

**Report of the Working Group on Legislation on Periodic Payment  
Orders**

**22 April, 2015**

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## **Introduction**

In 2010, the President of the High Court established a Working Group on Medical Negligence and Periodic Payments (WGMNPP) which included representatives of the legal profession, the insurance industry and the State Claims Agency to examine the case for legislation to provide for periodic payments in personal injury cases. The Working Group undertook consultations with relevant stakeholders and examined injury compensation systems in the EU and in Australia, the US and Canada.

Justice John Quirke, now President of the Law Reform Commission, presented a report by the Working Group on this issue (Module 1) to Justice Nicholas Kearns, President of the High Court, in October 2010. The report recommended that legislation should be enacted to empower the courts, as an alternative to lump sum awards of damages, to make consensual and non-consensual periodic payment orders to compensate injured victims in cases of catastrophic injury where long term permanent care would be required, for the costs of (a) future treatment, (b) future care and (c) the future provision of medical and assistive aids and appliances.

The Government agreed to examine this issue in response to the Working Group's recommendations and the ongoing concern of the judiciary at the inadequacy of the lump sum system to cater properly for catastrophically injured plaintiffs requiring ongoing care and medical treatment. The Government decided in January 2013 that legislation should be enacted to provide for periodic payments in cases of catastrophic injury involving State defendants. It also agreed that the question of extending periodic payment orders to cases involving non-State defendants should be examined by the Department of Justice and Equality in cooperation with the Department of Finance.

## **Actuarial Study**

The Department of Finance subsequently requested the State Claims Agency to commission research into the technical aspects of this issue, particularly the need to develop mechanisms that would provide for the financial security of payments on a long-term basis. Towers Watson was commissioned by the State Claims Agency to undertake a study on the feasibility of introducing PPOs in Ireland. This involved a detailed analysis of financial security mechanisms, indexation, variation and stepped payments. Towers Watson examined international models and consulted the insurance industry in Ireland.

## **Inter-Departmental Working Group on Legislation on Periodic Payment Orders**

Following the completion of the Towers Watson study, the Department of Justice and Equality established an inter-departmental working group to examine the technical aspects of this issue and to look at the implications of Towers Watson's findings for the proposed legislation on periodic payments.

### **Membership**

The members of the Working Group on Legislation on Periodic Payment Orders were as follows:

Mr Conan McKenna (Department of Justice and Equality) (chair);  
Mr Aidan Carrigan (Department of Finance);  
Mr Ronán Hession (Department of Finance) (from August 2014 replacing Mr. Pat Casey);  
Ms Bríd Kemple (Department of Finance);  
Ms Aideen Morrissey (Department of Finance);  
Mr Ciarán Breen (State Claims Agency);  
Ms Susan Moriarty (State Claims Agency);  
Ms Christine O'Rourke (Office of the Attorney General);  
Mr Terry Walsh (Department of Public Expenditure and Reform);  
Ms Kara Prole (Department of Health);  
Ms Máire Ní Chuirc (Department of Jobs, Enterprise and Innovation);  
Mr Augustine O'Connell (Department of Jobs, Enterprise and Innovation) (July / August 2014);  
Ms Carol Baxter (Department of Justice and Equality);  
Mr Michael Holohan (Department of Justice and Equality);  
Ms Marian Benzies (Department of Justice and Equality).

### **Terms of reference**

The terms of reference of the Working Group are as outlined at Appendix I.

### **Working method**

The Working Group met on 9 occasions, on 12 May, 4 June, 25 June, 22 July, 5 August, 3 September, 17 September 2014, 29 September 2014 and on 8 April 2015.

The Working Group discussed the following issues which had been highlighted in the Towers Watson study:

- Indexation of periodic payments orders (PPOs);
- Financial security mechanisms needed to support PPOs;
- Variation of payments;
- Stepped payments;
- Scope of a PPO scheme;
- The extent to which decisions on PPOs would be mandatory or discretionary.

In addition, the Working Group undertook a consultation process with the insurance industry and with other relevant stakeholders. A questionnaire was developed and circulated to stakeholders (copy at Appendix II) seeking their views on key aspects of the legislation. The questionnaire was sent to Insurance Ireland, members of the IFSC Insurance Subgroup on Solvency II issues, the Medical Protection Society, the Medical Defence Union and the Personal Injuries Assessment Board.

Submissions with completed questionnaires were received from Insurance Ireland, the Medical Defence Union, the Medical Protection Society, the Irish Society of Actuaries, DIMA (the Dublin International Insurance & Management Association) and the Personal Injuries Assessment Board.

Follow-on meetings were held with Michael Horan and Gerard Bradley of Insurance Ireland on 8 September 2014, with Patricia Byron and Maurice Priestley of the Personal Injuries Assessment Board on 15 September 2014 and with Yvonne Lynch, Gary Dunne and Clive Niven of the Irish Society of Actuaries on 22 September 2014 to discuss their submissions. A meeting was also held with Louise Lammond of Munich Re on 9 October 2014, following a request to a range of re-insurers for their views on the proposed legislation.

Mr Frank O'Connor, Director of Funding and Debt at the National Treasury Management Agency (NTMA) made a presentation to the Working Group on 3 September 2014 concerning the potential role for the NTMA on behalf of the State relating to the issuance of bonds which could be used by insurers to hedge against inflation in PPO payments. The Central Statistics Office also advised the Department of Finance on the issue of indexation.

## **Structure of Report**

The Report contains nine chapters.

Chapters 1 to 5 record the Working Group's discussions on the following topics – the scope of proposed legislation; whether periodic payment orders should be mandatory or discretionary; whether the court should have a power to award variable or stepped periodic payment orders; security of periodic payment orders and indexation of periodic payment orders – together with the agreed position of the Working Group on each of the topics.

Chapter 6 outlines the consultations held with representatives of the insurance and reinsurance industry.

Chapter 7 details the consultation held with the Personal Injuries Assessment Board.

Chapter 8 discusses the possible implications of the introduction of periodic payment orders for consumers and industry.

Chapter 9 sets out the conclusions reached by the Working Group regarding the introduction of periodic payment orders.

## **Chapter 1 – Coverage – Scope of PPO legislation**

### **Background**

The Working Group noted the recommendation of the High Court Working Group on Medical Negligence and Periodic Payments (WGMNPP) against expressly limiting the periodic payment order facility to catastrophic injury cases. The WGMNPP indicated that ‘difficulties may arise if the courts are required to confine the facility to particular categories of injury or particular degrees of severity of injury. For practical purposes, it is not possible equitably to define such categories or degrees of gravity of injury’.

