The Forum of Complex Injury Solicitors (FOCIS)
Personal Injury Discount Rate Exploring the option of a dual/multiple rate

Call for Evidence – Questions

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 24 members. The only formal requirement for membership of FOCIS is that members should have achieved a pre-eminence in their personal injury field. Seven of the past presidents of APIL are members or Emeritus members of FOCIS. Firms represented by FOCIS members include:

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

In line with the remit of our organisation, we restrict our responses relating to our members’ experience, practices and procedures relating to complex injury claims only. We will defer to others to respond on the impact relating to other classes of case.

Personal Injury Discount Rate Exploring the option of a dual/multiple rate

Call for Evidence – Questions

Question 1: Do you have a preferred model for a dual/multiple rate system based on any of the international examples set out in the Call for Evidence paper (or based on your or your organisations experience of operating in other jurisdictions)?

Please give reasons with accompanying data and/or evidence.

FOCIS considers that implementing a dual/multiple rate system by duration of loss will add complexity and cost. It also carries enhanced risk of unintended consequences which might well further deviate from the full compensation principle[1].

The vast majority of the world favours a single PIDR, or to make life even simpler, no discount rate at all so claimants' future losses are just multiplied by the applicable number of years. Our reservation in moving to a dual rate system is evidenced by the experience in Ontario, Hong Kong and Jersey.

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."*

It would appear that the primary reason for these recommendations having not yet been implemented in Ontario is simply a post COVID backlog of legislative reform. There is some suggestion that this reform may be merged into a wider review of their Civil Procedure Rules which may further delay implementation of the proposed reform of the PIDR to a single rate linked to Government Bonds.

Hong Kong has since 2013 had a triple-rate by duration following the decision of Bharwaney J (as he then was) in Chan Pak Ting in 2013. That decision was heavily influenced by the absence of any equivalent to ILGS in Hong Kong. Their Law Commission has just released a report and they are currently consulting on a draft bill that would legislate for the PIDR in a similar fashion to the Civil Liability Act 2018, but with a greater emphasis on implementing for the first time a periodical payment regime.

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[1] 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.

They are a small jurisdiction with a relatively low number of catastrophic injury claims per annum.

In 2019, Jersey rushed through legislation to introduce a dual rate by duration, with highly questionable assumptions on investment returns. The consequence is that both the short-term and long-term rates are too high to provide anything close to full compensation to claimants. Their dual rates also have a cliff edge that is likely to produce inequitable results for claimants falling just the wrong side of the 20-year dividing line between their short and long-term rates.

We illustrate the cliff-edge phenomenon with an example, the term-certain multiplier for a duration of 19 years, for which a discount rate of 0.5% per annum, real and net, applies is 18.13, whereas the term-certain multiplier for a duration of 21 years, for which a discount rate of 1.8% per annum, real and net, applies is (unfairly) lower at 17.51.

Ireland has adopted a dual rate through judicial decision (upheld in 2017 by the Irish Supreme Court in Russell v HSE) but split by head of loss rather than duration. This approach is to reflect the long-term differential between earnings and prices inflation that affects at least two of the most significant heads of future loss in catastrophic injury claims; care and loss of earnings. Recent expert evidence and anecdotal stories of related settlements suggest much lower discount rates are being applied in practice in Ireland; at effective discount rates ranging from –1.5% to –3.25%.

Question 2: What do you consider to be the main strengths and weaknesses of the dual/multiple rate systems found for setting the discount rate in other jurisdictions?

In preparation of this response our Chair[2] spoke with a committee from the Ontario Trial Lawyers Association (OTLA)[3]. They informed us that:

- 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 with the trial listed early in 2024, 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 multiplies several times. This adds cost and causes delay.
- Neither their PIDR nor Structured Settlement (akin to PPO) regimes provide a fair solution to address inflation of the claimants' lifetime losses. In cases in Ontario there are arguments about this issue, notably in relation to healthcare costs including arguments relating to the rapid rising costs consequent to technological improvements. They felt that the English regime for earnings inflation of PPOs

[2] 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.

[3] 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).

was patently fairer and closer to full compensation than their structured settlements.

Alongside APIL our Chair also spoke to a group of experienced legal practitioners, including a former Judge of the High Court in-charge of the Personal Injuries List from Hong Kong[4] who informed us that:

