

THE LAW REFORM COMMISSION OF HONG KONG

REPORT

**PERIODICAL PAYMENTS FOR FUTURE PECUNIARY LOSS
IN PERSONAL INJURY CASES**

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JANUARY 2023

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Preface

Introduction

1. This report ("**Report**") discusses the responses received in respect of the consultation paper issued by the Law Reform Commission's Periodical Payments for Future Pecuniary Loss in Personal Injury Cases Sub-committee ("**Sub-committee**") in April 2018 ("**Consultation Paper**"),¹ and sets out our analysis and final recommendations on this topic.

2. The Report includes a draft Bill entitled "*Personal Injuries (Miscellaneous Provisions) Bill*" ("**Draft Bill**") prepared by the Sub-committee to put a focus on further discussions pertinent to the implementation of periodical payment orders ("**PPOs**"), together with an overview of existing compensation schemes in Hong Kong. These are attached respectively at Annexes 2 and 3 to the Report.²

Background

3. In Hong Kong, the court awards pecuniary damages in personal injury cases in a lump sum. Damages for future pecuniary losses may be awarded on the same basis as damages for past pecuniary losses, that is, *restitutio in integrum* or full compensation for the loss. The claimant's past and future losses are assessed and crystallised, once and for all, into a lump sum payment³ which is determined at the date of the hearing or agreement.

4. Assessing a "*once and for all*" lump sum award is a difficult task for courts as any assessment of damages for future pecuniary loss must consider what a plaintiff might have earned but for the injury, the earning capacity of the plaintiff after the injury and any additional expenses incurred following the injury. This lump sum must reflect the present value of the plaintiff's prospective loss, that is, the plaintiff's stream of future lost earnings and/or future expenses. This conventional approach to quantify future losses by using the multiplier/multiplicand model established by case law has been generally criticised as being imprecise and unscientific.

¹ Apart from setting out the Sub-committee's Recommendations, the Report will not repeat the content of the Consultation Paper which is available on the Law Reform Commission's website at: <http://www.hkreform.gov.hk/en/publications/periodicalpayments.htm>. The Report should be read in conjunction with the Consultation Paper.

² At Annex 1 to the Report is the List of Respondents who made submissions in response to the Consultation Paper.

³ Nicholas Bevan, Theodore Huckle and Sheralee Ellis, *Future Loss in Practice: Periodical Payments and Lump Sums* (Butterworths, 2007), at para 2.06.

5. In a case, *Chan Pak Ting v Chan Chi Kuen & Anor*,⁴ Bharwaney J pointed out the option of making periodical payments as an alternative to the conventional multiplier/multiplicand approach to assessing damages for future pecuniary loss. Bharwaney J noted that the system of lump sum compensation was problematic given *"that the future may unfold in a way that makes the lump sum award either too little or too much"*.⁵ He mentioned that section 2 of the Damages Act 1996 in the UK empowered the courts to make periodical payments that lasted the actual life time of an injured plaintiff, and to vary such payments in accordance with the rise (or fall) of the retail price index.

Terms of reference

6. In early 2015, the then Chief Justice and the then Secretary for Justice asked the Law Reform Commission to review this subject. The terms of reference are:

"To review the relevant law relating to the assessment of damages for future pecuniary loss in personal injury cases, for the purpose of considering whether reform is needed to allow periodical payments for future pecuniary loss to be awarded, and if so, to make recommendations for reform as appropriate including, if deemed necessary, the viability and desirability of a mechanism for fixing and reviewing the presumed rate of return on investment to be applied in assessment of damages in personal injury cases."

Membership of the Sub-committee

7. In March 2015, a sub-committee was appointed to review the subject. The members of the Sub-committee are:

Mr Raymond Leung, SC (Chairman)	Senior Counsel Temple Chambers
Mr Mohan Bharwaney, SBS, SC	Accredited Arbitrator and Mediator Former Judge of the High Court
Miss Kitty Cheng (until March 2021)	Legal Counsel Hospital Authority

⁴ [2013] 1 HKLRD 634, HCPI 235/2011, 671/2007 and 228/2010 (date of judgment: 18 Sep 2012).

⁵ Same as above, at para 5.

Mr Norman Hui	Senior Teaching Consultant Department of Professional Legal Education University of Hong Kong
Mr Ros K T Lam, JP (until September 2017)	Former Assistant Commissioner of Insurance (General Business) Office of the Commissioner of Insurance
Mr Simon Lam (from October 2017)	Executive Director (General Business) Insurance Authority
Ms Lucia Lau (until April 2019)	Senior Legal Counsel Consumer Council
Ms Vivien Lau (from April 2019)	Legal Counsel Consumer Council
Mr Mark Reeves	Managing Partner Munros Solicitors
Mr Peter C H Tam (until September 2017)	Chief Executive Hong Kong Federation of Insurers
Mr Steve Wong Yiu Fai	Deputy Director of Legal Aid/ Policy & Administration Legal Aid Department
Miss Catherine Yeung (from March 2021)	Legal Counsel Hospital Authority

8. Ms Kitty Fung, Acting Deputy Principal Government Counsel of the Law Reform Commission Secretariat, is the secretary to the Sub-committee.

The consultation process

9. The consultation period ended on 24 August 2018. Further submissions were received during extension of the consultation period upon requests. In total, 51 submissions were received, ranging from a simple acknowledgement of the Consultation Paper to detailed submissions on the questions raised in the Consultation Paper (each "**Question**" and collectively the "**Questions**").

10. Those which submitted responses included academics, Government bureaux/departments, insurance companies, legal professional bodies, social services organisations, statutory bodies (relating to public health, insurance and consumers' rights) as well as members of the public (each "**Respondent**" and collectively the "**Respondents**"). A list of the Respondents is set out in Annex 1 to this Report. We are most grateful to all those which commented on the Consultation Paper. The submissions made are summarised in the following chapters.

11. On 25 June 2018, members of the Sub-committee attended a meeting of the Panel on Administration of Justice and Legal Services of the Legislative Council to provide a briefing on the Consultation Paper. In addition, a forum was held on 3 July 2018 to discuss the topic under consultation with representatives of the insurance sector.

Chapter 1

Power of the court to make PPOs in respect of damages for future pecuniary loss in personal injury cases

Introduction

1.1 This Chapter will deal with Question 1 as set out in the Consultation Paper:

*"Whether, as a matter of principle and notwithstanding the need for further exploration as to various aspects of operational feasibility, the court should be given, by way of legislation, the power to make periodical payment orders in respect of damages for future pecuniary loss in personal injury cases."*¹

1.2 Question 1 is a question of principle and does not invite the consideration of any practical problems. It is posed from a theoretical standpoint. It is also deliberately limited in ambit. It does not extend, for instance, to considerations of the types of personal injury claims to which PPOs may appropriately apply, which is an issue to be addressed in Question 3.

Responses to the Sub-committee's Question 1

1.3 The vast majority of the responses were supportive of the principle of bestowing upon the court a statutory power to order periodical payments for future pecuniary loss. Of the 24 responses to Question 1 received, 16 were in support, four were against and four were neutral. This is to be expected given the question is merely one posed on grounds of principle rather than one asking about practicalities of its imposition. We will in particular highlight those negative responses.

1.4 How this question was approached depended to a large extent on the background of the relevant Respondents. The four opposing Respondents have an insurance or quasi-insurance background and they may generally be regarded as the payers.

1.5 The Hong Kong Federation of Insurers ("HKFI") stated that it did not agree with the suggestion in Question 1. In the main, it said that a decision should not be made until such time when the impacts on different stakeholders have been fully studied and considered. It was of the view that Hong Kong has

¹ Consultation Paper, at paras 1.1 to 1.26.

a higher proportion of private settlements and an alternative mechanism (such as dedicated judge/counsel panel for assessing periodical payment arrangement only) was required. Furthermore, this should be limited to a class of claims in which future pecuniary loss should exceed a certain level. Otherwise the administrative charges would outweigh the benefits of PPOs. What is a practically efficient scheme in other common law jurisdictions may not be cost-effective in Hong Kong given the policy limits in employment compensation and motor policies, and the Hong Kong market for liability policies is much smaller than those places. It was suggested that if PPOs are to be implemented subject to various aspects of operational feasibility, it should be limited to catastrophic injuries and young plaintiffs who need substantive future cost of care and alternative accommodation and suffer substantive future loss of earnings. In short, HKFI considered that PPOs are for the high value claims where it is not possible for the court to make a just and fair assessment of the plaintiffs' claims due to uncertain life expectancy or possible consequential or pre-existing illness of the plaintiffs that may affect the multipliers in lump sum awards. For claimants in advance age, although they may have a claim for damages for future pecuniary loss, the amount of the claim may not justify the administrative costs incurred. HKFI stated that:

"Under the PPO regime, Claimants, Defendants and their insurers would be denied fair compensation or settlement, as parties are deprived of the opportunity of attaining finality in the case.

In response to the increase in overall costs of insurance due to PPOs, insurers would be forced to adjust the premium charged in order to maintain their service and competitiveness. Hence, the risks and costs consequential to the making of PPOs shall inevitably be shifted to the general public.

The enactment of PPO legislation also goes against the existing system of settlement negotiation. Under the current scheme, in order to exert pressure on costs consequence on the Plaintiff, the Defendant must make sanctioned payment into the Court which may beat the ultimate judgment. Unless there is an amendment of Order 22 RHC, There [sic] is no way of assimilating the current system of settlement negotiation with a PPO regime.

Conventional lump sum settlement is considered as a simple and clear method which allows the plaintiff [sic] receives the cash compensation immediately so he can either make the cash deposit in banks or appoint investment managers to find other investments opportunities for having higher investments return potential. This is a financial freedom that people are looking for.

We want to stress that it is the operational part, such as the extent of discretion to be allowed to court in deciding the periodical payment arrangement, the related legal framework and implications, the continuity of securely paying the periodical payments to the infringed party, etc., that will require a lot more consideration before a final conclusion should be reached.

This significantly raises cost implications for all parties and not all cases can be settled as PPOs. Mandatory blocking of the traditional lump sum settlements where both parties are in agreement to do the same would not be favoured. ...

While PPO may be able to address the issue of uncertainty and unpredictability of future inflation and life expectancy and also eliminate the risk of dissipation of the award by family members of the claimants, it also creates a lot more issues:

- Most Personal Injury claims will be prolonged rather than bringing finality to the proceedings even after resolution of the claims.*
- Given the substantial amounts of claims involved, extra reserving has to be decided at the board level of individual insurers.*
- If the HK Court follows the UK experience to appoint experts to advise on the financial needs of the claimants and to make recommendations on PPO, this will undoubtedly increase the claim costs.*
- In order to avoid the sanctioning of PPO which will create greater financial uncertainty and burden, insurers might be forced to offer and pay higher settlement sum in order to bring finality to a claim, thereby increasing their overall financial loss.*
- With the significant financial burden of administering more long-tailed claims, the ultimate financial impact will be transferred to consumers.*
- No tax advantage will be brought by PPO as the income generated from the investment of lump sum award is not taxable in HK.*
- PPO is fully guaranteed by the Financial Services Compensation Scheme in the UK while HK has no such scheme as backup.*
- Judgment by the Court is not an intuitive process, it is a result based on all the medical evidence and financial data presented before it. It should be the Court's responsibility to make more precise assessment (on matters including the discount rate) rather than shifting its responsibility through PPO, which will result in the lengthening of the entire litigation process.*

- *Receiving a lump sum award for damages would be more easily manageable and allow more flexibility for investment preferred by claimants."*

1.6 Neutral responses were given by the Motor Insurers' Bureau of Hong Kong ("**MIB**") and the Employees Compensation Insurer Insolvency Bureau ("**ECIIB**") on the basis that until a full study had been conducted, they were not in a position to respond.

1.7 It is discernible from overseas experience that the insurance industry perceived itself to be adversely affected by the introduction of periodical payments in the sense that the overall costs for settlement of the claims would be higher and the negative reaction of the insurance industry is generally precipitated by such sentiment.

Our analysis and response

1.8 As mentioned in the Consultation Paper, the Sub-committee believed:

"periodical payments are in principle a more appropriate means of payment of damages for significant future financial loss. They better reflect the purpose of an award to restore the plaintiff to the position he would have been in, had the injury not occurred, and they place the future risks on the tortfeasor. As for the plaintiff, whilst he has a right to compensation, he does not have a right to require it only be in the form of a lump sum."²

It was considered that periodical payments are in principle a more appropriate means of payment of damages for significant future financial loss.

1.9 A number of Respondents such as the Society for Community Organization, the Consumer Council and Mr Lai addressed this question empirically without much elaboration or reasoning. The response from Mr Lai is particularly interesting as it is personal, on occasion anecdotal, from an individual who was himself, we understand, severely injured.

1.10 Some Respondents answered it in principle but with a caveat similar to what was mentioned in the Consultation Paper covering the type of cases to be applied.³ For example, Well Link General Insurance Company Limited ("**Well Link General Insurance**") said that *"[i]n principle this is a politically correct decision, but this should be limited to a class of claims in which future pecuniary loss should exceed a certain level" and "it should be limited to catastrophic injuries and young age plaintiffs who need substantive future costs of care and alternative accommodation and suffer substantive future loss of earnings" and "PPOs are for the high value claims where it is not possible for the Court to make a just and fair assessment of the Plaintiffs' claims due to uncertain*

² Consultation Paper, at para 6.22.

³ Same as above, at para 6.28.

life expectancy or possible consequential or pre-existing illness of the Plaintiffs that may affect the multipliers in lump sum awards". This response merges with that under Question 3. In practice, it may sometimes be difficult to disentangle and compartmentalise these comments.

Detailed comments for and against

1.11 In Chapter 6 of the Consultation Paper, the Sub-committee went beyond addressing this question merely as a matter of principle and looked at the arguments for and against the introduction of periodical payments. The observations of the Sub-committee therein were rehearsed in a number of responses and the Respondents also sought to identify other related issues for consideration, which are highlighted below.

Restitutio in integrum

1.12 HKFI was at pains to emphasise that the proposed introduction of PPOs was a matter of public policy and *"not merely an issue of jurisprudence"*. In particular, it was mentioned that:

*"Despite the consultation is asking whether the court should be empowered to make periodical payment order, whether court judgement can ignore consent of plaintiff/defendant, can re-open a case for review, self-funding is required, etc., **the fundamental question we would like to ask is, whether there is a need to set up legislation for PPO with no other alternative.***

*The proposed PPO regime, to all intents and purposes, is **not merely an issue of jurisprudence.** It is public policy making per se with far-reaching implications for different stakeholders. We need first of all to establish clearly what sort of problems we are facing and seeking to resolve before deciding if law reform is the only solution. ...*

In other words, we would like to focus on those which we believe are fundamental to considerations of whether there is a good case for introducing a PPO regime in Hong Kong."

1.13 In essence, the Employees' Compensation Insurance Residual Scheme Bureau Limited echoed the views of HKFI.

1.14 According to its response, Asia Insurance Co, Ltd ("**Asia Insurance**") was of the view that the consultation focused on the implementation of PPOs, but the fundamental question it would like to ask was whether there is a need to set up legislation for PPOs with no other alternative and whether all the stakeholders are ready for the PPO.

1.15 We acknowledge that jurisprudential and public policy issues are frequently intertwined. However, in the realm of the topic under consultation, the jurisprudential concept lies at the heart of what we are addressing. For instance, a court imposed PPO is seemingly at odds with another concept often

repeated by Respondents in relation to plaintiff's "*exercise of their free will*" to decide whether to accept a lump sum or PPO and how to invest and spend the money received by way of damages. However, it has to be recognised that the assessment of damages in personal injury cases is often not dependent upon the plaintiffs' "*free will*", although the preference of the plaintiffs, in particular, as to the care regime will be taken into account as a relevant factor.

1.16 In our legal system, the basis of the award of damages for personal injuries is jurisprudential and it is *restitutio in integrum*. Lump sum awards are less able to achieve this aim. This point was repeated by The Law Society of Hong Kong ("**Law Society**") and echoed by the Liberal Party and Allied World Assurance Company, Ltd ("**Allied World Assurance**"), and as the Civil Division of the Department of Justice ("**CD**") put it, "*the aim of reform in personal injury cases is to properly compensate claimants for losses*".

Litigation expense

1.17 It is almost counter-intuitive that in many cases, lump sum awards are more costly to evaluate, requiring more expert evidence, for instance, on life expectancy. Allied World Assurance emphasised this, in particular, in relation to future pecuniary loss. It is acknowledged that while expert evidence will not be required on life expectancy for PPOs, but experts may still need to be appointed to advise on the financial needs of the plaintiff before PPOs could be made. However, we consider that this applies equally to lump sum payments.

1.18 Bank of China Group Insurance Company Limited ("**Bank of China**") mentioned in its response that even with PPOs, the court would still need to make assumptions due to "*uncertain life expectancy or possible consequential or pre-existing illness of the claimants*". We do not agree with this as the point of PPOs is to avoid the necessity to guesstimate life expectancy. Further, the need for extra expert input in a particular case by reason of a certain idiosyncrasy of the plaintiff does not undermine the justification for the introduction of PPOs in general.

Risk

1.19 HKFI mentioned in its response that:

"Another area of challenge will be to predict the proportion of claims that would settle as a PPO. PPO propensity for liability claims may vary according to different factors. As we see it, the single most important factor will be the 'Discount Rate' i.e. the assumed rate of return on investment which insurers are entitled to take into account when funding an award. Generally, a reduction in Discount Rate will bring the economic value of lump sums and PPOs closer together, whereas an increase will separate them further."

1.20 China Taiping Insurance (HK) Company Limited ("**China Taiping**") stated in its response that the majority of personal injury claims in Hong Kong were settled out of court with lump sum payments. The ensuing uncertainties following the proposed PPO regime might discourage parties from reaching

out-of-court settlements. Further, there would be the possibility of review of a periodical payment.

1.21 We observe that a number of elements of risk already commented on in the Consultation Paper by the Sub-committee were echoed by the Respondents. In essence, the lump sum awards put the future risk of under-compensation on the plaintiff and the future risk of over-compensation on the tortfeasor. This is because lump sum awards are unable to reflect future changes in economic, financial and personal circumstances. PPOs in part remove this risk from the plaintiff *"and can supply a sense of security and certainty"* to the plaintiff, as mentioned by CD.

1.22 In our view, periodical payments would remove the future risk arising from uncertain life expectancy and economic conditions. This was highlighted by Dr Felix Chan of The University of Hong Kong ("**Dr Felix Chan**") and Dr Chan Wai Sum of The Chinese University of Hong Kong ("**Dr Chan Wai Sum**") when they discussed about longevity risk. There is a possibility that a plaintiff may exceed the life expectancy assessed by the court and exhaust the compensation awarded in his old age. On such future risk, CD stated that *"a lump sum compensation will not be able to address and provide for the sudden change of circumstances to the claimant and cannot fight against the investment risk, mortality risk and inflation risk"*.

1.23 Further, we are of the view that PPOs can avoid the possible dissipation of assets by family members and subsequent reliance on social welfare. This was also a matter raised by CD which stated that *"a periodical payment order would encourage the plaintiff to spend the lump sum received by way of damages on the very purposes for which it is awarded. It would result in the injured plaintiffs being less likely to find themselves to be dependent on the social welfare system in the long term to cover any cost of care required or for their living, or at least to a lesser degree."*

1.24 We agree with the Sub-committee's view that a PPO can afford protection to the recipient by providing a steady income stream that can be index-linked to reflect inflation. It would serve to remove the need for the plaintiff to address the potentially stressful issue of life expectancy in his claim.⁴

1.25 In addition, the plaintiff does not have to bear the investment costs and investment and inflation risk of a lump sum.⁵

Lump sum flexibility/self-determination on use of funds

1.26 CD observed *"that most (if not all) claimants would agree that the award of a lump sum is attractive because it offers an immediate payment of a certain award, and gives him the freedom and flexibility to choose how the award should be invested and spent"*. PPOs do not provide the flexibility of a lump sum which can respond to the need for substantial capital expenditure due to changing events or which could be put into the traditional property based

⁴ By CD.

⁵ By Dr Felix Chan and Dr Chan Wai Sum.

investment that Hong Kong people invariably desire or adapted home, as highlighted by HKFI and The Medical Protection Society Limited ("**MPS**").

1.27 MPS stated that *"considerable heed should be paid to the overwhelming preference amongst plaintiffs for lump sum settlements"*. It went on to say that in England and Wales plaintiffs prefer the loss of earnings element to be paid by way of a lump sum. This is in contrast to the future care element which would be taken care of by a PPO.

1.28 HKFI mentioned in its response that:

"One of the main drawbacks of PPO is that it does not offer any flexibility – e.g. if claimants need to set aside a large sum of money for rainy days or to meet unexpected needs. From a cultural perspective, most Claimants, and indeed persons in Hong Kong prefer to keep and manage their own capital which they are free to invest i.e. a lump sum as damages especially in times of economic uncertainty)[sic]. This can be seen in the case of various groups in Hong Kong who expressed their wish to have their pensions in a lump sum payment albeit at a discount rather than in smaller structured payments over a course of years. ...

In Hong Kong, the majority of claims are eventually settled out of court with lump sum payments. This system is well established and tested. And it is commonly known to all parties involved. If the system of periodical payments were to be adopted in Hong Kong, however, the ensuring [sic] uncertainties could discourage parties from reaching out of court settlement. We would anticipate greater uncertainties. This, in turn, could prolong the process of settling the case, thus increasing the final overall costs incurred."

It also mentioned that:

"Judgment by the Court is not an intuitive process, it is a result based on all the medical evidence and financial data presented before it. It should be the Court's responsibility to make more precise assessment (on matters including the discount rate) rather than shifting its responsibility through PPO, which will result in the lengthening of the entire litigation process."

1.29 In gist, HKFI was of the view that: *"Receiving a lump sum award for damages would be more easily manageable and allow more flexibility for investment preferred by claimants."* In this connection, we would reiterate that the assessment of damages in personal injury cases is not to be dictated by the *"free will"* of the plaintiffs.

Lack of finality/independence

1.30 Undeniably, PPOs do not provide absolute finality since the plaintiff is not totally *"independent"* as long as funding from the defendant (or a paying party under the PPO) is still required. From a defendant's point of view, the PPO may be subject to review due to change of circumstances. In contrast, as

HKFI, the Law Society, MPS, China Taiping and Mr Lai considered or as the Liberal Party put it, *"the injured persons can get a lump sum compensation without years of waiting"*.

1.31 HKFI opined that:

"While PPO may be able to address the issue of uncertainty and unpredictability of future inflation and life expectancy and also eliminate the risk of dissipation of the award by family members of the claimants, it also creates a lot more issues:

- Most Personal Injury claims will be prolonged rather than bringing finality to the proceedings even after resolution of the claims.*
- Given the substantial amounts of claims involved, extra reserving has to be decided at the board level of individual insurers."*

1.32 China Taiping considered that:

"As a matter of principle, while the proposed PPO regime attempts to provide a refined method to quantify damages accurately, it remains to be seen as to whether the alleged benefits can outweigh detriments to the underlying objectives of the Civil Justice Reform, namely (i) to increase the cost-effectiveness of civil proceedings, and (ii) to facilitate the settlement of disputes.

It also remains to be investigated whether, as a matter of preference of claimants eligible to PPO under the proposed regime, a continued reliance on the defendant is preferred over the independence that a lump sum award may bring."

Financial freedom

1.33 PPOs do not enable a plaintiff to spend the money in accordance with his own preferences such as on investment in property. This was raised by HKFI which said that conventional lump sum can give people the financial freedom that they are looking for and that they would have an opportunity of a higher potential investment return.

Extra costs and higher damages awards

1.34 There will undoubtedly be extra administrative costs and, at the end of the day, higher overall damages payable under the PPO regime. Extra administrative costs will be due to the long term administration necessary to make payments. Extra damages will be payable as over the long term, taking into account of inflation based on overseas experience, the overall sums to be paid are likely to be higher by the time the PPOs expire.

1.35 HKFI forecast (on the strength of anecdotal evidence from the UK) that insurers might end up paying higher lump sum awards to avoid PPOs in

individual cases. It was argued that these costs would inevitably give rise to higher premiums or membership fees for MPS. Particular comments on this came from MPS, HKFI and China Taiping, the latter asking whether such increases in cost will outweigh the benefits for the relatively small number of affected claims.

1.36 HKFI mentioned in particular that:

"Regardless of whether the periodical payments are administered by insurers and/or other parties, the claims administration and accounting costs would be substantial. Ultimately, this financial impact would have to be transferred to policyholders/consumers."

It went on to say that:

"If the HK Court follows the UK experience to appoint experts to advise on the financial needs of the claimants and to make recommendations on PPO, this will undoubtedly increase the claim costs."

In order to avoid the sanctioning of PPO which will create greater financial uncertainty and burden, insurers might be forced to offer and pay higher settlement sum in order to bring finality to a claim, thereby increasing their overall financial loss."

With the significant financial burden of administering more long-tailed claims, the ultimate financial impact will be transferred to consumers."

No tax advantage will be brought by PPO as the income generated from the investment of lump sum award is not taxable in HK."

1.37 Wing Lung Insurance Company Limited categorically said that:

"Periodical payment order ("PPO") will prolong the process of settling claims and increase the overall costs of insurance as a result of more conservative reserving and additional operational expenses. Hence, it may not be feasible to introduce a PPO regime in Hong Kong at present."

1.38 China Taiping responded that:

"The proposed PPO regime poses immense difficulties on the assessment of reserve, owing to a variety of factors including, inter alia, (i) unpredictability of costs of care and medical inflation in the future, which are subject to factors such as increased life expectancy and adjustments on the minimum wage, and (ii) future adjustments to the 'Discount Rate', which will affect the economic value of lump sum settlements and, in turn, affect the claimant's preference of a PPO vis-a-vis lump sum payment."