The Working Group also noted the Government’s decision of January 2013 that legislation be developed to offer a periodic payment order facility to catastrophically injured persons.

### **Working Group Discussions**

A range of views were expressed within the Working Group as to the projected scope of the General Scheme. Some members favoured limiting the legislation to cases of catastrophic injury only. Others favoured enabling the facility to be available to serious personal injury cases, in line with the High Court Working Group approach, and to set the threshold at a specified compensation value.

The Working Group agreed that the periodic payment order facility should be offered only in cases where the injuries of the claimant would be sufficiently serious to require long-term care.

The Working Group considered the following two options:

- 1.** The PPO legislation should be limited to those suffering catastrophic injury.
- 2.** The PPO legislation should be available to personal injury cases over a certain value and in which the claimant would require long-term care.

The Working Group considered that it would not be appropriate to set the size of the award as the potential criterion for awarding or not awarding PPOs in view of the anticipated increase over time in the overall size of awards. The Working Group considered that the definition in the legislation should focus on catastrophic injury as had been agreed by the Government since catastrophic injury was likely to be the type of injury in which long-term costs

would occur for the claimant. The Working Group also considered that PPOs should be targeted at those requiring long-term care as a key impetus for the legislation is to ensure that claimants with long-term care costs would have sufficient financing on a long-term basis to cover such costs.

The Working Group undertook detailed consideration as to whether the General Scheme should encompass non-State defendants as well as the State. It was considered that it could be potentially discriminatory to restrict the General Scheme to State defendants only as claimants involving non-State defendants with the same degree of catastrophic injury and also requiring long-term care would not then enjoy the same security in terms of long-term funding of their care and medical needs as those involving State defendants. The Towers Watson study confirmed that it would be feasible to develop a scheme that included non-State defendants, according to certain constraints. The Working Group's deliberations on the questions of variation of payments, indexation and financial security mechanisms were undertaken with the aim of developing these aspects of the legislation in such a way as to make it feasible for the legislation to encompass both State and non-State defendants.

### **Working Group Position**

The Working Group considers that, in line with the Government decision on this matter, periodic payment orders should be limited to cases of catastrophic injury.

The Working Group further considers that a definition of what is meant by catastrophic injury should be included in the legislation. This definition should include the criterion that the person will require life-long permanent care.

The Working Group considers that it would not be appropriate to set the size of the award as the potential criterion for awarding or not awarding PPOs in view of the anticipated increase over time in the overall size of awards.

The Working Group considers that it would be prudent to introduce legislation which would allow for periodic payment orders to be made in cases which involve State defendants and for cases involving non-State defendants.



## **Chapter 2 – Mandatory or Discretionary PPOs**

### **Background**

The Working Group noted the views of the High Court Working Group on Medical Negligence and Periodic Payments (WGMNPP) that the court should have discretion on the matter of whether a PPO should be considered when settling an award.

WGMNPP's view was that seriously injured plaintiffs should not be deprived of a right to claim within the courts that damages which are intended to pay for the cost of their future care and treatment should be paid periodically and not by way of a single lump sum. Accordingly the court should be empowered to make consensual and non-consensual periodic payment orders to compensate injured victims in catastrophic cases. However, it did not go as far as to recommend that the courts should be required, in every personal injury case, to consider awarding compensation by a PPO. In addition, however, the Group declined to state specifically that PPOs should be limited to catastrophic injuries.

### **Working Group Discussions**

The Working Group discussed the issue of whether or not a periodic payment facility should be mandatory or discretionary. It also considered whether or not the court should have discretion to award a periodic payment order and whether either party would have the possibility to oppose such an order.

A range of views were expressed. Some members favoured making periodic payment orders mandatory rather than discretionary while others expressed reservations on this point. Some members favoured giving the court the discretion to award a periodic payment order and making the court's decision mandatory for plaintiffs. However, others had reservations on the issue of whether a judge could override a defendant if the defendant were opposed to a PPO. Some members indicated that the preferences of the defendant needed to be balanced against the discretion of the judge. Others pointed to the existing power held by judges to put pressure on parties to achieve settlement of claims. The wishes of claimants were also raised. Those with short life expectancy might not wish to receive their award in the form of a periodic payment order. Equally, consideration needed to be given to the implications for the State should the claimant's money and supports run out. That would also need to be a factor in the decision as to when a periodic payment order should be awarded.

### **Working Group Position**

The Working Group considers that the issue of the mandatory / discretionary nature of PPOs is closely linked to the scope of the legislation. It is conscious that the issue of whether a PPO should be mandatory or discretionary will have a major bearing on the impact of the legislation.

The Group considers that it would be prudent to include provision in the General Scheme whereby the court would have discretion to award a mandatory PPO but that its decision on this matter would be made having taken account of the views of the parties.

## **Chapter 3 – Variable and Stepped Periodic Payment Orders**

### **Background – Variable Payments**

The Working Group noted the recommendation of the High Court Working Group on Medical Negligence and Periodic Payments (WGMNPP) that the periodic payment legislation should make provision for the variation of periodic payment orders ‘where it has been determined that the plaintiff’s condition will seriously deteriorate or significantly improve and where this future contingency has been factored into the original periodic payments order.’

### **Working Group Discussion**

The Working Group acknowledged the difficulties for claimants whose health deteriorated due to factors that had not been anticipated at the time of the original settlement. It was also acknowledged that the care needs of a claimant might change considerably over the life cycle, particularly where the claimant was an infant. The Working Group agreed that variation potentially provided a means by which changes in a claimant’s circumstances or health status could be addressed.

However, having reviewed this issue in detail, the Working Group considered that provisions for variation of periodic payment orders would introduce uncertainty for the State and for the insurance industry with regard to their respective liabilities. While recognising that claimants might need periodic payment orders to be adjusted to accommodate changes in their circumstances or their medical condition, the Working Group did not consider variation to be the best way to respond to the needs of claimants as it would introduce uncertainty and unpredictability with consequent financial cost increases for the State and for the insurance industry.

### **Background – Stepped Payments**

The Working Group noted the WGMNPP’s recommendation that provision be made for “stepped payments”, viz. the adjustment, on the attainment by a plaintiff of a particular age or ages, of the periodic payments, as indexed, to reflect an increase or decrease in living or care expenses.’

