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PIBA RESPONSE TO THE MOJ CONSULTATION: "The Personal Injury Discount Rate: how it should be set in future"

Introduction

PIBA is a specialist Bar association with about 1480 members, who undertake the full range of personal injury work for claimants and defendants.

Q1: Do you consider that the law on setting the discount rate is defective? If so, please give reasons.

Q2: Please provide evidence as to how the application of the discount rate creates under- or over-compensation and the reasons it does so.

Response to Qs 1-2

PIBA addresses the substantive issues lying behind Qs 1 and 2 in response to Q10 below.

Q3: Please provide evidence as to how during settlement negotiations claimants are advised to invest lump sum awards of damages and the reasons for doing so.

Response to Q3

First, claimants are not advised how to invest their lump sum awards in settlement meetings. It is not part of the legal team's role to provide financial, investment advice.

An independent financial adviser is sometimes, but no means invariably, asked to provide some advice as to the most appropriate division of future heads of loss between lump sum and PPO. This sometimes involves an analysis of the likely returns on lump sum depending on how sums are invested. But, at the stage of the settlement negotiations, the IFAs do not provide actual investment advice. To the extent it happens at all, they provide models showing various projected outcomes based upon different investment portfolios.

Secondly, how the claimant may be advised (after settlement) to invest his or her lump sum award is entirely dependent on the amount recovered. This, in turn, is dependent on the discount rate applicable at the time of settlement. Thus, any evidence obtained as to the approach taken up until very recently by claimants whose cases have settled is not going to assist the Government, and may positively mislead the Government, when it seeks to determine how, and at what level, to fix the discount rate.

Until 20 March 2017, the position has been that the discount rate has been fixed at a level, 2.5%. Although this was intended to mirror the return on ILGS and may have broadly done so for a short period, for some many years it has not mirrored the investment return on ILGS. So any claimant advised to invest only in ILGS would be fairly bound to have a shortfall when meeting future expenditure. To the extent that claimants have been advised to invest other than in ILGS, that is, therefore, a product of the discount rate not matching the return on ILGS and does not provide a guide as to what the discount rate should be set at.

PIBA recognises that the few cases which have settled after 20 March 2017 and on the basis of a -0.75% discount rate may provide valuable information to the Government regarding investment strategies because the amount recovered now more accurately reflects the anticipated return on ILGS. Shortfalls can, however, still be anticipated because care costs are generally predicted to rise at a rate higher than RPI, against which ILGS is matched. So, to the extent that claimants whose cases settle on the basis of a -0.75% discount rate invest other than in ILGS, caution still needs to be exercised before drawing the conclusion that claimants are less cautious than, per *Wells v Wells*, they are assumed to be.

The obligation on those instructed by the claimant to invest the settlement sum is different from the obligation on those instructed to advise the claimant prior to settlement. So for instance in the case of claimants lacking capacity to manage their financial affairs, then Court of Protection deputy has to make investment decisions based upon best meeting the

claimant's needs that arise taking into account a host of practical factors, such as by how much damages are reduced to take into account contributory negligence, the cost of property, the wishes of the claimant and family and so on. These considerations are not equivalent to those made pre-settlement where those advising the claimant are trying to assess what a court is likely to award by way of damages if the case is not settled.

Q4: Please provide evidence of how claimants actually invest their compensation and their reasons for doing so.

Q5: Are claimants or other investors routinely advised to invest 100% of their capital in ILGS or any other asset class? Please explain your answer. What risks would this strategy involve and could these be addressed by pursuing a more diverse investment strategy?

Response to Qs 4-5

These questions are outwith the experience of PIBA members who have no ongoing involvement with claimants after settlement or, where appropriate, approval of the settlement.

Q6: Are there cases where PPOs are not and could not be made available? Are there cases where a PPO could be available but a PPO is offered and refused or sought and refused? Please provide evidence of the reasons for this and the cases where this occurs.

Response to Q6

There are cases where PPOs are not and could not be made available

A court may not make an order for periodical payments unless satisfied that the continuity of payments under the order is reasonably secure: see s 2(3) of the Damages Act 1996. Even if the parties are trying to settle a claim without court order, it would be most unwise for the claimant's legal advisers to recommend accepting a PPO unless the requirement under the 1996 Act was met. If the PPO is to last a long time and the continuity of payment is not reasonably secure, then the claimant will risk not recovering all of his future damages.