- The current triple rate in Hong Kong has not been challenged since Chan Pak Ting in 2013[5]. Mohan Bharwaney SC SBS[6] commented that probably means it no longer provides full compensation as the economic landscape has deteriorated. A party could try and challenge this through expert evidence but would need permission of the court and that has not yet been attempted. To do so would expose the Claimant to cost risk if they ran but lost the argument.
- For the first review under the current draft bill in Hong Kong they do not anticipate any change from their current triple rate (inc the short periods 1-5, 5-10 and 10+). Conceptually this could be considered, and changes proposed by their expert panel but (as under our CLA 18) they will not report until after the 1st review and before the 2nd review.
- Their stepped triple rate involves cliff edges and they agreed that could cause unfairness (e.g. a Claimant with an 11 year loss period (calculated at 2.5%) contrasted with up to 10 year loss (at 1%)).
- They do not have ILGS in HK which is one of the reasons they did not follow Wells v Wells. Nor do they have tax on interest income.
- Unlike the UK they do not think they have any significant long-term differential between prices and earnings inflation.
- They have an equivalent to the Ogden tables, known as the Chan tables, where you select a multiplier by combining the period of loss and the discount rate. This appears to be a simple table that makes no provision for switched or blended discount rates over the period in question.
- Similarly, where a period of loss (or expenses) would only start at a point of time in the future (say 6 years from judgment) which will continue for a period (say 4 years), there may be a debate on whether the -0.5% PIDR or 1% PIDR should be applied. Again, this argument can be resolved by resorting to first principle (i.e. the duration of time available for the damages awarded by way of lump sum to generate income).

Finally, our Chair spoke to Michael Boylan a very experienced clinical negligence practitioner in the Republic of Ireland and author of one of the leading textbooks[7] on that subject. He informed us that:

- In November 2021 he obtained Court approval in the case Oran Molloy (a minor) v HSE (unreported October 2021)[8] which culminated in a record award for an Irish birth injury claim of €30 million. While the defendant did not admit that it had agreed to depart from the previously positive discount rate set in Russell, when the settlement was being approved by the court, the plaintiff's lawyers advised the court that the settlement sum broadly represented a -1.5 per cent discount rate achieved on the totality of the future loss award (note that pursuant

[4] The attendees to that meeting on 15 March 2023 were Mohan Bharwaney SC (former judge in charge of the PI List in the High Court of Hong Kong), Raymond Leung SC and Mr. Mark Reeves (solicitor), who are members of the Sub-Committee of the Law Reform Commission of Hong Kong on the topic of Periodical Payment Orders (also dealing with issues of PIDR).
[5] Chan Pak Ting V Chan Chi Kuen [2013] HKEC 202
[6] Who was the presiding Judge in the lead authority of Chan Pak Ting
[7] Boylan M 2022, *Medical Negligence Litigation,* Bloomsbury Professional
[8] Ibid at para 5.23

to the expert evidence -3% had been pleaded for care and other earnings related heads of loss including medical and therapies) and that the settlement was at least €10 million greater than might have been expected using the official discount rates stipulated by the court in Russell.

- The High Court had previously held in Hegarty (a minor) v HSE[9] that because the Irish periodical payment rules require that the Harmonised Index of Consumer Prices be applied that will not meet the future care needs of catastrophically injured people because they will be subject to earnings inflation.
- In 2020 their government issued a consultation on the PIDR but no decisions have yet been made.

Question 3: What do you consider is the optimal point for the switch-over from a short to a long-term rate on a duration-based dual rate model?

Please give reasons with accompanying data.

25 years. See our response to Q4 below.

Question 4: What would you consider an absolute minimum and maximum point for the switch-over between two rates to be?

Please give reasons.

The MOJ refers to 5-15 years being the potential range. 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.

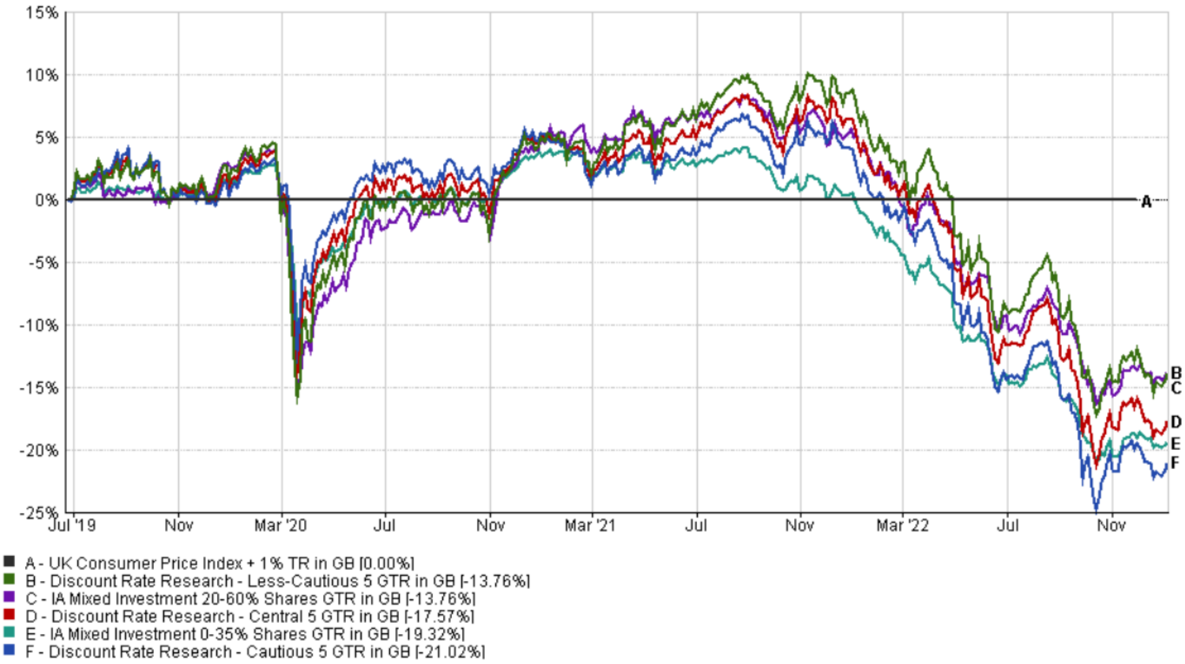
However, in our view it is not possible to predict future real investment returns with any reliable accuracy.