### **Working Group Discussions**

The Working Group noted that ‘stepped’ payments would provide greater certainty for the State and for non-State defendants/insurers while

acknowledging that this option would not accommodate unanticipated changes in a claimant's circumstances which might warrant extra expenditure such as the loss of the primary carer and the consequent reliance on paid care.

The Working Group pointed to the certainty that 'stepped payments' would offer for the State and for non-State defendants/insurers as this option would allow them to plan for anticipated increases in liabilities. However, the Working Group also noted the concerns of Insurance Ireland that provision for stepped payments, in particular multiple steps, would increase the complexity of what is statistically a very complex mechanism.

The Working Group also noted Towers Watson's recommendation in favour of 'stepped payments' rather than variation because of the certainty offered by the 'stepped payments' option. It also noted that experience in the UK has shown that courts have been reluctant to approve variable PPOs because of their inherent volatility but have been more open to the use of stepped payments which provide more certainty.

The Working Group noted the UK provisions under the Damages (Variation of Periodical Payments) Order (SI 2005/841). Paragraph 2 of Practice Direction 41B provides for stepped payments for the following contingencies:

- (1) *the claimant's condition will change leading to an increase or reduction in his or her need to incur care, medical or other recurring or capital costs;*
- (2) *gratuitous carers will no longer be able to provide care;*
- (3) *the claimant's education circumstances will change;*
- (4) *the claimant would have received a promotional increase in pay;*
- (5) *the claimant will cease earning.*

The Working Group considered the following option:

*The General Scheme will provide for 'stepped' changes to be made to the periodic payment order on specified dates representing specific milestones in the claimant's life or specific changes in the claimant's circumstances such as:*

- (a) *the claimant's education needs;*
- (b) *the claimant's earning capacity; or*

- (c) *the claimant's need for professional care where a voluntary carer can no longer provide such care.*

### **Working Group Position**

Given the potential for introducing uncertainty into the matter, the Working Group does not favour the inclusion of a provision in the General Scheme to allow for the variation of a periodic payment order.

The Working Group considers that the option of 'stepped' payments would provide a more appropriate means of balancing the needs of claimants and of defendants.

Accordingly, the Working Group considers that provision should be made in legislation for the court to consider whether to include one or more 'stepped' payments in a periodic payment order to cater for specific milestones in the claimant's life. Such milestones could include, inter alia, anticipated changes in care needs or entry into full-time education. The Working Group recommends that, in the interests of certainty, these milestones would be identified at the time of the award to enable the defendants to plan with regard to potential changes to their financial liabilities.

## **Chapter 4 – Security of Periodic Payment Orders**

### **Background**

The use of PPOs rather than lump sums transfers certain risks from the claimant to the defendant. Receiving payments on a regular basis reduces several risks for the claimant, such as Inflation risk, Investment risk and longevity risk. However, with the move to PPOs for non-State defendants, the claimant will now be exposed to credit risk as the insurer may go out of business during the claimant's lifetime. While, strictly speaking, the liability to pay a claimant rests with the defendant, in reality the payment almost invariably tends to rely on an underlying insurance policy.

The preference of the High Court Working Group on Medical Negligence and Periodic Payments (WGMNPP) was that an agency of the State, such as the NTMA, should be empowered to provide injured victims with the necessary security for periodic payments either by the provision of annuities to insurers and others or in such other manner as may be appropriate. Alternatively, WGMNPP proposed that consideration should be given to the introduction of a statutory scheme whereby the payments made under PPOs would be statutorily protected and fully guaranteed.

In assessing options, the Working Group sought to balance the objective of ensuring that the Court award received by a catastrophically injured person would be secure in the event of insurer insolvency, while ensuring - in so far as possible - that the State would not be exposed to undue risks and costs; in particular the Working Group sought to avoid private sector insurance risks being absorbed by the State.

### **Options available for Security of Payment**

#### **(a) State Sponsored Scheme**

In a report submitted to the Department of Finance in August 2012, the National Treasury Management Agency advised that in order to guarantee the PPO liabilities of non-State defendants, the State, if so minded, could establish a scheme whereby insurance companies could buy out their liabilities for PPOs by providing the NTMA with a lump sum. Such a scheme could be established within the NTMA allowing it to manage the assets and liabilities of the scheme and administer PPO payments. Ultimately the scheme would need a State guarantee. The lump sum payment received by the NTMA from insurers would be recognised as a general Government receipt, and the level of Government liabilities would increase, with the PPO payments made by the NTMA to plaintiffs treated as expenditure as they arise.

Feedback from the industry suggests that this approach would be seen as an attractive option for insurers as it would pass the risk and uncertainty surrounding the indexation and duration of PPOs to the State.

A convincing evidence-based case has not been made to show how the State could run such a scheme on a cost neutral basis. The insurance industry itself has made it clear that no private insurer would accept the risks of running such a scheme, not least because of the absence of reliable Life Tables (to calculate mortality) and the multiple uncertainties around managing matching assets over long periods. This is consistent with Towers Watson report which also concluded that direct responsibility for PPOs would not be acceptable to the vast majority of commercial insurance buyers.

Furthermore, it is wholly disproportionate that in order to eliminate a small tail risk of insurer insolvency - historically a rare event - the State would take over the management of all PPO liabilities across the entire insurance industry.

#### **(b) Reinsurance Pool**

A reinsurance pool would see insurers paying an annual premium to a pool for PPO reinsurance. This premium would be calculated annually depending on the level of risk of the individual insurer. When a PPO is awarded against an insurer, the reinsurance pool would take over the payments.

Such a scheme could be attractive from the point of view of insurance companies as it could remove a) uncertainty and b) PPO reserving requirements. This option could also mitigate the potential impact on insurance premiums and offer a solution to the possibility of reinsurers withdrawing capacity from the market.

Pooling, however, raises some serious issues for the State in terms of risk exposure. At a time when the Government is making extensive efforts to separate banking and sovereign risks, the Department of Finance is not supportive of proposals on insurance that would see the wholesale transfer of risks from that industry to the State.

Under a pooling approach, the State would be required to provide an ultimate back-stop for the reinsurance pool and, due to the uncertain costs around PPOs, large advances could be required from the State. If the State guarantee were called, payments by the State into the pool would be treated as expenditure and would negatively impact the general Government deficit. If, however, there are repeated calls on the guarantee then the Government would have to assume the full debt of the pool.

Furthermore, it is likely that it would take many decades before a critical mass would be achieved in Ireland to sustain a reinsurance pool.

### **(c) Expansion of the Insurance Compensation Fund**

The Insurance Compensation Fund is primarily designed to facilitate payments to policyholders in relation to risks in the State where an Irish authorised or an EEA authorised non-life insurer goes into liquidation and the approval of the High Court has been obtained for such payments.

