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PIBA RESPONSE TO THE MINISTRY OF JUSTICE CALL FOR EVIDENCE: “Personal Injury Discount Rate, Exploring the option of a dual/multiple rate”

Introduction

PIBA is a specialist Bar association with about 1,450 members, who undertake the full range of personal injury work for claimants and defendants. PIBA is neutral as between claimant and defendant interests: members represent both sides. We do not have independent data upon which to base our answers but our members are among the most experienced in dealing with the practical effects of discount rates on damages awards particularly in England and Wales but also, to a lesser extent, abroad.

Any system of personal injury damages must adhere to the principle of 100% compensation (sufficient compensation to provide full compensation, no more and no less), although there must be a sense of realism as to the extent to which that is truly achievable. It must also be fair, predictable, and workable. The 100% principle is the primary principle which ensures damages are fair and predictable.

The current approach to the discount rate is workable. PIBA's guiding principle when responding to this consultation is that any change to the application of discount rate(s) in the personal injury system must neither undermine the 100% principle nor make the system unworkable.

There is no clamour within PIBA that the current approach to the discount rate is unfair. All systems have winners and losers as no system is perfect. PIBA understands the main driver behind the current consultation to be the perceived inadequacy of treating all claimants the same in respect to discount rates: e.g. younger claimants who require compensatory damages for life are more able to ride out the economic cycle (premised as being of 5 to 10 years in duration) but older claimants less so. Whilst having an aim of better meeting the 100% principle by taking the individual claimant's circumstances into account to a greater extent is laudable, it may also give rise to new winners and losers. For example, those at the margins may be moved into a discount rate category incorrectly; tapering will minimise but not eliminate this issue. It is also inevitable that with greater complexity, as a dual or multiple discount rate would necessarily be over a single discount rate, there will be greater recourse to ambiguity and therefore a higher chance of contested litigation, which is undesirable from both the claimant and defendant perspective (as stress, delay and costs increase). There are also issues as to predictability of outcome.

PIBA is not opposed to change but does consider it imperative that change has a demonstrable benefit and that the cost (undesirable consequences) of implementing any change does not outweigh the real / anticipated benefit.

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.

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?

PIBA expresses no preference based on any of the international examples set out in the paper. PIBA does acknowledge that lessons can be learnt from other jurisdictions. However, just because dual or multiple rates are used in other jurisdictions does not necessarily evidence that those other approaches are effective, workable or better than the current

system in England and Wales. For example, PIBA notes that Civil Rules Committee in Ontario has twice (in 2017 and 2021) recommended that the dual discount rate in that jurisdiction revert to single discount rate (see Ontario Civil Rules Committee dated 20 April 2021 at para 25 and 26: see report [here](#)).

A weakness of the dual rate system in Ontario is the frequency with which the short-term rate has been changed. As the short-term rate is subject to frequent review/change the assessment of value in long-running claims is difficult and unpredictable and risks the parties prolonging litigation on the basis that a further change may be in their favour. This creates delay and problems of satellite litigation (for example in respect of part 36 offers).

In Ireland it is of note that at the time of the Court of Appeal decision in *Russell (a minor) v Health and Safety Executive* [2015] IECA 236 which set discount rates, there was no option for the Court to make a periodical payment order. PPOs have subsequently been introduced in Ireland though there is debate as to the success of PPOs in that jurisdiction.

A weakness of the discount rate systems in Hong Kong and Jersey is that these models have 'cliff-edges' such that a claimant with a 21-year life expectancy recovers substantially less compensation than a person with a 20-year life expectancy. Tapering would of course alleviate the risk of such frank injustice but at the cost of complexity (which would probably lead to higher costs and greater delay).

In short, PIBA would identify the main perceived benefit of dual or multiple discount rates to be an anticipated closer alignment to the 100% principle by better taking into account individual circumstances but at the inevitable cost (weakness) of increased complexity and thereby reduced consistency and predictability (as well as greater delay and cost).

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.

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

Please give reasons.