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

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

Personal Financial Planning Ltd have prepared the below graph to illustrate the performance of portfolios broadly comparable to the 'less cautious', 'central' and 'cautious' portfolios modelled by GAD, relative to CPI plus 1%, since the publication of the GAD report to the Lord Chancellor in 2019 (together with the IA sector averages for wider comparison).

[9] Hegarty (a minor) v HSE [2019] IEHC 788



25/06/2019 - 04/01/2023 Data from FE fundinfo2023

The 'central' portfolio has since July 2019 achieved a cumulative return of minus 17.57% relative to CPI plus 1%. If a claimant with a 10-year life expectancy had invested in the 'central' portfolio in June 2019, an unrealistic real return would be required over the remaining period.

The annualised returns over the past four years, relative to CPI plus 1%, of the portfolio as modelled is as follows:

28/3/19 to 28/3/20	-6.28%
28/3/20 to 28/3/21	12.78%
28/3/21 to 28/3/22	-2.98%
28/3/22 to 28/3/23	-21.51%

If this was the investment return realised by a claimant over the first four years of a ten-year duration, the following table illustrates the rate of return, relative to CPI plus 1% that would be required from year 5 to ensure full-compensation:

	Capital at Outset	Return relative to CPI + 1%	Annual Need	Capital Remaining
1	£101,300.00[10]	-6.28%	£10,000.00	£84,938.36
2	£84,938.36	12.78%	£10,000.00	£85,793.48
3	£85,793.48	-2.98%	£10,000.00	£73,236.84
4	£73,236.84	-21.51%	£10,000.00	£47,483.59
5	£47,483.59	7.12%	£10,000.00	£40,866.29
6	£40,866.29	7.12%	£10,000.00	£33,777.57
7	£33,777.57	7.12%	£10,000.00	£26,183.86
8	£26,183.86	7.12%	£10,000.00	£18,049.17
9	£18,049.17	7.12%	£10,000.00	£9,334.98
10	£9,334.98	7.12%	£10,000.00	£0.00

This data indicates that a return of 7.12% per annum, above CPI plus 1% net of taxation and charges is required to ensure full compensation is achieved. This is not realistic and under-compensation will be the result.