Individual insurers may adopt different approaches in reserving due to differing strategies on risk-modelling. Hence, absent [sic] further study by reinsurers, economists and actuaries, the said uncertainties would lead to a more conservative reserve by insurers, thereby resulting in additional operational costs.

Further, should the additional costs cannot be recovered efficiently, the burden may ultimately be shifted to the consumers/general public in the interest of maintaining individual insurers' service and competitiveness. It remains to be assessed whether the said costs can be outweighed by benefits received by claimants eligible to PPO under the proposed regime."

1.39 The preliminary view expressed by Zurich Insurance Company Ltd ("**Zurich Insurance**") in its response was that:

"... Hong Kong is not a market ready for the introduction of the PP mechanism at the moment. Although the mechanism can provide a more accurate assessment of damages for future pecuniary loss, we believe that Hong Kong has already been having a well-established and robust legal system which is capable of handling personal injury cases. On the contrary, if PP is introduced in Hong Kong, the extra administration and accounting costs derived from its uncertainties would unavoidably be transferred to the policyholders."

Reserving

1.40 Many Respondents, such as the Law Society and China Taiping, raised issues on the difficulty or extra complexity of reserving. In essence, PPOs transfer more risk from the plaintiffs to the defendants or in practice to their insurers. The Law Society pointed out that life expectancy would be uncertain. China Taiping pointed out that there would be unpredictable changes in future costing due to inflation or wage levels. Of course, we consider that these are the major reasons for having periodical payments in the first place, that is, to pass such uncertainties now faced by plaintiffs to the defendant tortfeasors. They also pointed out there would be further uncertainties if PPOs could be open to review.

1.41 The foregoing concerns pertinent to complexity in reserving and added administrative costs probably leading to higher insurance premiums were shared by The Actuarial Society of Hong Kong ("**Actuarial Society**"). That said, it is reassuring to note that no insurmountable technical difficulties were anticipated. Actuarial Society helpfully indicated that:

"From a professional perspective, the estimation and assessment of PPO costs is not uncommon in other jurisdictions. The ASHK [Actuarial Society] believes there is sufficient knowledge and capability on the topic internationally that Actuaries practicing in Hong Kong can leverage off. Granted, there will be a transition period for both Actuaries and the insurers in Hong Kong but the ASHK is of the view that it's members possess the requisite

technical skills to support the insurance industry through this transition."

1.42 The observation of the Actuarial Society is well borne out by the findings of the Institute and Faculty of Actuaries of the United Kingdom ("IFoA") as published in a series of reports on PPOs.⁶ In the main, the majority of insurers and reinsurers would use a probabilistic approach⁷ to mortality in reserving for settled PPO claims and only a minority would use an annuity certain approach.⁸ In valuing PPO claims for reserving purposes, all participating insurers discounted their PPO cashflows. For future PPO claims, about 50% of the participating insurers discounted to valuation date with the remainder discounting to future expected settlement date. A range of real discount rates (considering both the inflation of payments and discounting in respect of investment returns) were used for reporting under current UK Generally Accepted Accounting Principles. All participating insurers and reinsurers estimated reserve uncertainty for PPOs either stochastically⁹ or through scenario testing.¹⁰

Guarantee of payment

1.43 There is uncertainty as to whether insurers would be able to pay PPOs during the full term. There is no financial guarantee in place at present for financial institutions to ensure payment. This is raised by a number of Respondents including the Law Society, and insurers such as China Taiping.

1.44 To solve issues with respect to guaranteed payment, the Law Society suggested that damages be capitalised on judgment and paid by the insurer into a fund from which periodical payments could then in due course be paid out. The fund would be managed and professionally run by a third party with a view to it increasing in value from its investments.

⁶ The series of PPO reports published by IFoA started as early as 2005 and they include (1) *Periodical Payment Orders Working Party Update – GIRO 2018 Report (Industry Survey)* dated 3 December 2019 ("**GIRO 2018 Report**"); and (2) *Periodical Payment Orders Working Party Update – Industry Survey* dated 22 July 2020 ("**IFoA 2020 Report**"). "GIRO" stands for the General Insurance Research Organising Committee of IFoA.

⁷ The probabilistic approach takes into account the probability of survival for all future payments. It takes into account the effect on life expectancy of someone who has already survived a year and allows for the possibility of survival longer than his/her original life expectancy assumption: see GIRO 2011: *PPO Working Party Update*, dated 13 October 2011, available at <https://www.actuaries.org.uk/system/files/documents/pdf/f12-ppo-working-partymain2011-10-10.pdf>, accessed on 13 May 2022.

⁸ The annuity certain approach assumes payments will be made with certainty for every year of future life expectancy: see GIRO 2011: *PPO Working Party Update*, dated 13 October 2011, available at <http://www.actuaries.org.uk/system/files/documents/pdf/f12-ppo-working-partymain2011-10-10.pdf>. This approach typically takes into account: (a) life expectancy – based on medical evidence to provide the expected length of payments; (b) future inflationary and stepped increases; (c) future investment returns; and (d) indexation clauses within the reinsurance treaties: IFoA Periodical Payment Orders Working Party, *Information for Actuaries Valuing Periodical Payment Orders* (2016), at 17, accessed on 13 May 2022.

⁹ "All reserving involves a combination of statistical methodology and expert knowledge of the business. Stochastic reserving is no different in this regard; the difference is that the output is a probability distribution rather than a point estimate. This helps to embed the uncertainty around the estimated reserves into the core reserving process." See the UK's Actuarial Post "Making Uncertainty Explicit: Stochastic Modelling", available at <https://www.actuarialpost.co.uk/article/making-uncertainty-explicit-stochastic-modelling-6090.htm>, accessed on 13 May 2022.

¹⁰ See GIRO 2018 Report, at 35 to 36 and Appendix T; and IFoA 2020 Report, at 45 to 47 and Appendix T.

1.45 HKFI stated in its response that:

"In Hong Kong, the Employees Compensation Insurer Insolvency Bureau (ECIIB) was set up to assume responsibility for the liabilities of EC insurers which become insolvent. And for the motor market, the Motor Insurers' Bureau (MIB) would secure the satisfaction of claims made by the injured or his/her dependents when, among other situations, the insurers concerned are unable to meet their obligations under their insurance policies due to insolvency.

Both Bureaus are funded by contributions from policyholders calculated at a percentage of gross premiums of the relevant insurance policies. But there is no similar arrangement for other classes of liability insurance. This raises a fundamental question of whether it's justifiable to confine access to PPO based on the classes of insurance instead of the nature of the injuries sustained and the unique circumstances and needs of the claimant. The proposed Policyholder's Protection Fund, designed for local policyholders in case of insurers becoming insolvent, only provides compensation up to HK\$1 million per case. This is definitely not good enough to guarantee the funding of PPO which usually involves a huge amount of settlement."

It also observed that unlike in the UK where PPOs are fully guaranteed by the Financial Services Compensation Scheme ("**FSCS**"), Hong Kong has no such scheme as backup.

1.46 China Taiping stated that:

"It is uncertain as to whether annuity providers in Hong Kong are interested in taking up and administering Periodical Payment Orders as they involve long-term liabilities. It remains to be seen whether, in the absence of this form of secure financial resource, parties will be more inclined for a lump sum settlement approach instead.

Meanwhile, guarantee arrangements are currently only available in respect of employees' compensation (i.e. the Employees Compensation Insurer Insolvency Bureau) and motor insurance (i.e. the Motor Insurers' Bureau). As acknowledged in the Consultation Paper, a similar mechanism for protection of recipients is needed if PPO is to be introduced. Details of such protective mechanism are required to properly inform stakeholders on the desirability of the proposed PPO regime."

1.47 Asia Insurance mentioned that:

"... there is no substantive annuity market that an insurer can use to fully transfer the risk of funding a PPO. Before implement the

PPO, annuity market needs to be developed to cater for this new settlement arrangement."

Impact assessment

1.48 Objections in principle to PPOs came from the insurance sector led by HKFI. Rather than a complete outright objection, they indicated that before a decision can be made on PPOs, there needs to be an impact assessment of its effect on different stakeholders. Notably, this stance was adopted by Asia Insurance, China Taiping, Dah Sing Insurance Company (1976) Limited ("**Dah Sing Insurance**"), QBE Hongkong & Shanghai Insurance Limited, QBE General Insurance (Hong Kong) Limited (together with QBE Hongkong & Shanghai Insurance Limited ("**QBE**"), ECIB and MIB.

1.49 In brief, it was argued that the introduction of a PPO regime is more than a question of jurisprudence. It is a question of public policy. CD also noted certain collateral public policy issues such as the impact on social welfare when a plaintiff who has received a lump sum runs out of money. In rendering its preliminary observations, the Hospital Authority also commented "... *that detailed impact assessment has not yet been undertaken when the Consultation Paper was issued*" and urged the Government or the Law Reform Commission to conduct an impact assessment.

1.50 Zurich Insurance mentioned that:

"PP perhaps could quantify the damages paid to claimants for future pecuniary losses more accurately, but its introduction would also bring uncertainties to our industry, and foreseeably increase operating costs for insurers. In turn, this will drive up insurance costs, thereby negatively impacting upon consumers. Therefore, extensive studies and reviews on the mechanism have to be conducted before its implementation."

1.51 HKFI made the general comment that: *"We need first of all to establish clearly what sort of problems we are facing and seeking to resolve before deciding if law reform is the only solution."* It was envisaged that the proposed impact assessment should cover the following topics:

- (a) the scope – potential number of cases that would benefit from PPOs based on the nature of the claims settled in the past, say ten years;
- (b) whether there should be a threshold above which PPOs would be considered;
- (c) whether it would be more cost-effective in the case of Hong Kong to set up a centralised system of administering PPOs;
- (d) the role of the Hospital Authority in providing quality medical care in support of PPOs; and
- (e) the experience of other countries (eg Singapore and the UK) where awards of PPO have been rare and what these insurance markets have learnt.

1.52 With no disrespect, we consider that most of the issues listed in the proposed impact assessment have already been addressed in the Consultation Paper and they have also been canvassed in various submissions received in response to the public consultation exercise. These include discussions on costs and benefits, threshold of claims, pros and cons, scope, security and other options such as the need for an administrative system.

1.53 We take the view that an attempt to quantitatively assess the potential impact of PPOs would be a futile exercise due to the small number of cases. That said, to put things into perspective, there is the empirical evidence from Employees Compensation Assistance Scheme ("**ECAS**") statistics. In brief, the number of cases with a grant of assistance over HK\$4 million (inclusive of employees' compensation and common law damages) in the last 30 years (from 1991 to 2021), which could be taken as a percentage of all recipients of ECAS assistance, is 51 out of 2,491 (or 2%).¹¹ This could be broadly applied to the number of personal injury cases in Hong Kong courts during the same period. However, this figure does not reflect:

- (a) cases settled without proceedings; or
- (b) on the number of cases suitable for PPOs since quantum of the claim is not the only consideration.

1.54 As to the question of what "*problems we are facing*", the deficiencies of the present system and how better to resolve them are the focus of this Report. On a qualitative approach, we have taken reference from legally aided cases involving catastrophic injuries sustained by plaintiffs in respect of which judgments were entered between September 2011 and April 2019.¹² These cases involved mentally incapacitated persons (of one to 60 years of age at the time of injury) including minors, where the amount of damages ranged from HK\$13 million (October 2011) to HK\$40 million (March 2018).¹³

1.55 In the vast majority of these cases, the damages received are kept in court subject to an order for regular payments to meet the recurring expenses of the injured person. The damages are not invested in a way to generate sufficient income to match the assumed rate of return upon which the damages were assessed and awarded (ie 4.5% under *Chan Pui Ki v Leung On*¹⁴ and 2.5% after the decision of Bharwaney J in *Chan Pak Ting v Chan Chi Kuen & Anor*¹⁵).

1.56 Bearing in mind that money in the Suitors' Fund¹⁶ is conventionally invested and managed by the Registrar¹⁷ by way of fixed deposit with local

¹¹ Employees Compensation Assistance Fund Board Annual Report (2015 to 2016), at Appendix 4, showing 38 applicants (out of 2,325 from 1991 to 2016) received assistance of over HK\$4 million and Employees Compensation Assistance Fund Board Annual Report (2020-2021), at Appendix III, showing 13 applicants (out of 166 from 2016 to 2021) received assistance of over HK\$4 million.

¹² Information provided by the Legal Aid Department.

¹³ Information provided by the Legal Aid Department.

¹⁴ [1996] 2 HKLR 401, CACV 263/1995 (date of judgment: 19 Jul 1996).

¹⁵ [2013] 2 HKLRD 1, HCPI 235/2011, 671/2007 and 228/2010 (date of judgment: 7 Feb 2013).

¹⁶ See Suitors' Fund in the High Court Suitors' Funds Rules (Cap 4B) and the District Court Suitors' Funds Rules (Cap 336E).

¹⁷ See s 2 of the High Court Ordinance (Cap 4) and s 2 of the District Court Ordinance (Cap 336).

banks, which generated less than 1% return *per annum* over the last ten years, it is inevitable that the plaintiffs in these cases are exposed to the real risk of under-compensation in that the money may run out sooner than the period of time for which it was intended to last. Understandably, the Registrar is not equipped with the skills and expertise of an investment advisor, nor should he be put in such position as a custodian of the Suitors' Fund. A PPO would clearly help ameliorate the deficiencies in the present system.

1.57 Further input on the likely costing, reserving and means of funding for PPOs from the insurance industry is more than welcome. However, it does not detract from the fact that the insurance industry itself is best placed to carry out the proposed impact assessment, if deemed necessary. More importantly, consideration as to the desirability of vesting a power in the court to make PPOs is primarily a legal question, albeit with a social dimension, pertinent to the need to realise and give effect to the principle of *restitutio in integrum*.¹⁸ Hence, it is not a matter of public policy as such as might have been perceived at some quarters. Rationally, the risk of under-compensation now faced by plaintiffs can be managed by the use of a PPO, which is a vehicle to properly and fully compensate plaintiffs for their loss.

1.58 Accordingly, we take the view that knock-on effects of PPOs are best left to the stakeholders themselves. Some reference may be drawn from experience in the UK. In about August 2005, amidst the advent of PPOs pursuant to the Courts Act 2003, which came into force in 2005, the Damages Working Party of the IFoA ("**Damages Working Party**") observed that:

"In general, for insurers the cost impact is likely to be relatively small compared to reinsurers as it is limited to large claims which are only a small proportion of the total claims by number.

Estimates published by Watson Wyatt and EMB¹⁹ suggest that for direct motor the impact would be 1-2% and 2% increases respectively for total motor claims costs.

There may be additional expenses when considering the total premium impact.

However, for reinsurance, the impact is likely to be significant as the personal injury claims affected by periodical payments are also likely to have some recovery from reinsurers."²⁰

¹⁸ Consultation Paper, at para 2.3.

¹⁹ Watson Wyatt was a global consulting firm, now known as Willis Towers Watson. EMB is an international property and casualty consulting and software company.

²⁰ Anthony Williams and members of the Damages Working Party, *Periodical Payments and the Courts Act* (Oct 2005), available at https://www.actuaries.org.uk/system/files/documents/pdf/williams_0.pdf, at 19, accessed on 12 July 2021.

1.59 While recognising the higher degree of uncertainties of the impact of PPOs facing reinsurers, the Damages Working Party concluded that there would still be *"a positive opportunity" to "make it possible for the cost to an insurer of making periodical payments to be lower than the lump sum cost"*.²¹ It depends on whether the insurers are willing to take on the *"mortality risk"* and *"investment risk"* in providing for periodical payments. PPOs would also be beneficial to insurers in terms of cashflow as compared to a lump sum award.²²

1.60 From the other side of the fence, the Personal Injuries Bar Association of the General Council of the Bar of England and Wales, in its submission to the Ministry of Justice of the UK in response to the 2013 consultation paper, observed that *"The advent of Periodical Payment Order (PPO) regime has seen a transformation in the way in which very high value claims are settled. It is now standard for future care and case management (future care) claims to be settled by way of a PPO rather than on a lump sum basis... [w]e see the PPO regime as a great success and its uptake in the context of future care to have been very high..."*.²³

1.61 Amidst the lack of a specific proposal as to how the proposed impact assessment is to be conducted and in the absence of proper identification of the utility thereof, we are contented to reach our various conclusions and make recommendations in this Report on the basis of a rational and qualitative analysis as a matter of legal principle. There is no reason why the same justification for a PPO regime in other overseas jurisdictions should not apply to Hong Kong.²⁴

Pilot scheme

1.62 Dah Sing Insurance suggested that there should be a three-year pilot scheme.

Out of court settlements

1.63 HKFI said that there are a large amount of what it terms private settlements (ie settlements outside of court) without court proceedings and it suggested that there should be a dedicated panel to assess PPOs for such settlements. We consider that there is already in place a well-established mediation system in Hong Kong which could deal with any requirements for PPOs to be negotiated and agreed outside of court proceedings. Furthermore, there are plenty of experienced mediators who would be able to deal with such issues.

²¹ Same as above, at 40.

²² Same as above, at 26, 27 and 40.

²³ Ministry of Justice of the UK, Bar Council response to the Damages Act 1996: the Discount Rate – review of the legal framework consultation paper (May 2013), at paras 6 and 27.

²⁴ The Damages Working Party also observed that the power to make PPOs, in one form or another, could be found in Australia, Sweden, Germany, the United States of America, France, Spain, Canada, Austria, Finland, the Netherlands, Portugal, Italy and Luxemburg. This tallies with the findings of the Sub-committee as summarised in Chapter 4 of the Consultation Paper. In particular, a PPO regime has been in force in Ireland since October 2018 pursuant to the Civil Liability (Amendment) Act 2017.

1.64 Asia Insurance mentioned in its response that:

"After the civil justice reform, the court encouraging the parties to use an alternative dispute resolution procedure and helping the parties to settle their case out of court with lump sum basis. If PPO were to be adopted in Hong Kong, it could discourage parties from reaching out of court settlement. We would anticipate greater uncertainties. This, in turn, could prolong the process of settling the case, thus increasing the final overall costs incurred."

Settlement in general

1.65 Wing Lung Insurance Company Limited felt that PPOs would prolong the process of settling claims as well as increase costs to insurers. Asia Insurance and China Taiping felt that the uncertainties following the introduction of a PPO regime would discourage out-of-court settlement.

1.66 In theory, we think that PPOs should in some respects make the process of settlement shorter because it is not necessary to look at certain heads of claim in the same manner with reliance on expert reports to assess a lump sum of future loss. Once parties are familiar with the process, it should not make settlement any more difficult. PPOs do not add uncertainty to quantum, and rather, they remove it because the problem with lump sum payments is the uncertainty in quantifying them.

Variable future Discount Rates

1.67 China Taiping pointed out that future changes in the presumed net rate(s) of return on investment ("**Discount Rate**") may affect a claimant's preference for a lump sum as opposed to a PPO. It is true that a lower Discount Rate means a greater multiplier and a bigger lump sum. This however may apply both ways and, in any event, if PPOs are to be adjusted to take into account inflation, then a principal factor upon which Discount Rates are varied would be taken into account for future payments under PPOs.

Why change the existing good proven system?

1.68 When any change is suggested, this argument is inevitably raised. There are a number of general comments along the lines of Zurich Insurance's response that we have a good system already, why tinker with it. Likewise, the Bank of China pointed out that the existing system attempts to take into account uncertainties by the complicated Discount Rates and that we cannot expect our systems to be perfect as we are only human.

1.69 We have duly considered the sentiment expressed by Zurich Insurance that there is no "*imminent need*" for PPOs in Hong Kong and that of ECIB that there is no "*clamour*" for a review of Hong Kong's present system as there has only been a single comment on the matter by one judge.²⁵ After

²⁵ A reference to Bharwaney J in *Chan Pak Ting* (see the discussion at para 5 of the Preface of this Report).

lengthy discussion, we consider that whilst there may be no clamour for reform, it does not mean that we should not be looking at the issue of whether Hong Kong society can benefit from such a change.

1.70 HKFI said that sanctioned payments²⁶ would be less effective unless there is an amendment to the present scheme. Such an amendment has been carried out in England and Wales with Rule 36.18(4) of the Civil Procedure Rules ("**CPR**")²⁷ providing for written offers to specifically identify the split between lump sum and periodic payments. There is no reason why a similar amendment could not be made to the Rules of the High Court (Cap 4A) to allow the lump sum to be effected by way of sanctioned payment and for periodical payments to be made the subject to a sanctioned offer.

Is it justifiable to confine PPOs to limited instances where guaranteed funding is available?

1.71 HKFI raised this by asking whether it is *"justifiable to confine access to PPO based on the classes of insurance instead of the nature of the injuries sustained"*. Apparently, this comment is premised upon the fact that motor and employee compensation insurance policies are backed by insolvency funds but other types of insurance are not. It is noteworthy that CD had looked at this same point but concluded *"it does not mean that the Court should not be conferred with the jurisdiction to make such an order in appropriate cases"*.

²⁶ Sanctioned offers and payments involve a procedure for one party to make offers or payments into court to settle a dispute. If the other party does not accept, he runs the risk of costs and interest sanctions if he subsequently fails at the trial to better what was offered, even if he wins the action. It is a procedure which aims to encourage the parties to take possible settlement seriously and to avoid unproductive prolongation of the litigation; see *The Final Report of the Chief Justice's Working Party on Civil Justice Reform* – Executive Summary, s 11; "sanctioned offers and payments", at para 42; available at <https://www.civiljustice.hk/fr/paperhtml/fr21.html>, accessed on 13 May 2022. In Hong Kong, the provisions governing the procedure of making sanctioned payment can be found in Order 22 of the Rules of the High Court (Cap 4A) as well as Order 22 of the Rules of the District Court (Cap 336H).

²⁷ Rule 36.18(4) A Part 36 offer to which this rule applies—

- (a) must state the amount of any offer to pay or to accept the whole or part of any damages in the form of a lump sum;
- (b) may state—
 - (i) what part of the lump sum, if any, relates to damages for future pecuniary loss; and
 - (ii) what part relates to other damages to be paid or accepted in the form of a lump sum;
- (c) must state what part of the offer relates to damages for future pecuniary loss to be paid or accepted in the form of periodical payments and must specify—
 - (i) the amount and duration of the periodical payments;
 - (ii) the amount of any payments for substantial capital purchases and when they are to be made; and
 - (iii) that each amount is to vary by reference to the retail prices index (or to some other named index, or that it is not to vary by reference to any index); and
- (d) must state either that any damages which take the form of periodical payments will be funded in a way which ensures that the continuity of payments is reasonably secure in accordance with section 2(4) of the Damages Act 1996 or how such damages are to be paid and how the continuity of their payment is to be secured.

Conclusion

1.72 We recommend that the court should be given, by way of legislation, the power to make PPOs in respect of damages for future pecuniary loss in personal injury cases.

1.73 For the avoidance of doubt, this new power vested in the court is not intended to affect the free will and power of a non-mentally incapacitated person to attain amicable settlement with the tortfeasor or relevant paying party.

1.74 Detailed mechanism of the proposed PPO regime is set out in Parts 2 and 3 of the Draft Bill.

Final Recommendation 1

We recommend that the court should be given, by way of legislation, the power to make PPOs in respect of damages for future pecuniary loss in personal injury cases. For the avoidance of doubt, this new power vested in the court is not intended to affect the free will and power of a non-mentally incapacitated person to attain amicable settlement with the tortfeasor or relevant paying party.

Chapter 2

Mechanism for the formulation and promulgation of the Discount Rate

Introduction

2.1 This Chapter focuses on Question 2 as set out in the Consultation Paper. The question consists of three parts, viz:

- "(1) *Whether an authority should be empowered to fix and to conduct periodical revision of the presumed net rate(s) of return on investment (the Discount Rate(s)) to be applied in the assessment of damages in all personal injury cases, in particular, in the selection of multiplier(s) for assessing future pecuniary loss for different periods of future loss and expenses to be incurred.*
- (2) *Whether the Chief Justice or any other person or body should be such empowered authority.*
- (3) *The identification of the stakeholders whom such empowered authority should consult in fixing the Discount Rate(s), the frequency of review and the mode of promulgation of the Discount Rate(s) so fixed."*¹

Responses to the Sub-committee's Question 2

2.2 In general, the vast majority were supportive of the idea of empowering an authority to conduct periodical review of the Discount Rate ("**Authority**"). Amongst those in support were various leading insurance companies.

2.3 Likewise, the vast majority were in support of the Chief Justice assuming the role of the Authority subject to two conditions, namely (a) consultation with identified experts and stakeholders; and (b) transparency in the decision-making process and the methodology employed.

2.4 The general sentiment was that a review should be conducted at least once every three to five years.² There were, at the same time,

¹ Consultation Paper, at paras 5.81 to 5.96.

² The Law Society (every three years); CD (every five years); the Official Receiver's Office (not more than every five years); Allied World Assurance (every five years) – cf a review every five years under s 1(3) of the Civil Liability Act 2018 (UK).

suggestions that there should be more frequent adjustments of the Discount Rate, say, every year.³

Our analysis and response

Question 2(1) - To establish an Authority to conduct periodical review

2.5 Of the 20 responses to this part of the question, 18 were in support. Amongst those in support were:

- (a) Insurance companies (namely QBE, Bank of China, Zurich Insurance, Well Link General Insurance and Allied World Assurance) and MPS;
- (b) Government departments and a statutory body (namely CD, the Legal Aid Department, the Official Receiver's Office and the Consumer Council);
- (c) Professional bodies (namely the Actuarial Society and the Law Society);
- (d) Political groups (namely the Liberal Party and the Society for Community Organization); and
- (e) Members of the public and academia, notably Dr Chan Wai Sum (an expert in the case of *Chan Pak Ting v Chan Chi Kuen & Anor*⁴).