Whilst PIBA is able to provide a theoretical answer (the optimal point for switch over is the point at which there is most likely to be full compensation with least undesirable side effects) PIBA does not have the data to be able to answer questions 3 or 4.

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.

PIBA cannot state a preference amongst these options as a neutral organisation. Whether a dual or multiple rate should be introduced will have a direct consequence on the size of awards and the PIBA membership will have many different views on the issue.

PIBA's view on the advantages and disadvantages of the various options are set out in response to questions 8 and 9.

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.

PIBA cannot assist on this question.

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

Please explain your reasoning.

PIBA cannot offer a view on how frequently the rate should be reviewed from an economic perspective. However, we do make the point that the more regular the review, the more likely it is that there will be serious problems of delay, unpredictability, and satellite litigation. Clearly, review needs to be sufficiently frequent to ensure discount rates are not so out of date as to cause injustice but not so frequent that there are multiple changes of discount rate during the course of any claim (such that there may be unpredictability of award or a tendency to delay). There is no standard length of claim, but most serious claims take several years to completely resolve. Catastrophic injury claims can take in the region of 5-7 years from the accident to resolve. Catastrophic birth injury claims can be closer to 20 years.

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

This depends on the type of dual rate system introduced.

It is uncontroversial that different heads of loss are subject to different rates of inflation. In the context of the indexation of PPOs and this was explored in some detail by the Privy Council in *Helmot v Simon*. Thus:

- the PC in *Helmot* applied one rate for “earnings related losses comprising the [claimant’s] loss of earnings and the cost of employing his carers” and a different rate for the “non-earnings related elements of the future loss”. Thus, the same rate was used for future loss of earnings as for future care.
- ASHE 6115 has been routinely used for the indexation of PPOs for future commercial care since *Thompstone*.
- Lloyd-Jones J in *Sarwar v Ali* used the ASHE aggregate for male full-time employees at the 90th percentile as the appropriate index for the PPO for future loss of earnings.

- Foskett J used ASHE 212 (for engineering professionals) for the PPO for future loss of earnings in *Robshaw*.
- Foskett J used ASHE 222 for the PPO for therapies and RPI for the PPO for CoP/deputyship costs in *Robshaw*.
- the parties in *Farrugia* agreed to use the Guideline Hourly Rates as the index for the PPO for deputyship costs.

In theory, using an assumption for future inflation which is specific to each head of loss ought to lead to a more accurate assessment of compensation for claimants.

Using a dual rate by reference to the period over which the loss will be suffered has the theoretical advantage of reflecting more accurately the likely return on investment of damages invested for long periods.

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

The workability of multiple discount rates for different heads of loss depends on how it is structured. Much will depend on how different heads of loss are to be categorised:

- if future commercial care and case management are to be carved out for a separate DR, what would be the justification for using a DR based on CPI for future loss of earnings, deputyship costs etc, none of which will be subject to prices inflation?
- the problem with multiple rates for different heads of loss, aside from the difficulty in settling on an appropriate rate for each, will be the significant uncertainty which this will introduce when trying to predict the outcome at trial during settlement discussions. How could a party predict what DR will apply to each head of loss on the other side of a rate review?

- multiple rates are also likely to impose a substantial layer of complexity on claims, both for the legal advisers but also for claimants in seeking to understand their position. Such complexity will also impact not only pre-settlement / pre-judgment financial planning but also ongoing financial planning after settlement / judgment, which may lead to difficulty, lack of certainty and/or a continuing reliance of financial and legal professionals.
- further, unless there is real clarity, there are likely to be arguments over the scope of each head of loss for which a different DR applies. Does future care include gratuitous care, agency care and directly employed care? Will the assumptions for future earnings inflation apply equally to high earners and low earners, employed and self-employed, those with good prospects of promotion and those without?
- in the final analysis, a single rate based on an assumption for damages inflation which is a compromise across all heads of loss (which is the current approach) may actually be fairer and more workable than trying to apply different DRs for each head of loss. The same point may be made a different way: given the lack of knowledge as to economic performance beyond the short term, there is a real doubt as to whether a dual or multiple discount rate system will bring outcomes closer to the 100% compensation principle – whether at all and/or without a significant compromise in terms of fairness, predictability and/or workability.