At the moment, EU or EU-passport insurers providing road traffic insurance are secure. The position post-Brexit is unclear. Accordingly, there is uncertainty even now as to whether a PPO should be taken from such a foreign RTA insurer.

Many defendants, outside of road traffic where unlimited third party cover is compulsory, are insured only to certain levels. Many local authorities have insurance policies with liability limits. Unless it is entirely clear that the liability limit will not be reached under the PPO, then a PPO cannot be made available in claims against such defendants. Given most PPOs are in respect of payments for life, there can be a great deal of uncertainty regarding the appropriate upper level of an equivalent lump sum to the PPO. In such cases, the claimant will be advised not to take a PPO.

The MPS is understood to be self-funding and the convention is that a PPO cannot be obtained against the MPS.

The MDU has a contract of insurance. As above, if the indemnity limit may be crossed, the case would be unsuitable for a PPO.

By section 2(5) of the 1996 Act, the court can make an order requiring a party to use a method under which the continuity of payment is reasonably secure. The difficulty here, however, is in identifying a structured annuity provider in the commercial market place.

<u>There are cases where a PPO is available but it is sought/offered and refused</u>

PPOs are extremely uncommon in cases other than those involving substantial future care costs. In cases involving substantial future care costs, subject to complicating factors (such as partial recovery of damages), a PPO may well be the most appropriate form of compensation for future care/case management.

For a period of time after *Thompstone v Tameside & Glossop NHS Trust* [2008] 1 WLR 2207 it was fairly common for parties to agree terms under which, in appropriate cases, future care and case management costs were met by a PPO; in the vast majority of these cases, other heads of loss were paid by way of a lump sum payment.

Almost all personal injury cases involving substantial future care costs are resolved by agreement rather than quantum trial. It thus takes cooperation between the parties as to the appropriate division between lump sum and PPO.

Over the last few years, many insurers have become increasingly unwilling to settle cases with even future care costs being compensated by way of a PPO. It has become commonplace for insurers to make lump sum only offers. Presumably, insurers have

determined that it is less expensive, overall, to settle claims on this basis, hence the practice of steering away from lump sum + PPO settlements.

With the change of discount rate to -0.75%, the practice of insurers may change and they may be more willing to resolve future heads of loss, not necessarily limited to care/case management, on a PPO basis. It is difficult to know what the attitude of individual claimants will be to PPOs. That may depend on the advice they receive in the light of the prevailing discount rate, the level of the award and their intentions for the future. However, this is largely expectation only because very few cases have resolved in the short period since the discount rate was changed.

Q7: Please provide evidence as to the reasons why claimants choose either a lump sum or a PPO, including where both a lump sum and a PPO are included in a settlement.

Q8: How has the number of PPOs changed over time? What has driven this? What types of claims are most likely to settle via a PPO?

Response to Qs 7-8

Cases are many and various and so the following is necessarily something of a generalisation.

Claimants generally settle on a lump sum only basis unless the claim involves substantial future care costs

This is partly because insurers are most unlikely to offer PPOs in any case other than one involving substantial future care losses. So, in some cases, it is not a matter of choice by the claimant intent upon settling his claim. The only way then for the claimant to secure a PPO is by taking the case to trial and seeking from the court an order for a PPO.

It is also the case that claimants generally do not seek PPOs for heads of loss other than future care and deputyship costs.

What is set out below, therefore, relates principally to cases involving substantial future care costs.

Claimants who recover only a % of damages may well prefer to settle on a lump sum only basis

Where the claimant recovers only a % of damages, the claimant is going to have to 'mix and match' in order to meet his future needs. If, say, a claimant recovers 50% of his damages, he may choose to reduce the amount of care he actually receives and/or to make savings relating to equipment and/or to purchase a cheaper property than he reasonably needs and so on. Recovering on a lump sum basis provides that claimant with the maximum degree of flexibility. A PPO, which is limited to regular payments meeting 50% of the claimant's needs, could well put the claimant in an impossible position. He may be better off spending his fund of damages to meet his full needs now with the backstop of state provision in the event his fund runs dry. Or he may choose a risky investment strategy in an attempt to make good the shortfall.