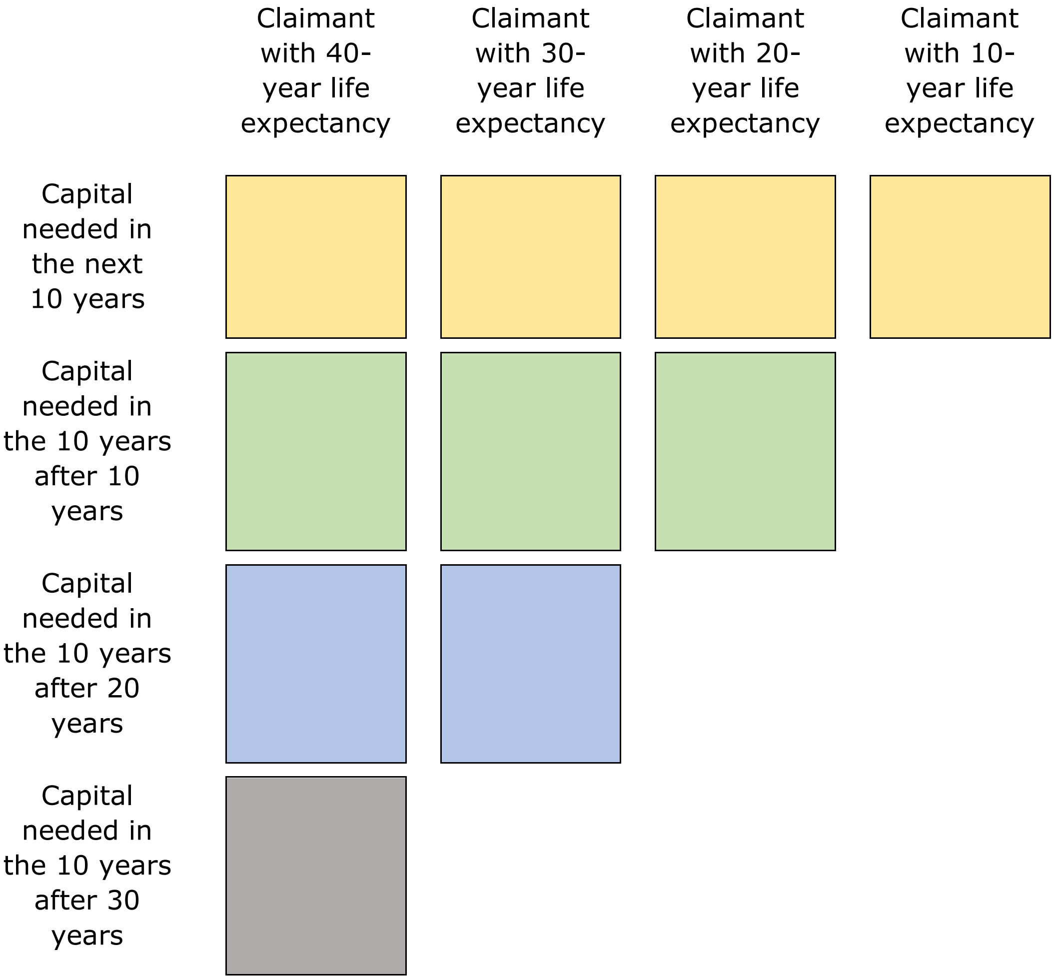
This also illustrates the importance of acknowledging the impact of 'sequencing risk', i.e. the impact of having bad years at the start, on the appropriateness of the assumption that claimants will be advised to invest all of their capital upon receipt. Phasing in and out of investments over time helps reduce this risk but taking this real investment behaviour into account in the discount rate is very difficult.

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.

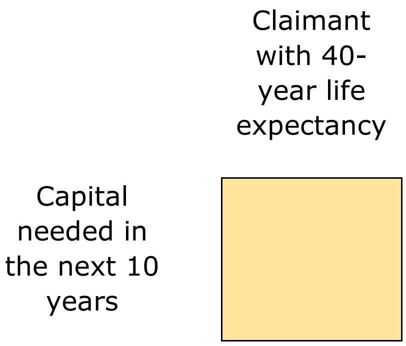
Therefore, from a financial advice perspective there is not only a switch-over duration from short-term rates to long-term rates, but there is also a switch-back from long-term rates to short-term rates over time.

[10] The multiplier applied to a multiplicand of £10,000 is 10.13, based on a minus 0.25% discount rate over 10 years.

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



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).

Question 5: If a dual rate system were to be introduced, would you advocate it was established on the basis of the duration of the claim with a switchover point, on duration based on length of claim or its heads of loss (or a combination of the two)?

Please give reasons for your choice.

For the reasons set out in answer to question 4, a dual rate that actually reflects claimants' investment journey over time is unworkable in practice.

A dual rate by heads of loss, notably for care claims, would provide a better match for long-term earnings inflation, but without adding any significant complexity to preparing schedules of loss. 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.

A Stepped Rate[11] 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

[11] See paragraph 33 of the Call for Evidence paper for a definition.

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.

Consequently, if there is to be a move from the simplicity of the current single PIDR to a dual rate, then of the two options we are firmly of the view that a dual rate to reflect long-term earnings inflation on care needs would be fairer, more predictable and simpler.

Question 6: In dealing with volatility of markets over the short-term is it a reasonable assumption that short-term rates in a duration-based system should be more variable and set at a lower rate; and long-term rates more stable and set at a higher rate?

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

We agree that funds held for short-term needs are 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[12]. We observe that this concern is the primary reason for the recommendation for a return to a single PIDR in Ontario.

Any assumption about the likely return on long-term investments would have to be within the requirement of the Civil Liability Act 2018 that the relevant damages are invested using an approach that involve "*less risk than would ordinarily be accepted by a prudent and properly advised individual investor who has different financial aims*".

We approach with caution the Government Actuary's indication of a possible short-term rate of -0.75% followed by a long-term rate from losses exceeding 15 years of +1.5%. Those indicative dual rates were premised on 50% prospects of under compensation, ignoring mortality. Then you also need to consider the extent to which the economic landscape has changed since the Economic Scenario Generator (ESG) was run on 31 December 2018. In the assumptions section of his July 2019 report the Government Actuary said that "*Under the assumptions used in my modelling, a claimant settling towards the end of this five years would be expected to be investing in more favourable*

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

economic conditions than a claimant investing in the next year. As such, it might be argued that a slightly higher PI discount rate would better reflect the possible investment conditions over the whole period until the next review". Four years on we all find ourselves in a rather less optimistic economic climate than that. It also reinforces the concern of the Ontario sub-committee about how confident can we be about making accurate predictions for a long-term rate applicable from 15 years into the future?