2.6 We consider that the strong support from the Respondents shows that they were receptive to the impetus for change as enunciated in the Consultation Paper. This is encapsulated, for instance, in the observation by the Liberal Party that:

"At present, it takes lengthy court proceedings to fix the 'Discount Rate' and such process involves various fields of expertise and expert witnesses. The fixing of 'Discount Rate' incurs high social costs, which however have to be borne by individual litigants. Being time-consuming, inefficient and unreasonable, this practice is highly unsatisfactory."

2.7 Amongst the Respondents, the responses from HKFI and Hong Kong Construction Association ("**HKCA**") were regarded as "*neutral*" on this Question.

³ Actuarial Society (on a more frequent basis, such as annually) and Allied World Assurance (minor adjustment every year).

⁴ [2013] 2 HKLRD 1, HCPI 235/2011, 671/2007 and 228/2010 (date of judgment: 7 Feb 2013).

2.8 However, HKFI sought to enter a caveat in the following terms:

"Another area of challenge will be to predict the proportion of claims that would settle as a PPO. PPO propensity for liability claims may vary according to different factors. As we see it, the single most important factor will be the 'Discount Rate' i.e. the assumed rate of return on investment which insurers are entitled to take into account when funding an award. Generally, a reduction in Discount Rate will bring the economic value of lump sums and PPOs closer together, whereas an increase will separate them further.⁵

This is a big topic with far reaching implications and we would need the input of economists and actuaries to facilitate the making of an informed judgment on the proper way forward. If and when it is deemed desirable to have a system set up to determine the 'Discount Rate', we would need to ask:

- (a) for the purpose of discount, should we assume that claimants would invest in index-linked government securities or a mixed portfolio of investments;*
- (b) how can we ensure that the legal framework and process governing the way in which the discount rate is set will produce a rate which is a correct one;*
- (c) whether there are good and compelling reasons, in the specific context of Hong Kong, to encourage the use of PPOs for settling claims related to certain types of bodily injuries."*

2.9 Remarkably, even where HKCA did not see fit to put in a positive vote, it duly recognised the fact that the resolution of the Discount Rate will be important in the assessment of damages.

2.10 In the premises, HKCA subscribed to the idea of having a mechanism for fixing and reviewing the Discount Rate. In its submission, HKCA commented that:

"In principle, the HKCA considers that it is important to have a simple, understandable and easily understood basis for the calculation of the sum included in any PPO. In this regard, the HKCA agrees that a discount rate would be of significant assistance and that there should be a method whereby a discount rate is fixed and regularly reviewed thereby obviating the need for expensive expert evidence and periodic review by the judiciary of the discount rate. The HKCA has no particular view as to whether this should be done by a separate authority or the Chief Justice."

⁵ See para 1.19 of this Report.

2.11 Suffice it to say, at this juncture, that HKFI maintained that the fixing of the Discount Rate should be a separate consultation topic with impact assessment to be carried out. A section below is devoted to observations pertinent to the position of HKFI along with MIB.⁶

2.12 In short, the support for establishing an Authority for fixing and reviewing the Discount Rate is unequivocal and overwhelming.

Question 2(2) - Whether the Chief Justice is to be the Authority

2.13 Of the 14 submissions received, ten were supportive, two were neutral (Allied World Assurance and HKCA) and two were in the negative (CD and the Official Receiver's Office).

2.14 Reading between the lines, HKCA did not mind having the Chief Justice as the Authority, nor did Allied World Assurance, as long as it is perceived to be impartial and there is adequate representation and expert input in the decision-making process.

2.15 Probably, the negative sentiment expressed by CD stemmed from the experience in England and Wales. The submission made reference to the Lord Chancellor from whom the judicial function had been removed by the Constitutional Reform Act 2005. Yet, the Lord Chancellor, who has been empowered by section 1 of the Damages Act 1996 to fix the Discount Rate, failed to exercise such power between 2001 and 2017.

2.16 In March 2017, the Lord Chancellor made the unpalatable decision of fixing the Discount Rate at *minus* 0.75%, which is a logical conclusion on the basis of return on index-linked government securities ("**ILGS**") (as mapped out by the House of Lords in *Wells v Wells*⁷). Only that, the ultra-low return from ILGS was wholly exceptional and unexpected amidst the aftermath of the financial tsunami in 2008.

2.17 Further, CD observed that the Lord Chancellor issued successive consultation papers in February and March 2017 seeking to muster public support in bringing about fundamental changes to the assumed portfolio of investments since the setting of the Discount Rate has to be "*accepted by the public for it to work*".⁸

2.18 Upon conclusion of the consultation exercise, the Lord Chancellor revised the Discount Rate to *minus* 0.25% on 15 July 2019.⁹ It was met with a

⁶ See the discussion at paras 2.39 to 2.57 of this Report.

⁷ [1999] 1 AC 345, [1998] UKHL 27.

⁸ See Consultation Paper, at paras 5.71, 5.73 and 5.80.

⁹ Ministry of Justice of the UK, "Lord Chancellor announces new discount rate for personal injury claims (July 2019)", available at <https://www.gov.uk/government/news/lord-chancellor-announces-new-discount-rate-for-personal-injury-claims>, accessed on 12 July 2021; Lord Chancellor, *Personal Injury Discount Rate - Outcome of Review* (July 2019), available at http://data.parliament.uk/DepositedPapers/Files/DEP2019-0748/PIDR_Statement_of_Reasons.pdf, accessed on 12 July 2021.

negative response notably from the insurance sector with the Association of British Insurers threatening a judicial review, which was only abandoned in December 2019.¹⁰

2.19 The concerns of CD are clear in view of the experience in England and Wales and the exposure of the Authority to challenges by way of judicial review. Along a similar vein, concerns were expressed by the Official Receiver's Office alluding to the fact that the Chief Justice may be too busy already even without this additional responsibility.

2.20 That said, the position in Hong Kong is distinguishable since we are not shackled by decisions such as *Wells v Wells*.¹¹ In England and Wales, the obduracy for change, which requires a good deal of public support to counteract, is to be expected.

2.21 To start with, Hong Kong is blessed with the opportunity, which was seized upon by Bharwaney J, in the case of *Chan Pak Ting*¹² in deciding on a few sets of investment portfolios suitable for achieving a reasonable and realistic return for a range of payment periods based on a combination of fixed time deposits, Exchange Fund Notes ("**EFNs**"), bonds and blue-chip stocks (see the following table extracted from paragraph 5.29 of the Consultation Paper).

Duration of Needs	Discount Rate	Investment Portfolio
Not exceeding five years	- 0.5%	20% in 12 months fixed deposits, 80% in Hong Kong EFNs.
Not exceeding ten years	1%	15% in 12 months fixed deposits and 85% in EFNs and bonds of BBB+ or better.
Exceeding ten years	2.5%	10% in 12 months fixed deposits, 70% in bonds of BBB+ or better, and 20% in high quality blue-chip stocks that qualified as " <i>widows and orphans</i> " stock.

¹⁰ John Hyde, *Insurers ponder JR challenge to -0.25% discount rate* (Aug 2019), available at <https://www.lawgazette.co.uk/news/insurers-ponder-jr-challenge-to-025-discount-rate/5071180.article>, accessed on 12 July 2021; BC Legal, *ABI Decides Against Judicial Review of New PI Discount Rate in England and Wales*, available at <https://www.bc-legal.co.uk/bcdn/1032-297-abi-decides-against-judicial-review-of-new-pi-discount-rate-in-england-and-wales>, accessed on 10 January 2022.

¹¹ [1999] 1 AC 345, [1998] UKHL 27.

¹² [2013] 1 HKLRD 1.

2.22 The decision on the reasonable portfolio¹³ was made by Bharwaney J with input from actuarial experts. It has since been endorsed by the Court of Appeal. It represents the starting position for any future review regardless of the mechanism to be employed.

2.23 There is no reason to doubt that the Chief Justice is not as well placed as Bharwaney J in making decisions on the Discount Rate from time to time provided that the process is prescribed by statutory provisions, thereby ensuring (a) adequate expert input and consultation; and (b) transparency.

2.24 It bears repeating that the Chief Justice is now empowered to issue periodical direction for setting of the Judgment Rate,¹⁴ which is promulgated every two or three months.

2.25 We have taken note of the majority views espousing the empowerment of the Chief Justice, the only person identified in Question 2(2), as the Authority. Having considered the views of the minority, namely CD and the Official Receiver's Office, we find them more compelling. As pointed out specifically by CD in the light of the experience in England and Wales, the risk of legal challenges being brought against the Authority by way of judicial review is real. We find it undesirable for the holder of the office of the Chief Justice, who is not expected to be in possession of the expertise and knowledge in economics and finance, to be placed in a position with exposure to threats of litigation over a subject of potential controversies.¹⁵

2.26 As one of the primary responsibilities of the Financial Secretary is to oversee the policy formulation and implementation of decisions on financial, monetary, economic as well as trade and development matters in Hong Kong, we consider that the Financial Secretary, to be assisted by his team of financial experts and advisors, would be well placed to be the Authority.¹⁶

Question 2(3) - Frequency of review and expert input

Frequency

2.27 The view held by the majority of the Respondents was that a review should be held every five years or at an interval of not more than five years (see paragraph 2.4 above).

2.28 Incidentally, the five-year period of review coincides with the design of the new scheme in the UK now provided in the Civil Liability Act 2018, which

¹³ This is comparable to the low risk portfolio comprising, among others, about 25% UK and overseas equities, 10% cash and the remainder in bonds and UK GILTS as mapped out in Ministry of Justice of the UK, *Summary of how portfolios presented to the Government Actuary's Department were derived from consultation responses and from material requested from the Wealth Management Association* (Sep 2017), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/656016/portfolio-analysis-allocation-to-risk-profiles-redacted.pdf, accessed on 12 July 2021.

¹⁴ See s 49(1) of the High Court Ordinance (Cap 4) and s 50(1) of the District Court Ordinance (Cap 336).

¹⁵ See paras 2.15 to 2.19 of this Report.

¹⁶ See clause 3 of the Draft Bill.

received Royal Assent on 20 December 2018 and came into force on the same day.

2.29 In contrast, the Actuarial Society proposed an annual review. It is not clear from its submission what level of annual review was contemplated. However, if it is taken to mean that there ought to be an annual announcement of the Discount Rate after due consideration of the relevant and more recent financial data pertinent to the presumed investment portfolio (as opposed to a review of portfolio itself, which is reserved for the five-year review), such proposal is not exceptionable.

2.30 QBE suggested *"identifying other triggers (such as economic indicators) to a review prior to any back-stop being reached"*. Such possibility is in fact built into the requirement for a review to be held not more than every five years. If there is any indication for an earlier review, it is a matter for the Authority acting upon expert advice.

2.31 The Official Receiver's Office suggested publication to be made by way of subsidiary legislation whereas Allied World Assurance proposed announcement in the Government Gazette.

2.32 We have considered the collective views of the Respondents and concluded that an annual announcement of the Discount Rate after a yearly routine review would be preferable. However, a major review touching upon, for instance, the combination of a reasonable portfolio of investments upon which the rates of return are used for setting the Discount Rate, should only be undertaken every six years.¹⁷ It is contemplated that a major review of this nature would entail a process of public consultation capturing a wide array of stakeholders. This is borne out by the experience of the Ministry of Justice in the UK. Hence, an interval slightly longer than five years is deemed appropriate.

Experts/Stakeholders to be consulted

2.33 There was a general consensus that expert input is required before any decision is made on the Discount Rate. The following areas of expertise/representatives have been identified by the Respondents:

(a) Areas of Expertise or Representatives

Legal professions
Insurance industry
Labour rights
Consumer rights
Economics and finance
Actuarial

(b) Organisations (*in alphabetical order*)

Actuarial Society of Hong Kong

¹⁷ Clause 4(3) of the Draft Bill.

Census and Statistics Department
 Department of Health
 Department of Justice
 Financial Services and the Treasury Bureau (Financial Secretary)
 Hong Kong Bar Association
 Hong Kong Federation of Insurers
 Hong Kong Monetary Authority
 Hong Kong Mortgage Corporation Limited
 Hospital Authority
 Insurance Authority
 Judiciary
 Legal Aid Department
 Motor Insurers' Bureau of Hong Kong
 Office of the Government Economist
 The Law Society of Hong Kong

2.34 The wide range of organisations identified by the Respondents demonstrates that caution should be exercised to guard against the risk of the expert panel (from which the Authority must seek advice before making any decision) becoming a platform for political jostling.

2.35 It is precisely for this reason that we find the suggestion made by the Official Receiver's Office for the establishment of an independent commission, akin to that provided in Part 3 of the Minimum Wage Ordinance (Cap 608),¹⁸ not particularly attractive.

2.36 By way of illustration, under the Civil Liability Act 2018, the Lord Chancellor in the UK is obliged to consult:

- (a) for the first review, the Government Actuary and the Treasury only (see paragraph 2(4) of Schedule A1 to the Damages Act 1996 added by section 10 of Civil Liability Act 2018); and
- (b) for each subsequent review within five years of a previous review (see paragraphs 1(3) and 6 of Schedule A1 to the Damages Act 1996 added by section 10 of Civil Liability Act 2018):
 - (1) the Government Actuary chairing an expert panel; and
 - (2) four other members of the expert panel to be appointed by the Lord Chancellor for each review:
 - one having experience as an actuary;
 - one having experience of managing investments;
 - one having experience as an economist; and

¹⁸ Part 3 of the Minimum Wage Ordinance (Cap 608) provides for the establishment of a Minimum Wage Commission. The members of the said Commission are all appointed by the Chief Executive. Not more than ten people who are not public officers, and not more than three who are, may be appointed. The chairperson cannot be a public officer. It also sets out the functions and powers of the Commission.

- one having experience in consumer matters as relating to investments.

2.37 Under the UK model, the expert panel will be chaired by the Government Actuary. It will have the benefit of sparing the Lord Chancellor from getting too involved in the ground work and intricate debates within the expert panel.

2.38 As matters now stand, it seems sensible that a similar "*expert panel*" of the intended Authority should be kept to an optimum size consisting of no more than, say, seven members to be chosen from any of the following organisations:¹⁹

- (a) Actuarial Society of Hong Kong;
- (b) Hong Kong Monetary Authority;
- (c) Investor and Financial Education Council;
- (d) Mandatory Provident Fund Schemes Authority;
- (e) CFA Society Hong Kong;
- (f) Judge of the High Court in charge of the Personal Injuries List;
- (g) The Treasury; and
- (h) University academics specialising in consumer and actuarial matters.

The position of HKFI and MIB

2.39 In general, HKFI and MIB took the stance that the Discount Rate should be dealt with in a different consultation exercise and there ought to be an "*impact study*" or "*comprehensive study*".

2.40 The rationale for a mechanism for reviewing the Discount Rate has been explored in Chapter 5 of the Consultation Paper. The Sub-committee had a meeting with the insurance industry on 3 July 2018. It was explained at the meeting that:

- (a) the problem of Discount Rate is operationally related to PPOs, if it is to be implemented, but the two are not dependent on each other; and
- (b) the perennial problem of fixing and reviewing the Discount Rate needs to be addressed, regardless of whether a PPO regime is to be implemented.

¹⁹ It is observed that valuable information pertinent to returns on investment may be in the possession of various existing organisations, such as the HKMC Annuity Limited (under the Hong Kong Mortgage Corporation Limited, which is wholly owned by the Government). It is envisaged that such information may readily be channelled to the relevant panel of consultees through one or more of its members such as the representative of the Hong Kong Monetary Authority (see Clauses 5(4) and 9(1) of the Draft Bill). Further, the Financial Secretary, who is also the Chairman of the Hong Kong Mortgage Corporation Limited, has a wide discretion to take into account relevant factors pertinent to returns on investment in a rate determination (see https://www.hkmc.com.hk/eng/investor_relations/faq.html and Clause 7(6) of the Draft Bill).

2.41 It is self-evident that there was overwhelming support from various insurers for the establishment of an Authority for fixing and periodical review of the Discount Rate, as seen above.

2.42 It would appear that the concerns of HKFI (and probably MIB) were set out in its submission, raising three main questions, namely:

- (a) for the purpose of Discount Rate, should we assume that the claimants would invest in ILGS or a mixed portfolio of investments;
- (b) how can we ensure that the legal framework and process governing the way in which the Discount Rate is set will produce a rate which is a correct one; and
- (c) whether there are good and compelling reasons, in specific context of Hong Kong, to encourage the use of PPOs for settling claims related to certain types of bodily injuries.

2.43 As for question (a), it is necessary to bear in mind that there is no ILGS in Hong Kong. Consequentially, we are not plagued by problems arising from ultra low returns from ILGS (net of tax and administration charges) as in the UK.

2.44 Further, the legal principle that recipients of damages are not to be regarded as totally risk adverse is reflected in the decision of Bharwaney J in *Chan Pak Ting*,²⁰ as affirmed by the Court of Appeal. In short, recipients are supposed to invest in a mixed portfolio consisting of (1) fixed deposits, (2) EFNs, (3) bonds, and (4) stocks, depending on the duration of investment (ie the duration of the needs arising from the injuries). Such investment portfolios are considered low risk but not risk-free (see paragraph 2.21 above).

2.45 The intended Authority can legitimately rely on the portfolios decided in *Chan Pak Ting*²¹ as the starting position. In any case, if no Authority is established, the decision therein would be binding on all lower courts trying personal injury cases.

2.46 Incidentally, the approach of Bharwaney J coincides with the reform brought about by the Civil Liability Act 2018. In the new paragraph 4 of Schedule A1 to the Damages Act 1996, it is provided that:

- "4(1) *The Lord Chancellor must comply with this paragraph when determining under paragraph 2 or 3 [ie consultation with experts] whether the rate of return should be changed or kept unchanged ('the rate determination').*
- (2) *The Lord Chancellor must make the rate determination on the basis that the rate of return should be the rate that, in the opinion of the Lord Chancellor, a recipient of relevant*

²⁰ [2013] 1 HKLRD 1.
²¹ Same as above.

damages [ie damages for personal injury] could reasonably be expected to achieve if the recipient invested the relevant damages for the purpose of securing that-

- (a) the relevant damages would meet the losses and costs for which they are awarded;*
 - (b) the relevant damages would meet those losses and costs at the time or times when they fall to be met by the relevant damages; and*
 - (c) the relevant damages would be exhausted at the end of the period for which they are awarded.*
- (3) In making the rate determination as required by sub-paragraph (2), the Lord Chancellor must make the following assumptions-*
- (a) the assumption that the relevant damages are payable in a lump sum (rather than under an order for periodical payments);*
 - (b) the assumption that the recipient of the relevant damages is properly advised on the investment of the relevant damages;*
 - (c) the assumption that the recipient of the relevant damages invests the relevant damages in a diversified portfolio of investments;*
 - (d) the assumption that the relevant damages are invested using an approach that involves-*
 - (i) more risk than a very low level of risk, but*
 - (ii) less risk than would ordinarily be accepted by a prudent and properly advised individual investor who has different financial aims.*
- (4) That does not limit the assumptions which the Lord Chancellor may make.*
- (5) In making the rate determination as required by sub-paragraph (2), the Lord Chancellor must-*
- (a) have regard to the actual returns that are available to investors;*
 - (b) have regard to the actual investments made by investors of relevant damages; and*
 - (c) make such allowances for taxation, inflation and*

investment management costs as the Lord Chancellor thinks appropriate.

- (6) *That does not limit the factors which may inform the Lord Chancellor when making the rate determination."*

2.47 Remarkably, the approach as set out in paragraph 4(2) of Schedule A1 to the Damages Act 1996 also finds expression in the submission of CD. Accordingly, the same approach has been adopted in clause 7 of the Draft Bill.

2.48 As to question (b) referred to in paragraph 2.42 above, there can never be a "*correct*" Discount Rate as such. The concept of the Authority is to do away with the injustice caused by delay and the disproportionate costs to be incurred in reviewing the Discount Rate by way of court proceedings. Further, the assumption of no "*windfall gain*" is built into the scheme (see, for example, paragraph 4(2)(c) of Schedule A1 to the Damages Act 1996).

2.49 It is contemplated that the Authority will operate with a high degree of transparency. A mechanism for publication of the reasons for rate determination similar to that adopted in the UK has been built into the Draft Bill.²² Hence, the Discount Rate as determined can be subject to public scrutiny. No doubt, any authority entrusted with the power to fix or review the Discount Rate would be heedful of any criticism, if proven to be valid.

2.50 By way of illustration, publication of the reasoning for determination of the Discount Rate is provided in paragraph 5 of Schedule A1 to the Damages Act 1996,²³ which reads:

"Determination

5 *When the Lord Chancellor makes a rate determination, the Lord Chancellor must-*

- (a) *give reasons for the rate determination made, and*
- (b) *publish such information as the Lord Chancellor thinks appropriate about-*
 - (i) *the response of the expert panel established for the review, or*
 - (ii) *in the case of a review required by paragraph 1(2) [i.e. first review], the response of the Government Actuary or the Deputy Government Actuary (as the case may be)."*

²² See clause 8 of the Draft Bill.

²³ See the equivalent under clause 8 of the Draft Bill.

2.51 As for question (c) referred to in paragraph 2.42 above, it tends to conflate the PPO issue with the Discount Rate issue. Though the two issues are operationally related, they are not interdependent.

2.52 It is not clear what "*impact study*" or "*comprehensive study*" was envisaged by HKFI or MIB. In the meeting in July 2018²⁴ referred to in paragraph 2.40 above, the representatives of the insurance industry were specifically invited to come up with specific parameters and methodology for the intended studies. Logically, it cannot be just another round of expression of opinion or concerns, which will not take matters any further.

2.53 By way of illustration, in the UK, the introduction or cessation of legislation has to take into account the impact on business in terms of regulatory requirements (see sections 21 to 25 of the Small Business, Enterprise and Employment Act 2015).²⁵

2.54 When the Civil Liability Bill (session 2017-2019) as introduced into the House of Lords (House of Lords Bill 90) was introduced to the UK Parliament, it was accompanied by an impact assessment ("**Impact Assessment**"). A section included (only about half a page) was entitled "*G. Direct costs and benefits to business calculations ...*". Its content is encapsulated in the following observations:

"110. ... the guidance the Lord Chancellor is amending solely relates to the court's role in awarding damages and is not guidance on how to carry out a business activity. ...

*111. ... while the damages that a court awards in a personal injury case might have an indirect effect on business compliance, the court's role in awarding damages is about compensating the victim rather than ensuring any future regulatory compliance."*²⁶

2.55 We consider that it is a matter of legal principle that injured persons are to be fully and fairly compensated (without any over-compensation or under-compensation). The mechanism for fixing and reviewing the Discount Rate is simply a measure geared towards the achievement of that aim.

2.56 Of course, any decision on the Discount Rate may impact on the businesses of employers and insurers alike. That is simply an incidence of the administration of justice. Hence, an acceptable or tolerable "*impact*" on the businesses, whatever that means, cannot be a "*pre-requisite*" for the introduction of a mechanism for determining the Discount Rate.

²⁴ See para 2.40 of this Report.

²⁵ The Small Business, Enterprise and Employment Act 2015 requires the UK Government to publish a target for deregulation and to obtain independent verification of the economic impact of regulatory decisions that count towards that target. The Act also ensures transparency by requiring the Government to report regularly on progress against its target; see Department for Business, Innovation and Skills of the UK, *Business Impact Target: First Annual Report 2015-2016*, dated June 2016; available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/530683/bis-16-182-bit-annual-report.pdf, accessed on 31 Mar 2022.

²⁶ Ministry of Justice of the UK, *Impact Assessment* (MoJ012/2017, 2018), at paras 110 and 111; available at <https://publications.parliament.uk/pa/bills/lbill/2017-2019/0090/civil-liability-IA2.pdf>, accessed on 8 Dec 2022.

2.57 As indeed, in *Chan Pak Ting*,²⁷ Bharwaney J observed that the potential increase in insurance premium as a result of his decision on the Discount Rate therein is not a matter with which the court should concern itself.

Latest position in the UK

2.58 As explained, the relevant provisions under the Civil Liability Act 2018 came into force on 20 December 2018. Part 2 of the Civil Liability Act 2018 expands the Lord Chancellor's power to fix the Discount Rate under the Damages Act 1996. There are very detailed provisions governing:

- (a) the court to give regard to, although not bound by, an order issued by the Lord Chancellor as to the determination of the Discount Rate. There can be different Discount Rates for different heads of damages or periods of future pecuniary losses (new Schedule A1 to the Damages Act 1996); and
- (b) under Schedule A1 to the Damages Act 1996:
 - mandatory periodic reviews as prescribed (paragraph 1) though power is given to the Lord Chancellor to announce the review period (ie for first review and thereafter for subsequent review within every five years);
 - conducting the first review (paragraph 2);
 - conducting later reviews (paragraph 3);
 - determination of rate of return (ie the approach and assumptions) (paragraph 4);
 - determination (and publication of reasons) (paragraph 5);
 - expert panel (paragraph 6);
 - proceedings, power and funding of an expert panel (paragraph 7); and
 - provisions to apply where the Lord Chancellor orders two or more rates of return (paragraph 8).

Under Part 3 of the Civil Liability Act 2018, the Treasury is given power to seek information from insurers concerning the amount of damages paid and the insurance premiums.