<u>Claimants with substantial future care needs generally preferred a PPO to meet their future care needs</u>

PPOs were very successful in that: (a) the investment obligation is put on the shoulders of the defendant; (b) the payments for care are index-linked to carers' wages (ASHE6115); (c) such payments are invariably made for life; (d) the alternative, a lump sum, assessed by reference to a discount rate of 2.5% provided a sum which would not meet the payments made under a PPO for the claimant's expected life expectancy, unless the claimant was prepared to engage in a relatively high risk investment strategy.

Seriously injured claimants want to know that their care needs will be met for life. A PPO achieves this. Taking into account the above features of a PPO, they were generally preferred by claimants as the method for compensating their future care needs.

<u>It remains to be seen how claimants will respond where PPOs are offered as an alternative to a lump sum assessed by reference to a discount rate of -0.75%</u>

Where the claimant has a lengthy predicted life expectancy, the lump sum payable by reference to the new discount rate may be 3 times as high as the equivalent lump sum assessed by reference to a 2.5% discount rate.

Lump sums are now more attractive to claimants than they were but it is too early to say how many claimants will seek a lump sum by way of future care/case management in circumstances where, but for the change in the discount rate, they would have sought a PPO.

It is expected that claimants will still be advised to accept a PPO for future care in many cases following the discount rate change. This is because: (a) even the discount rate of -

0.75% does not reflect current ILGS rates which are lower; (b) the ILGS rates do not reflect wages inflation per se; (c) a PPO provides the most secure and reliable method of investment for annual care costs required for life; (d) if the claimant exceeds his predicted life expectancy by more than a short period of time, the lump sum will be inadequate.

Heads of loss other than care: some are more suited to a PPO than others

Where a claimant is clearly going to lack capacity to manage his financial affairs for life, payment of future professional deputyship costs for life by way of a PPO has the same advantages as for future care. The costs are likely to be regular for life, making a PPO eminently suitable (all other things being equal).

Where, on the other hand, the claimant is liable to incur costs sporadically, for instance with prosthetics and some expensive equipment items, the disadvantage of a PPO becomes more readily apparent. It limits the claimant's flexibility and freedom to respond to unforeseen events. If, for instance, a claimant were to recover £3000 p.a. by way of a PPO for a single prosthetic, he would not be well placed to replace it, at a cost of £15,000, if the first prosthetic was damaged beyond repair after 2 years.

Accommodation claim and the need for capital

The basis upon which future accommodation has been calculated until the change in discount rate (applying the *Roberts v Johnstone* formula) limits the claimant to a notional annual sum, calculated as a percentage of the additional capital sum of the property needed, to which the life multiplier is applied to provide a lump sum. A claimant with a short life expectancy recovers only a modest proportion of the cost of the property even though his need for the property is as great as someone with a longer life expectancy.

This has meant that these claimants have needed to use part of their award for other damages (often more than just PSLA) to fund the balance of the capital cost of the suitable property. Given the rise in property prices, especially in the South East of England, the shortfall is often measured in many hundreds of thousands of pounds.

As a result, some claimants with a need for disability-related accommodation have needed to recover a substantial part of their damages by way of a lump sum payment. This limits the extent to which they can recover future losses by way of a PPO, even if they would otherwise wish to do so.

It remains to be seen how the cost of accommodation will be calculated by the courts in the light of the change in the discount rate. It is a matter shortly to be addressed by the Court of Appeal.

PPOs are infrequently offered other than for future care

As set out above, many insurers have reined back from offering PPOs even for future care in many cases over the last few years. The NHSLA and MIB have been notable for their (relative) enthusiasm for PPOs compared to many RTA insurers.

Subject to the odd exception, the default position in settlement negotiations is that PPOs will not be offered for heads of loss other than future care. Once advised of this, claimants have little expectation, therefore, of recovering PPOs for other heads of loss and the issue of whether they "choose" to take a lump sum payment does not, in practice, arise. It is what they will recover by settlement, whether they choose it or not.

Where a PPO is offered by an insurer, the insurer tends to be less concerned as to whether the PPO will cover heads of loss additional to future care. The key decision made by the insurer is whether to offer PPOs or not.

Where settlement requires court approval, the insurers are that much more likely to agree to pay PPOs for future care

Where the claimant has substantial care needs and has capacity (as is the position for most claimants with spinal cord injuries such as paraplegia and tetraplegia), the insurers will frequently attempt to settle these cases by way of a lump sum only payment. Such an approach is sometimes, although not invariably, successful.