The disadvantages of different rates for different periods, leaving aside issues relating to the selection of the rate, are practical. Can practitioners easily find the appropriate multiplier and how predictable will the rate be on the other side of a review? These practical issues are revisited in the answer to the next questions.

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?

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.

These questions can be taken together. PIBA will focus on the practical implications of introducing dual or multiple rates. The main practical issues are as follows.

- **Complexity**

It is imperative that litigants can find the applicable multiplier easily, without the need for algorithms or expert input. §§66 to 68 of the Call for Evidence paper refer to 3 different approaches to calculating the multiplier where there are different rates for different periods, with the ‘blended’ approach being the approach favoured by the GAD. It is not immediately clear how one goes about finding the multiplier for a loss which will endure beyond the switchover point, where the cashflow for each subsequent year is discounted twice, once for the short-term period (at a lower rate) and again for each year after the switchover (at the long-term rate).

- **Predictability**

It is unknown how frequently each of the rates will be subject to review. At present, a review of the single rate takes place every 5 years. There must be an argument for more regular reviews if there is to be a short-term rate (as there is in Ontario) or if different rates will apply to different heads of loss (where the data underpinning the assumptions for each rate may change more regularly). The more rates there are, the more the parties to personal injury litigation will have to try to predict in the period leading up to a rate review. The less predictable the rates which will apply at trial, the harder it will be to settle claims. Further, as the rate review approaches, there is a greater incentive on the parties to behave tactically in fixing the date for the joint settlement meetings and the like.

A further problem arises in respect of settlement approval around the time of

reviews of the discount rate. Settlements reached on behalf of children or protected parties are not binding until the court has approved them and either party is at liberty to withdraw from the settlement before that time. If a settlement is reached at a time when more than one discount rate relevant to the settlement is due to change, the risk of a party withdrawing from the settlement before it is approved is likely to be greater.

Similarly, applications for interim payments in high-value personal injury claims require the court to forecast the likely value of certain heads of loss during the litigation in order to ensure that such a payment does not risk exceeding a reasonable proportion of the likely amount of the final judgment. This task would be much more difficult if more than one discount rate relevant to the value of the claim is likely to change before the end of the litigation.

This difficulty in being able to predict what DR will apply when the litigation reaches trial would be even more problematic if there is any possibility that the discount rates might revert to a single rate at the next review.

- **Satellite Litigation**

In the particular case of a system in which different discount rates might be applicable to different heads of loss, there may well be uncertainty as to how specific items are to be categorised in order to identify which DR applies.

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.

There should be a short lead-in time. There needs to be sufficient time for practitioners to come to terms with the appropriate methodology for the new systems but not so much time as to give rise to tactical manoeuvring.

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?

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?

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?

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?

PIBA is not in a position to answer these questions.

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?

In principle, just as a move to a dual or multiple discount rate could be justified, so could a return to a single discount rate.

In practice, a state of continual flux in the personal injury system would give rise to undesirable consequences: delay, uncertainty, increased costs.

Even the prospect of reverting to a single rate would itself create considerable uncertainty in predicting the future outcome of a trial on quantum, which is the essential task of practitioners in the settlement process. It will be hard enough to predict what the existing rates might change to on review without the additional uncertainty of the possibility that dual or multiple rates might become a single rate again.

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.

This question has been addressed in question 11 above.

In principle, multiple rates may have the potential to better achieve full compensation, to the extent that that is in fact realistically possible. In practice, multiple rates will give rise to a more complex system, which is harder to predict and likely to lead to satellite litigation.

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?

As discussed in 8 above it is uncontroversial that different heads of loss are subject to different rates of inflation. This appears to be the only sound justification for different discount rates for different heads of loss (any other justification risks eroding the 100% principle).

Future costs of care and case management could be subject to a different discount rate if the inflation data for this head of loss differed so significantly as to make a divergence justifiable.