The Fund places a maximum value of 65% or €825,000 (whichever is the lesser) on all payments from the fund in the event of a liquidation of an insurer. Given that PPO payments would typically exceed these limits, the availability of the ICF cover does not go far enough to provide security for PPO payments. Therefore, in order for the ICF to satisfactorily guarantee security of payment of PPOs, it would be necessary to remove the payment limits in the case of PPOs. This would align with the approach in the UK, where the security of PPO liabilities is covered by the Financial Services Compensation Scheme.

It is worth noting that where an insurance company goes into administration the ICF limits do not apply.

While the ICF receives contributions from the Exchequer, these are considered loans and are ultimately repayable, as the ICF is funded on an ex-post basis through contributions received from non-life insurance companies through a 2% levy on non-life premiums.

It is important to note that the last published accounts for the ICF show a debt to the Minister for Finance at 31 December 2013 of €987m. At the maximum levy rate allowed under the ICF legislation of 2%, it is not expected that this debt (plus interest) will be paid off until 2025 at the earliest.

Loans made by the State to the ICF do not currently impact the general Government deficit. However, repeated calls on the guarantee may lead to the Government assuming the full debt of the fund. Any borrowing required by the State in order to fund such loans or payment levels would increase the National Debt.

There are some downsides to this option.

As this option would leave the responsibility for reserving for PPO claims on the books of insurers it is likely to lead to a larger increase in premiums than would be expected from either Option a or Option b.



Providing 100% coverage for PPO claims when there is just 65% coverage for all other claims would have to be warranted based on the public interest in ensuring that an extremely vulnerable group of claimants are not exposed to serious financial risks arising from insurer insolvency.

### **NTMA Bonds**

As part of the discussion on security of payment the NTMA spoke to the Working Group on the possibility of issuing long term, amortising bonds which would be linked to the index chosen for PPOs. The Working Group's consultations with the insurance industry indicated that the development of a bond with a long maturity would be useful to assist insurers to finance a long-term PPO liability.

While these bonds would be useful for insurers to manage their liabilities they are unlikely to deal with the solvency risk to the satisfaction of the judiciary.

### **Working Group Discussions**

The Working Group gave detailed consideration to the following options to safeguard the financial security of PPOs awarded in non-State cases:

- **State Sponsored scheme:** The Working Group considered the possibility of a State compensation scheme to guarantee PPOs in the event that a company with PPO liabilities became insolvent or went into liquidation (or similar). The Working Group noted the insurance industry's preference for this option. The Working Group highlighted, however, the potential financial risks and liabilities that could accrue to the State from this option.
- **Reinsurance Pool:** The Working Group considered whether an industry pool could be developed to guarantee PPOs in the event that a company with PPO liabilities became insolvent. The complexities of this approach as well as the issues around exposure of the State and the lack of a critical mass of insurers were noted.
- **Expansion of the Insurance Compensation Fund:** The Working Group considered whether changes were desirable to the legislation governing the liquidation of companies in the event of insolvency. The particular vulnerability of catastrophically injured claimants was noted. However, the Working Group also pointed to the difficulty of prioritising those in receipt of PPOs over other creditors.

The Working Group noted the interest of the insurance industry in the availability of a long-term NTMA bond that would assist insurers to manage a long-term PPO liability. The Working Group considered that the availability of such a bond would be complementary to the mechanisms to ensure security of payments to plaintiffs over the long-term but would not be sufficient security in their own right.

### **Working Group Position**

The Working Group considers that security of payment of PPOs in non-State defendant claims is of vital importance. The Group is acutely aware of the judiciary's views on this issue and of the need to provide a financial security mechanism that can ensure security for a claimant over the term of his / her life.

The Working Group considered that the NTMA bond option would need to be combined with another mechanism in order to safeguard the PPO in the event of an insurance company's insolvency. It requested the NTMA and the Department of Finance to explore the feasibility of such a bond.

The Working Group supports the Department of Finance proposal to amend the limits that apply under the Insurance Compensation Fund to allow for full payment of PPO liabilities in the event of insurer insolvency. While there are risks to doing this when the Fund is so heavily reliant on Exchequer advances already, it is balanced against the position that the cost of the cover will come from the industry ultimately.

## **Chapter 5 – Indexation of Periodic Payment Orders**

### **Background**

The recommendations of the Working Group on Medical Negligence and Periodic Payments (WGMNPP) included a recommendation on indexation of periodic payment orders. That recommendation was that the CSO should produce, on an annual basis, indices comprising the average hourly rate of pay for certain persons, including nurses, physiotherapists and care assistants, the average costs of medical procedures for the treatment of persons injured and the estimated average costs for medical aids and appliances.

The Towers Watson study examined this issue in some detail. It concluded that an index as suggested by WGMNPP could prove volatile given the small sample size available in Ireland. It recommended that a broader-based index should be used to avoid possible volatility in indexation.

### **Working Group Discussion**

The Working Group agreed that indexation was a key issue and that the choice of index would have significant implications for the success of the periodic payment facility.

The Working Group's preference was that a specific index should be chosen and inserted into the legislation. The Working Group did not favour leaving the choice of index to the discretion of the court as it could introduce a high degree of uncertainty as to potential financial liabilities both for the State and for the insurance industry.

The Working Group considered that the index chosen should provide as much certainty as possible for defendants in terms of projected increases in their financial liabilities. The index should be published at the same time each year to enable accurate recording of changes to costs annually. The Working Group shared the Towers Watson assessment that the index to be chosen should not lead to an unacceptable degree of statistical fluctuation and should not be unduly volatile. It also considered that the index should take account of the type of costs incurred by claimants and the changes to those costs over time. The costs of care were particularly important as they constituted the largest component of costs incurred by claimants.

The Working Group agreed with the Towers Watson analysis that the sample size in Ireland is too small to develop a bespoke index or to use an index based

on care-worker earnings similar to the index used in the UK (ASHE 6115) in view of the potential volatility of such an index. It favoured the use of a broad-based index against which securities could be hedged more easily.

For these reasons, the Working Group considered the following options on indexation for the General Scheme:

**(a) Irish Consumer Price Index (CPI)**

The Consumer Price Index (CPI) is designed to measure in index form the change in the average level of prices paid for consumer goods and services by all private and institutional consumers. It measures changes in prices across 12 categories:

- Food and non-alcoholic beverages;
- Alcoholic beverages and tobacco;
- Housing, water, electricity, gas and other fuels;
- Furnishings;
- Health;
- Transport;
- Communications;
- Recreation and culture;
- Education;
- Restaurants and hotels;
- Miscellaneous good and services.