2.59 For the sake of completeness, the Lord Chancellor issued another consultation paper on 6 December 2018 to solicit information (up to 30 January 2019) as to how injured persons invested their awards of damages and the returns thereof.²⁸ As a result of the consultation process, the Lord Chancellor, upon the advice of the expert panel, set the Discount Rate at minus 0.25% on 15 July 2019.

²⁷ [2013] 1 HKLRD 1.

²⁸ See para 4(5) of Schedule A1 to the Damages Act 1996.

2.60 In compliance with the requirement under paragraph 5 of Schedule A1 to the Damages Act 1996,²⁹ the Lord Chancellor published the reasons for the rate determination on 15 July 2019 in a document entitled *Personal Injury Discount Rate – Outcome of Review* which was accompanied by an Impact Assessment prepared by the Ministry of Justice of the UK.

2.61 It is noteworthy that although defendants to personal injury claims (including insurers, NHS Resolution and medical defence organisations) were duly identified as "Affected Stakeholder Groups" under Section C of the Impact Assessment, the relevant parts in Section E thereof pertinent to the effects on such stakeholders was put in only three paragraphs, which read as follows:

"Defendants

69. *A higher PIDR³⁰ will lead to lower lump-sum damage awards. As mentioned above, this will make PPOs relatively more attractive to claimants who are unwilling to invest in higher risk portfolios.*

70. *As insurers must hold additional capital for PPOs to meet solvency requirements under Solvency II,³¹ an increased propensity for PPOs at a higher PIDR would, therefore, represent an immediate cost to insurers, albeit one that is likely to be partially offset by the reduced or absent lump sum in cases settling by a PPO rather than by a lump sum alone. As we are unable to estimate the impact of this option on the uptake of PPOs, this impact has not been monetised.*

71. *NHS Resolution does not have to meet Solvency II requirements so will not be affected in the same way as insurers.*³²

2.62 Pithy as it may be, the foregoing approach of the Lord Chancellor lends support to the fundamental tenet underlying the entire consultation exercise in that the need for a PPO regime is primarily a jurisprudential issue. The incidence of PPOs on the identified stakeholders such as insurers is not a relevant consideration, still less a determinative countervailing factor.

²⁹ As added by s 10 of the Civil Liability Act 2018.

³⁰ Meaning "personal injury discount rate".

³¹ The Solvency II regime introduces a regulatory framework for insurance firms in the EU. It is based on the risk profile of each individual insurance company in order to promote comparability, transparency and competitiveness. It is divided into three pillars: (a) quantitative requirements, including the rules to value assets and liabilities (in particular, technical provisions), to calculate capital requirements and to identify eligible own funds to cover those requirements; (b) requirements for risk management, governance, as well as the details of the supervisory process with competent authorities and (c) transparency, reporting to supervisory authorities and disclosure to the public; see European Commission, *Solvency II Overview – Frequently asked questions*, available at https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_3120, accessed on 31 Mar 2022.

³² Ministry of Justice of the UK, *Impact Assessment* (MoJ040/2019, 2019), at paras 69 to 71; available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/816906/personal-injury-rate-impact-assessment.pdf, accessed on 8 Dec 2022.

2.63 In keeping with the assurance expressed by the Actuarial Society that there would be sufficient knowledge and capability of the professional actuaries to support the insurance industry during the transition from lump sum settlements to PPOs,³³ the IFoA repeatedly reported that all the participating insurers were able to work out the pricing of insurance after the introduction of PPOs in the UK.³⁴

2.64 For the sake of completeness, collateral issues with a social dimension such as the availability of public healthcare services are not amenable to any meaningful quantitative assessment. As the Ministry of Justice of the UK rightly put it in the Impact Assessment referred to in paragraph 2.60 above:

"Wider Society including Taxpayers and Insurance Policy Holders

*72. Society will suffer a cost if claimants have to fall back on the State because of their investments failing to match the rate of return predicated by the PIDR and not having other assets to use. As a higher PIDR will lead to lower lump-sum awards, this outcome may be more likely than under the current PIDR (Option 0)."*³⁵

2.65 It is for this reason that we consider that an impact assessment on the role of the Hospital Authority, as suggested by HKFI and MIB and others, is neither feasible nor necessary. Even for cases disposed of by way of a lump sum award or settlement, the damages will be assessed on the reasonableness of the plaintiff's claim, for instance, for the costs of future treatment in the private sector vis-à-vis the public sector. However, once an award has been made by the court (or agreed upon by the parties), there is no way to control how the money is to be utilised by the plaintiff save in the case of a mentally-incapacitated person.

2.66 Simply put, there is nothing to prevent a plaintiff from keeping the damages awarded to him for private treatment and resorting to public healthcare services for whatever reason. The PPO regime has never been portrayed as a panacea to address social issues of this nature. Further, no amount of assessment can quantify or influence the impact of this element of human behaviour.

Conclusion

2.67 It seems clear that the establishment of an Authority to fix and review the Discount Rate is justified and the Financial Secretary is the obvious choice.

2.68 We anticipate that the statutory provisions to vest in the Financial Secretary the power to fix and review Discount Rate can be less elaborate than that adopted in the UK.

³³ See para 1.41 of this Report.

³⁴ GIRO 2018 Report, at 37 and para T.4 in Appendix T, IFoA 2020 Report, at 48 and para T.4 in Appendix T.

³⁵ Ministry of Justice of the UK, *Impact Assessment* (MoJ040/2019, 2019), at para 72.

2.69 Details of the proposed mechanism and composition of the Authority for periodic review of the Discount Rate are set out in Part 2 of the Draft Bill.

Final Recommendation 2

We recommend that the Financial Secretary should be the Authority empowered to formulate and promulgate the Discount Rate.

We also recommend that the Financial Secretary should consult an expert panel for each review of the Discount Rate. The Discount Rate should be subject to periodic review once every six years.

Chapter 3

Factors and limitations on the court's power to award and review PPOs

Introduction

3.1 This Chapter focuses on Question 3 of the Consultation Paper which has three parts, namely:

- "(1) *Whether the power of the court to award periodical payment should be irrespective of the consent of the parties to the proceedings.*
- (2) *Whether the power to award periodical payment should be generally vested in the court to be exercised in circumstances as it deems just and fair or whether such power should be limited to cover a specific class of personal injury cases, and, if so, how the class of cases is to be defined.*
- (3) *Whether a periodical payment order made by the court may cover all or only some heads of future pecuniary loss, in whole or in part, irrespective of the consent of the parties to the proceedings; and in the latter case, whether a periodical payment may cover all other heads of damages to such extent as the parties may agree."*¹

3.2 The three sub-questions posed under Question 3 look at who should be the ultimate decision maker on whether a PPO is made, the court or the parties, and the breadth of coverage of any PPOs made.

Responses to the Sub-committee's Question 3

Question 3(1)

3.3 The majority of Respondents (nine against, six for and one which was essentially against) felt that this should not be the case and that the consent of the parties should be paramount.

3.4 This is a debate which has taken place in other jurisdictions where periodical payments have been established and is a matter addressed in this Chapter. In essence it is a conceptual issue as to whether the court, a neutral

¹ See Consultation Paper, at paras 6.24 to 6.41.

arbitrator, is better placed to protect the interests of the claimant and to reflect a more appropriate application of the law than the individual parties or whether personal wishes of the parties should prevail. In the Consultation Paper, the Sub-committee has left this open.

3.5 It can be said that a court mandated decision may better ensure the application of the concept of *restitutio in integrum* as it is likely to be a dispassionate decision focused on the plaintiffs' objectively assessed best needs. Where the decision is mandated by consent, then "*best needs*" are not necessarily the overriding concern.

3.6 The Liberal Party adopted a very practical response to this issue. It pointed out that in the UK when periodical payments were initially voluntary, few cases adopted them and it was only after 2003 when the courts were made the ultimate arbiter that awards became more common. It concluded therefore that empowering the court as the arbiter is necessary for implementing periodical payments. The Sub-committee also referred to this UK experience at paragraph 6.36 of the Consultation Paper. MPS made the same observation based on its own voluntary scheme which ran for ten years up to 2016 and which got very few responses from plaintiffs. However, despite making the same observation, MPS's conclusion was in the opposite as it felt that there should be mutual consent of the parties before a PPO is made. The Official Receiver's Office reflected upon the likely lack of enthusiasm from the public by saying this is a new concept and "*it appears that the society would be less resistant if a consent approach is adopted*". It said that the position can then be reviewed after a few years' operation.

3.7 In the Consultation Paper,² the UK practice was looked at in the context of section 2 of the Damages Act 1996, Rule 41 of the CPR and Practice Direction 41B. The Damages Act 1996 makes it mandatory for the court to consider whether to award a PPO. The CPR require that in doing so, the court takes into account the views of the parties and all the circumstances of the case to see what best meets the claimant's needs, which is the paramount determinant. In making its decision, the court does take into account the form of award preferred by the claimant including the reasons for the claimant's preference and nature of any financial advice the claimant has received. The emphasis however is on the court ascertaining what best meets the claimant's needs and this may not be what the claimant prefers.

3.8 The Law Society in its response mirrored the comments made by the Sub-committee in the Consultation Paper and, in addition, specifically referred to the equivalent provisions in the Irish Civil Liability (Amendment) Act 2017³ ("**2017 Irish Act**") which essentially follow those in the UK legislation concerning the factors that the court should take into account in arriving at its decision.

² See Consultation Paper, at paras 6.32 to 6.37.

³ See the new s 51(2) as added by the 2017 Irish Act and Consultation Paper, at para 4.48.

3.9 It needs to be emphasised that in jurisdictions where the court is the final arbiter, the parties' views are always an important element in its decision making. So, when Well Link General Insurance and HKFI said, "[n]o, the parties' consent should be respected. Each case depends on its own facts and each claimant may have his or her own plan e.g. some claimants may return to China for the rest of his life", it may also be said that a court mandated system along the lines of the practice implemented in England and Wales or Ireland can still meet all these requirements. "Respected" does not necessarily mean "acquiesced to".

3.10 The Consumer Council interestingly observed that in order to safeguard the plaintiff's interest due to the potential existence of imbalance in bargaining power, the court should have the power to award PPOs irrespective of the consent of the parties to the proceedings. The implication is that a plaintiff maybe "forced" into taking periodical payments.

3.11 The Society for Community Organization provided an interesting qualification to the courts' exercise of power, namely, that the parties should attempt to agree first on periodical payments and only if consensus is not reached should the court have the ultimate decision-making power. In practice, this is what will happen as parties to a case will try to negotiate a settlement first.

3.12 The Law Society favoured the court being the final arbiter most notably because culturally local Chinese people are inclined to buy properties if they have a lump sum of money and this could exhaust damages received by them.

3.13 HKFI stated that mandatory blocking of the traditional lump sum settlements where both parties are in agreement to do the same should not be favoured. To this, it bears reiterating that the proposed statutory power vested in the court to make a PPO is not to deprive the parties (including mentally competent claimants) of the opportunity to achieve an amicable settlement. Incidentally, in the IFoA 2020 Report, it is documented that of all the (non-MIB) PPOs surveyed, the claimants were the sole driving force behind the decision for settlement by PPOs in 77% of the cases whereas 22% of the cases were by mutual decision between the claimants and the defendants.⁴ Only 1% of the (non-MIB) PPOs were court driven. Therefore, it should not be assumed that claimants would necessarily prefer a lump sum award or settlement.⁵

3.14 The comments of Mr Lai, being the only severely injured plaintiff who wrote in with comments, are important for his anecdotal views. He said that it is better to provide injured victims with more than one option. Those who can still change careers after suffering injuries like him prefer payment of a lump sum and do not want to be psychologically haunted by the actions throughout their lives, that means no more contact with the employer, the insurance company and the defendant, as well as no more concern of being followed or visiting medical experts. He pointed out that there is psychological relief in the finality of proceedings and being able to get on with a new life. He nevertheless

⁴ IFoA 2020 Report, at 168.

⁵ See Consultation Paper, at paras 3.48 to 3.49.

recognised the importance of PPOs in appropriate cases, particularly for long-term medical care. He cited as an example case where the relatives are too busy to be involved in care.

3.15 HKFI and Allied World Assurance produced a useful summary of the approach in other common law jurisdictions listed in the Consultation Paper in support of the parties' consent being paramount which as they put it, would get more buy in:

- Australia: award based on whether the parties apply and the court approves;
- Canada: relies on parties' consent;
- Ireland: award made after hearing parties' submissions (in fact in Ireland, the court is the ultimate determiner save for future loss of earnings awards); and
- Scotland: award made after parties consent.

3.16 CD reviewed the attitude of plaintiffs and defendants towards PPOs and lump sum payments but emphasised that the court has a duty to safeguard the interests of vulnerable claimants, and concluded that, on balance, the court should have the final say in deciding whether to award PPOs, emphasising that weighty consideration should be given to the plaintiff's wishes.

3.17 QBE said that the court at its discretion can impose PPOs where a person is under a disability (a minor or mentally incapacitated), but that for catastrophic injuries requiring long-term care, PPOs should only be on the consent of the parties. The Law Society also emphasised that where the claimant is incapacitated (where a committee under the Mental Health Ordinance (Cap 136) is to be appointed), the court should by default look at the possibility of PPOs.

Question 3(2)

3.18 A majority of the Respondents (nine for and four against) felt that the ultimate flexibility as to what a PPO should cover should lie with the court.

3.19 Reasons given for preferring the court's discretion were, for instance, *"so that more plaintiffs and defendants in cases of different classes can benefit from the periodical payment arrangement"*,⁶ *"exclusion of certain classes of cases might lead to injustice"*,⁷ *"... it would be difficult to classify ... cases in different classes and there could well be arguments on one classification from another. ... the circumstances of each case could be unique ..."*⁸ and *"[w]e have considered limiting periodical payment orders to only catastrophic injuries but agree with the LRC that in that case, substantial argument could arise as to what*

⁶ By the Society for Community Organization.

⁷ By the Department of Justice's Legal Policy Division (now known as Constitutional and Policy Affairs Division).

⁸ By the Official Receiver's Office.

amounts to 'catastrophic injuries'⁹ and "inconsistencies in application are likely to arise. Further, the focus will not be on the plaintiff's needs but on an interpretation of his condition ...".¹⁰

3.20 HKFI, Well Link General Insurance and Bank of China felt that PPOs, if legislated for, should be limited to "catastrophic injuries and young age plaintiffs who need substantive future costs of care and alternative accommodation and suffer substantive future loss of earnings" and limited "to a class of claims in which future pecuniary loss should exceed a certain level". No specific suggested level was given.

3.21 Further, HKFI stated in its response that:

"Parties should not be prevented from settling in the traditional lump sum method if they so agree.

It should be limited to situation where the claimant is in vegetative/paralysis state or disability is close to 100%.

The power would be vested in court only when the criteria are satisfied, and the life expectancy of the claimant is not certain making calculation of a fair and just lump sum payment infeasible.

To enhance certainty and to ensure application of the mechanism in a cost-effective way, court's power to award periodical payment should be limited to cover specific classes of injury cases only. The class of cases can be defined by:

- *A specific amount of future pecuniary loss: the court can only make periodical payment orders in cases with future loss over a specific amount; or*
- *Nature of injury: the court can only make periodical payment orders for cases where the claimants sustain catastrophic injury whose life expectancy is uncertain or who is in need of permanent institutional care."*

3.22 It is important to note, whether the Respondent felt that the ultimate decision should lie with the court or that legislation should define the category of injury for which PPOs are to be awarded, it was generally felt by all Respondents (including Mr Lai) that PPOs are more appropriate for the larger value claims involving long-term care or accommodation issues or claims referred to as catastrophic and, in particular, where the plaintiff was under a disability. This tallies with the experience from the UK.¹¹

⁹ By the Law Society.

¹⁰ Same as above; see also Consultation Paper, at para 6.25.

¹¹ In the IFoA 2020 Report, it is documented that the majority of the PPOs involved claimants with catastrophic level injuries requiring full time or prolonged personal care (See IFoA 2020 Report, at 8 (figure 1), 8 (figure 2), 37 (figure 30) and 38 (figure 31)). Generally, the propensity for PPOs would increase with the size of the claim (See IFoA 2020 Report, at 17 (figure 10)).

3.23 It was also generally agreed by the Respondents that where the claims are smaller, where past income losses or expenses already incurred are involved or where the administration costs of running a PPO are disproportionately high (perhaps for older plaintiffs), then PPOs would not be appropriate. Mr Lai pointed out that for past loss of income, medical expenses and the like, plaintiffs may have borrowed money from other people and the lump sum is needed to repay such debts.

3.24 Although Allied World Assurance said that the overall decision should be vested in the court, it also said that as a valid reference and guideline for the type of case PPOs should apply to, and in order to minimise the impact when they come into play, one can look at the definition of catastrophic injury in the 2017 Irish Act:

"a personal injury which is of such severity that it results in a permanent disability to the person requiring the person to receive life-long care and assistance in all activities of daily living or a substantial part thereof".¹²

3.25 However, both the Law Society and CD observed that categorising PPOs, for instance, to only catastrophic injury cases is likely to lead to endless argument as to what constitutes catastrophic injury, and that fixing an arbitrary threshold below which a PPO should not be made would sidetrack from the real issue, being how claimants for future loss can be fully compensated, or as the Law Society put it, *"the focus will not be on the plaintiff's needs but on an interpretation of his condition ..."*.

3.26 Mr Lai felt that *"for the time being"* PPOs should cover future loss of earnings and medical expenses.

3.27 The Department of Justice's Legal Policy Division (now known as Constitutional and Policy Affairs Division) ("**CPAD**") felt that:

"To maintain flexibility, our inclination is that the Court should be given power to order PPO(s) in respect of all heads of future pecuniary loss. As highlighted by the Consultant Paper, while PPO(s) may be particularly appropriate for future care and medical needs, it is premature to eliminate, at this stage, the possibility of a more extensive use of PPO for other heads."

3.28 The view of the majority not to restrict PPOs to artificially defined *"catastrophic"* cases is understandable. Personal injuries practitioners and insurers alike would be familiar with the categories of disabilities laid down by the Court of Appeal in *Lee Ting Lam v Leung Kam-ming*¹³ to guide the assessment of damages for pain, suffering and loss of amenities ("**PSLA**"). Evidently, a straight-jacketed approach towards the classification of injuries is neither warranted nor feasible in all circumstances. Time and again, arguments were unnecessarily canvassed as to which category of disability a particular claimant

¹² See the new s 51H as added by the 2017 Irish Act.

¹³ [1980] HKLR 657, CACV 11/1980 (date of judgment: 30 May 1980).

should fall. Rogers JA explained in *Chan Yuk v Dragages et Travaux Publics (HK) Ltd & Others* that:

*"There were four categories labelled 'serious injury', 'substantial injury', 'gross disability' and 'disaster'. ... these can only be categories indicating general descriptions of what is likely to be included in any one bracket. It might be obvious that in some instances it would be difficult to distinguish what ought to come within the bracket of gross disability and what ought to come within the category of disaster."*¹⁴

3.29 Having considered the views of the respondents, and taking into account that most of the cases giving rise to the need for making PPOs (to avoid the uncertainty of life expectancy and future economic situations) are catastrophic cases which require constant medical care, we are inclined to adopt the Irish model by specifying that PPOs should be limited to catastrophic cases properly understood.

3.30 In this connection, it is noteworthy that what may be regarded as falling within a statutory definition of "catastrophic cases" can be discerned from the "*gross disability*" and "*disaster*" categories of injuries as laid down by the Court of Appeal in *Lee Ting Lam v Leung Kam Ming*¹⁵ (as a guide to the assessment of damages under the PSLA head) as follows:

"Gross Disability

*This comprises injuries which leave the victim with very restricted mobility or cause serious mental disability or behavioural changes. This bracket includes paraplegics who, particularly if young, can expect to be placed at the upper end of the bracket. Awards in this category range from \$100,000 to 150,000.*¹⁶

Disaster

*This is where the victim requires constant care and attention and is incapable of ever leading or appreciating an independent adult life. This bracket includes tetraplegics and those reduced to 'living cabbages' or left with the mental age of very young children. Awards are from \$150,000 upwards.*¹⁷

3.31 We therefore propose to incorporate the Irish definition of "*catastrophic injury*"¹⁸ with the intention that it should cover cases falling within the "*gross disability*" and "*disaster*" categories, which are well recognised by legal practitioners in Hong Kong.

¹⁴ [2000] 3 HKLRD 1, at 6; CACV 89/2000 (date of judgment: 28 Jun 2000), at para 9.

¹⁵ [1980] HKLR 657.

¹⁶ Adopting the methodology laid down by Bharwaney J in *Wong Man Kin v. Golden Wheel (C & HK) Transportation Co. Ltd* [2015] 5 HKC 570. The range of awards in this category is revised to \$948,000 to \$1,435,000 as in June 2022.

¹⁷ Same as above. Awards are revised to \$1,435,000 upwards as in June 2022.

¹⁸ See s 2 of the 2017 Irish Act and clause 2 of the Draft Bill.

3.32 Further to the above, we consider that PPOs should only be applicable to Court of First Instance cases (see definition of "court" in clause 2 of the Draft Bill) as PPOs would only be suitable in high value claims involving damages for long term care and medical expenses. That would automatically weed out cases with value of claim up to HK\$3 million handled by the District Court (ie covering over 80% to 85% of personal injury cases). As explained earlier in this Report, the proportion of personal injury cases deserving consideration of PPOs is likely to be less than 1% and the value of such a claim on a lump sum basis is likely to be over HK\$10 million.¹⁹

Question 3(3)

3.33 In the Consultation Paper, the Sub-committee pointed out that there is an option to have court determined PPOs in respect of only certain heads of claim such as future accommodation and care, and a consensual approach is to be adopted for other heads of claim such as future loss of earnings.²⁰

3.34 Allied World Assurance felt that the consent of the parties was necessary for a PPO to be made, however once given, it should be for the court to decide whether the award should cover all or only some areas of future pecuniary loss. PPOs could apply to any one of the following heads:

- future care and medical expenses;
- future loss of earnings;
- future deputy fees;²¹ and
- future accommodation costs.

3.35 QBE felt that for a person under a disability, the court should determine whether a PPO is ordered, but for a paraplegic, consent should be required. That said, the court's power should be limited to awards for:

- future care;
- case management; and
- cost of medical treatment.

However, the parties should be free to incorporate wider heads, eg loss of future earnings and loss of services, by consent.

3.36 CPAD also felt that the court should have the discretion on which heads of future loss PPOs should apply to.

¹⁹ See paras 1.53 and 1.54 of this Report.

²⁰ See Consultation Paper, at para 6.40.

²¹ See Consultation Paper, at paras 3.47 and 6.29.

3.37 Dr Felix Chan and Dr Chan Wai Sum felt that a combination of awards was more appropriate, ie future earnings loss being limited to a lump sum and PPOs only being applicable to future care and treatment.

3.38 CD felt that it would be unsatisfactory to restrict the power of the court to make a PPO only to some heads of loss, as such restrictions would undermine the purpose of introduction of the periodical payment system to a certain extent. However, it still considered that PPOs should be restricted to future pecuniary loss, except in the case where the parties consent otherwise, to ensure that PPOs are only used when necessary (ie to cover the future unpredictable award) rather than for heads such as PSLA or pre-trial loss. This is to avoid unnecessary risk and uncertainty, and to bring finality. CD felt that it would be acceptable to allow exceptions where the parties have consented otherwise, which accord with the autonomy and wishes of the parties. It noted that this is in line with the position in the UK.

3.39 The Liberal Party also felt it appropriate to follow the position in the UK and there was no need to seek an alternative.

3.40 The Consumer Council also felt that the power should be vested in the court to make a PPO that best meets the needs of the claimant. This would depend on the circumstances of the case, the power therefore should be vested widely and not limited to a specific class of personal injury case. The court should have the discretion as to which heads of claim will be included in the PPO. This would be consistent with the court's power towards PPOs irrespective of the consent of the parties.

3.41 The Actuarial Society pointed out that it was not necessary for the court to award PPOs for all heads of damages as the benefit of them is to ensure that the risk of dissipation of funds is minimised.

3.42 HKCA said that it was important to have a regime that respects the balance between the parties' autonomy and the need to ensure that there is adequate ongoing compensation available. It felt that PPO's availability should be preconditioned on the acceptance of the parties or limited to situations where there is sufficient degree of uncertainty as to future costs to justify imposing a PPO. PPOs should not be used where justice can be done based on a lump sum assessment.

Our analysis and response

3.43 Distilling the responses, we have the following observations:

- Some Respondents felt that PPOs should only cover future loss claims but at the discretion of the court.²²
- Some however felt that there should be a limit to certain heads of loss where the court's discretion is exercised and that for heads of

²² Allied World Assurance and QBE.

damages covering non-pecuniary loss, these could only be subject to a PPO if the parties consented.²³

- Some Respondents felt that the court should have a general unlimited discretion to award PPOs for all heads of loss.²⁴

Conclusion

3.44 We recommend that the power of the court to award periodical payments should:

- (a) irrespective of the consent of the parties to the proceedings in respect of future pecuniary loss, be referable to costs of care and accommodation;
- (b) be limited to catastrophic cases;²⁵ and
- (c) without prejudice to (a) above, cover all heads of future pecuniary loss subject to the consent of the parties to the proceedings.²⁶

3.45 The recommendations herein are reflected in clause 11 under Part 3 of the Draft Bill. In particular, clause 11(3)(d) thereof provides that where a PPO includes, by consent, an element of "*future loss of earnings*", the amount awarded and the duration of payment will be expressly set out in the original order. This is to facilitate the "*last opportunity*" claim that may be made by dependants in the event of the premature death of a recipient of a PPO (see Question 4(3) of the Consultation Paper).²⁷

Final Recommendation 3

We recommend that the power of the court to award periodical payments should,

- (a) irrespective of the consent of the parties to the proceedings in respect of future pecuniary loss, be referable to costs of care and accommodation;**
- (b) be limited to catastrophic cases;²⁸ and**
- (c) without prejudice to (a) above, cover all heads of future pecuniary loss subject to the consent of the parties to the proceedings.**

²³ CD and the Liberal Party (which reflected the UK position).

