio, with or without an IFA. Their reported fees range from 0.85% to 1.0% plus VAT (1.02% to 1.20% including VAT). Additional costs with discretionary fund managers include: custody fees, internal (in-house) fund costs, market transaction, brokerage and third-party costs. Some of these are paid per transaction and some as a percentage of value. The data is very 'noisy' and no meaningful average can be calculated for these additional costs, although some allowance for them is necessary. IFA fees are additional, as above.
- Alternatively, respondents use collective investment fund managers with advice from an IFA. Fund management fees range from 0.5% to 1.5%. Additional costs with investment funds include custodianship, audit, accountancy and fund administration. The overall cost figure for collective investments tends to fall in the range 1.0% to 1.5%. No VAT is charged on these costs or fees. IFA fees are additional, as above.
- Platform fees are reported in the range 0.1% to 0.3% depending on the value of the portfolio. No VAT is charged on these fees.
- There are outliers above and below the ranges referred to, as would be expected in such a small sample size and with a diverse population of clients.

The broad indication is that overall costs, including advice, tend to fall in the range 1.5% to 2%: 124 out of the sample (73.4%) of 169 claimants, with sums available of up to £1.5 million, are reported to have total annual investment costs in this range, and the average is 1.78%. This evidence matches our own experience of costs incurred by our clients.

I should point out that the costs set out above are incurred by claimants in managing cash flows and risk, selecting what to buy and what to avoid, when to sell, holding and keeping track of investments, the income they generate and capital gains and capital losses, and all regulatory compliance. Therefore, for claimants, the costs of investment act as a drag on investment returns, but they have to be incurred because claimants are forced to invest their damages.

Yours sincerely

Ian Gunn
Consultant