We agree with the response to this Call for Evidence from the expert actuary Chris Daykin[13] when he comments that "*Assumed higher mean returns on a longer-term investment portfolio from some allocation to equities would be accompanied by much higher levels of potential volatility, so greatly enlarging the funnel of doubt for outcomes and increasing probabilities of running out of money during the claimant's lifetime. Setting a discount rate for periods starting in the medium to long term would be a highly speculative exercise and it may be difficult to arrive at a consensus. Views will be underpinned by a very wide range of different assumptions about returns on different asset classes and what will happen to economic growth – and in particular to inflation – over long future periods.*"

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 typically 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) 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. This volatility, as outlined in the expert report prepared for the MOJ[14] 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…"*

Come what may the long-term should be set at a level that provides for active rather than passive investment management. The evidence from the 389 investment portfolios of professional deputies and trustees that was appended to the FOCIS submission in 2019 revealed that the overwhelming majority of those claimants had actively managed funds and actually incurred investment management charges at about twice the rates ultimately assumed by the GA and Lord Chancellor. That is a conclusion that will need to be revisited in the 2024 review as the Lord Chancellor is obliged by CLA 2018 to consider actual claimant investor behaviour and its impact on (net real) returns. See further in answer to Q14 below.

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

[14] *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.

Question 7: If short-term rates are more volatile, should frequency of review be increased?

Please explain your reasoning.

The frequency of review of the PIDR is a significant feature of any shift to duration-based rates. Both the GA and the MoJ accept that short-term losses are more volatile, primarily due to inflationary changes. It is notable that in the 23 years since the dual rate system was introduced in Ontario, the short-term rate has been amended 15 times[15]. Such frequent reviews would be necessary if a short-term rate is adopted but would be disruptive and encourage gaming and delays in ADR. In addition, altering the discount rate for recent changes makes the rate 'more right' on the date it is set, but no more certain of being right tomorrow. In contrast were we to stick with a single rate then 5 yearly reviews as prescribed by the Civil Liability Act 2018 (CLA 2018) will likely suffice.

Question 8: What would you regard as the advantages of a dual/multiple rate system?

In his statement of reasons, the Lord Chancellor expressed his interest in the Government Actuary's analysis of the case for a dual rate, which he thought showed "*some promising indications, particularly in relation to addressing the position of short-term claimants*". Given that the underlying problem with a single PIDR is the unfairness of the current -0.25% rate for very short life expectancy cases, compounded by the acute nature of the longevity risk in such cases, a move to a dual rate may alleviate some of the problems faced by short-term claimants.

However, PPOs are the far better solution to the real problem of providing full compensation to claimants with very short life expectancy and the MoJ ought to put its efforts into incentivising their broader use. See further our answers to Q19 and Q21 below. In any event it is a small proportion of Claimants who have claims that are likely to fall into the short-term category[16]. The majority of Claimants with longer-term losses are likely to be significantly disadvantaged by a shift to a dual rate by duration model (that ignores the investment journey set out in answer to Question 4), as demonstrated by the following table extracted from an article by Edward Tomlinson[17]:-

Male Age, with normal LEx	Single PIDR (-0.25%)	Dual Stepped PIDR (-1.75% first 15 years 1.5% thereafter)	Percentage Difference
10	£868,900	£503,195	42.1%
20	£735,600	£465,621	36.7%
30	£608,300	£422,452	30.6%
40	£487,600	£373,532	23.4%
50	£373,000	£318,134	14.7%
60	£269,500	£258,943	3.9%
70	£178,100	£179,959	-1.0%

[15] Future pecuniary damage awards | Ontario.ca.
[16] Both with reference to our members' experience and as suggested by the 43-year average life expectancy assumed in the GADs 2019 report.
[17] *Dual discount rate* by Edward Tomlinson, J.P.I. Law 2022, 3, 169-175. The dual PIDR column assumes a Stepped rather the switched or blended discount rate.

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.

Question 9: What would you regard as the disadvantages of a dual/multiple rate system?

The most significant disadvantage of changing to a dual or multiple rates by duration is that it is likely to assume a high level of positive net real return for claimants in the longer-term which is highly speculative. That creates further risks for seriously injured claimants most of whom are highly reluctant and risk averse investors.

No one actually knows whether a dual or multiple rates system would ultimately work to the favour of most claimants or most defendants, but it is clear that it would add an extra layer of complexity which will inevitably add to costs (see further our response to Q5). The MoJ’s Call for Evidence refers 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.

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

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 that they need to provide for their life-long injury related needs. Those with seriously disabling injuries will often be unable to work and will be very heavily reliant on their compensation without any other major source of finances. 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. We are deeply concerned that a 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 risk of under-compensation for many claimants.

Whilst the GA 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.

