



Institute
and Faculty
of Actuaries

Draft Provisions to enable courts to impose a Periodical Payment Order in respect of damages for personal injury

IFoA response to the Scottish Government

12 September 2017

About the Institute and Faculty of Actuaries

The Institute and Faculty of Actuaries is the chartered professional body for actuaries in the United Kingdom. A rigorous examination system is supported by a programme of continuous professional development and a professional code of conduct supports high standards, reflecting the significant role of the Profession in society.

Actuaries' training is founded on mathematical and statistical techniques used in insurance, pension fund management and investment and then builds the management skills associated with the application of these techniques. The training includes the derivation and application of 'mortality tables' used to assess probabilities of death or survival. It also includes the financial mathematics of interest and risk associated with different investment vehicles – from simple deposits through to complex stock market derivatives.

Actuaries provide commercial, financial and prudential advice on the management of a business' assets and liabilities, especially where long term management and planning are critical to the success of any business venture. A majority of actuaries work for insurance companies or pension funds – either as their direct employees or in firms which undertake work on a consultancy basis – but they also advise individuals and offer comment on social and public interest issues. Members of the profession have a statutory role in the supervision of pension funds and life insurance companies as well as a statutory role to provide actuarial opinions for managing agents at Lloyd's.



Frances MacQueen
Civil Law and Legal System Division
Ground Floor West
St Andrews House
Regent Road
Edinburgh
EH1 3DG

12 September 2017

Dear Frances

IFoA response to Scottish Government Draft Provisions to enable courts to impose a Periodical Payment Order in respect of damages for personal injury

1. The Institute and Faculty of Actuaries (IFoA) welcomes the opportunity to respond to this consultation. The IFoA's General Insurance (GI) Board has contributed the detail in this response.
2. We have limited our response to the financial consequences of introducing PPOs. We have not made any comment on the legal process; however, we would ask you to note that any decisions on legal process could have financial consequences. We would welcome the opportunity to discuss all aspects of PPOs with officials.

General Comments

3. The IFoA welcomes the publication of these draft provisions. The absence of this valuable Order for Scottish Courts seems to us as disadvantageous to pursuers seeking compensation for the injuries they have suffered. Paragraph 8 of the consultation notes the strong support from some legal bodies for the introduction of PPOs. The IFoA adds its voice to those bodies in supporting such a move.
4. The IFoA has a public interest responsibility. As such, that responsibility has led us to the conclusion that where an individual has suffered loss, compensation of the individual should be at the centre of any claim. The impact on the defender should be secondary and is ultimately a matter for the shareholder and other policyholders, in respect of insurers, or the taxpayer, in respect of governments. Consequently, we disagree with the conclusion in paragraph 17 that there should not be any adverse impact on defenders. The court should seek to compensate the pursuer, as appropriate, even if that causes the defender to suffer additional financial loss.
5. Our members' experience of PPOs is that they form part of a compensation package. It is rare for a PPO to form the complete settlement for pursuers; therefore, any proposed introduction should recognise that PPOs will only be in respect of settling specific Heads of Damage.
6. Paragraph 1 of the consultation notes the challenge of assessing life expectancy. While it is possible to assess the **average** life expectancy of the population as a whole, there are

London 7th Floor · Holborn Gate · 326-330 High Holborn · London · WC1V 7PP · **Tel:** +44 (0) 20 7632 2100 · **Fax:** +44 (0) 20 7632 2111

Edinburgh Level 2 · Exchange Crescent · 7 Conference Square · Edinburgh · EH3 8RA · **Tel:** +44 (0) 131 240 1300 · **Fax:** +44 (0) 131 240 1313

Oxford 1st Floor · Park Central · 40/41 Park End Street · Oxford · OX1 1JD · **Tel:** +44 (0) 1865 268 200 · **Fax:** +44 (0) 1865 268 211

Beijing 6/F · Tower 2 · Prosper Centre · 5 Guanghua Road · Chaoyang District · Beijing China 100020 · **Tel:** +86 (10) 8573 1000 · **Fax:** +86 (10) 8573 1100

Hong Kong 2202 Tower Two · Lippo Centre · 89 Queensway · Hong Kong · **Tel:** +11 (0) 852 2147 9418 · **Fax:** +11 (0) 852 2147 2497

challenges assessing the **average** life expectancy of a sub-set of the population suffering from serious injuries. This is without considering the impossibility of determining the longevity of an **individual**.