²⁴ The Consumer Council, the Society for Community Organization and CPAD.

²⁵ See clause 2 of the Draft Bill.

²⁶ In particular, it is proposed that where a PPO includes an element of "*future loss of earnings*", the amount and duration of payment should be explicitly set out in the original order (see clause 11(3)(d) of the Draft Bill).

²⁷ See Consultation Paper, at para 4.1.

²⁸ See clause 2 of the Draft Bill.

Chapter 4

Circumstances for review by the court of PPOs and co-existence of a PPO regime with the current regime

Introduction

4.1 We will consider in this Chapter the responses received in relation to Question 4 which is sub-divided into four constituent parts, which are:

- "(1) Whether the original periodical payment order should be open to review by the court upon the application of either party to the proceedings.*
- (2) If yes, what should be the circumstances for reviewing periodical payment orders, including but not limited to the following:*
 - (a) changes in the need for and level of future care as a result of significant medical deterioration or improvement, which is foreseen at the time of the original order, with specific criteria pertinent to the nature of deterioration or improvement, as well as the duration during which a review can be applied for, being stipulated in that order;*
 - (b) exceptional life-changing circumstances, and if so, what are these circumstances; and*
 - (c) restriction on the number of applications for review and limit on extension of time for review that may be allowed.*
- (3) Whether, upon the cessation of periodical payment occasioned by premature death of a recipient of periodical payment, the dependants of such recipient should be afforded one last opportunity to pursue a claim against the paying party for loss of dependency, or being the amount which the deceased recipient would have contributed to his dependant from the periodical payment he received but for his premature death and in respect of which the dependant has not received any compensation or*

damages from the paying party or any person who was or may be liable to him.

- (4) *Whether the current mechanism for provisional damages should be preserved and whether periodical payment orders should be applicable to cover provisional damages although their co-existence is technically possible.*¹

4.2 First, Question 4 is composed of the "*main question*" as seen in Question 4(1) with Question 4(2) as the follow-up question that further qualifies Question 4(1). These responses will be dealt with in paragraphs 4.5 and 4.16 respectively.

4.3 Second, Question 4(3) concerns what happens when the plaintiff suffers a premature death and the interaction with an existing PPO, and Question 4(4) deals with whether the current regime of provisional damages should (and how to) co-exist with a PPO regime. These responses will be dealt with in paragraphs 4.35 to 4.37 and 4.43 to 4.45 respectively.

4.4 An overall conclusion on the said responses will be dealt with in paragraphs 4.49 to 4.52.

Summary of responses and review

Question 4(1)

4.5 The "*positive*" responses and review are as follows:

- (a) Society for Community Organization: Its response was to allow for a timely response to future changes to the case, but only in very exceptional circumstances to preserve "*stability and predictability of court decisions*".
- (b) Mr Lai: His response was that upon application of either party to the court and if fair, a variation may be made.
- (c) CD: Its response was that the court would strike a balance between finality and needs of the plaintiff which might be changing and perhaps even drastically so. Any variation would be tightly controlled with clear evidence to avoid an unnecessary burden on a defendant.
- (d) The Law Society: It was generally observed that review by the court was upon application by the claimant.²

¹ See Consultation Paper, at paras 6.42 to 6.57.

² In fact, an application may be made by the paying party depending on the circumstances.

- (e) Allied World Assurance: Its response was that upon significant changes, whether it be deterioration or improvement of the plaintiff, variation should be allowed but with limitations as suggested in the Consultation Paper citing different jurisdictions. The Damages (Variation of Periodical Payments) Order 2005 ("**2005 Order**") was mentioned as were Rule 41.2 of the CPR, Practice Direction 41B, and the Irish Civil Liability (Amendment) Bill 2017 which suggested a "*stepped*" approach to ensure certainty.³
- (f) The Consumer Council: Its response was that variation of a PPO should be in restricted circumstances that were foreseen and specified as at the time of making the PPO for the plaintiff so that satellite litigation and additional costs could be avoided. However, if such a variation is successful, then the defendant(s) should bear the costs unless the variation is based on "fraudulent evidence" put forward by the plaintiff to avoid deterring a worthwhile and necessary application to vary. Its response also suggested a review mechanism of the PPO that is administrative in nature and to be based on the opinion of a board or panel of experts.
- (g) MPS: Its response was that PPOs should only be varied in very limited circumstances especially since plaintiffs prefer "*clean breaks*" from the defendant via lump sum payments, and therefore continuing court intervention should be under greater scrutiny and restriction.⁴
- (h) The Legal Aid Department: Its response on PPOs was rather neutral but that variation of a PPO should be reserved.
- (i) Zurich Insurance: Its response was generally similar to that of CD, with the added point that the number of applications for variation should be limited. This response by Zurich Insurance is also related to Question 4(2)(c).
- (j) The Official Receiver's Office: Its response on PPOs was rather neutral but that variation of a PPO should be reserved with grounds for such a variation to be "*stipulated*".

4.6 For ease of reference and by way of illustration, section 2B of the Damages Act 1996 ("**1996 Act**") in the UK⁵ (as amended by the Courts Act 2003) provides that:

³ The Irish Civil Liability (Amendment) Bill 2017 was discussed in the Consultation Paper, at paras 4.43 to 4.44 and fn 58 in Chapter 4. It has since been passed into law in the form of the Civil Liability (Amendment) Act 2017, which came into effect on 1 October 2018 (S.I. No. 377 of 2018). Importantly, "Stepped Payment" shall be differentiated from variation of a PPO, which is discussed in detail at paras 4.23 to 4.24 below.

⁴ See Consultation Paper, at paras 3.48 to 3.49 and 6.18 to 6.23.

⁵ Same as above, at paras 3.28 and 3.29.

"2B. Variation of orders and settlements

- (1) *The Lord Chancellor may by order enable a court which has made an order for periodical payments to vary the order in specified circumstances"*

4.7 In turn, Article 2 of the 2005 Order provides that:

"Power to make variable orders

2. *If there is proved or admitted to be a chance that at some definite or indefinite time in the future the claimant will —*
- (a) *as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration, or*
- (b) *enjoy some significant improvement in his physical or mental condition, where that condition had been adversely affected as a result of that act or omission,*

the court may, on the application of a party, with the agreement of all the parties, or of its own initiative, provide in an order for periodical payments that it may be varied."

4.8 We readily acknowledge the need to limit the power to vary PPOs, even where a PPO is warranted in the first place.⁶ In this connection, we take the view that the 2005 Order⁷ would be a good reference point as the basis for any legislation to be enacted in Hong Kong. The principle of fairness to all parties finds expression in the procedure. Notably, an application to vary may be made by the plaintiff or the defendant on account of "*serious deterioration*" or "*significant improvement*", as the case may be.

4.9 To start with, a PPO would set out clearly the terms of payments.⁸ It should also be remembered that in granting a PPO, the court will also have the ancillary power to allow a defendant to call for regular medical examination(s) of a plaintiff and thus to provide a structured check-up of the plaintiff.⁹ Similar provisions have been adopted in clause 11 of the Draft Bill.

⁶ Same as above, at paras 6.50 to 6.51.

⁷ Same as above, at paras 3.29 to 3.30, see also Articles 2 and 9 of the 2005 Order.

⁸ Rule 41.8 of the CPR states that:

"(1) Where the court awards damages in the form of periodical payments, the order must specify —

(a) the annual amount awarded, how each payment is to be made during the year and at what intervals;

(b) the amount awarded for future —

(i) loss of earnings and other income; and

(ii) care and medical costs and other recurring or capital costs;

4.10 Further, where a "*variable order*" is made under a PPO, the stringent criteria to be fulfilled and the timeframe for an application for leave to vary a PPO will be expressly set out in the original order (see clauses 16 and 19 of the Draft Bill).

4.11 It is noteworthy that Article 10 of the 2005 Order¹⁰ provides that a person applying for permission to apply to vary an order or agreement bears the burden to show that the specified disease, deterioration or improvement has occurred and that it has caused or is likely to cause as of a particular date an increase or decrease in the plaintiff's financial loss. It is envisaged that similar rules of procedure will be made if the recommendations for PPO herein are accepted and implemented.

4.12 The concern expressed by the Consumer Council about legal costs is a valid one. However, the stringent requirement as to how a variation application should be supported by substantive evidence would mean that the court will have ample opportunity to scrutinise the merits of the application, both at the stage of leave application and at the substantive determination of the application to vary. The costs of such applications are at the discretion of

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- (c) that the claimant's annual future pecuniary losses, as assessed by the court, are to be paid for the duration of the claimant's life, or such other period as the court orders; and
 - (d) that the amount of the payments shall vary annually by reference to the retail prices index, unless the court orders otherwise under section 2(9) of the 1996 Act.
 - (2) Where the court orders that any part of the award shall continue after the claimant's death, for the benefit of the claimant's dependants, the order must also specify the relevant amount and duration of the payments and how each payment is to be made during the year and at what intervals.
 - (3) Where an amount awarded under paragraph (1)(b) is to increase or decrease on a certain date, the order must also specify –
 - (a) the date on which the increase or decrease will take effect; and
 - (b) the amount of the increase or decrease at current value.
 - (4) Where damages for substantial capital purchases are awarded under paragraph (1)(b)(ii), the order must also specify –
 - (a) the amount of the payments at current value;
 - (b) when the payments are to be made; and
 - (c) that the amount of the payments shall be adjusted by reference to the retail prices index, unless the court orders otherwise under section 2(9) of the 1996 Act."

⁹ See Consultation Paper, at para 6.46.

¹⁰ Application for permission

- "10.(1) An application for permission to apply for a variable order or a variable agreement to be varied must be accompanied by evidence –
- (a) that the disease, deterioration or improvement specified in the order or agreement has occurred, and
 - (b) that it has caused or is likely to cause an increase or decrease in the pecuniary loss suffered by the claimant.
- (2) Where the applicant is the claimant and he knows that the defendant is insured in respect of the claim and the identity of the defendant's insurers, he must serve the application notice on the insurers as well as on the defendant.
 - (3) Where the applicant is the claimant and he knows that the defendant is a member of a defence society and the identity of the defence society, he must serve the application notice on the defence society as well as on the defendant.
 - (4) The respondent to the application may, within 28 days after service of the application, serve written representations on the applicant and, if he does, must file them with the court.
 - (5) The court will deal with the application without a hearing." (emphasis added)

the court.¹¹ Where appropriate, the court may deal with such applications on paper¹² in the interest of saving costs.

4.13 Further, we would lay down a marker that legal aid should be made available for such applications (see clause 25 of the Draft Bill).

4.14 To address the concerns of Respondents such as Zurich Insurance and CD, it is proposed that the number of applications would be limited to only one, although extension of time for making an application to vary a PPO may be granted by the court in appropriate circumstances (see clauses 20 and 21 of the Draft Bill), adopting a procedure along the lines of Article 7 of the 2005 Order.¹³

4.15 Details of the intended mechanism for an application to vary a PPO have been set out in clauses 16 and 19 to 23 under Part 3 of the Draft Bill.

4.16 The "*negative*" responses and review are as follows:

- (a) Well Link General Insurance: Its response was that uncertainties were increased, as were reserving amounts for payments and added risks for preserving funds. The busy court diary would not allow for timely consideration of urgent applications if the parties are not in agreement, especially if the plaintiff's medical condition changes quickly (whether for the better or for the worse) and whether such change is significant enough to warrant a variation application.
- (b) QBE: Its response was that it does not subscribe to variation of PPOs save for a plaintiff making such a variation subject to "*identified known risks*".
- (c) HKFI: Its response was centred on the loss of finality and the added costs. It mentioned that:

"Any review of the PPO would result in a loss of finality and additional legal and administrative costs. Further, review of PPO, if frequent, would result in a waste of judicial resources and an inevitable increase in legal costs and other related expert fees.

An abuse of such mechanism may further result in lengthy and costly litigations.

¹¹ See clause 24 of the Draft Bill, cf Article 14 of the 2005 Order providing safeguards via the standard rules of court (inclusive of costs).

¹² See Consultation Paper, at para 3.31.

¹³ Same as above, at para 3.29, cf Article 7 of the 2005 Order which provides that:
"A party may make only one application to vary a variable order in respect of each specified disease or type of deterioration or improvement."

If properly represented settlements in lump sum or otherwise should be expertly awarded, the ability to return to them incentivizes repeat proceedings with no obvious benefit to the parties and with the implication of additional cost, time and potential emotional trauma."

- (d) Bank of China: Its response was centred around "fairness" between the parties as also applied in the context of the Civil Justice Reform and the additional burden on the court. Its response also suggested that (variation of) PPOs will duplicate the workload for the court (and the parties), cause problems for insurers to "reserve" funds and have add-on costs.

4.17 By way of a collective reply, we would repeat the observations in paragraphs 4.5 to 4.12 above. It is also emphasised that the mechanism for a "Variable Order" and a "Variation Order" (as provided in clauses 16 and 19 to 23 of the Draft Bill) is to be distinguished from a "stepped" payment provided for in the original order (see clause 12 thereof).¹⁴

4.18 In respect of the concerns regarding the increased complications and burden to the insurers and reinsurers in reserving funds for payments, the principle of *restitutio in integrum* should be at the forefront of the considerations.¹⁵ Further, the UK experience suggests that the insurers are more than capable of adjusting their strategy in reserving their funds.¹⁶ Although jurisprudence consideration lies at the heart of our consideration, we note that the (re)insurance sector will need to build readiness to address these new challenges with the support of the actuarial community before they will be ready for PPOs.

4.19 Incidentally, in the IFoA 2020 Report, it was documented that: "*In total there have been 44 observed deaths since settlement, against an expected number of 16.2 deaths assuming unimpaired mortality, representing a multiplier of 2.7 (for male and female PPO claimants combined). This result is statistically significant.*"¹⁷ Although it is too early to draw any conclusion due to the limited experience and the relatively small number of cases, there seems to be a "risk-pooling" effect which may enhance the viability of the PPO regime to incentivise stakeholders from the insurance industry.

4.20 As to the concerns regarding a busy court diary and related matters, it is envisaged that such applications would be rare and further streamlining would be made to "Practice Direction 18.1 – The Personal Injuries List" in order to enhance efficiency and cost-effectiveness. Since the applications would in the main be decided by a dedicated Personal Injury

¹⁴ See the discussion at paras 4.23 to 4.24 of this Report.

¹⁵ See Consultation Paper, at paras 1.9, 2.3, 6.2 to 6.10 and 6.19 to 6.21.

¹⁶ See the discussion at para 1.42 of this Report.

¹⁷ IFoA 2020 Report, at 40 (Figure 35); see also IFoA 2020 Report, at 9 (Figure 3) and 31 (Figures 25 and 26).

Judge,¹⁸ there is no reason to doubt that the application would be swiftly processed.

Question 4(2)(a)

4.21 The "positive" responses and review in relation to Question 4(2)(a) are as follows:

- (a) Society for Community Organization: Its response was that the circumstances under Questions 4(2)(a) and 4(2)(b) should warrant reviewing a PPO due to "*exceptional life-changing circumstances*" (its wording being difficult to understand but presumably meaning when there are non-medically or medically related reasons), but there should not be a limit on the number of applications so made.
- (b) Mr Lai: His response was that reviews in case of significant improvement or deterioration as compared to when the PPO was made should allow for review, but not more than say three times with a time limit as it may become too much of a nuisance to the plaintiff and wasteful of the court's time.
- (c) QBE: Its response noted the matters in Questions 4(2)(a) to 4(2)(c) as being relevant to a review of a PPO.
- (d) Actuarial Society: Its response was that a "*trigger*" for a review would need to be more clearly defined, an example being if there is a deterioration in the plaintiff due to an "*independent event*" versus "*directly related*" event(s) related to the original claim. Its response allowed for the reverse scenario (ie if the plaintiff's condition would improve due to medical advances).
- (e) The Law Society: Its response noted the matters in Questions 4(2)(a) to 4(2)(c) as being relevant to a review of a PPO.
- (f) CD: Its response noted the matters in Questions 4(2)(a) and 4(2)(b) as being relevant to a review of a PPO.
- (g) Allied World Assurance: Its response noted the matters in Questions 4(2)(a) to 4(2)(c) as being relevant to a review of a PPO with the added "*life-changing circumstances*" possibly including the plaintiff reaching adulthood and/or a change in the plaintiff's family status.
- (h) The Official Receiver's Office: Its response noted the matters in Question 4(2)(a) as being relevant to a review of a PPO.

¹⁸ Judge in charge of the Personal Injuries List shall be known as the Personal Injury Judge; see Practice Direction 18.1, para 11.

4.22 By way of a collective reply, we would refer to clause 12 of the Draft Bill concerning "*stepped*" payment, which is to be distinguished from a "*variable order*" provided under clause 16 thereof. In essence, a "*stepped*" payment is a definitive term of the PPO directing that the periodical payment is to be adjusted (increase or decrease, as the case may be) at certain point of time as stipulated in the original order on account of the defined change in the stage(s) of life or circumstances of the plaintiff. It will operate by the force of the original order and no further application needs to be made.

4.23 The typical example is a young recipient under a PPO attaining majority and there may be an anticipated change in his needs and hence the amount of periodical payments. In the UK, about 28%¹⁹ to 31%²⁰ of PPOs contains a "*stepped*" payment clause.

4.24 A "*variation order*" in the proper sense is one addressed in Question 4(2)(a) which would be governed by the provisions such as those proposed in clauses 16 and 19 to 23 of the Draft Bill. Under this regime, the court may make a "*variable order*"²¹ specifying the qualifying event and criteria for an application to vary a PPO, though the same can also be provided for by agreement of the parties.²²

4.25 First and foremost, the anticipated "*deterioration*" or "*improvement*" has to be spelt out in the original order²³ and so is the timeframe for an application for leave to vary the PPO, to be followed by a substantive application where leave is granted, upon materialisation of the "*deterioration*" or "*improvement*".²⁴ Although an applicant may apply for extension of time for the application to vary,²⁵ only one substantive "*Variation Order*" may be made.²⁶

4.26 The only "*neutral*" response and review in relation to Questions 4(2) to 4(4) came from the Legal Aid Department. Its response was neutral save that the mechanism for provisional damages should be either preserved or included in any future PPO regime/legislation.

Question 4(2)(b)

4.27 The "*positive*" responses and review in relation to Question 4(2)(b):

- (a) Society for Community Organization: See the response to Question 4(2)(a) above.²⁷

¹⁹ IFoA 2020 Report, at 35.

²⁰ GIRO 2018 Report, at 28.

²¹ See clause 16 of the Draft Bill.

²² See clause 22 of the Draft Bill.

²³ See Consultation Paper, at paras 3.29, 3.30 to 3.31 and 6.12.

²⁴ See clause 19 of the Draft Bill.

²⁵ See clause 20 of the Draft Bill.

²⁶ See clause 21 of the Draft Bill.

²⁷ See para 4.21(a) of this Report.

- (b) Mr Lai: See the response to Question 4(2)(a) above.²⁸
- (c) The Law Society: See the response to Question 4(2)(a) above.²⁹
- (d) CD: See the response to Question 4(2)(a) above.³⁰
- (e) Allied World Assurance: See the response to Question 4(2)(a) above.³¹
- (f) The Official Receiver's Office: See the response to Question 4(2)(a) above.³²

4.28 Only QBE provided a "*negative*" response and review in relation to Question 4(2)(b). Its response was that variation of a PPO should be limited to only "*those predicted at the time of making the order*".

4.29 Only the Legal Aid Department provided a "*neutral*" response and review in relation to Question 4(2)(b). See the response to Question 4(2)(a) above.³³

4.30 In light of the provision for "*stepped*" payment³⁴ (as discussed in paragraphs 4.23 to 4.24 above) and the availability of a mechanism empowering the court to make a "*variable order*"³⁵ (as discussed in paragraphs 4.5 to 4.15, 4.25 and 4.26 above), we accept that there is probably no need for another procedure to allow for adjustment due to "*life-changing circumstances*" which are not amenable to exhaustive definition.

Question 4(2)(c)

4.31 The "*positive*" responses and review in relation to Question 4(2)(c):

- (a) Mr Lai: See the response to Question 4(2)(a) above.³⁶
- (b) The Law Society: See the response to Question 4(2)(a) above.³⁷
- (c) Allied World Assurance: See the response to Question 4(2)(a) above.³⁸

²⁸ See para 4.21(b) of this Report.

²⁹ See para 4.21(e) of this Report.

³⁰ See para 4.21(f) of this Report.

³¹ See para 4.21(g) of this Report.

³² See para 4.21(h) of this Report.

³³ See para 4.26 of this Report.

³⁴ See clause 12 of the Draft Bill.

³⁵ See clause 16 of the Draft Bill.

³⁶ See para 4.21(b) of this Report.

³⁷ See para 4.21(e) of this Report.

³⁸ See para 4.21(g) of this Report.

- (d) The Official Receiver's Office: See the response to Question 4(2)(a) above.³⁹

4.32 The "*negative*" responses and review in relation to Question 4(2)(c):

- (a) Society for Community Organization: Its response was that there should not be any restriction on the number of applications for review.⁴⁰
- (b) QBE: Its response was that variation of a PPO should be limited to only "*those predicted at the time of making the order*".

4.33 The "*neutral*" responses and review in relation to Question 4(2)(c) are as follows:

- (a) CD: Its response was that it had no "*strong views*" on the number of applications for review or limits on the extension of time for reviews, since it foresaw such reviews of PPOs to be infrequently sought or infrequently granted.⁴¹
- (b) The Legal Aid Department: See the response to Question 4(2)(a) above.⁴²

4.34 As discussed, we take the view, after striking a balance between protection for the recipient under a PPO and needs for finality, that the number of applications to vary a PPO should be limited to one (see in paragraph 4.14 above).

Question 4(3)

4.35 The "*positive*" responses and review in relation to Question 4(3) are as follows:

- (a) Society for Community Organization: Its response was, generally, that dependants should be afforded one last opportunity to pursue the claim for loss of dependency with such a claim being either in the form of a lump sum or periodical payments.

³⁹ See para 4.21(h) of this Report.

⁴⁰ See para 4.21(a) of this Report.

⁴¹ In the UK, it has been reported that about 15% of PPOs contained a variation provision, as quoted in IFoA Periodical Payment Orders Working Party, *Periodical Payment Orders Working Party Update - GIRO 2016 Report (Industry Survey)* (2018) ("**GIRO 2016 Report**"), at 28, but it is noted a "lower" amount of variations to PPOs in brain injury cases (at 10%) whereas a "higher" amount of variations to spinal injury (at 34%). See also GIRO 2016 Report, at 36 and 146 to 147. More recent IFoA publications documented that a "*variation order*" can be found in 14% (quoted in GIRO 2018 Report, at 28) and 18% (quoted in IFoA 2020 Report, at 35) of PPOs.

⁴² See para 4.26 of this Report.

- (b) Mr Lai: His response was that the period for dependant(s) to claim for loss of dependency should be from the time of accident until "the recipient's" expected retirement age with the length of payment period determined at trial to allow for certainty.
- (c) The Legal Aid Department: Its response was neutral save that the mechanism for provisional damages should be either preserved or included in any future PPO regime/legislation.
- (d) CD: Its response was that dependant(s) *"would rely on part of the damages originally entitled by the claimant for their living"* when the PPO covers *"future loss of earnings"*. The Fatal Accidents Ordinance (Cap 22) does not include loss of dependency in a non-fatal accident situation, and since lump sum payments could be paid to any *"dependants"* to *"support their future living after the claimant's death"*, a last opportunity to claim loss of dependency would allow dependant(s) to be put in a fair position to protect their *"future living"*.

4.36 The *"negative"* responses and review are as follows:

- (a) QBE: Its response was in the negative since once a plaintiff dies, there is no requirement to pay for *"financial need[s]"* such as future cost of care, case management, medical expenses and other heads of continuous loss.
- (b) The Law Society: Its response was since the full sum of damages had been paid (whether into a *"fund"* or otherwise), further liabilities had ended.
- (c) Bank of China: Its response was that the cause of the premature death might or might not be linked to the *"original"* accident via the *"original"* action and, in any event, factually disputed and perhaps complicated to the extent of having to apportion the liabilities of various tortfeasors, thus leading to expensive legal and medical expert costs.
- (d) Actuarial Society: Its response was mainly based on the fact that life insurance would cover such a risk.
- (e) HKFI: It was mentioned that: *"this defeats the point of the PPO. If the dependents of the original recipient wish to guarantee future income a more effective method would be a lump sum payment converted into a transferrable annuity, with the dependents named as beneficiaries."*

Further, it considered that *"the dependants of the recipient should not be afforded the one last opportunity to pursue a claim"*

against the paying party for loss of dependence as this may create substantial uncertainties on the entire mechanism by virtue of the difficulties to ascertain:

- *who are the dependants of the recipient;*
- *causation between the death and the injury; and*
- *the amount of loss of dependency."*

HKFI's view was that "*dependants*" should "*guarantee future income*" by taking a lump sum payment which would be converted into a transferrable annuity with the "*dependants*" as "*beneficiaries*". Its response also mentioned that uncertainties that would arise include "*who*" are the dependants, "*causation*" between the premature death and the original injury, and the amount of damages to be paid to the dependant(s).