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 a further contingency adjustment of at least 0.5% is applied to the discount rate to mitigate the risk of various real variable factors, such as longevity and the risk that funds are required in a different manner than when the award was granted.

Question 10: What do you consider would be the specific effects on implementing and administering the discount rate if a dual/multiple rate is introduced?

As we explained in answer to question 5 a shift to dual, let alone multiple rates by duration would significantly increase complexity and costs. In line with the experience in Ontario, it would in many cases require expert input from an actuary and/or forensic accountant.

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).

See also our answer to Q12 below.

Question 11: In addition to specific effects, do you consider there will be additional consequences as a result of implementing a dual/multiple rate?

Please give reasons with accompanying data/evidence if possible.

If the short-term rate were 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.

Question 12: If a dual/multiple PIDR were to be introduced would it be helpful to provide a lead in period to prepare processes, prepare IT changes etc. and if so, how long should this be?

Please provide reasons for your answer.

For a change to a dual or multiple rate by duration sufficient time would be required for all concerned to be trained on the methodology and for the production of new versions of the Ogden Tables and PIBA Facts and Figures. Such a period should also enable parties to recalculate their claims and reconsider any existing Part 36 or other offers to settle. We envisage the profession would require a minimum of a 6-12 month transitional period. It may not be necessary to have a transitional period for the alternative of dual rates by heads of loss, although consideration would have to be given to the impact on pre-existing Part 36 offers.

Question 13: What do you consider would be the effects of a dual/multiple rate on a claimant's investment behaviour and what would this mean for the design of a model investment portfolio?

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)[18]
- Code of Business Source Book (COBS) 9.2 – assessing suitability[19]

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[20], 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. The expert IFA, Richard Cropper[21], has made the powerful

[18] https://www.handbook.fca.org.uk/handbook/PRIN/2/?view=chapter
[19] https://www.handbook.fca.org.uk/handbook/COBS/9/?view=chapter
[20] 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.
[21] Who is also a Member of the Ogden Working Party.

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.

Conversely 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.

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 Christopher Daykin's 2019 submission that:

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

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

We also note that Table 7.2 of the Purple Book 2022[22], showed that the proportion of Defined Benefit assets held in equities has continued to fall and has been around 19% in the last two years. However, in practice most of the equities are held by open funds and funds which are immature. If you look at Table 7.9, 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

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

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 additional comfort of an employer covenant.

In the Bermuda case of *Thomson v Thomson and Colonial Insurance Company Limited*[23], at first instance in the Supreme Court of Bermuda, Chief Justice Kawaley observed at paragraph 38 that the case appeared to be the first occasion in which a common law court has been required to consider the respective merits of an assumed investment of the entire lump sum to be awarded in ILGS as opposed to in a mixed basket of investments.

At paragraph 93 of the *Thomson* Judgment, it was observed that Mr Gorham, a Canadian Actuary whose expert evidence was relied upon by the Defendants:

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

Chief Justice Kawaley commented:

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

We observe that an assumption that was considered by Chief Justice Kawaley to be a stunning dilution of the full compensation principle is very close to the assumed outcome of the -0.5% adjustment made by the Lord Chancellor in 2019 that, on rosier economic predictions than subsequently transpired, circa 35% of claimants would see their damages fund run out and so be under compensated.

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

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

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

"*What Mr. Daykin was saying is essentially that Mr Gorham's theory of sufficiency demonstrated that, using his model, there is approximately a 50% chance of a Claimant receiving a fund sufficient to meet expenses and losses, with the other side of the coin being that 50% of Claimants would not have sufficient assets to do so. Consequently, Mr. Daykin concluded that these figures come nowhere near meeting the principle of full*

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

compensation which has been accepted over many years by the courts. What Mr. Daykin said in relation to the 90 to 95% figures was not that these represented over-compensation on the basis of the Chief Justice's ruling, but that if one were to test a model proposed in place of the Wells mechanism (as advocated by Mr Gorham), then there would have to be a demonstration that the payments were sufficient for the Claimants in at least 90 to 95% of cases in order to come close to providing full compensation."

We remain of the view that whether the PIDR remains a single rate or is changed to a dual or multiple rate, it ought to be set at levels that are premised on well over 90% of claimants actually being fully compensated. Anything less cannot truly be described as a full compensation regime.

Question 14: What do you think would be the effects of a dual/multiple rate on drawing up assumptions for tax and expenses when setting the discount rate?

In 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.

The average total charge incurred across all 389 cases was 1.58%. 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.

The FOCIS data 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 tiny minority of Claimants (4.9%) incurred charges below 1% and only 35.7% of the portfolios incurred charges of 1.5% and below. Furthermore, when looking solely at the 169 portfolios whose value falls below £1.5m, 74% portfolios incurred charges between 1.5% and 2.0%, only 12.5% incurred lower charges and 13.6% incurred charges of 2% or more.

We refer to the response to this 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%.