Where the claimant has substantial care needs and lacks capacity to litigate (as is the position for most claimants with traumatic brain injuries or birth brain injuries), then settlement will be subject to court approval. In these circumstances, the claimant's legal advisers will most often recommend settlement of future care on a PPO basis. If the claimant's legal advisers insist on a PPO payment for future care, the insurers are that much more likely to make offers on this basis so as to ensure that the settlement is approved by the court.

It remains rare and the exception to the general rule for other heads of future loss to be compensated by way of a PPO even where the settlement requires court approval.

Q9: Do claimants receive investment advice about lump sums, PPOs and combinations of the two? If so, is the advice adequate? If not, how do you think the situation could be improved? Please provide evidence in support of your views.

Response to Q9

Claimants sometimes, but not invariably, receive advice from independent financial advisers about the appropriate division of future losses between lump sum and PPO.

The advice certainly should be adequate if the IFA is performing his professional duties satisfactorily.

The investment advice, whatever it is, cannot overcome the hurdle of having to persuade an insurer to provide PPOs. As set out above, the practice of a significant number of insurers has been one of strong resistance to PPOs, even for future care and certainly for other heads of future loss. This may change with the change now made to the discount rate, making payment on a lump sum basis (certainly for claimants with long life expectancies) that much less attractive to insurers. Equally, lump sums are now more attractive to some claimants.

Q10: Do you consider that the present law on how the discount rate is set should be changed? If so, please say how and give reasons.

Response to Q1, Q2 and Q10

Individual members of PIBA have very different views as to how and at what level the discount rate should be set. Regardless of their individual views, PIBA members do not consider it constructive to describe the present law on the discount rate as "defective". The present law is the result of careful judgments from the House of Lords in *Wells v Wells*.

Whether the discount rate provides for over-compensation or under-compensation depends on what is taken as full or 100% compensation. Here, the Government's position is that, on the one hand, it adheres to the 100% compensation principle and that, on the other hand, it may be appropriate to increase the discount rate from -0.75% to reflect investment returns on investments other than pure ILGS.

For those who believe that 100% compensation means providing the claimant with the ability, with the minimum risk, to obtain the necessary funds to meet future expenses, these two positions adopted by the Government are internally inconsistent.
For those who believe that 100% compensation is a relative concept and can be achieved by assuming that claimants can or should invest other than purely in ILGS, then the 100% compensation principle can be complied with consistently with investment in a mixed bag. For these individuals, *Wells v Wells* should no longer be followed.
Asking whether the application of the discount rate creates under-compensation or over-overcompensation does not, therefore, advance the debate but obscures the real question in issue, which is whether claimants' future losses should be assessed on the premise that the notional claimant will invest in ILGS or accept higher investment risks with a mixed portfolio of investments.

Given the state of the law is clear (see *Wells v Wells*), determination of this question is an essentially political one. The Government has recognised this in the consultation paper at para 12. *Wells v Wells* proceeded on the basis that the intention of the discount rate was to provide a mechanism for compensating the claimant at trial for future losses. Accordingly, it did not take into account the effect of selection of the appropriate discount rate on defendants as a class.

If the Government wishes to draw a different balance between the interests of claimants and the interests of defendants and the public at large, that is pre-eminently a matter for the Government and, in due course, Parliament. That being a political issue on which PIBA members speak with different voices, PIBA remains silent.

PIBA would, however, wish to rehearse the point made above that the investment choices made by claimants do not provide a good indicator for the Government of the appropriate method for selecting the discount rate. The lump sum was assessed by reference to a discount rate of 2.5%, long since known to be well above and now confirmed as being (at least) 3.25% above the actual return on ILGS. In those circumstances, claimants post-settlement would be expected to invest other than purely in ILGS as they had not recovered sufficient funds to meet their needs by investing only in ILGS.

If Parliament does change the law so that a claimant is expected to invest in a mixed portfolio, then either: (a) the discount rate should reflect the expected cost of obtaining investment advice; or (b) the claimant should be entitled to recover costs associated with obtaining such investment advice. The law at present prevents such a claim being made.

Q11: If you think the law should be changed, do you agree with the suggested principles for setting the rate and that they will lead to full compensation (not under or over compensation)? Please give reasons.

Q12: Do you consider that for the purposes of setting the discount rate the assumed investment risk profile of the claimant should be assumed to be:

(a) Very risk averse or "risk free" (Wells v Wells)

(b) Low risk (a mixed portfolio balancing low risk investments)

(c) An ordinary prudent investor

(d) Other.