7. On average, actuaries would expect to be able to assess life expectancy, but that average means that 50% of the population would live longer than expected, while 50% would die earlier than expected. As such, it is impossible to say that a pursuer has been under, or over, compensated as the compensation will depend on the average assumptions used in the calculation. The IFoA commented in much more detail on this matter in our responses to both the 2013 and 2017 Ministry of Justice consultations.^{1 2}
 8. We note paragraph 14 of the consultation document sets out the main benefit of awarding a PPO. As well as eliminating longevity risk, the pursuer is not responsible for investing large lump sums, which may be successful or unsuccessful. In addition, the pursuer is not tempted to spend the lump sum in ways it was not intended; thus running the risk of exhausting the lump sum well in advance of the expected lifetime of the pursuer.
- Q2. New section 2C(3) permits the use of a payment method other than that specified in the order in certain circumstances. What is your view on whether the court should be able to pre-empt the possibility of reliance being placed on this section and narrow down (either completely or partially) the method(s) of payment for all defenders?**
9. We would support flexibility in the method of making payment. Pursuers may be subject to changing circumstances that could make the original method inappropriate. It would be useful for all parties if the court could set a principle that would apply in practice to enable a change in payment method.
- Q3. We propose that decisions made in relation to variation or suspension are to be subject to a bespoke review process. Do you have views on what level of review would be appropriate and on how that might best be achieved in practice?**
10. Given the nature of injuries suffered in these cases, a bespoke review process would be the only realistic option. We do not believe that any review should act as a re-run of any original decision, but only to consider variations or suspensions.
- Q5. Do you wish to highlight any particular issues in relation to the draft provisions? Do you agree with our interim findings as set out here and throughout the report? If not, why not? Can you provide any relevant evidence to support your views?**
11. We noted in our introductory comments the benefits of PPOs in reducing risk to the individuals; however, awarding a PPO does not introduce a risk-free settlement. PPOs will still include an element of inflation risk, as actual inflation over time may not match any assumption built into the settlement.
 12. We would support the use of standardised inflation indices, rather than leaving the decision with the Court. We suggest this for the following reasons:
 - Introduces extra uncertainty for both pursuers and defendants;
 - Index choices could be idiosyncratic;

¹ <https://www.actuaries.org.uk/documents/foa-response-ministry-justice-personal-injury-discount-rate-how-it-should-be-set-future>

² <https://www.actuaries.org.uk/documents/consultation-response-ministry-justice-damages-act-1996-discount-rate-review-legal>

- Selection of an index may require expert knowledge not readily available to the court; and
 - Unfairness, or inconsistency, between awards in different cases.
13. The nature of PPOs is that they will not provide exact compensation. An alternative approach would be the American Workers' Compensation that meets medical expenses as they fall due.
14. PPOs will also introduce credit risk to the pursuer. Although this is recognised in the consultation, it is important to emphasise the Financial Services Compensation Scheme does not provide 100% compensation in all cases.

Q6: In general, what do you think the impact of implementing these provisions would be?

15. The impact should be more PPOs in Scotland. However, it has been difficult to predict how changes to the awards system would lead to specific changes in behaviour. PPOs cannot be divorced from Lump Sum settlements; therefore, changes to the discount rate are likely to lead to changes in the propensity for PPOs. The announcement of proposed changes in England and Wales to the discount rate will affect the number of PPOs. Any proposals to change the Scottish discount rate would also have an impact.

Q7. Is it likely that more or fewer actions will be settled out of court?

16. Again, this is an area where it is difficult to predict reactions to changes to the legal framework. Pursuers and claimants may, at different times, have different preferences regarding PPOs, or lump sums.

Should you wish to discuss any of the points raised in further detail please contact Philip Doggart, Technical Policy Manager (Philip.doggart@actuaries.org.uk / 0131 240 1319) in the first instance.

Yours sincerely



Marjorie Ngwenya
President, Institute and Faculty of Actuaries