A separate rate for future loss of earnings would be difficult to define. A simple application of national average earnings would give rise to under- or over-compensation in many cases and may not sit well with the court's findings as to the individual claimant's likely future career path. The judges in *Robshaw* and *Sarwar* selected an index from ASHE for the PP for loss of earnings applicable to the individual claimant.

If a bespoke discount rate were considered appropriate for loss of earnings PIBA would not be in favour of multiple discount rates for loss of earnings depending on the circumstances of employment/ self-employment.

As with loss of earnings, there is too much variability with other heads of loss to make a bespoke discount rate any more suitable than a generic discount rate for all heads of loss.

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.

The complexity in finding the correct multiplier may reduce over time as practitioners familiarise themselves with the approach.

But the additional complexity of forecasting movement in the DRs on the other side of review will be a permanent feature of a dual/multiple rate approach. Overall, there will be an increase in unpredictability and a heightened risk of inconsistency.

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.

It is the experience of PIBA that:

1. in clinical negligence claims against the NHS, it remains common for the parties to agree to a Periodical Payments Order;
2. in accident claims, however, it remains unusual for the parties to agree to a PPO.

There are several reasons why the parties less often agree to a PPO in accident claims.

There are undoubtedly cases in which a claimant may not want a PPO. This may be because

a lump sum would afford them greater flexibility or because their damages are discounted for contributory negligence or liability risk. Further, the low discount rate in recent years has made lump sum settlements more attractive to claimants.

However, the main reason for a claim settling on a lump basis where a PPO would otherwise be viable is likely to be that the defendant's insurer is simply unwilling to offer it. It is common in PIBA's experience for defendants to refuse to settle on a PPO basis at a Joint Settlement Meeting, leaving the claimant with the option of either settling on a lump sum basis or pursuing the claim to trial. Most claimants in that situation would accept a lump sum settlement.

The reasons for defendants' unwillingness to consider a PPO in many accident claims are probably:

1. commercial considerations related to the long-term financial commitment involved in a PPO;
2. the unavailability of excess loss reinsurance by which the defendant's insurer can spread the risks involved in a PPO;
3. the absence of a market through which life insurers might buy up PPOs from general insurers.

PIBA suggests that these issues relating to the insurance industry would need to be addressed if PPOs are ever likely to be more readily offered by insurers. However, the difficulty in respect of Government intervention on such issues is that these are essentially commercial considerations, which are of course less susceptible to regulation.

The only alternative to finding a way to make PPOs more attractive (or less unattractive) to insurers would be to adjust the rules to make PPOs compulsory in some way. This could be done by obliging the parties to engage with the option of a PPO in every case.

PIBA does not support making PPOs compulsory in this way. The use of PPOs is heavily case-specific and will not be suitable for many claims or claimants, even where there is a

willing and secure insurer. The parties to personal injury litigation should always be free to be flexible in the way they settle claims, even if such flexibility is fettered by restrictions imposed by one or other party to the settlement process. Such freedom to settle comes against the background of well-established rules in respect of costs and the likelihood of imposition of a PPO, which acts as a safety net to claimants in appropriate cases.

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

Please give reasons.

Logically, if a substantial part of the overall award of damages were made subject to a PPO and if the heads of loss in the lump sum element of the award would more appropriately attract a different discount rate, there would be a case for adjusting the discount rate to reflect that reality.

The discount rate for the lump sum in this situation would be difficult to set, however, because assumptions would have to be made about the sort of heads of loss likely to be kept in the lump sum. It is unlikely ever to be possible to use exactly the right discount rate for the mixture of heads of loss not subject to the PPO.

Further, the risk in this approach is that it would make the valuation and settlement of personal injury claims ever more complicated. There would inevitably be tactical considerations as to how the claimant divides his or her claim between the lump sum and the PPO. Parties would also be left having to predict yet another discount rate on the other side of a review by the Lord Chancellor. Simplicity would favour retaining a single discount rate for the lump sum irrespective of whether some part of the award is subject to a PPO.

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

PIBA is not in a position to answer this question.

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On behalf of the PIBA Executive Committee

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