Please give reasons.

Response to Qs 11-12

As set out above, PIBA does not welcome hiding behind terms such as under-compensation and over-compensation. The decision as to the investment risk profile to be adopted is a political one. If the balance is to be redrawn between claimants and defendants/the public, then the Government is in a position, if it so chooses, to work backwards from the result that it wishes to achieve rather than to fix the discount rate by reference to a notional investment risk profile as such.

Q13: Should the availability of Periodical Payment Orders affect the discount rate? If so, please give reasons. In particular:

- Should refusal to take a PPO be taken as grounds for assuming a higher risk appetite? If so, how big a difference should this make to the discount rate?
- Should this assumption apply in cases where a secure PPO is not available?

Response to Q13

PPOs are not freely offered to claimants

As set out above, it is not the case that claimants are routinely refusing to take PPOs. The position is the converse with many insurers routinely refusing to offer PPOs. Whether the position will change in light of the change in the discount rate remains to be seen.

Given that claimants are not routinely refusing to take PPOs, there can be no basis for surmising that claimants are, therefore, as a class willing to take more risk than the notional *Wells v Wells* cautious investor. This is a non-sequitur. The Government must make its own decision as to the appropriate discount rate level but not by reference to the uptake on PPOs to date.

PPOs are not always suitable for claimants

As set out above, PPOs cannot always be provided by defendants for want of sufficient security of continuity of payment. If the claimant is recovering a proportion only of his damages, a PPO may be not suitable for one or more (or even all) heads of loss. Even where the claimant recovers full damages, a PPO may not be the appropriate method of payment, not least given the need to meet the capital cost of accommodation and given the enhanced flexibility offered by a lump sum payment.

The discount rate should be the same whether or not PPOs are available

What seems to be envisaged is that the court would have a two tier system for discount rates; one rate where the defendant cannot provide a PPO or where the claimant reasonably refuses an offer of a PPO; and another, higher discount rate where a PPO is secure and offered but unreasonably refused by the claimant.

At the least, it would be necessary to limit the higher discount rate to cases where the claimant has unreasonably refused to accept a PPO because otherwise that claimant would be treated inconsistently as against a claimant who was not offered a PPO at all. There could be no justification for such discrimination.

PIBA cautions strongly against such a two tier system. It will encourage considerable further litigation as the parties argue whether the claimant's conduct is deemed to be reasonable or not. This in turn will lead to the defendant routinely obtaining its own IFA report (contrary to the guidance in *Thompstone*) and seeking to investigate the decision-making process on the part of the claimant, which is currently litigation-privileged.

The court's assessment of what form of award best meets the needs of the claimant is one it can make without investigating all the issues which go to the reasonableness of the claimant's decision to accept or refuse a PPO.

PIBA recommends that the discount rate should not be dependent upon whether PPOs are available. The current state of the law by s 2(1) of the 1996 Act meets the underlying concern evidenced by the question, namely to ensure that PPOs are awarded where they are appropriate.

Q14: Do you agree that the discount rate should be set on the basis that claimants who opt for a lump sum over a PPO should be assumed to be willing to take some risk? If so, how much risk do you think the claimant should be deemed to have accepted? Please also indicate if you consider that any such assumption should apply even if a secure PPO is not available. Please give reasons.

Response to Q14

No. See response to Q13.

Q15: Do you consider that different rates should be set for different cases? Please give reasons. If so please indicate the categories that you think should be created.

Response to Q15

PIBA members have different views on this issue.

Some members believe that consistency is key and that there should be a single discount rate to cover all cases. If different categories of cases are dealt with differently, there would have to be a rational justification for so treating the categories differently. That is hard to find since the underlying principle of 100% compensation should apply equally to all claimants in respect of future losses. Having different rates will encourage litigation and manoeuvring to contend that a given case is in one class or another.

Other members believe that those with the most serious injuries need to be treated as in a special category because they should not be put in a position where they are expected to take any risks relating to their compensation awards. For instance, a distinction could be made between future care and other heads of loss; or between future care (including case

management) above a certain annual cost and all other heads of loss. And heads of loss which rise by reference to earnings (such as care) can be assessed on a discount rate different from heads of loss which rise (at least broadly) by reference to RPI; this approach was adopted in *Helmot v Simon*.

Q16: Please also indicate in relation to the categories you have chosen whether there are any special factors that should be taken into account in setting the rate for that category.