- (f) Allied World Assurance: Its response was to follow the typical "*procedure*" as per the UK experience.
- (g) Zurich Insurance: Its response was that such a provision to allow one last opportunity to claim loss of dependency was opposed since this may create substantial uncertainties, especially the identities of the dependants, causation issues and the amount of the loss of dependency.

4.37 The "*neutral*" responses and review are as follows:

- (a) Well Link General Insurance: Its response was based on the difficulty in knowing whether the premature death was caused by the "*original*" accident/injuries.
- (b) The Official Receiver's Office: Its response noted that the "*additional*" loss of dependency claim due to premature death may not reflect the actual loss and there is a "*policy balancing exercise*" when considering there would not be any continued PPO payments.

4.38 We would emphasise that the "*last opportunity*" claim by the dependants of a recipient under a PPO referred to in Question 4(3) would only apply to cases where the PPO includes, by consent of the parties (see Recommendation 3 discussed in paragraph 3.44(c) above) an element of "*future loss of earnings*" (as opposed to future costs of care and accommodation). In this scenario, as rightly observed by CD, in the event of the premature death of the recipient under a PPO, it does appear that his dependants would suffer a loss by way of the financial benefits to be derived from the portion of payments representing the deceased's "*future loss of earnings*".

4.39 In the UK, as already highlighted in the Consultation Paper, Rule 41.8(2) of the CPR provides that:

"Where the court orders that any part of the award shall continue after the claimant's death, for the benefit of the claimant's dependants, the order must also specify the relevant amount and duration of the payments and how each payment is to be made during the year and at what intervals."

4.40 As such, if Hong Kong is to adopt the UK approach by the court ordering continuation of the award after the plaintiff's premature death, there would be no need for a subsequent claim for loss of dependency. However, we take the view that it is not entirely satisfactory to deal with this element of the claim or payments under a PPO by way of a rule of court (such as Rule 41.8(2) of the CPR). Hence, the claim ought to be preserved by way of an explicit statutory provision such as that proposed in clause 15 of the Draft Bill. We take the view that there is neither conceptual nor logistical impairment to this approach.

4.41 The court is accustomed to determine the eligibility of a person for a loss of dependency claim within the remit of the Fatal Accidents Ordinance. If the cause of death is related to the original injury, there is unlikely to be any issue of causation since the computation of the element of PPO on account of "*future loss of earnings*" of the injured person (ie the recipient under a PPO who dies prematurely) would have already been assessed by the parties at the inception of the PPO and spelt out in the original order (see clause 11(3)(d) of the Draft Bill and paragraph 3.45 above). With respect, the fear of uncertainty or unfairness as perceived by HKFI and others may be misguided. If the cause of death is unrelated to the original injury, then the dependants have no basis to make any claim against the party ordered to make the PPO, for example, if the claimant died as a result of an accidental fire.

4.42 By the same token, the fact that a recipient under a PPO could have provided for the risk of premature death by procuring life insurance is not relevant. As a matter of law, a tortfeasor is required to compensate the injured person for wrongful act on the principle of *restitutio in integrum*. It is precisely for this reason that the court will not take into account any compensation received by the injured person from his own insurer to reduce the damages payable by a tortfeasor.⁴³

⁴³ *Parry v Cleaver* [1970] AC 1, [1969] UKHL 2.

Question 4(4)

4.43 The "*positive*" responses and review in relation to Question 4(4) are as follows:

- (a) Mr Lai: His response was that the current mechanism for provisional damages should remain and PPOs should be able to cover provisional damages.
- (b) Well Link General Insurance: Its response was that the mechanism for provisional damages should be preserved since PPOs are limited in their scope and a lump sum payment for provisional damages would be "*more helpful*" to the plaintiff.
- (c) QBE: Its response was that the co-existence of provisional damages and PPOs was feasible.
- (d) The Law Society: Its response was that the mechanism for provisional damages should be preserved. While it considered that their co-existence is feasible, it did not agree that PPOs should be applicable to cover provisional damages.
- (e) CD: Its response was provisional damages and PPOs serve different purposes.
- (f) The Consumer Council: Its response was provisional damages and PPOs serve different purposes.
- (g) The Official Receiver's Office: Its response was provisional damages and PPOs serve different purposes.

4.44 The "*negative*" responses and review in relation to Question 4(4) are as follows:

- (a) Society for Community Organization: Its response was that although "co-existence" of both provisional damages and PPOs is possible, the mechanism for provisional damages would "*serve no meaningful purpose*" and therefore could be abolished if PPOs cover provisional damages.
- (b) Allied World Assurance: Its response acknowledged the co-existence of both provisional damages and PPOs in the UK experience, but if PPOs were in place and options to vary were available, it was unnecessary to "*maintain*" the mechanism for provisional damages.

4.45 The "*neutral*" responses and review in relation to Question 4(4):

- (a) HKFI: It considered that "[c]areful review and study should be done to understand the ultimately impact between the 2 systems in order to arrive at an appropriate mechanism. The mechanism for provisional damages and periodical payment orders serve different functions." Its view was that a lump sum payment under provisional damages would be more helpful to the claimants. Its response was that more study is needed to understand the "2 systems", the "2 systems" serve different functions, and lump sum payments under provisional damages are more "*helpful*" to plaintiffs.
- (b) Bank of China: Its response was that lump sum payments under provisional damages were more helpful.
- (c) The Legal Aid Department: Its response was that it did not have any particular views on whether the mechanism for provisional damages should be preserved or whether it should be subsumed in the proposed periodical payment regime.

4.46 By way of a collective reply, we observe that Article 4 of the 2005 Order⁴⁴ allows for the court to make a "*variable order*" in addition to existing provisional damages⁴⁵ (thus allowing co-existence of the two regimes as the basis for the two regimes are different). Importantly, a major difference between a "*variation order*" under the PPO regime and an order for provisional damages is that the former is applicable to both "*serious deterioration*" and "*significant improvement*" whereas the latter is only applicable to "*serious deterioration*".⁴⁶

4.47 Furthermore, we agree that the present regime for provisional damages serves a different purpose and it would not be in conflict with a PPO, even in the scenario of a premature death.⁴⁷ It would not result in any duplication of damages.

4.48 Theoretically, there is no reason why the court cannot order a scheme of payment of provisional damages, akin to a PPO. However, it is advisable to separate the two for the sake of conceptual discipline.

⁴⁴ See Consultation Paper, at para 3.29; Article 4 of the 2005 Order: "The court may make a variable order in addition to an order for an award of provisional damages made by virtue of section 32A of the Supreme Court Act 1981 or section 51 of the County Courts Act 1984."

⁴⁵ See Consultation Paper, at paras 3.32 to 3.34, with paras 3.33 to 3.34 defining the features of a provisional damages award and thus differentiating the provisional damages award with a PPO which is summarily defined at paras 3.20 and 3.24 to 3.25.

⁴⁶ Same as above, at para 3.36.

⁴⁷ Same as above, at para 6.55.

Conclusion

4.49 The detailed responses from various stakeholders and suggested detailed replies have already been discussed and shall not be repeated.

4.50 Summarising the issues relating to Questions 4(1) and 4(2), we feel that the main reasons against reviewing PPOs and their distinct circumstances were due to fears of uncertainty, costs and increased administration.

4.51 As for the issues relating to Questions 4(3) and 4(4), we consider that the main reasons against allowing dependants of the plaintiff a last opportunity to pursue a defendant for loss of dependency and allowing co-existence of provisional damages and PPOs were due to a misunderstanding of the different regimes or a mistrust of allowing the different regimes to co-exist, as well as fears of increased costs, overlap of damages and uncertainty.

4.52 To put things into perspective, upon careful consideration of the responses and taking into account the development and experience from the UK since the implementation of PPOs as discussed in the Consultation Paper,⁴⁸ we have sought to crystallise our recommendations in respect of this question by way of Part 3 of the Draft Bill so as to put a focus on any further discussion on this topic.

Final Recommendation 4

We recommend that the original PPOs should be open to review by the court under the following limited circumstances:

- (a) changes in the need for and level of future care as a result of significant medical deterioration or improvement, which is foreseen at the time of the original order, with specific criteria pertinent to the nature of deterioration or improvement, as well as the duration during which a review can be applied for, being stipulated in that order; and**
- (b) the review should be restricted to only one application subject to extension of time for the application as the court may allow in appropriate circumstances.**

⁴⁸

Same as above, at paras 3.43 to 3.63.

Final Recommendation 5

We recommend that upon the cessation of periodical payment occasioned by premature death of a recipient of periodical payments, the dependants of such recipient should be afforded one last opportunity to pursue a claim against the paying party for loss of dependency, or being the amount which the deceased recipient would have contributed to his dependants from the periodical payments he received but for his premature death and in respect of which the dependants have not received any compensation or damages from the paying party or any person who was or may be liable to him.

Final Recommendation 6

We recommend that the current mechanism for provisional damages should be preserved.

Chapter 5

Security of the periodical payments

Introduction

5.1 In this Chapter, we will deal with Question 5 which has three parts, namely:

- "(1) Whether the court should take into account the security of the periodical payments before making the order.*
- (2) The funding options that should be available to ensure adequate security for periodical payments. These options may include, but are not limited to:*
 - (a) self-funding provided by, as the case may be, insurers, the government, or statutory bodies of substantial means;*
 - (b) self-funding backed by guarantees from government or a statutory scheme of protection; and*
 - (c) procurement of annuities or similar investment products to provide a secured stream of income.*
- (3) Whether, apart from government departments, there are other organisation and institutions, whether created by statute or otherwise, which are considered to be financially secure as paying parties for court ordered periodical payments."*¹

5.2 Whereas Question 5(1) is a matter of principle expressed in the form of a question, Question 5(2) together with its three sub-questions seek to identify WHAT funding options are available. Question 5(3) in turn addresses WHO could be considered financially secured paying parties for PPOs.

5.3 Question 5(2)(a) and (b) can also be looked at as two lines of defence. The first being self-funding by insurers, the Government or statutory bodies of substantial means and the second is the backing to the self-funding entities via guarantees from Government or a statutory scheme of protection.

¹ See Consultation Paper, at paras 6.58 to 6.81.

Responses to the Sub-committee's Question 5

5.4 We have received 17 responses for Question 5(1) and they were unanimously in favour of the need for the court to take into account the security of the periodical payments before making the order to ensure continuity of the payments. For instance, HKFI stated that:

"The court should make sure the continuity of the periodical payment is secure.

When considering to introduce periodical payment orders into the Hong Kong legal system, it does not alter the aim to provide equitable compensation to the plaintiffs. Therefore, when the plaintiffs are not receiving their awards in a lump sum, but by means of periodical payments, it is essential to ensure the continuity of the payments. As such, security of the periodical payments must be taken into consideration. As revealed in the paper, a lot of the countries has [sic] considered/implemented some mechanism/legislation to ensure there will be a reasonably secured payer for the purpose of periodical payments."

For Questions 5(2) and 5(3), an overriding majority of the responses were also in favour.

5.5 Many responses to Questions 5(1), 5(2)(a) and (b) and 5(3) were in duplication and they sought to address the questions together. Instead of going through each of the questions individually, the responses received are summarised below and our comments on them are in the ensuing paragraphs.

Our analysis and response

What are the funding options?

5.6 As mentioned in the Consultation Paper, in order for PPOs to work, payments have to be secured against all potential adverse consequences so that the recipients will not be affected. The details of such protective mechanism will have to be mapped out for the implementation of a PPO regime.² The responses received in relation to the proposed protective mechanism or funding options that should be in place, include the following:

² By way of example, in the UK, payments under PPOs will be 100% guaranteed by the Financial Services Compensation Scheme. Hence, if a financial institution fails to meet its obligation to make payment under a PPO, the recipient can look to the scheme for payment. A similar mechanism for protection of recipients will be needed if PPOs are to be introduced in Hong Kong. This may take the form of a "bail out" scheme established on the strength of levies imposed on paying parties under PPOs. It is also necessary to provide for other eventualities such as merger and acquisition of insurers and other financial institutions with liabilities under PPOs. See Consultation Paper, at para 6.72.

- (a) self-funding by insurers (ie insurance, including annuity);
- (b) self-funding by Government or statutory bodies of substantial means such as the Hospital Authority, Employees Compensation Assistance Fund Board ("**ECAFB**"), MIB³ and ECIB;⁴
- (c) statutory scheme of protection/legislation, such as:
 - (i) to follow the approach of the UK by establishing an FSCS that provides enhanced protection to fully secure the continuity of periodical payments; and
 - (ii) to set up a policy holders' protection scheme ("**PPS**") in Hong Kong as a source of security in case of insurance company insolvency; and
- (d) centralised fund proposed by the Law Society ("**Centralised Fund**").

Who are financially secured to pay PPOs?

5.7 The Respondents considered that financial security can be provided by:

- (a) bodies that are considered secure which include:
 - (i) the Government;
 - (ii) companies fully owned by the Government, eg the HKMC Annuity Limited (wholly owned by the Hong Kong Mortgage Corporation Limited which in turn is wholly owned by the Government through the Exchange Fund);
 - (iii) statutory bodies;
 - (iv) the Hospital Authority;
 - (v) MIB;
- (b) guarantees from the Government; and
- (c) funding of PPOs through the use of "*trust*".

³ MIB's mandate is to cater for motor accidents where either at the time of the accident giving rise to liability there is not in force a policy or such policy is ineffective; and where any final claim is not paid in full by the relevant insurer because of its insolvency.

⁴ ECIB assumes responsibility for the liabilities of insurers engaging in employees' compensation business that become insolvent. It is the trustee of the insolvency fund set up under the Employees Compensation Assistance (Amendment) Ordinance 2002 to cater for claims arising from insurer insolvency.

5.8 Different opinions exist as to whether an insurer authorised by the Insurance Authority is deemed a financially secured payer for PPOs. HKFI was the only Respondent that supported this view while the Official Receiver's Office expressed concerns on substantial self-funding scheme if insurers have financial difficulties. Some Respondents felt that *"the continuity of payments must be fully protected irrespective of the insolvency of the insurance company honouring the PPO obligations"*⁵ and similar view was expressed by the Society for Community Organization which considered *"self-funding backed by guarantees from government or a statutory scheme of protection is more desirable"*. CD also felt that only Government departments and some other entities such as the Hospital Authority would be financially secure enough. It should be noted that the Insurance Authority's regulatory and supervision framework cannot guarantee that there will not be any insurer insolvency. HKFI mentioned that:

"... while payments of periodical payment by insurers should be considered secure, as insurers are subject to stringent liquidity requirements and relevant statutory regulations, the government should also bear the responsibility to fund the system of PPOs so as to safeguard the interest of the injured. ...

In the event that a statutory scheme of protection is considered necessary to secure PPOs made by insurers, we submit that it is necessary to first consult the insurance industry on the levy required in maintaining the operation of the said scheme.

Further, the government should bear the responsibility to fund such statutory scheme, so as to safeguard the interest of the injured."

5.9 As regards the funding options, HKFI mentioned that:

"[I]nsurers should not be required to procure annuities or other investment products for satisfying a PPO order.

Firstly, the government should also bear the responsibility to fund the system of PPOs so as to safeguard the interest of the injured.

We consider that periodical payment by insurers should be considered secure, as insurers are subject to stringent liquidity requirements and relevant statutory regulations.

According to section 8 of the Insurance Ordinance (IO), an insurer must maintain an excess of assets over liabilities of not less than a required solvency margin.

⁵ By Dr Felix Chan and Dr Chan Wai Sum.

Section 25A of the IO also requires an insurer carrying on general business to maintain assets in Hong Kong of an amount which is not less than the aggregate of 80% of its net liabilities and the solvency margin applicable to its Hong Kong general business.

Under section 35AA of the IO, if an authorized insurer fails to maintain an excess of assets over liabilities of not less than a required solvency margin, the Authority is empowered to require the insurer to give effect to any such plan accepted by the Authority as adequate for the restoration of a sound financial position.

Section 17 of the IO (Cap.41) provides that an insurer is required to submit annually to the IA its financial statements prepared in accordance with the requirements of Schedule 3 to the IO.

As the above provisions of the IO already safeguard the liquidity of the insurers and thus payment of periodical payment, it is not necessary to require the insurers to procure annuities or any other financial instruments to secure the periodical payment.

We do not prefer to include the funding option of procurement of annuities or similar investment products, since such arrangements may create other types of risks and complications in providing the income stream."

5.10 It is safe to conclude that the Government, a Government guarantee, statutory bodies and a statutory scheme of protection were considered by the majority of Respondents to be the best security for the continuity of PPO payments. In this context, the idea of a UK FSCS-equivalent legislation was suggested to be set up for the PPO. The FSCS in the UK provides guarantee to PPOs made against regulated insurance companies. Hence, there is virtually no risk of non-payment under PPOs. In a similar vein, an idea to extend the impending PPS to cover PPOs was also suggested.

5.11 CD highlighted that cost is an important consideration to the option of a Government guarantee or a statutory scheme of protection and that:

"... it is for the government and the legislature to decide whether such guarantee should be given and if yes, under what circumstances. We are of the preliminary view that such guarantee if given, should be restricted to limited circumstances, as it would bring additional cost to the public purse and shift the defendants' burden to taxpayers."

5.12 The Society for Community Organization highlighted the potential increase in premium if the option of self-funding by insurers is used. It considered that:

"... In particular, option (b), namely self-funding backed by guarantees from government or a statutory scheme of protection, is more desirable. Not only can it prevent the insurance industry from expressing the need for significant premium increases to cover unpredictable future periodical payments of compensation, it can also provide [ultimate] financial support for recipients. In contrast, option (a) may lead to premium increases, or objections from taxpayers or legislators".

5.13 It had impliedly suggested that the cost would better be borne by the Government. HKFI maintained that the Government should bear the responsibility to fund the system of PPOs/statutory scheme for PPOs. The Actuarial Society pointed out that a Government backed scheme may be required if insurers are unwilling to bear the risk of PPOs due to the difficulty in assessing the costs arising from PPOs.

5.14 The importance of assessing the financial implications of PPOs on ECAS⁶ was highlighted by the Labour Department.

5.15 Bank of China highlighted the key criteria to be used in evaluating between different funding options to provide the security required for PPOs.

5.16 On the option of annuity to secure continuity of payments under a PPO in Question 5(2)(c), there was a general consensus amongst Respondents that the Hong Kong annuity market is still at its infancy stage.

5.17 MPS highlighted that in the situation of "un-insured" or "un-indemnified" doctors in clinical negligence awards, it may be beyond the ability of the court to satisfy itself that a PPO is able to secure the full scope of the plaintiff's award.⁷

⁶ ECAS was set up in 1991 under the Employees Compensation Assistance Ordinance (Cap 365) to provide payment to injured employees who are unable to receive compensation under this Ordinance because the relevant employer is untraceable or uninsured. ECAS also provides protection for policy holders (employers) in case their employee compensation insurers becoming insolvent. In the late 90s, ECAS ran into financial difficulties. To restore the long-term viability of ECAS, the Employees Compensation Assistance (Amendment) Ordinance 2002 was enacted on 28 June 2002 to excise claims arising from employee compensation insurer insolvency from the scope of ECAS. This was the background to the setting up of ECIB.

⁷ Currently, medical doctors in Hong Kong are not statutorily required to take out professional liability insurance against medical malpractice. Although the Hospital Authority maintains a medical malpractice insurance cover for its doctors, it is not clear how many of the medical doctors in Hong Kong are not insured against professional indemnity for medical malpractice.

5.18 HKFI suggested market pool with involvement of the Government or international reinsurance market and the Hong Kong Mortgage Corporation Limited. It mentioned that similar to the UK, a financial services scheme might be set up in order to secure the PPO. ECAFB and MIB were considered to be financially secure as paying parties for court ordered periodical payments. It opined that the Hospital Authority was also regarded as financially secure. It quoted the examples in other jurisdictions, such as in the UK, *"the Lord Chancellor promulgated the Damages (Government and Health Service Bodies) Order 2005 setting out the designated government bodies and health services bodies to make secured periodical payments. Equally in New Zealand, the Accident Compensation Corporation, being a government department is responsible for administering the periodical payments. In Ireland, various options were proposed by the Working Group on Medical Negligence and Periodic Payment [sic] trying to depart this from the government system."* It mentioned that it had tended to agree that a specified body needs to be established statutorily to provide a financially secure means to ensure continuity of periodical payments. HKFI believed that, in the eyes of the public, a Government body or quasi-Government body would be a better option to provide the sense of security.

Bodily injury landscape in Hong Kong

5.19 Theoretically, bodily injury can be covered by various types of liability insurance covers. Based on the UK experience, PPOs are made mainly in large bodily injury cases arising from motor claims and medical malpractices. For Hong Kong, it is reasonable to assume that most of the bodily injury cases resulting in PPOs would likely come from motor vehicle third party claims, employees' compensation insurance claims and medical malpractice claims.

5.20 In Hong Kong, statutes mandate compulsory insurance for motor vehicle third party bodily injuries and employees' work-related injuries. Hence, insurers are invariably involved on the defendants' side in motor and employees' compensation insurance claims. However, the situation with non-motor vehicle third party claims and non-employees' work-related injuries varies.

5.21 We understand that the majority of franchised public bus companies in Hong Kong (Long Win Bus Company Limited, New World First Bus Services Limited, Citybus Limited and New Lantao Bus Co (1973) Ltd) insure their motor vehicle third party liability with the commercial insurance market. The Kowloon Motor Bus Co (1933) Ltd has sought special approval from the Transport Department to self-insure based on a strong self-funding position accumulated over the years. It also relies heavily on reinsurance cover from the commercial insurance market and hence is a combination of self-funding and commercial insurance.

5.22 We note that not every medical doctor in Hong Kong is insured against medical malpractice.⁸ As explained above, the Hospital Authority has taken out medical malpractice insurance cover with commercial insurers for its doctors. The coverage includes a self-insured retention and is therefore also a combination of self-funding and commercial insurance.

5.23 For non-Hospital Authority medical doctors, there is no mandatory insurance requirement for medical malpractice and hence the scenario described by MPS re "*un-insured*" or "*un-indemnified*" doctors in clinical negligence awards could happen.⁹

5.24 Moreover, some private medical doctors might insure with insurers which are not authorised by the Insurance Authority. This would create a potential problem even if an FSCS-equivalent legislation were set up for PPOs (assuming the legislation would only cover regulated insurance companies in Hong Kong, as in the case of the FSCS which only covers authorised financial institutions in the UK). As an example, MPS¹⁰ is a mutual and not an authorised insurer in the UK or Hong Kong and medical doctors who have joined MPS will not be covered under the PPS in future because MPS is not an insurance company and is not regulated by the Insurance Authority. That is also the reason why MPS needs to resort to the use of trust in the funding of a PPO to provide the security required by the court.

Existing compensation mechanisms

5.25 Hong Kong currently has compensation schemes for motor vehicle third party claims and employees' work-related injuries claims, which are mandated by statutes or agreements among the Government, MIB or ECIIB and insurers. They include:

- (a) the First Fund Scheme and Insolvency Fund Scheme administered by MIB;
- (b) ECAS administered by ECAFB; and
- (c) the Employees Compensation Insurer Insolvency Scheme ("**ECIIS**") administered by ECIIB.

⁸ Same as above.

⁹ See para 5.17 of this Report.

¹⁰ MPS originates in the UK and is one of the world's leading medical defence organisations. It accepts members by subscription from many places in the world, say, Ireland, South Africa, Malaysia, Singapore and Hong Kong, and has more than 300,000 members worldwide. MPS provides professional support and expert medico-legal advice to its members by offering indemnity for clinical claims of negligence, advice and representations in respect of medical investigation or disciplinary procedures and even criminal proceedings arising from clinical care. The MPS operation is run as a fund and not considered as an insurance.

5.26 Since motor third party insurance and employees' compensation insurance covers are statutory requirements, insurers would invariably be the financial institutions being called upon to pay the PPO awarded by courts. The existing compensation mechanisms serve as the "*insurer*" of the last resort in case of insolvencies of insurers or where there is not in force a policy or such policy is ineffective eg due to an employer failing to take out insurance cover.

5.27 A PPO awarded by a court for large bodily injury cases under motor and employees' compensation insurance policies should not change the way these compensation schemes operate. Theoretically, PPOs related to motor vehicle third party claims and employees' work-related injuries can rely on the existing compensation schemes. However, due to the different history and background to the setting up of the foregoing compensation schemes, they carry different governance, mandate, limits, fund sizes and levy structure and hence are not fully aligned to the PPO regime. If decisions are made to address the incompatibilities, legislative amendments and/or further negotiations among the Government, MIB or ECIIB, and the insurers would be required. For instance,

- (a) ECAS works on a structure of lump sum relief payment and periodical payments basis with monetary limits and is not compatible with the potential payout format under the PPO regime.
- (b) ECIIB is relatively more aligned to the PPO regime in that it covers the situation of an insurer defaulting payment due to insolvencies.
- (c) MIB, on the other hand, stands in the shoes of the insurer in cases of invalidated insurance cover and insurance cover not having been effected (similar to ECAS) and insolvencies of insurers (similar to ECIIB).

5.28 In addition, the financial implications of PPOs on the funds of the existing compensation schemes need to be considered. It should be noted that the current fund size as well as levy rates of ECAS, ECIIB and MIB are predicated on the existing lump sum award regime. A review of the existing levy (including who to pay the additional levy, if any) as well as the current fund size under ECAS, ECIIB and MIB would be important. The mandates and *modus operandi* of these bodies will also have to be reviewed as these schemes were not set out to achieve the objectives of a PPO regime.