*Advantages of using CPI index*

- This index measures a broad-based basket of goods and services, including health, so that increases in costs should be in line with general increases in prices in the Irish economy;
- This index can be used as a basis for a security which could hedge against PPO risk.

*Disadvantages of using CPI index*

- The CPI does not specifically measure increases in costs of medical appliances or of care-worker earnings, leading to the risk that the value of claimants' payments may not keep pace with the costs of care or of medical supports.

- The CPI is more volatile than the Harmonised Index of Consumer Prices (HICP) (see below) because of its sensitivity to interest rates.

**(b) Irish Harmonised Index of Consumer Prices (HICP)**

The Harmonised Index of Consumer Prices (HICP) measures changes in consumer price inflation across the Eurozone and aims to be representative of developments in the prices of all goods and services available for purchase in the Eurozone. The Irish HICP is a subset of the CPI and is measured in accordance with harmonised statistical methods set down by Eurostat.

*Advantages of using Irish HICP*

- The Irish HICP measures a broad-based basket of goods and services, including health, so that increases in costs would be in line with general increases in prices in the Irish economy;
- This index can be used as a basis for a security which could hedge against PPO risk;
- This index is less volatile than the CPI.

*Disadvantages of using Irish HICP*

- The Irish HICP does not specifically measure increases in costs of medical appliances or of care-worker earnings, leading to the risk that the value of claimants' payments may not keep pace with the costs of care or of medical supports;
- Irish HICP measures a narrower basket of goods and services than the CPI so may not be as representative of cost increases within the economy.

**(c) CPI / HICP + a fixed rate**

This is the approach suggested by Towers Watson in its research on the issue. Essentially the relevant index (either CPI or HICP) would be used with a built-in increase of 0.5% to cover wage inflation.

*Advantages of using CPI / HICP + a fixed rate*

- This approach would offer predictability to the State and to the insurance industry in terms of the likely increase in liabilities;

- It would help to ensure that the claimant's payment could keep pace with possible increases in the costs of care / medical supports;

*Disadvantages of using CPI / HICP + a fixed rate*

- This option could be more expensive for the State and for the insurance industry than options 1 and 2.

**(d) Hybrid index of CPI + costs of care**

Essentially this would involve using the CPI index plus an additional index consistent with increases in the costs of care.

*Advantages of using a hybrid index of CPI + costs of care*

- This index would combine the broad-based measurement within the CPI with the specific changes in care costs which are a major part of the expenditure for claimants.
- The integration of a module tracking care costs would mean that the value of a claimant's payment would keep pace with possible increases in care costs.

*Disadvantages of using a hybrid index of CPI + costs of care*

- The index could fluctuate more widely than the other options and be unrepresentative of general increases in inflation.

**Department of Finance Paper on Indexation**

The Department of Finance, following consultation with the Central Statistics Office, produced a paper on indexation that examined possible options in terms of indexation.

The paper noted that an index based purely on either the Consumer Price Index (CPI) or on the Harmonised Index of Consumer Prices (HICP) did not directly take account of wages. The paper indicated that it would be particularly inappropriate to use the Eurozone HICP because the relevant cost increases for PPO indexation are those that relate to Ireland.

The paper further examined the potential of the quarterly Earnings, Hours and Employment Cost Survey published by the Central Statistics Office which

measures hourly and weekly earnings of all employees in enterprises of over 50 employees and of a sample of employees in smaller enterprises. The paper noted that, over the longer term, this index should give the best outcome for recipients.

In this context, the Department of Finance also examined the approach recommended in the Towers Watson report, namely to select HICP plus a fixed percentage of 0.5% - to take account of wage increases - and undertook further analysis of the indexation issue. The Department noted that there is a great deal of uncertainty at present and for the longer term future about the relationship between wage developments and prices.

The Department's conclusion based on this analysis was that a broad-based consumer price index provided the most reliable indicator of likely costs over the long-term.

In view of the volatility of indices, the paper recommended that the indexation question be reviewed regularly to ensure that it was accurately measuring the costs to be incurred by the claimants.

### **Review Period – Working Group Discussion**

There was a diversity of views on the timeline for initial review of the index. Some members favoured a review after three years, in view of the importance of ensuring that the index accurately reflected the changes in costs incurred by claimants and did not run at a percentage significantly below that for care costs. Others favoured an initial review after five years, indicating that there would not be sufficient evidence, in the form of adequate data, after three years to justify a change of approach.

### **Working Group Position**

The Working Group is conscious of the need for certainty in this matter and considers that it would not be desirable to leave the choice of index to the court's discretion as this could introduce volatility as regards the potential liabilities for both State and non-State defendants.

The Working Group agrees with the Department of Finance's recommendation to select a broad-based index tracking representative costs across the Irish economy.

The Working Group considers that the most appropriate indexation measure for inclusion in the legislation, as recommended by the Department of

Finance, is the Irish HICP, with the question of providing for an additional uplift for additional wage growth and of determining the percentage of such uplift to be reviewed at 5 yearly intervals.

The Working Group considers that the legislation should provide for a PPO to be indexed to the Irish HICP, with the index being reviewed at intervals of not less than 5 years.



## **Chapter 6 – Consultations with Insurance and Reinsurance Industry**

The Department of Justice and Equality sought the views of the insurance industry on the content of the proposed legislation on 23 July 2014. The insurance industry was requested to complete a questionnaire and to provide any further information that it considers useful.

The following bodies provided material to the Working Group in response to the questionnaire. The replies submitted are provided in Appendix III.

1. DIMA (Dublin International Insurance & Management Association)
2. Insurance Ireland
3. Irish Society of Actuaries
4. Medical Defence Union
5. Medical Protection Society
6. Personal Injuries Assessment Board

In addition, the Department met with Munich Re – a multi-national reinsurance company to discuss the legislation

## **Chapter 7 – Consultation with the Personal Injuries Assessment Board (PIAB)**

### **Personal Injuries Assessment Board:**

The Personal Injuries Assessment Board made a written submission which indicated that it favoured making PPOs available to all claimants, and not just to those claiming against the State. It also favoured making PPOs mandatory in all cases where long term future care and treatment were needed. It recommended that PPOs should be updated where the claimant's condition or circumstances changed to such an extent that the estimated costs at time of settlement no longer reflected the true position. The Personal Injuries Assessment Board was also of the view that an index should be specially developed to reflect the cost of providing for future requirements.

