FACULTY OF ADVOCATES

RESPONSE BY THE FACULTY OF ADVOCATES ("the Faculty")

TO THE

REVIEW OF THE PERSONAL INJURY DISCOUNT RATE (PIDR) FOR SCOTLAND

The regime in place for setting the PIDR in Scotland since 1 July 2019 by virtue of the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 [see B1 of the Damages Act 1996 and Schedule B1] represents a significant improvement to the arrangements that preceded it.

One important feature of the new regime is regular review. It is acknowledged that regular review of the PIDR is an essential component in ensuring that the principle of full compensation (no more and certainly no less) is observed. On the other hand, substantial unheralded movement in the PIDR (whatever methodology is used to calculate it) is likely to create serious difficulties for claimants and compensators and their advisers due to the uncertainty that this involves.

In the relatively short period that the new regime has been in place the Faculty has no reason to think it is not working as was intended or that there are new grounds to alter in any way the makeup of the notional portfolio (paragraph 12 of B1), the assumed period of investment (30 years – paragraph 7(2)(b) of B1), the impact of inflation (by reference to the Retail Prices Index – paragraph 9(2)(a) of B1) and the standard adjustments outlined at paragraph 10 of B1.

The Faculty has no specific expertise in relation to the investment of money and economic forecasting. We rely on the skills and experience of others. We must defer to those who are qualified to make judgements in this field. Since 2019 there have been several events that have produced upheaval to the economic outlook at least for the short term. We are unaware of any changes that mean that it is necessary to adjust the range of factors to be considered when calculating the PIDR. Although the current percentages provided for in the standard adjustments for taxation and management charges may be at a level that undercompensates claimants, this was the case from the outset of the new regime. We are unaware of any factors necessitating a change in the position since that time.

Single or Multiple Rates (Paragraphs 21 and 22 of Schedule B1 of the 1996 Act

The view of the Faculty is that it would be unwise to change from a single rate to a multiple rate or rates. We note that in this jurisdiction there has been no opportunity to consider this complex issue in detail [c.f. the position in England and Wales which is of course subject to a different regime - see Consultation Paper published by the Ministry of Justice (17 January 2023)]. We do not think that a change from a single rate to multiple rates could possibly be justified without a proper examination and detailed analysis of the circumstances pertaining to Scotland. This has not occurred to date.

We observe that in most jurisdictions throughout the world a single PIDR is favoured. We are aware that some small jurisdictions (for example Ontario, Hong Kong, and Jersey) operate with multiple rates, but we are not familiar with the specific circumstances in these places or whether the approach taken in them has in fact been a success in meeting the aim of full compensation, no more and no less.

What is clear to us is that there would be significant challenges in moving to multiple rates whether by head of loss or by duration.

In relation to a different rate by head of loss, our view is that there is no clear justification for any distinction in the PIDR applicable between one head of claim and another. It is not obvious as to how to discriminate between heads of claim in deciding which PIDR should apply. Although it is sometimes maintained that future loss of earnings should be treated in a different way from other losses, we are not convinced that there is any clear reason for such an approach.

It is understood that investment performance over a longer period may result in a better return or more opportunity to recover from a short-term downturn, but we do not think that there is any evidence to justify

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multiple rates in the PIDR by duration. While the Faculty is not persuaded that there are any advantages to such a move, we are clear that there would be several disadvantages.

The most important disadvantage is the introduction of a significant additional layer of complexity in what is already a sophisticated process. There would in many cases be a need to have detailed expert input from an actuary and/or forensic accountant to ensure that the right multiplier is selected for the relevant period of loss. There would be more scope for disagreement between the parties as to how to apply the multiplier to the loss. The difficult task of quantifying delayed or stepped losses would be even more convoluted and controversial. We cannot see how dual or multiple rates by duration would address the issue presented by inflation. It is also likely that the pressure to tinker more regularly with the rate or rates would increase. We think that this would discourage early settlement, encourage manipulation by delay and create additional uncertainty.

The Faculty recognises that the compensation principle is difficult to achieve in practice. We think that for longer term losses the use of Periodical Payment Orders is by far the best method of meeting the aim of full compensation while mitigating the difficulties and uncertainties inevitably encountered where there are such losses in large claims.

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