Response to Q16

See response to Q15 above.

Q17: Should the court retain a power to apply a different rate from the specific rate if persuaded by one of the parties that it would be more appropriate to do so? Please give reasons.

Response to Q17

PIBA members have different views on this issue.

The issue elicits similar responses to those set out in response to Q15.

PIBA members are agreed that there should, at the least, be a power to use a different rate, not least in cases where the claimant lives abroad and his damages will not be invested in the UK.

Q18: If the court should have power to apply a different rate, what principles should apply to its exercise?

Response to Q18

See above.

Q19: Do you consider that there are any specific points of methodology that should be mandatory? Please give details and reasons for your choice.

Response to Q19

This is not an issue on which PIBA is well placed to assist.

Q20: Do you agree that the law should be changed so that the discount rate has to be reviewed on occasions specified in legislation rather than leaving the timing of the review to the rate setter? If not, please give reasons.

Q21: Should those occasions be fixed or minimum periods of time? If so, should the fixed or minimum periods be one, three, five, ten or other (please specify) year periods? Please give reasons.

Response to Qs 20-21, 23, 24, 26

This is an issue on which PIBA members have different views.

Some members consider the discount rate should be fixed for a considerable period of time so that there is consistency and predictability. Without this, parties will not be able to settle their cases routinely and at a time appropriate for the individual case. Instead, parties will be encouraged to manoeuvre the date for settlement of their case around the timing of the next change to the discount rate. Depending on how the discount rate is based, it should be possible to make a broad assessment of the likely change (if any) to the discount rate. This will encourage one party (depending on which way the discount rate is expected to shift) to delay settlement, the other to want to bring settlement forward. All this will serve to upset the appropriate resolution of cases.

Other members consider that accurate assessment of future loss is key. Therefore, the discount rate should be altered whenever it has changed by a sufficient amount, say 0.5%. In the alternative, the discount rate could be reviewed regularly, say every 3 years. Again different members have slightly differing views as to the mechanism and triggers for change. What these members all agree on is that if the updated calculation of the discount rate is significantly different from the one set in light of this consultation, then there should be a mechanism in place to ensure that the discount rate is changed to reflect this.

Q22: When in the year do you think the review should take effect? Please give reasons.

Response to Q22

This is not an issue on which PIBA has any particular view to express.

Q23: Do you agree that the rate should be reviewed at intervals determined by the movement of relevant investments returns? If so, should this be in addition to timed intervals or instead of them? What do you think the degree of deviation should trigger the review?

Q24: Do you agree that there should be a power to set new triggers for when the rate should be reviewed? If not, please give reasons.

Q25: Do you consider that there should be transitional provisions when a new rate is commenced? If so, please specify what they should be and give reasons.

Response to Q25

PIBA does not speak with one voice on this issue.

There are some members who favour the new rate applying to new causes of action only. The effect of the combination of a significant change in the discount rate with a review of the discount rate generally has been to stultify the progress of ongoing claims. Settlements are few and far between. Insurers prefer to wait until the outcome of the review before settling or are inclined to make offers which do not reflect compensation based upon the discount rate of -0.75%. This puts claimants, and their legal advisers, in an invidious position, having to guess the outcome of this review.

If it was clear that the existing discount rate of -0.75% applied to all claims (and causes of action) up to the date of the new discount rate coming into force, then progress in settling these claims could be made. There is an unhealthy backlog building up, day on day, which will lead to delay in the settlement of future cases as well as delay in the settlement of the ongoing cases.

Other members consider it fairer that the new rate applies to all cases from the date of introduction of the new rule. In this way, it would mirror the effect of the change in March 2017 to the discount rate.

Q26: Do you consider that the discount rate should be set by:

(a) A panel of independent experts? If so, please indicate how the panel should be made up.

(b) A panel of independent experts subject to agreement of another person? If so, on what terms and whom?

Would your answers to the questions above about a panel differ depending on the extent of the discretion given to the panel? If so, please give details.

(c) The Lord Chancellor and her counterparts in Scotland or another nominated person following advice from an independent expert panel? If so, on what terms?

(d) The Lord Chancellor and her counterparts in Scotland as at present?

(e) Someone else? If so, please give details.