The Working Group met with PIAB on this issue on 15 September, 2014. At that meeting PIAB reiterated its strongly held view that any decision to introduce PPOs must be extended to PIAB. Its representative stressed PIAB's belief that to restrict the ability to award PPOs to the courts only would run the risk of undermining the 'raison d'être' of PIAB, which is to remove from the costly courts process cases where liability is not disputed and to allow PIAB to assess the value of the award. (PIAB legislation does not limit the value of the award that PIAB can make; in this regard it has the same scope as the courts.)

### **Working Group Position**

The Working Group considered the issue of whether the Personal Injuries Assessment Board should have the facility to award PPOs. It agreed that it would be desirable for the Personal Injuries Assessment Board to have the facility to make recommendations in this regard and that the necessary changes should be advanced either in the legislation providing for PPOs or that relating to the Personal Injuries Assessment Board, or a combination of both.

## **Chapter 8 – Implications for Consumers and for the Insurance Industry**

### **Background**

The Working Group considered the potential implications for consumers and for the insurance industry of the introduction of PPOs. Indicative numbers of potential cases were provided in respect of State defendants and non-State defendants. It was estimated that 8-10 cases involving State defendants would fall into the category for PPOs each year, while approximately 20 cases could arise each year involving non-State defendants. The profile of such cases was considered to be largely medical negligence and motor accidents, with some cases arising as a result of workplace injuries.

### **Implications for insurance premiums**

In view of the absence of detailed data projections in terms of the number of potential cases, it was not possible to provide a robust estimate of the likely implications for consumers or of the likely effect on premia. Towers Watson in its study estimated that the potential increase in premia could span between 0.8% and 6%. An increase of 6% could occur if all severe injury cases were required to be awarded PPOs and if the discount rate were reduced to -1%. However, if the discount rate were held at 0%, the increase in premia would be 3.5%. Insurance Ireland is more pessimistic putting the potential increase at 15%.

### **Implications for Insurance company reserves**

Towers Watson also assessed the potential impact on reserves if severe injury cases were to be awarded on a mandatory or discretionary basis. It estimated that the additional reserves needed by an insurance company could span between an additional 6% and 48% of existing reserves. The lower figure was based on the assumptions that 40% of relevant cases would settle as PPOs and the discount rate would be 1%. The higher figure was based on the assumptions that all relevant cases would be awarded PPOs and that the discount rate would be -1%.

### **Working Group Discussions**

Consultations with the insurance industry highlighted the problem that many employers' liability insurance policies and those for general liability impose set limits of indemnity at levels considerably lower than the levels of serious or catastrophic injury settlement values. If these limits were to be raised to reflect more accurately the potential size of a catastrophic injury award or if

these policies were to be offered on an unlimited basis, the price of these categories of insurance would increase.

The possibility was also raised that some insurance companies might exit the Irish market if PPOs were introduced. There might be a risk, in particular, that some re-insurance companies would exit the market as happened in the UK when its PPO legislation was introduced. The exit of re-insurers from the Irish market would be particularly problematic for insurance companies as there is a small number of re-insurers currently operating in the Irish market and Irish insurance companies, because of their smaller scale, tend to rely on re-insurance as the means of addressing long-term liabilities.

The consultations with the insurance industry also pointed to the potential impact of other factors on the implications for consumers and for the insurance industry. It estimated that the impact on the cost of insurance could be as high as 12-15%. The following factors were considered to have the potential to affect the feasibility of PPOs and the price of insurance in a market in which PPOs would be available:

- Legal costs: the legal costs arising in PPO cases could potentially increase costs significantly unless measures were in place to regulate or to limit such costs (including in particular additional costs associated with variation orders, if such were permitted);
- Discount rate: the discount rates would have a significant impact as to the scale of the liability to be borne by the insurance industry. Any reduction in the discount rate could increase liabilities significantly. The need to monitor the discount rate was noted;
- Lump sum inflation: PPOs tend to have an inflationary effect on lump-sum payments as insurers try to 'buy-out' of the uncertainties involved in maintaining PPOs on their books;
- Re-insurers: re-insurers might price themselves out of the market altogether as a means of avoiding PPOs, as happened to some extent in the UK in the early stages. Alternatively, they could set a higher point for entry into the market than currently. At the moment, re-insurers enter the Irish market at relatively low levels (c€1.5m). If this level were to rise to €3-4m, there could be a knock-on impact on insurance costs.

## **Working Group Position**

The Working Group considered the potential implications of the introduction of PPO legislation on the costs of insurance, particularly the potential impact on business and consumers if the legislation were to lead to an upward movement in insurance costs. In the absence of robust data to assess the likely impact on insurance costs, the Working Group considered that the possible risk of an increase in insurance costs might be mitigated by restricting the scope of PPOs (i.e. that there would be no provision for variation and that the facility would be restricted to those with catastrophic injury requiring long-term care).

## Chapter 9 – Conclusions and Recommendations

The Working Group undertook a detailed examination of the potential implications that legislation on periodic payment orders would have for claimants and defendants, including the State Claims Agency, insurers, re-insurers and medical indemnity societies. It analysed the technical issues that would have to be addressed in such legislation.

The Working Group recognised that the introduction of periodic payment orders would be of significant benefit to catastrophically injured claimants as it would enable them to have continuity of payments to cover their care and medical costs for the duration of their lives. The Working Group also recognised that the introduction of periodic payment orders would add to the liabilities of insurance companies and increase the cost of insurance, with knock-on effects for both businesses and consumers.

It recommends that the legislation should be drafted on the following basis:

- The court should have the discretion to award PPOs but should have to take account of the views of both claimants and defendants.
- The periodic payment facility should be available for those who are both catastrophically injured and requiring of long-term permanent care.
- The Irish HICP should be specified as the index to be used to track increases in costs over time. The index should be reviewed regularly, at intervals of no less than 5 years.
- The legislation should make provision for stepped periodic payments, where identified at the time of the award. These steps should include milestones such as the claimant's entry into or exit from education or the claimant's move into a paid care situation. The legislation should not provide for variation orders.
- In order to guarantee the security of payment for non-state defendants the legislation should provide for an amendment to the limits that apply under the Insurance Compensation Fund to allow for full payment of PPO liabilities in the event of insurer insolvency.