5.29 An overview of the existing compensation schemes and the enabling legislation is at Annex 3 to this Report.

PPS

5.30 The Government proposes to establish a Policy Holders' Protection Scheme ("**PPS**") to protect policy holders' interest by compensating policy holders or securing the continuity of insurance contracts in case an insurer becomes insolvent.

5.31 Although Hong Kong has a very robust insurance regulatory system and there were only a handful of insolvencies of small non-life insurers in Hong Kong in the past two decades, the 2008 global financial crisis highlighted the need for a more comprehensive compensation fund for protecting policy holders with a view to strengthening their confidence in the insurance market.

5.32 In 2010, the then Office of the Commissioner of Insurance commissioned an actuarial study to assess the optimal levy rate, target fund size and other detailed arrangements for the proposed PPS. The Government completed the public consultation on the proposal in June 2011. There was general support from the public, the insurance industry and the Legislative Council ("**LegCo**") for the establishment of a PPS and the key proposed features of the PPS. Based on the consultation conclusions, the Insurance Authority has been working with the insurance industry and relevant stakeholders to iron out various technical issues and fine-tune the proposals.

5.33 Further to the consultation with the LegCo Panel on Financial Affairs on the legislative proposals for establishing a PPS in March 2018, the Government and the Insurance Authority are conducting a consultancy study to update the key parameters of the PPS (eg target fund sizes and lead time for accumulation). The Government targets to conduct a public consultation within 2022 on the specific content of the proposed PPS and, after consolidating public views, prepare the necessary draft Bill.

5.34 According to the latest proposal, the PPS is designed with a specific focus on individual policy holders, small and medium enterprises (defined as a manufacturing business which employs fewer than 100 persons in Hong Kong, or a non-manufacturing business which employs fewer than 50 persons in Hong Kong; and this definition is adopted by the Small and Medium Enterprises Loan Guarantee Scheme) and owners' corporations. Under the current proposal, it excludes retirement schemes, motor insurance policies, employees' compensation insurance policies, aviation and marine insurance policies and certain offshore risks. It is proposed that it pays 100% for the first HK\$100,000 of any claim, plus 80% of the balance up to a total of HK\$1 million.

5.35 The scope of PPS complements the two existing compensation schemes providing safety nets to policy holders in case of insurer insolvency, namely the Insolvency Fund Scheme and ECIIS administered by MIB and ECIBB respectively. As such, it does not cater for bodily injury claims arising out of motor and employees' compensation insurance. It is also not intended to cater for corporate insurance policy holders. The background to the PPS

reflects that its scope in Hong Kong is not comparable to the FSCS of the UK, which is essentially an insolvency compensation scheme giving umbrella coverage to financial institutions. Further, whether the PPS can be used as a platform for providing protection to PPO claimants against insolvency will need to be evaluated against its legislative intent.

5.36 In the UK, National Health Service self-insures its medical malpractice risk and is deemed a secured PPO payer under section 2(4)(c) of the Damages Act 1996. The Hospital Authority however uses a combination of self-insurance and commercial insurance market for its medical malpractice risk. If our objective is to provide protection to PPO claimants against insolvency, considerations may be given to set up an insolvency protection mechanism for the commercial insurance market in so far as medical malpractices claims are concerned (similar to MIB, ECAS and ECIB for motor and employees' compensation claimants).

5.37 If our objective is to provide protection to PPO claimants against insolvency, the following has to be worked on:

- (a) harmonisation of the incompatibilities between PPOs and the existing compensation schemes for motor and employees' compensation insurance; and
- (b) setting up an insolvency protection mechanism for the commercial insurance market in so far as medical malpractices claims are concerned (as in the case of MIB, ECAS and ECIB for motor and employees' compensation claimants in relation to invalidated insurance cover and insurance cover not having been effected and insolvencies of insurers). Whether the PPS can be used as a platform for this will need to be evaluated against its legislative intent.

Annuity

5.38 Rather than paying for the claim as the payments come due the insurer could purchase an annuity from a third party. It may give finalisation of the claim for the insurer and consequently reduce capital costs as well as inflation and longevity risk.

5.39 Annuity market in Hong Kong is in its infancy and it will take a long time for the demand to be built up to drive supply of the appropriate products for PPO claimants. There are also specific challenges to the development of a PPO annuity market due to the following:

- (a) PPOs have characteristics that are atypical for conventional annuities. In particular, PPO claimants are typically significantly younger than conventional annuitants. The average age of a

PPO claimant is around 35-40, but claimants can be in their teens or younger.¹¹ In addition, the nature of their injuries means that they often have an impaired and hence reduced life expectancy compared with the standard population.

- (b) In the context of life insurance, impaired lives do not typically involve brain and spinal injuries that are seen in many of the PPOs cases. The term instead usually refers to people who have chronic conditions, such as heart disease, diabetes or cancer and usually the products are for older lives than PPOs. This makes PPO longevity risk unusual and uncertain, and consequently risk transfer to a third-party may be significantly more difficult and costly.
- (c) In the UK experience, when life insurers estimate mortality rates for their annuity portfolios, they have access to industry-wide mortality rates and often have statistically significant death data of their own to fit appropriate mortality base rates. However, there are no specific sets of mortality rates readily available for PPO claimants or for individuals subject to the type of severe brain and spinal injuries typically suffered by PPO claimants. Moreover, the number of PPO claimants is very low compared to the number of annuities written by life insurers, and it is likely to take many years until there are sufficient data points to enable any statistically robust set of mortality rates to be produced and even then, there may be insufficient data.¹²
- (d) It may be difficult to match the timing of the annuity payments to the timing of the claim payments. Inflation risk remains if a significant delay is necessary.¹³
- (e) The annuities must be based on the same index of the PPOs, otherwise there will be a basis risk.
- (f) The cost may become prohibitive as life insurance companies will include loadings in the annuity price, including capital charges and profit loadings.¹⁴
- (g) Unless the annuity is purchased on behalf of the claimant, (therefore with a contractual obligation on the annuity provider to pay the claimant directly), the annuity would be a wholesale transaction and therefore the transaction would not be covered by the future PPS. The result is that there would be a risk that

¹¹ IFoA Periodical Payment Orders Working Party, *Information for Actuaries Valuing Periodical Payment Orders* (2016), at 19.

¹² Same as above.

¹³ GIRO Working Party 2010, *Periodic Payment Orders* (2010), at 144.

¹⁴ Same as above.

the annuity provider becomes insolvent and is hence unable to pay the claimant.¹⁵

5.40 Even if there were a market for annuities, variation order agreements and the like would make transferring the risk in whole difficult. An additional consideration is that it is not clear whether it would be possible to completely transfer the liability, as there may still be a residual credit risk.

5.41 Although annuity as a concept for PPOs can easily be understood, in practice, this is much more complicated. There is currently no mechanism to transfer the liabilities under PPOs to third parties entirely.

Centralised Fund

5.42 The Law Society was the only Respondent that put forward a more concrete idea of setting up a Centralised Fund. The fund could be maintained "... *by an independent third party, like Motor Insurance Bureau, a special branch of the Registrar, or a newly established authority*". In terms of funding mechanism, the Centralised Fund will rely on the accumulation of investment return better than the Discount Rate used in the judgment as well as "*the excess*" between "*short-paid*" orders to support the "*long-paid*" orders.¹⁶

5.43 The proposal doesn't include a levy mechanism as a source of funding. It is also not clear how the body will cope with shortage of fund and whether Government guarantee will be required.

5.44 The PPS serves some reference value in highlighting the following important facets in the setting up of a PPO statutory body for PPOs:

- (a) avoid duplication with existing compensation schemes;
- (b) clarity in compensation basis and the limit of compensation;
- (c) determination of target fund size, levy rate, levy cap and "*stepped up*" levy;
- (d) selecting a suitable funding mechanism: pre-funding, progressive funding or post funding;
- (e) governance structure; and
- (f) administrative structure.

¹⁵ Same as above.

¹⁶ The Law Society envisaged that inevitably, some payment will be shorter than assessed and some longer.

5.45 The Centralised Fund idea is predicated on the payments for damages for future needs being capitalised into a fund to be managed by an independent third party. This is the concept of capitalisation which will be commented below.

- (a) Under the capitalisation idea proposed by the Law Society, the insurer pays the present value of the PPO loss to a centralised body for the latter to handle the PPOs ("**Centralised Body**"). This is a commutation idea that is already used in the insurance market between insurer and reinsurer for PPOs in the UK. The reinsurer pays the insurer a lump sum amount as settlement of the reinsurance recovery under excess of loss reinsurance. The settlement will consider the expected future life expectancy of the claimant, indexation of the claim and of the attachment point and investment income in the form of a discount, and can be linked to the date of the PPO settlement. This effectively crystallises the reinsurer's liabilities to the insurer in respect of that PPO. The size of the lump sum for capitalisation may or may not necessarily represent the expected cost of the PPO. Reinsurance treaties could specify calculations using agreed assumptions and methodology, which may be different from economic principles as a commercial consideration in setting treaties' price levels. The International Underwriting Association of London has worked out some guidelines relating to the concept of capitalisation.¹⁷
- (b) The idea is feasible but highly technical. For understanding the idea, we can consider the proposed Centralised Body as the reinsurer. The difficulties involved are as follows:
 - (i) Life expectancy disagreements. Examples of these are which mortality table to use and what adjustments to make for life impairment. One possibility is to use the expert witness report obtained by the insurer for discussions with the claimant, as this will remove bias and reduce cost.
 - (ii) What discount rate to be used will be important. In the commercial market, this is also dependent on individual companies' views on the future investment performance, which will vary from company to company and across different time periods.
 - (iii) As a capitalisation agreement will be the final agreement of the recoveries on a claim with no course for any later adjustment, the insurer will either benefit or lose out from a claimant living longer or shorter than expected. Each

¹⁷ International Underwriting Association of London, *IUA02-016 and IUA02-017: Per Claimant Capitalisation Clauses Commentary* (2012).

party tries to consider if an individual will be unlikely to die at the expected time. A reinsurer will pay either too much or too little. If a claimant dies earlier than average, the insurer will receive more than it will have to pay out, however the insurer will pay out more than it recovers if the claimant exceeds average life expectancy.

- (iv) "*Variation Orders*" need careful consideration in the capitalisation agreement considering the specifics of the judgment.¹⁸
- (v) In the idea proposed by the Law Society, the insurers may be willing to pay a risk premium to remove the liability from their balance sheets. However, the Centralised Body would need to have the necessary expertise to decide how it would like to negotiate for the adequate capitalised settlement from the insurers.

5.46 In addition to the technical complexities involved, the Centralised Body will need adequate funding to address potential cash flow mismatch especially during the building up stage of the target fund size and to cater for cost which will likely rise over time. All these will be the fundamental questions to consider in devising a funding mechanism with an adequate fund size, and sustainable and reliable source of funding.

Risk management for the PPO payer

5.47 One key impact of PPOs is to transfer the longevity, investment and inflation risks from the injured party to the insurance company. If a Centralised Body were to be set up, it will take over all these uncertainties and the financial implications arising therefrom. As a matter of fact, PPOs bring in new risks to its payers regardless whether they are insurers, financial institutions, statutory bodies, or the Government. There is a need to take a risk management view for anyone being put in the position to honour the PPOs.

5.48 The following is a review of the risk landscape of PPOs to the payers:

- (a) Operational cost. The focus is on the overheads of handling claims that will remain open for many years. Cost-efficiency consideration will be a key factor to take note because regardless of the number of PPOs (which we assume will be small), a qualified team is required to handle the claims.
- (b) PPO propensity, ie the proportion of claims that settle as a PPO, is another key factor. The biggest impact on PPO propensity is

¹⁸ IFoA Periodical Payment Orders Working Party, *Information for Actuaries Valuing Periodical Payment Orders* (2016), at 145.

likely to be the Discount Rate. A reduction in the Discount Rate will bring the economic value of lump sums and PPOs closer together, whereas an increase will separate them further (and hence will likely increase PPO propensity). The need to review the Discount Rate on a regular basis is a given and hence the uncertainty will be there to stay and timed by the interval of review.

- (c) The present value of the losses and the cost of the claims will be affected by the Discount Rate.
- (d) Matching assets and liabilities is harder for a PPO liability than a lump sum claim because most investment instruments are much shorter in duration than that of PPO liabilities.

5.49 Finally, inflation will continue to be an uncertainty to be reckoned with.

Cost consideration

5.50 Although the financial cost to the defendant of paying a PPO as opposed to a lump sum is not an issue to be considered by the court under the principle of *restitutio in integrum*, it is important for us to consider this aspect from a sustainability standpoint.

5.51 The security of a PPO payment relies on the continuity of adequate funding and this underpins sustainability. The other side of the coin of funding is cost.

5.52 Regardless of the options we contemplate, there is a need to assess the potential cost involved. No matter who is the payer, there is a need to estimate the potential financial impact arising from the PPOs and the cost of administering the PPOs as compared to the existing lump sum award approach.

5.53 Although commercial enterprises such as insurers and Government stakeholders have different focus in the PPO, ultimately, the impact of PPOs on the existing market will cascade through the value chain of stakeholders and be reflected in: premium and availability of insurance and reinsurance; amount of levy to be charged to the policy holders for the PPO protection; and in case Governmental funding/guarantee is provided, cost to the Government. Several Respondents had commented on this.¹⁹

5.54 We consider that successful implementation of the jurisprudence principle to improve the hitherto lump sum awards of the court requires a strong practical consideration.

¹⁹ By CD, the Society for Community Organization, the Actuarial Society, HKFI and the Hospital Authority.

Conclusion

5.55 The Government, a Government guarantee, statutory bodies and a statutory scheme of protection were considered by the majority of the Respondents to be the best security for the continuity of PPO payments.

5.56 Under the current bodily injury landscape and compensation schemes in Hong Kong and with the absence of a suitable annuity market as well as the lack of readiness expressed by the insurance sector, the award of a PPO would likely be restricted to certain classes of defendants (such as those funded by the Government or quasi-Government institutions or statutory bodies) which are able to provide security or guarantee of the long-term periodical payments.

5.57 PPOs can potentially leverage the existing compensation schemes of MIB, ECAS and ECIIB. However, this is not what these schemes were set out to achieve, and consequential amendments would be required to the relevant legislation and agreements among the Government, MIB or ECIIB and insurers, as well as the mandates and *modus operandi* of these bodies before they are ready for PPO. It is also important to ascertain how fund size, funding mechanism and levies to be paid by the policy holders will be affected. The foregoing needs to be satisfactorily addressed to prepare for their readiness for PPO.

5.58 PPS theoretically can be used as a platform to secure PPO payments for non-motor and non-employees' compensation claims. However, this is not what the PPS is set out to achieve.

5.59 In relation to PPOs for medical malpractice claims, it is important to address the "*un-insured*" or "*un-indemnified*" doctors in clinical negligence awards as in the case of MIB, ECAS and ECIIB for motor and employees' compensation claimants.

5.60 The operational feasibility and sustainability of any scheme for PPOs is of the utmost importance if it is to be successfully implemented. Sustainability is predicated on security in funding and the other side of the coin of funding is cost. The cost of PPOs is driven by the new uncertainties arising from the nature of PPOs versus lump sum awards. A PPO payer needs to be able to address these uncertainties in estimating the fund size and devising a robust funding mechanism with the support of the relevant stakeholders. This underscores the direction in which a PPO payer would need to take to attain the required level of readiness for PPOs. Although jurisprudence consideration lies at the heart of our deliberation, we note that the stakeholders will need to build readiness to address these new challenges before they will be ready for PPOs.

Roadmap

5.61 To take Question 5 forward, we have considered two options which warrant further detailed evaluation:

(a) Option A

- (i) Set up a new independent statutory body with Government guarantee to administer solely PPOs.
- (ii) Need to align the existing compensation schemes through requisite amendments in the relevant legislation as well as agreements between the Government, and MIB or ECIIB.
- (iii) Need to assess financial implication on fund size and levy required.
- (iv) Pros:
 - Government guarantee and hence fully secure.
 - Full transparency on cost of PPOs to society.
- (v) Cons:
 - Cost-efficiency likely to be low given the anticipated low number of PPO cases against the fixed cost of a standalone statutory body.
 - Funding takes time to build.
 - Additional levy would most likely be required.

(b) Option B

- (i) Harmonise the existing compensation schemes for motor and employees' compensation claims and the impending PPS (legislative intent permitting) to cover PPOs.
- (ii) Need to align the existing compensation schemes through requisite amendments in the relevant legislation and agreements among the Government, and MIB or ECIIB, and insurers, as well as the mandates and *modus operandi* of these bodies.
- (iii) Need to assess financial implication on fund size, funding mechanism and levy required.
- (iv) Pros:
 - Leverage existing funds of MIB, ECAS and ECIIB.
 - Leverage administrative mechanisms of existing schemes and cost-efficiency are likely to be higher.

- (v) Cons:
- Although in theory this can be done, it will involve a significant exercise to harmonise the existing compensation schemes, mechanisms and the concomitant legislative amendments.
 - Additional levy would most likely be required due to the additional cost involved.
 - Lack of full transparency on cost of PPOs to society.

5.62 Taking into account of the above, we consider that the funding options that should be available to ensure adequate security for periodical payments may include, but are not limited to:

- (a) self-funding provided by, as the case may be, insurers, the Government, or statutory bodies of substantial means;
- (b) self-funding backed by guarantees from the Government or a statutory scheme of protection; and
- (c) procurement of annuities or similar investment products to provide a secured stream of income.

5.63 Apart from Government departments, other organisations and institutions, whether created by statute or otherwise, may provide adequate financial security to the satisfaction of the court as paying parties for court ordered periodical payments. It would be open to a defendant to procure annuities or similar investment products to provide a secured stream of income in order to discharge its payment obligation under a PPO despite the potential difficulties anticipated by insurance companies as expressed in paragraphs 1.37 to 1.53.

5.64 Given the wide coverage of the majority of personal injury cases under motor insurance (including MIB), employees' compensation insurance (including ECAFB and ECIB), professional indemnity protection in respect of medical malpractice (covered by the Hospital Authority or medical protection insurance or schemes), we consider that PPOs ought to be introduced by way of legislation as soon as practicable starting off with payers with funding and guarantee from the Government, statutory bodies, and for scheme of protection deemed secured by the court. Further refinement can be made along the way to include other stakeholders, in particular, payers with insurance and quasi-insurance background after they have addressed their concerns, to build readiness for PPOs.

Final Recommendation 7

We recommend that the court should have a discretion to make a PPO after taking into account the security of the periodical payments to ensure the continuity of payments and satisfying itself that a PPO is able to secure the full scope of the plaintiff's award.

Final Recommendation 8

We recommend that PPOs ought to be introduced by way of legislation as soon as practicable and further refinement can be made along the way after implementation for stakeholders to build readiness for PPOs.

Chapter 6

Summary of our Final Recommendations

Final Recommendation 1

We recommend that the court should be given, by way of legislation, the power to make PPOs in respect of damages for future pecuniary loss in personal injury cases. For the avoidance of doubt, this new power vested in the court is not intended to affect the free will and power of a non-mentally incapacitated person to attain amicable settlement with the tortfeasor or relevant paying party. (Paras 1.72 to 1.74)

Final Recommendation 2

We recommend that the Financial Secretary should be the Authority empowered to formulate and promulgate the Discount Rate.

We also recommend that the Financial Secretary should consult an expert panel for each review of the Discount Rate. The Discount Rate should be subject to periodic review once every six years. (Paras 2.67 to 2.69)

Final Recommendation 3

We recommend that the power of the court to award periodical payments should,

- (a) irrespective of the consent of the parties to the proceedings in respect of future pecuniary loss, be referable to costs of care and accommodation;
- (b) be limited to catastrophic cases;¹ and
- (c) without prejudice to (a) above, cover all heads of future pecuniary loss subject to the consent of the parties to the proceedings. (Paras 3.44 and 3.45)

¹ See clause 2 of the Draft Bill.

Final Recommendation 4

We recommend that the original PPOs should be open to review by the court under the following limited circumstances:

- (a) changes in the need for and level of future care as a result of significant medical deterioration or improvement, which is foreseen at the time of the original order, with specific criteria pertinent to the nature of deterioration or improvement, as well as the duration during which a review can be applied for, being stipulated in that order; and
- (b) the review should be restricted to only one application subject to extension of time for the application as the court may allow in appropriate circumstances. (Paras 4.49 to 4.52)

Final Recommendation 5

We recommend that upon the cessation of periodical payment occasioned by premature death of a recipient of periodical payments, the dependants of such recipient should be afforded one last opportunity to pursue a claim against the paying party for loss of dependency, or being the amount which the deceased recipient would have contributed to his dependants from the periodical payments he received but for his premature death and in respect of which the dependants have not received any compensation or damages from the paying party or any person who was or may be liable to him. (Paras 4.49 to 4.52)

Final Recommendation 6

We recommend that the current mechanism for provisional damages should be preserved. (Paras 4.49 to 4.52)

Final Recommendation 7

We recommend that the court should have a discretion to make a PPO after taking into account the security of the periodical payments to ensure the continuity of payments and satisfying itself that a PPO is able to secure the full scope of the plaintiff's award. (Paras 5.55 to 5.64)

Final Recommendation 8

We recommend that PPOs ought to be introduced by way of legislation as soon as practicable and further refinement can be made along the way after implementation for stakeholders to build readiness for PPOs. (Paras 5.55 to 5.64)

List of Respondents to the consultation

Responses were received from the following Respondents, arranged in alphabetical order:

1. Actuarial Society of Hong Kong
2. Allied World Assurance Company, Ltd
3. Asia Insurance Co, Ltd
4. Bank of China Group Insurance Company Limited
5. Census and Statistics Department
6. Chief Secretary for Administration's Office, Administration Wing
7. China Taiping Insurance (HK) Company Limited
8. Construction Industry Council
9. Consumer Council
10. Dah Sing Insurance Company (1976) Limited
11. Department of Health
12. Department of Justice, Civil Division
13. Department of Justice, Legal Policy Division (now known as the Constitutional and Policy Affairs Division)
14. Dfsad Dfsa
15. Dr Au Wing Kwong, Hong Kong Shue Yan University
16. Dr Chan Wai Sum, The Chinese University of Hong Kong
17. Dr Felix W H Chan, The University of Hong Kong
18. Employees Compensation Insurer Insolvency Bureau
19. Federation of Hong Kong Industries
20. Financial Services and the Treasury Bureau
21. Home Affairs Department
22. Hong Kong Adventist Hospital – Stubbs Road and Tsuen Wan
23. Hong Kong Construction Association
24. Hospital Authority
25. Judiciary
26. Labour Department
27. Legal Aid Department
28. Liberal Party

29. Motor Insurers' Bureau of Hong Kong
30. Mr Lai
31. Official Receiver's Office
32. QBE General Insurance (Hong Kong) Limited
33. QBE Hongkong & Shanghai Insurance Limited
34. Social Welfare Department
35. Society for Community Organization
36. The Chartered Insurance Institute Hong Kong Limited
37. The Duty Lawyer Service Council
38. The Employees' Compensation Insurance Residual Scheme Bureau Limited
39. The Hong Kong Association of Banks
40. The Hong Kong Federation of Insurers
41. The Hong Kong Federation of Trade Unions - Occupational Safety and Health Association Company Limited
42. The Law Society of Hong Kong
43. The Medical Council of Hong Kong
44. The Medical Defence Union Limited
45. The Medical Protection Society Limited
46. The Real Estate Developers Association of Hong Kong
47. The Treasury
48. Well Link General Insurance Company Limited
49. Wing Lung Insurance Company Limited
50. Zurich Insurance Company Ltd
51. Anonymous

Personal Injures (Miscellaneous Provisions) Bill

The following draft bill is included to assist in explaining the proposals in this report. It is not the final version for the legislative process if legislation were to be introduced to give effect to the proposals.

A BILL

To

Establish a mechanism for setting and reviewing the presumed rate of returns on investment for assessment of damages in personal injuries claims; and to vest in the court the power to make periodical payments orders by way of damages for personal injuries claims.

Enacted by the Legislative Council.

Part 1

Preliminary

1. Short title

This Ordinance may be cited as the Personal Injuries (Miscellaneous Provisions) Ordinance.

2. Interpretation

In this Ordinance—

catastrophic injury (災難性傷害) means a personal injury which is of such severity that it results in a permanent disability to the person requiring the person to receive long-term care and assistance in all activities of daily living or a substantial part thereof (comparable to injuries under the "gross disability" and "disaster" categories as discernible from legal precedents);

Composite Consumer Price Index (綜合消費物價指數) means the index of inflation in that series as promulgated from time to time by the Census and Statistics Department;

Consultees (接受諮詢者) means the persons or bodies whom the Financial Secretary must consult in setting or reviewing the rate of return on investment under section 5 or 6;

controlling officer (管制人員) has the meaning as defined in the Public Finance Ordinance (Cap. 2);

court (法院、法庭) means the Court of First Instance;

future pecuniary loss (未來金錢損失) means, unless otherwise specified, the components of damages which the court may award in a claim or action for personal injury on account of the future needs of the injured person in terms of medical treatment, nursing and domestic care, aids and equipment,

accommodation, transportation, socializing and other expenses incidental to such future needs;

Monetary Authority (金融管理專員) means the Monetary Authority appointed under section 5A of the Exchange Fund Ordinance (Cap. 66);

panel of Consultees (接受諮詢者小組) means a panel of Consultees appointed and established by the Financial Secretary under section 9;

periodical payments order (按期付款令) means an order made by the court in accordance with section 11;

personal injury (人身傷害) includes any disease and any impairment of a person's physical or mental condition;

Personal Injuries List (人身傷亡案件審訊表) means the list established under Order 72, rule 2 of the Rules of the High Court (Cap. 4 sub. leg. A) for the proceedings of personal injury cases;

publicly funded organization or body (公帑資助的組織或機構) includes any organization or body, whether incorporated or unincorporated, which is funded by the general revenue and carrying on public functions independent of the Government;

rate determination (回報率裁定) means the rate of return on investment as determined and promulgated by the Financial Secretary from time to time in accordance with sections 7 and 8 upon a review conducted in accordance with section 4, 5 or 6;

recipient (受償人) means an injured person who is entitled to the benefits under a periodical payments order and, as the case may be, includes any person having management of the affairs of the injured person;

stepped payment (步階式付款) means the changes in periodical payments as specified in a periodical payments order as defined in section 12;

variable agreement (可予更改的協議) means an agreement specifying the circumstances under which an application for variation may be made as defined in section 22;

variable order (可予更改的命令) means a periodical payments order specifying the circumstances under which an application for variation may be made as defined in section 16.