Response to Q26

The setting of a new discount rate is essentially a political question; so, too, is the question of whether future variations should be set by a politician or an independent person. The key decision for Parliament is how to set the formula. It could be justified by selecting the result sought to be achieved and explaining how this result achieves, in Parliament's view, the best balance between claimants and defendants/public. Or Parliament could set a formula, which can then be applied. Whether it is applied by a panel of experts or the Lord Chancellor is not really the point. It all turns on the framework set by Parliament.

Q27: Do you consider that the current law relating to PPOs is satisfactory and does not require change? Please give reasons.

Q28: Do you consider that the current law relating to PPOs requires clarification as to when the court should award a PPO? If so, what clarification do you consider necessary and how would you promulgate it?

Q29: Do you consider that the current law relating to PPOs should be changed by creating a presumption that if a secure PPO is available it should be awarded by the court? If so, how should the presumption be applied and on what grounds could it be rebutted?

Q30: Do you consider that the current law relating to PPOs should be changed by requiring the court to order a PPO if a secure PPO is available? If so, what conditions should apply?

Response to Qs 27-30

As set out above, PPOs are not suitable for all cases. The current state of the law is satisfactory in that the court is obliged to consider awarding any and every head of future loss by way of a PPO. PIBA does not support any rule change which requires the court to order a PPO if a secure PPO is available. This would be to impose a straightjacket on the court when the issue of whether a PPO is fact-specific and when PPOs so clearly do not work for all heads of future loss, even in cases involving injuries of the highest severity.

If there was a presumption in favour of a PPO, then this might encourage insurers to make PPO offers when otherwise they refuse to. If the discount rate remains at -0.75%, insurers may become more enthusiastic to settle cases by way of PPOs in any event.

However, PIBA does not favour even changing the law to impose a presumption in favour of a PPO. It would be absurd to order a PPO where, for instance, a claimant had a future loss of £500 p.a. for the next 5 years. The costs involved in administrating and managing the PPO would outweigh the damages. So the courts would immediately have to impose a threshold figure or guideline threshold figure.

As set out above, PPOs frequently do not work where the claimants recover a proportion of their damages. So the courts would have to set a threshold or guideline threshold for the % recovery which would normally lead to a PPO being appropriate.

And as set out above, some heads of loss are not well suited to a PPO, for instance future loss of earnings where the claimant's career path might have gone in many different ways and is most easily resolved on a lump sum basis.

The result of imposing a presumption, therefore, would be to overcomplicate the assessment of damages and to add an entirely new layer of issue for protracted argument between the parties. Any perceived benefit would be heavily outweighed by the added costs incurred in arguing out these issues. In a climate where the Government is considering imposing fixed costs on some multi-track cases, that would be particularly inapposite.

At the moment, the court's power to vary a PPO is limited. The court can order that there be stepped changes at specific dates, say age 65. But it has no power, for instance, to order that: (a) the annual payment ceases if the claimant is found to have regained capacity to manage his financial affairs; or (b) the annual payments will change if the claimant moves from community into residential accommodation. In both of these cases, the change will occur (if it does at all) at an unknown time. PIBA would welcome a provision which gave the court the capacity to provide for PPOs to vary upon the happening of an event rather than simply at set future times.

Q31: Do you consider that the cost of providing PPOs could be reduced? If so, how.

Response to Q31

PIBA favours any reduction in the cost of providing PPOs because the cost is understood to be a barrier to insurers offering PPOs in appropriate cases.

PIBA is not well placed to assist on the issue of how to reduce those costs.

Q32: Please provide details of any costs and benefits that you anticipate would arise as a result of any of the approaches described above.

Q33: Please provide any evidence you may have as to the use or expected use of PPOs in the light of the change in the rate and more generally.

Response to Qs 32-33

Please see above.

Impact Assessment

Q34: Do you agree with the impact assessment that accompanies this consultation paper? If not, please give reasons and evidence to support your conclusions.

Response to Q 34

PIBA is not in a position to say that it agrees with the entire impact assessment. At the same time, it does not consider it helpful or productive to go through the impact assessment line by line and limits itself to the matters set out above.

Equalities Statement

Q35: Do you think we have correctly identified the range and extent of effects of these proposals on those with protected characteristics under the Equality Act 2010?

Q36: If not, are you aware of any evidence that we have not considered as part of our equality analysis? Please supply the evidence. What is the effect of this evidence on our proposals?

Response to Qs 35-36

As above.

ROBERT WEIR QC, Chair of PIBA
PIBA Executive Committee members

28 April 2017