## **Appendix I**

### **Working Group on Legislation on Periodic Payment Orders**

#### **Terms of Reference**

1. Assess advantages and disadvantages with a view to a recommended position on:
  - issues concerning the configuration of Periodic Payment Orders:
    - the means by which payments will be varied to cater for future needs of claimants;
    - the extent to which Orders will be compulsory or discretionary;
    - indexation mechanisms.
  - options for addressing potential implications for the insurance industry, including:
    - how to provide for guarantees;
    - the impact on the costs of insurance and implications for consumers;
    - the impact on the provision or availability of insurance;
    - the impact of any potential collapse of an insurance company;
    - transitional issues for the insurance industry arising from the transfer of existing claims to periodic payments.
  - the financial mechanisms required for the operation of Periodic Payment Orders for both State and non-State defendants;
2. Identify any necessary changes to the draft General Scheme on Periodic Payment Orders arising from the Towers Watson report.
3. Complete the work of the Group by 30 September 2014.

## **Appendix II:**

### **Questionnaire**

#### **Legislation on Periodic Payment Orders**

##### **Questions for the Insurance Industry**

The High Court Working Group on Medical Negligence and Periodic Payments (2010) recommended that legislation be enacted to provide for periodic payment orders (PPOs) in cases of serious injury. The Government decided in January 2013 to approve the drafting of PPO legislation in respect of awards made against the State. The Government also agreed that the introduction of PPOs in respect of private defendants be examined further in consultation with the Department of Finance, during the drafting of Heads for the legislation.

The Department of Justice and Equality has established an Inter-Departmental Working Group to assist it in the task of preparing legislation to provide for periodic payments. The Working Group has been tasked with examining the technical aspects of the legislation and consulting the insurance industry in this regard. The Working Group's report will feed into the development of legislation on periodic payment orders which will begin later this year.

The Department of Justice and Equality seeks the views of the insurance industry on the content of the proposed legislation. The insurance industry is requested to complete the attached questionnaire and to provide any further information that it considers useful. The deadline for response to the attached questionnaire is 31 August 2014. Questionnaires and any supporting documentation should be forwarded by email to Michael Holohan at [MMHolohan@justice.ie](mailto:MMHolohan@justice.ie).

Civil Law Reform Division  
Department of Justice and Equality  
23 July 2014



## Legislation on Periodic Payment Orders

### Questionnaire

<b>Name of Person Completing Questionnaire</b>	
<b>Name of Organisation Represented</b>	

1. Please indicate your views as to whether the legislation should provide for:
  - (a) periodic payment orders to be limited to catastrophic injury cases only;
  
  - (b) periodic payment orders to be available in relation to personal injuries claims above a certain cost and in which the person requires long-term care.
  
2. Please indicate your views on whether a settlement involving a periodic payment order should be:
  - (a) mandatory in all cases;
  
  - (b) mandatory when requested by the parties; or
  
  - (c) left to the discretion of the court.
  
3. Please outline your views as to how the security of payment for a periodic payment order should be guaranteed.

4. Please indicate your views with regard to:
  - (a) the circumstances in which periodic payment orders should be varied;
  - (b) the possibility of providing for stepped payments to address specified changes in a claimant's care needs.
  
5. Please indicate your preferences as to whether the index used to underpin periodic payment orders should be:
  - (a) a currently published general index such as the Consumer Price Index (CPI) or the Harmonised index of Consumer Prices (HICP);
  - (b) a subset of the CPI/HICP which specifically covers health costs, that is, COICOP Division 6 in full, or elements of it;
  - (c) an index specifically developed for this purpose;
  - (d) If (c); (i) should this index track medical and social care costs, such as the ASHE 6115 in the UK? Or (ii) track other costs? (please specify);
  - (e) Any other type of index; please specify.
  
6. Please outline any other views that you may have regarding the proposed legislation.

### **Appendix III: Submissions Received**

7. DIMA (Dublin International Insurance & Management Association)
8. Insurance Ireland
9. Irish Society of Actuaries
10. Medical Defence Union
11. Medical Protection Society
12. Personal Injuries Assessment Board

**1. Response from DIMA (Dublin International Insurance & Management Association)**

**Legislation on Periodic Payment Orders**

**Questionnaire**

<b>Name of Person Completing Questionnaire</b>	Sarah Goddard
<b>Name of Organisation Represented</b>	DIMA (Dublin International Insurance & Management Association)

The responses on this questionnaire reflect the opinions of DIMA members, predominantly from the non-life reinsurance sector, collected over a short period of time. DIMA has not had an opportunity to interrogate the member responses to these questions in further depth to gain more detailed insight on the issue of PPOs, which generally would be part of DIMA's process of developing responses to such questionnaires in order to properly reflect the views of the marketplace. As a result, the responses to this questionnaire are high level in nature and do not enter into detail. Nevertheless, the general consensus is that should PPOs be introduced, insurance costs would be impacted by the increased administration, and bring uncertainty in the form of future reserving requirements and reinsurance availability and rating.

a. Please indicate your views as to whether the legislation should provide for:

(a) periodic payment orders to be limited to catastrophic injury cases only;

It is the view of the DIMA members which participated in a survey about the potential impact of PPOs that these should be limited to catastrophic injury cases only.

(b) periodic payment orders to be available in relation to personal injuries claims above a certain cost and in which the person requires long-term care.

2. Please indicate your views on whether a settlement involving a periodic payment order should be:

(a) mandatory in all cases;

(b) mandatory when requested by the parties; or

**It is the view of the DIMA members which participated in a survey about the potential impact of PPOs that these should be mandatory when requested by the parties.**

(c) left to the discretion of the court.

3. Please outline your views as to how the security of payment for a periodic payment order should be guaranteed.

**It is the view of the DIMA members which participated in a survey about the potential impact of PPOs that such payments should be secured against the insurance company. Reserving and technical reserve matching requirements involving actuarial reviews should be appropriate for this.**

4. Please indicate your views with regard to:

(a) the circumstances in which periodic payment orders should be varied;

**It is the view of the DIMA members which participated in a survey about the potential impact of PPOs that such payments should either not be varied, or only in the circumstances of a significant change of the claimant, either an improvement or a worsening**

(b) the possibility of providing for stepped payments to address specified changes in a claimant's care needs.