(2) For the purposes of this Ordinance, a claim or action for personal injury excludes—

- (a) a claim or action brought by the estate of a deceased person under Part IV of the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23);
- (b) a claim or action brought by the dependant of a deceased person for loss of dependency under the Fatal Accidents Ordinance (Cap. 22); and
- (c) a claim or action arising from the carriage of passengers by sea or by air where the liability of the carrier or the relevant party is limited by operation of any international convention or any legislation giving effect to such international convention.

Part 2

Rate of Return on Investment

3. Assumed rate of return on investment of damages

- (1) In determining the return to be expected from the investment of a sum awarded as damages for any future loss of any nature in an action for personal injury, the court must, subject to and in accordance with rules of court made for the purposes of this section, take into account such rate of return (if any) as may from time to time be promulgated by a notice in the Gazette on the authority of the Financial Secretary under this Part.
- (2) A notice under subsection (1) may specify a different rate of return by reference to—
 - (a) the description and future loss of any nature;
 - (b) the length of the period during which future pecuniary loss is expected to occur; and
 - (c) the time when future pecuniary loss is expected to occur.

4. Periodic reviews of rate of return

- (1) The Financial Secretary must review the rate of return periodically in accordance with subsections (2) and (3).
- (2) The first review of the rate of return must be started within 6 months following the commencement of this Ordinance.
- (3) Each subsequent review of the rate of return must be started within 6 years following the last review.
- (4) The Financial Secretary may start a review, other than that under subsection (2) or (3), in light of significant changes in financial and economic conditions which, in the opinion of the Financial Secretary, would have a material impact on the rate of return as determined after a review in accordance with subsection (2) or (3).
- (5) The Financial Secretary must decide and publish by notice in the Gazette (as the case may be)—
 - (a) when, within the 6 months following commencement of this Ordinance, a review under subsection (2) is to be started;
 - (b) when, within the 6 years following the last review, a review under subsection (3) is to be started;
 - (c) when a review in accordance with subsection (4) is to be started.
- (6) For the purposes of this section, a review is concluded on the day when the Financial Secretary makes a rate determination in accordance with sections 5 or 6, as the case may be, upon a review conducted under subsection (2), (3) or (4).

5. Conducting first review

- (1) This section applies to the first review of the rate of return required by section 4(2).

- (2) The Financial Secretary must review the rate of return (as currently applied by the court in accordance with legal precedents) and determine whether it should be—
 - (a) changed to a different rate; or
 - (b) kept unchanged.
- (3) The Financial Secretary must conduct that review and make that determination within 9 months from the day as published in accordance with section 4(5)(a).
- (4) In conducting the review, the Financial Secretary must consult one or more panels of Consultees to be established in accordance with section 9.
- (5) The exercise of the power of the Financial Secretary under this section to determine whether the rate of return should be changed or kept unchanged is subject to section 7.
- (6) When deciding what response to give to the Financial Secretary under this section, the panel of Consultees must take into account the duties imposed on the Financial Secretary by section 7.

6. Conducting later reviews

- (1) This section applies to any review conducted by the Financial Secretary under section 4(3) or (4).
- (2) The Financial Secretary must review the rate of return and determine whether it should be—
 - (a) changed to a different rate; or
 - (b) kept unchanged.
- (3) The Financial Secretary must conduct that review and make that determination within 6 months from the day as published in accordance with section 4(5)(b) or (c).
- (4) In conducting the review, the Financial Secretary must consult and consider the views of the panel of Consultees.
- (5) The exercise of the power of the Financial Secretary under this section to determine whether the rate of return should be changed or kept unchanged is subject to section 7.
- (6) When deciding what response to give to the Financial Secretary under this section, the panel of Consultees must take into account the duties imposed on the Financial Secretary by section 7.

7. Determining rate of return

- (1) The Financial Secretary must comply with this section when determining under section 4(2), (3) or (4), as the case may be, whether the rate of return should be changed or kept unchanged (*rate determination*).
- (2) The Financial Secretary must make the rate determination on the basis that the rate of return should be the rate that, in the opinion of the Financial Secretary, a recipient of relevant damages could reasonably be expected to achieve if the recipient invested the relevant damages for the purpose of securing that—
 - (a) the relevant damages would meet the losses and costs for which they are awarded;
 - (b) the relevant damages would meet those losses and costs at the time or times when they fall to be met by the relevant damages; and

- (c) the relevant damages would be exhausted at the end of the period for which they are awarded.
- (3) In making the rate determination as required by subsection (2), the Financial Secretary must make the following assumptions—
 - (a) the assumption that the relevant damages are payable in a lump sum (rather than under a periodical payments order);
 - (b) the assumption that the recipient of the relevant damages is properly advised on the investment of the relevant damages;
 - (c) the assumption that the recipient of the relevant damages invests the relevant damages in a diversified portfolio of investments; and
 - (d) the assumption that the relevant damages are invested by using an approach that involves—
 - (i) more risk than a very low level of risk; but
 - (ii) less risk than would ordinarily be accepted by a prudent and properly advised individual investor who has different financial aims.
- (4) Subsection (3) does not limit the assumptions which the Financial Secretary may make.
- (5) In making the rate determination as required by subsection (2), the Financial Secretary must—
 - (a) have regard to the actual returns that are available to investors;
 - (b) have regard to the actual investments made by investors of relevant damages; and
 - (c) make such allowances for taxation, inflation and investment management costs as the Financial Secretary thinks appropriate.
- (6) Subsection (5) does not limit the factors which may inform the Financial Secretary when making the rate determination.
- (7) In this section—

relevant damages (有關損害賠償) means a sum awarded as damages for future loss of any nature in an action for personal injury.

8. Determination

When the Financial Secretary makes a rate determination, the Financial Secretary must—

- (a) promulgate the rate determination by a notice in the Gazette specifying the effect date with specific reference to the date of accrual of a cause of action;
- (b) give reasons for the rate determination made; and
- (c) publish such information as the Financial Secretary thinks appropriate about the response of the panel of Consultees established for the review.

9. Panels of Consultees

- (1) For each review of a rate of return required by section 4(2), (3) or (4), as the case may be, the Financial Secretary must appoint and establish one or more panels of Consultees comprising representatives or members (***panel of Consultees***) from—
 - (a) the Treasury;

- (b) the Monetary Authority;
 - (c) the Actuarial Society of Hong Kong;
 - (d) the CFA Society Hong Kong;
 - (e) the Investor and Financial Education Council;
 - (f) the Mandatory Provident Fund Schemes Authority;
 - (g) the judge of the High Court in charge of the Personal Injuries List; and
 - (h) the university academics specializing in consumer and actuarial matters.
- (2) A panel of Consultees established for a review of a rate of return required by section 4(2), (3) or (4) ceases to exist once it has responded to the consultation relating to the review.
- (3) The Financial Secretary may terminate the appointment of any person on the panel of Consultees if the Financial Secretary is satisfied that—
- (a) the person is unable or unwilling to take part in the panel's activities on a review conducted under section 4; or
 - (b) it is no longer appropriate for the person to be a member of the panel because of gross misconduct or impropriety.

10. Proceedings, powers and funding of panels of Consultees

- (1) A panel of Consultees is to consist of no less than 8 members and is to be chaired by a representative of the Treasury as nominated by the Financial Secretary.
- (2) A panel of Consultees may—
- (a) invite any other person to attend, or to attend and speak at, any meeting of the panel; and
 - (b) when exercising any function, take into account information submitted by, or obtained from, any other person (whether or not the production of the information has been commissioned by the panel).
- (3) The Financial Secretary must make arrangements for a panel of Consultees to be provided with the resources which the Financial Secretary considers to be appropriate for the panel of Consultees to exercise its functions.
- (4) The Financial Secretary must make arrangements for the person appointed on a panel of Consultees to be paid any remuneration and expenses which the Financial Secretary considers to be appropriate.

Part 3

Periodical Payment

11. Orders for Periodical Payments

- (1) A court awarding damages for future pecuniary loss in respect of a catastrophic injury—
 - (a) may order that the damages are wholly or partly to take the form of periodical payments; and
 - (b) must consider whether to make that order.
- (2) A court awarding damages for future loss of earnings to a plaintiff in respect of a catastrophic injury may, if the parties consent, order that the damages are wholly or partly to take the form of periodical payments.
- (3) Where a court makes a periodical payments order under this section, the order must specify, where applicable—
 - (a) the annual amount awarded to the injured person;
 - (b) the frequency of the payments that are to be made to the injured person from the annual amount by the paying party;
 - (c) the amount awarded in respect of each head of future pecuniary loss;
 - (d) where the periodical payments order includes damages in respect of future loss of earnings, the amount awarded for such loss of earnings and the duration of the remaining working life of the injured person based on which the award is made;
 - (e) the stepped payment, if any, pursuant to section 12;
 - (f) the method by which payments are to be made by the paying party to the recipient;
 - (g) that the payments under the order are to be made to the recipient during the lifetime of the injured person; and
 - (h) any other matter that the court considers appropriate.
- (4) A court may not make a periodical payments order unless satisfied that the continuity of payment under the order is reasonably secure.
- (5) For the purpose of subsection (4), the continuity of payment under an order is reasonably secure if—
 - (a) the source of payment is the Government, the Motor Insurers' Bureau of Hong Kong or the Hospital Authority;
 - (b) it is protected by a guarantee executed under section 13; or
 - (c) the court which made the order declares its satisfaction that the continuity of payment is reasonably secure.
- (6) A periodical payments order may include provision—
 - (a) requiring the party responsible for the payments to use a method (selected or to be selected by the party) under which the continuity of payment is reasonably secure by virtue of subsection (5);
 - (b) as to how the payments are to be made, if not by a method under which the continuity of payment is reasonably secure by virtue of subsection (5);

- (c) requiring the party responsible for the payments to take specified action to secure continuity of payment, where the continuity is not reasonably secure by virtue of subsection (5); and
 - (d) enabling a party to apply for a variation of provision included under paragraph (a), (b) or (c).
- (7) Where a periodical payments order is made, an alteration of the method by which the payments are made is to be treated as a breach of the order (whether or not the method was specified under subsection (6)(b)) unless—
- (a) the source of payment under the new method is the Government, the Motor Insurers' Bureau of Hong Kong or the Hospital Authority; or
 - (b) the new method is protected by a guarantee executed under section 13; or
 - (c) the court which made the order declares its satisfaction that the continuity of payment under the new method is reasonably secure.
- (8) Without limiting subsection (9), a periodical payments order is treated as providing for the amount of payments to vary by reference to the Composite Consumer Price Index at such times and in such a manner, as may be specified in the order.
- (9) A periodical payments order may include provision—
- (a) disapplying subsection (8); or
 - (b) modifying the effect of subsection (8).

12. Stepped payment

- (1) Where it is anticipated that there will be changes in the circumstances of an injured person during the person's life which are likely to have an effect on the person's needs, a court may make provision in a periodical payments order that a payment under the order increases or decreases from a specified date by a specified amount (*stepped payment*).
- (2) The changes in circumstances which may form the basis of a stepped payment include—
- (a) an injured person reaching 18 years of age;
 - (b) an injured person entering primary or secondary school;
 - (c) an injured person entering tertiary level education; and
 - (d) anticipated changes in the care needs of an injured person at different stages of life, including a requirement to move into institutional or residential care.
- (3) Where a stepped payment is provided for, the order must also specify—
- (a) the change in circumstances on which an increase or decrease in the amount of a payment (*relevant increase or decrease*) is based;
 - (b) the date on which the relevant increase or decrease takes effect;
 - (c) the amount of the relevant increase or decrease at current value; and
 - (d) that the amount of the relevant increase or decrease is applied from the date it takes effect to the annual amount awarded to the injured person as adjusted in accordance with the Composite Consumer Price Index.
- (4) Where—
- (a) the court provides in a periodical payments order for a stepped payment; and

- (b) prior to the date that the stepped payment is due to take effect, it is evident to the injured person that the anticipated change in the person's circumstances on which that stepped payment was based will not arise,

the recipient must, as soon as practicable and not later than 14 days before the date on which the stepped payment is due to take effect, notify the court that made the periodical payments order and the paying party in writing that the anticipated change in the circumstances of the injured person which formed the basis for the stepped payment concerned will not arise.

- (5) Where the court receives a notification under subsection (4) from a recipient in relation to a stepped payment specified in a periodical payments order, the court must amend the periodical payments order concerned by making such adjustments to the order as it considers appropriate.
- (6) Where a periodical payments order is amended under subsection (5), the court must send a copy of the order as amended to the recipient and the paying party.

13. Guarantees by Government

Subject to section 28 of the Public Finance Ordinance (Cap. 2), the Financial Secretary or the head or the controlling officer of a government department, may execute a guarantee in respect of liability incurred by any publicly funded organization or body under a periodical payments order.¹

14. Non-assignment without leave of court

- (1) In the event of the bankruptcy of an injured person in receipt of the benefits under a periodical payments order, nothing received under the order is to be regarded as property under the person's estate in bankruptcy except that where the payment under the order includes a component referable to the loss of income of the injured person in which case such component (or a part of the component) may be ordered by the court to vest in the trustee and form part of the estate in bankruptcy.
- (2) The right of a person under a periodical payments order may not be assigned or charged without the approval of the court; and—
 - (a) the court must not approve an assignment or charge unless satisfied that special circumstances make it necessary; and
 - (b) a purported assignment or charge, or agreement to assign or charge, is void unless approved by the court.

15. Fatal accidents claims on pre-mature death of injured person

- (1) Subject to subsection (3), where a periodical payments order includes a component referable to damages for future loss of earnings of the injured person and the person dies before expiry of the remaining working life as specified in the periodical payments order pursuant to section 11(3)(d), the cessation of the periodical payment on the death of the injured person must not operate as a bar to a claim for loss of dependency accruing to the dependants of the injured person at the time of death of the injured person under the Fatal Accidents Ordinance (Cap. 22).
- (2) For the purpose of sections 28 to 30 of the Limitation Ordinance (Cap. 347), a claim for loss of dependency made in the circumstances specified in subsection

¹ This clause may be inserted if it is contemplated that payments may have to be secured by a guarantee from the Government.

(1) is deemed to have accrued on the date of death of the injured person subject to the relevant provisions under the Ordinance as to the power of the court to override the time limit.

(3) Any award of damages for loss of dependency made in the circumstances specified in subsection (1) must take into account—

- (a) the component of periodical payment referable to loss of earnings already received by the injured person during the person's lifetime under the periodical payments order; and
- (b) any compensation or damages referable to loss of earnings of the injured person already received by or on behalf of the injured person during the injured person's lifetime from any person who was liable or, if sued, would be liable to the injured person in respect of the injury resulting in the death of the injured person.

16. Power to make variable orders

Without limiting sections 11(3)(e) and 12, if there is proved or admitted to be a chance that at some definite or indefinite time in the future, the injured person for whose benefit a periodical payments order is to be made by the court will—

- (a) as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration; or
- (b) enjoy some significant improvement, in the person's physical or mental condition, where that condition had been adversely affected as a result of that act or omission,

the court may, on the application of a party, with the agreement of all the parties, or of its own initiative, provide in a periodical payments order that it may be varied (*variable order*).

17. Defendant's financial resources

Unless—

- (a) the defendant is insured in respect of the claim;
- (b) the continuity of payment under a periodical payments order is reasonably secure in the manner as specified in section 11(5); or
- (c) the order is made by consent and the injured person is neither a minor, nor a mentally incapacitated person as defined by section 2(1) of the Mental Health Ordinance (Cap. 136),

the court will take into account the defendant's likely future financial resources in considering whether to make a variable order.

18. Award of provisional damages

The court may make a variable order in addition to an order for an award of provisional damages made by virtue of section 56A of the High Court Ordinance (Cap. 4).

19. Contents of variable order

Where the court makes a variable order—

- (a) the damages must be assessed or agreed on the assumption that the disease, deterioration or improvement will not occur;
- (b) the order must specify the disease or type of deterioration or improvement;

- (c) the order may specify a period within which an application for it to be varied may be made;
- (d) the order may specify more than one disease or type of deterioration or improvement and may, in respect of each, specify a different period within which an application for it to be varied may be made; and
- (e) the order must provide that a party must obtain the leave of the court to apply for it to be varied, unless the court otherwise orders.

20. Applications to extend period for applying for leave to vary

Where a period is specified under section 19(c) or (d)—

- (a) a party may make more than one application to extend the period, and such an application is not to be treated as an application to vary a variable order for the purposes of section 19; and
- (b) a party may not make an application for the variable order to be varied after the end of the period specified or such period as extended by the court.

21. Limit on number of applications to vary

A party may make only one application to vary a variable order in respect of each specified disease or type of deterioration or improvement.

22. Variable agreements

- (1) If there is agreed to be a chance that at some definite or indefinite time in the future the injured person, for whose benefit a periodical payments order is to be made by the court on consent of the parties, will—
 - (a) as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration; or
 - (b) enjoy some significant improvement, in the person's physical or mental condition, where that condition had been adversely affected as a result of that act or omission,
 the parties to an agreement may agree that a party to it may apply to the court subsequently for its terms to be varied (*variable agreement*).
- (2) Where the parties agree to permit an application to vary the terms of an agreement, the variable agreement—
 - (a) must expressly state that a party to it may apply to the court for its terms to be varied;
 - (b) must specify the disease or type of deterioration or improvement;
 - (c) may specify a period within which an application for it to be varied may be made; and
 - (d) may specify more than one disease or type of deterioration or improvement and may, in respect of each, specify a different period within which an application for it to be varied may be made.
- (3) A party who is permitted by an agreement to apply for its terms to be varied must obtain the leave of the court to apply for it to be varied.

23. Order for variation pursuant to variable order or agreement

- (1) On an application for the variation of a variable order or a variable agreement, if the court is satisfied—

- (a) that the disease, deterioration or improvement specified in the order or agreement has occurred; and
 - (b) that it has caused or is likely to cause an increase or decrease in the pecuniary loss suffered by the injured person,
- it may order—
- (i) the amount of annual payments to be varied, either from the date of the application for leave or from the date of the application to vary if the order did not require leave of the court for an application to vary, or from such later date as it may specify in the order;
 - (ii) how each payment is to be made during the year and at what intervals; and
 - (iii) a lump sum to be paid in addition to the existing periodical payments.
- (2) Sections 11(3) to (8), 13 and 18 apply to orders made under this section as they apply to an order for periodical payments.

24. Costs

The costs of an application under this Part are in the discretion of the court.

25. Legal aid

Where a periodical payments order is granted by the court under section 11, which contains a variable order or variable agreement, any sum received by the recipient under the periodical payments order is to be excluded from the assessment of means in any subsequent application for legal aid for the purpose of pursuing an application to vary the variable order or variation agreement and any proceedings ancillary to an application under sections 19(e), 20, 22(3) and 23.

26. Rules of court

- (1) The power of the court under this Part does not limit any power exercisable apart from this Part.
 - (2) The Chief Justice may make rules of court for regulating the proceedings before the court under the provisions of this Part and any appeals arising from and matters incidental to the proceedings.
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Overview of existing compensation schemes in Hong Kong

Scheme	First Fund Scheme and Insolvency Fund Scheme under Motor Insurers' Bureau of Hong Kong (MIB)	Employees Compensation Assistance Scheme (ECAS) under Employees Compensation Assistance Fund Board (ECAFB)	Employees Compensation Insurer Insolvency Scheme (ECIIS) under Employees Compensation Insurer Insolvency Bureau (ECIIB)
Cover	<p>First Fund:</p> <ul style="list-style-type: none"> (a) where either at the time of the accident giving rise to liability there is not in force a policy or such policy is ineffective, and judgment so obtained is not satisfied in full within 28 days; (b) where the aggregate of any sums payable under judgment or judgments of relevant liability against the same person or persons arising from the same event exceed the greater of the prescribed limit or the higher limit afforded by an insurer under the policy and to the extent that the judgment debtor is unable to pay the uninsured portion of such judgment within 28 days; (c) where the judgment in respect of relevant liability arises out of terrorist acts; and (d) MIB has no legal obligation to pay victims of "hit and run", but will give favourable consideration to financially assist "hit and run" victims on an ex-gratia basis provided that there is a reasonable certainty that the injury or death was caused by negligent driving. <p>Insolvency Fund:</p> <p>where any final claim is not paid in full by the relevant insurer by reason of its insolvency.</p>	<p>Employees injured at work or eligible family members of deceased employees who fail to receive employees' compensation ("EC") and/or common law damages for which the employer is liable after exhausting all legal and financially viable means of recovery from the employer (or insurer) concerned.</p>	<p>Assume responsibility for the liabilities of insurers engaging in EC business that become insolvent on or after 1 April 2004.</p>

Scheme	First Fund Scheme and Insolvency Fund Scheme under Motor Insurers' Bureau of Hong Kong (MIB)	Employees Compensation Assistance Scheme (ECAS) under Employees Compensation Assistance Fund Board (ECAFB)	Employees Compensation Insurer Insolvency Scheme (ECIIS) under Employees Compensation Insurer Insolvency Bureau (ECIIB)
Limit	No particular limit except under scenario (c) of the First Fund scheme above, where the liability is limited to a maximum aggregate amount of HK\$200 million.	<p>Unpaid EC:</p> <ul style="list-style-type: none"> - pursuant to Employees' Compensation Ordinance (Cap 282) ("ECO") <p>Unpaid common law damages:</p> <ul style="list-style-type: none"> - where the amount does not exceed HK\$6 million: paid in full in a lump sum; - where the amount exceeds HK\$6 million: initial payment of HK\$6 million, followed by monthly payments calculated at the rate of the monthly earnings of the employee at the time of accident or HK\$40,000, whichever is the higher (in the case of an employee who is suffering from paraplegia or quadriplegia and has been determined as a "severely-injured relevant eligible person", an additional monthly payment of HK\$40,000), until the total amount of damages awarded is paid off. 	<p>(a) where the claim is made pursuant to Part IV of ECO: limited to the liability of an insurer under the ECO to pay any compensation or damages as a result of the claim;</p> <p>(b) in any other circumstances: limited to the liability of an insurer to indemnify an employer or a principal contractor under an EC policy against the liability of the employer or principal contractor to pay any compensation or damages as a result of the claim.</p>
Levy	First Fund: 1% of motor policy premiums Insolvency Fund: 2% of motor policy premiums	5.80% of EC policy premiums charged by the Employees' Compensation Insurance Levies Management Board, of which 3.10% is allotted to the ECAFB.	2% of EC policy premiums
Fund Size	<p>First Fund:</p> <p>Gross Fund of HK\$902 million Net Fund of HK\$451 million</p> <p>Insolvency Fund:</p> <p>Gross Fund of HK\$3,269 million Net Fund of HK\$3,236 million</p> <p>(as at 31 December 2020)</p>	<p>Gross fund of HK\$1,311 million Net fund of HK\$1,288 million</p> <p>(as at 31 March 2020)</p>	<p>Gross Fund of HK\$2,629 million Net Fund of HK\$2,628 million</p> <p>(as at 31 December 2020)</p>

Scheme	First Fund Scheme and Insolvency Fund Scheme under Motor Insurers' Bureau of Hong Kong (MIB)	Employees Compensation Assistance Scheme (ECAS) under Employees Compensation Assistance Fund Board (ECAFB)	Employees Compensation Insurer Insolvency Scheme (ECIIS) under Employees Compensation Insurer Insolvency Bureau (ECIIB)
Enabling Legislation/Agreements	<p>The First Fund Agreement dated 1 February 1981 between MIB and the Government</p> <p>The Domestic Agreement dated 1 February 1981 between MIB and authorised Motor Insurers</p> <p>The Domestic Agreement dated 1 November 1985 between MIB and authorised Motor Insurers</p> <p>The MIB Undertaking dated 29 June 1995 given by MIB to the Government</p> <p>The Domestic Memorandum dated 29 June 1995 between MIB and authorised Motor Insurers</p> <p>Supplemental Memorandum of Agreement dated 24 June 2002 between MIB and the Government relating to a Memorandum of Agreement dated 1 February 1981</p> <p>The Insolvency Fund Agreement dated 13 August 2009 between MIB and the Government</p> <p>Supplemental Domestic Deed dated 13 August 2009 between MIB and authorised Motor Insurers relating to a Domestic Agreement dated 1 November 1985</p>	<p>Employees Compensation Assistance Ordinance (Cap 365)</p> <p>Employees' Compensation Insurance Levies Ordinance (Cap 411)</p>	<p>Insolvency Fund Domestic Agreement between ECIIB and Insurers within the meaning of section 3 of ECO</p> <p>Insolvency Fund Agreement dated 21st February 2003 between ECIIB and the Government</p>
Relevant Links	http://www.mibhk.com.hk/eng/index.php	http://www.ecafb.org.hk/en/index.php	http://www.eciib.com.hk/