We implore the Lord Chancellor to recognise that the vast majority of Claimants with significant future losses incur charges of circa 1.5% per annum in investment management charges and that those charges are not and cannot be included in the damages claim and so do not feature in the damages award (see our answer to Q2 in our 2019 response). Once the further allowance for capital gains and income tax liabilities is made, we contend that a composite reduction in the discount rate of at least 2% is required, prior to factoring in a further adjustment for longevity and other risks.

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

Enquiries within FOCIS and the investment professionals who work with their clients revealed that the primary aim of investment advisers is almost always to devise an investment strategy based on meeting the client's need for their lifetime (including the longevity risk). 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 this data would not have been incurred unless they were necessary to maximise the prospects of the investments lasting to meet the client's needs. We contend that in the 2024 review the expert panel and the Lord Chancellor should carefully consider the FOCIS dataset relating to actual investment advice and management charges so that the Lord Chancellor makes an informed decision considering this actual investor behaviour as he is bound to do under the Civil Liability Act 2018.

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 taxation rates. We note the example (premised on a single PIDR) given by Christopher 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%". We contend that the current (single) PIDR ought to be rounded down by at least 0.5% to allow for taxation. We suspect that the tax adjustment on a 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.

The impact of taxation in the GAD's 2019 report was based on a range of size of awards, but the highest was £3million, whereas many claims are far in excess of that sum.

There is some evidence that the investment charges reduce as a percentage of the award for very large awards (e.g. £3 million+). However, those larger awards are most likely to incur higher incidence of tax. Consequently, we contend that a composite reduction to the discount rate to allow for both investment management and taxation ought to be at least 2%.

Question 15: What do you consider would be the effects of a dual/multiple rate on analysing inflationary pressures and trends when setting the discount rate?

Short-term rates would be much more heavily impacted by inflationary pressures.

A dual rate for the care head of claim would achieve closer matching for inflation. See further our answer to Q19 below.

Question 16: What do you consider would be the effects on claimant outcomes of a dual/multiple rate being adopted for setting the discount rate?

If dual/multiple rates by duration were adopted that would cause significant disadvantages to most seriously injured claimants. Claimants with a short life expectancy will likely face the uncertainty of a short-term rate that is under annual review. That will delay the preparation of their final schedule of loss and settlement of their cases, reducing the precious period for which they can actually use their damages to meet their needs and restore aspects of their previous quality of life. It also would not address the longevity risk they face.

Claimants with smaller financial settlements or longer-term losses are also at risk. Compared to a single discount rate, they are likely to be much worse off under a dual rate[24] (if the rates are anything like those projected by GAD in 2019). In order to have any chance of making their settlement last for their lifetime, these claimants would need to take greater risk with their money. However, they are likely to end up being under compensated as inevitably some of those risks will not work in their favour. However, as most claimants are risk averse it is more likely that they would not take the level of assumed investment risk and hence would inevitably see their damages fund run out early (falling back on the State) or not be used to meet all of their needs (so not providing restitution). Either way that is not full compensation for them. It is of no help nor comfort to each claimant in that situation that there might be some other unrelated claimants whose damages fund had some excess left at the end of their lives.

Question 17: If a dual/multiple rate was adopted would it be possible to return to a single rate in future reviews, or would a move be too confusing and complex and seen as irrevocable?

Please give reasons.

Following the setting of the PIDR in 2019, it is important that claimants have a period of certainty. It would be preferable to refine the single PIDR following the upcoming input of the expert panel. Therefore, we think it would be a mistake to change the system so soon, especially when the merits and consequences of such a shift are at best uncertain. If the outcome of this Call for Evidence leaves the Lord Chancellor in any doubt, then we would suggest sticking with the long tried and tested single PIDR, rather than risking unpredictable outcomes or unintended consequences.

Whilst it would not be impossible to change back to a single rate in future reviews that would be of no assistance to any claimants whose claims had already been determined under any dual rate era, as it is very rare for such changes to be applied retrospectively.

Question 18: What do you consider the respective advantages and disadvantages of adopting multiple rates would be, when compared with either a:

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

As explained in question 5, a shift to dual rates based on duration would significantly increase complexity and would in many cases require expert input from an actuary, economist and/or forensic accountant. This of course would increase further if you had triple rates like in Hong Kong but applied a switched or blended approach to avoid unfair cliff edges under the Stepped approach.

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

If, as in Hong Kong, the medium-term rate was to apply as early as 5 years, then both it and the short-term rate would have the disadvantages associated with annual reviews. It may lead to more frequent change depending on the prevailing financial and economic conditions. This element of uncertainty arising from anticipated changes may delay and complicate pleading and negotiation of claims.

Question 19: If a heads of loss approach were adopted, what heads of loss should be subject to separate rates – care and care management costs, future earnings losses, accommodation, or any other categories?

Should a heads of loss approached be adopted, we hold the view that there should be a separate rate for care and care management costs only. Our view is that that impact of change should be limited as far as it can, and this head of loss often makes up well over half of the total award of damages in catastrophic injury claims. 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.

PPOs are predominantly made for the heads of claim of care and case management, and rarely for other heads of claim. However, the remaining major heads of loss differ significantly from the typical CPI basket of goods and services.

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[25] and by the Courts of Appeal in Bermuda (Thomson v Colonial Insurance)[26] and Ireland (Russell v HSE)[27]. 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.

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).

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

[25] Helmot v Simon [2012] UKPC 5
[26] Thomson v Colonial Insurance Company Limited [2016] CA (Bda) 6 Civ
[27] Gill Russell (A Minor) v HSE [2015] IECA 236

"*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.*"

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

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

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 2022 of the Office For Budget Responsibility report shows a long-term (2071-2072) forecast of real earnings growth of 1.8% (gross earnings growth of 3.8% less CPI growth of 2.0%. Another major head of loss for seriously injured claimants is future medical treatment and therapies. Most of this head of loss is earnings-related and historically, inflation is on average materially higher than CPI.

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[28]. A further major head of claim for seriously 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

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

periodical payments terms are agreed for this head of loss they are usually indexed to the appropriate category of ASHE or RPI[29].

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

Question 20: Introducing a dual/multiple PIDR could result in increased levels of complexity for both claimants and compensators. Do you agree with the assumption that this complexity will stabilise and ease once the sector adapts to the new process?

Please give reasons.

Many catastrophic injury claims take 3-7 years to resolve and as such, the ongoing annual review of the short-term rate is likely to cause complexity and uncertainty to the ongoing litigation.

Specialist solicitors, barristers and experts advising in such claims would largely adapt to this complexity, although it would present a greater long-term risk of error and negligence claims for any generalist practitioners and their clients.

Question 21: The Government remains interested in exploring the use of PPOs in relation to high value personal injury settlements. We would therefore welcome any submissions, data and/or evidence stakeholders may have in relation to the effective use of PPOs.

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.

NHSR and the MIB are notable exceptions in that they have from the outset endorsed the PPO regime 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 such insurers to attend Joint Settlement Meetings ('JSMs') or mediations even close to trial and refuse to make any periodical payment offers at all, or at least it was the position until the new discount rate was announced, which has prompted a significant culture change.

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

[29] 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.

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 and Faculty of Actuaries' latest research[30] 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[31], 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 recent experience of our members is that most insurers still see lump sum settlement as their preferred (cheaper) option, undermining their claims that the -0.25% discount rate is unfair for them. 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.

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.
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[32] (and MIB).

In November 2022, the government published its response to the Solvency II consultation[33], which stated that it would ensure the risk margin is changed to reduce the risk margin for long-term life insurance business, including PPOs. It was hoped that this would make available substantial amounts of capital, safeguard against the risk

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[30] Institute of Actuaries' 2021 report
[31] As of 2011, with this report and assuming 7% claims inflation from then onwards. We observe that is materially in excess of CPI+1%.
[32] 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.
[33] https://www.gov.uk/government/consultations/solvency-ii-review-consultation

margin becoming too large and too volatile during future periods of low interest rates and retain a risk margin that ensures that insurers hold sufficient assets to transfer their liabilities to another insurer if required. The changes may help insurers, but nowhere near enough to make a real difference. Claimants have a countervailing concern as to whether the paying insurer will remain solvent to keep making the periodical payments for the decades ahead. Despite this recent change, the experience of FOCIS members remains that most (but not all) insurers remain resistant to offering PPOs unless and until faced by a claimant who feels so strongly about the issue that they are prepared to reject a lump sum offer in the millions and press on towards a trial.

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

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

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 (eg CMCs).

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.

In any event the concept of a variant PIDR for PPO cases would appear to be contrary to s4(3)(a) of Sch A1 of CLA 2018 which mandates that in determining the rate the Lord Chancellor must assume that the relevant damages are payable as a lump sum (rather than under an order for periodical payments).

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.

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

Please give reasons.

We suspect there is a typographic error in this question. We are strongly opposed to the suggestion of a higher PIDR for loss of earnings or for cases involving a PPO as explained at Q19 above.

There is much to be said for the MoJ's comment at paragraph 121 of the call for evidence that the wider issues of inflation are best left for the expert panel and full review in 2024.

Question 23: What impact would a dual/multiple rate system have on protected characteristic groups, as defined in the Equality Act 2010?

Most claimants with significant future loss claims will also have a protected characteristic.

The implementation of a dual/multiple rate system runs a real risk of having the discriminatory effect on this protected characteristic group of lower compensation, the expectation to take greater investment risk and an increased risk of under compensation, departing from the government's often repeated commitment to the full compensation principle.

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.

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.

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 all assumptions applied to the ESG modelling to ensure transparency and allow expert scrutiny both by the MOJ's expert panel and externally.

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.