**It is the view of the DIMA members which participated in a survey about the potential impact of PPOs that stepped payments would add uncertainty to the reserving process and therefore increase resistance to PPOs.**

5. Please indicate your preferences as to whether the index used to underpin periodic payment orders should be:

- (a) a currently published general index such as the Consumer Price Index (CPI) or the Harmonised index of Consumer Prices (HICP);
- (b) a subset of the CPI/HICP which specifically covers health costs, that is, COICOP Division 6 in full, or elements of it;
- (c) an index specifically developed for this purpose;

**It is the view of the DIMA members which participated in a survey about the potential impact of PPOs that there should be an index specifically developed for this purpose. However, there was insufficient time to identify what the source for such an index would be; in the absence of an original and appropriate index, a subset of the CPI/HICP could be an alternative.**

- (d) If (c); (i) should this index track medical and social care costs, such as the ASHE 6115 in the UK? Or (ii) track other costs? (please specify);
- (e) Any other type of index; please specify.

6. Please outline any other views that you may have regarding the proposed legislation.

**The introduction of PPOs will potentially impact business in several ways. This includes increasing the administration of claim awards and payments, uncertainty over future reserving, and uncertainty over the availability and cost of reinsurance. Where claims involving PPO awards are reinsured, this would likely increase the burden upon insurers in terms of the follow up and collection of recoveries from the reinsurer. Uncertainty surrounding such proposals could ultimately result in reinsurers deciding to withdraw capacity from certain classes.**

## 2. Response from Insurance Ireland

### Legislation on Periodic Payment Orders

#### Questionnaire

Name of Person Completing Questionnaire	Michael Horan
Name of Organisation Represented	Insurance Ireland

1. Please indicate your views as to whether the legislation should provide for:

- (a) periodic payment orders to be limited to catastrophic injury cases only; **PPOs limited to catastrophic cases only.**
- (b) periodic payment orders to be available in relation to personal injuries claims above a certain cost and in which the person requires long-term care. **PPOs should be restricted to cases in excess of €2m.**

2. Please indicate your views on whether a settlement involving a periodic payment order should be:

- (a) mandatory in all cases;
- (b) mandatory when requested by **all** the parties; **or at the Court's discretion when the plaintiff is a Ward of Court and catastrophically injured.**
- (c) left to the discretion of the court.

**Option (b) subject to the clarification above and to our answer under 1.**

3. Please outline your views as to how the security of payment for a periodic payment order should be guaranteed.

**We agree that security of payment must be guaranteed to protect the claimant. If PPOs are limited to State claims, where the effective guarantor is the State, then security is not an issue.**

**There are limited security options for non-State PPOs. If PPOs were to be extended to all indemnifiers there would be a need for the guarantee to be provided by a NTMA or other government instrument. We are conscious of the funding guarantee difficulties which have been encountered in some larger jurisdictions, including the inability of the market to provide appropriate annuities and the collapse of some solutions introduced internationally, e.g indexed pools in France.**

**Funding by a mutual pool is not considered to be a desirable option. Apart from observing and learning from the failure of the “French pool”, a pool could lead to a lowering of underwriting standards by some insurers. This could disadvantage those who maintain appropriate standards, with the costs of subsequent rate corrections and/or mutual pool funding deficits ,say from an insurer failure, ultimately being passed on to consumers.**

**The unavailability of impaired life annuities and an absence of suitable duration would render the purchase of a life annuity from life insurers unviable.**

**In short, Insurance Ireland acknowledges the advantages of PPOs as outlined in the Report of the High Court Working Group on Medical Negligence and Periodic Payments of which Insurance Ireland was a member. However there are few options available in the private sector and therefore we believe PPOs are best suited to State compensators.**

4. Please indicate your views with regard to:

(a) the circumstances in which periodic payment orders should be varied;

**We would not be in favour of Variation Orders (VO) in principle as such a contingent liability would create too much uncertainty and it would prove very difficult to guarantee security of payment in future years. The circumstances in which a VO can be made should only arise where such provision was made when the initial PPO is drawn up, e.g. an unexpected deterioration in the claimant’s condition and care requirements. There should be few cases where variation is required and these should be limited to where significant changes occur in relation to medical prognosis. What one would wish to avoid is a scenario where frivolous VOs are made where the administration costs for the Court and providers will be disproportionate. The purpose of PPOs should be for the benefit of the injured party with the majority of any compensation payments flowing to same, with associated professional fees tightly controlled. There is a risk of creating a new industry around such orders with excessive associated additional costs. It will therefore be essential if PPOs are introduced to ensure that a proportional approach is adopted by all parties.**

**If there are excessive VOs, the ability of the insurance industry to adequately price, reserve for and securely fund PPOs may be jeopardised. It will be essential that the funds set aside for PPOs are sufficiently robust to meet future demands and liabilities from the PPOs but not so large that they make insurance unaffordable. The more uncertainties that are introduced, via excessive, unforeseeable VOs, the more difficult it becomes to adequately provide for same. A solution needs to be found which is fair and balances the needs of the individual injured parties with the needs of society to have stable and affordable insurance solutions.**



(b) the possibility of providing for stepped payments to address specified changes in a claimant's care needs.

**Stepped payments (i.e. if fixed future payments, reviewed at fixed future points in time) may encourage the Courts to make overly generous provisions upfront for the "stepped" modules to avoid any risk of under-compensation, the cost of which would have to be borne by the wider insurance pool. If they are introduced it will be important that an independent process to review them, including comparison of the actual vs expected outcomes ( at the point of setting payments) is introduced. Feedback should be used to both improve the accuracy of stepped payments and ensure that a proportionate approach to compensation is adopted.**

**Both of these questions once again raise the securitisation and guaranteed funding of a PPO. The injured party will need to know that funds will be available to meet such additional sums that might become payable and without absolute security these forms of settlement would be unattractive/inequitable to the injured party.**

**In short, for reasons of uncertainty and guaranteeing security of payment we would be opposed to stepped payments.**

5. Please indicate your preferences as to whether the index used to underpin periodic payment orders should be:

- (a) a currently published general index such as the Consumer Price Index (CPI) or the Harmonised index of Consumer Prices (HICP);
- (b) a subset of the CPI/HICP which specifically covers health costs, that is, COICOP Division 6 in full, or elements of it;
- (c) an index specifically developed for this purpose;
- (d) If (c); (i) should this index track medical and social care costs, such as the ASHE 6115 in the UK? Or (ii) track other costs? (please specify);
- (e) Any other type of index; please specify.

**Our view is that ( c )would be in the best interests of claimants, i.e. a specifically developed index . However, given the relatively small size of the State ( and the even smaller community of costs which would need to be bundled together) , a true, representative index could be very difficult to devise.**

**Option (a) is likely to be too broad. Option (b) may not be representative of the true basket of costs, e.g. staff costs for medical/aid assistants will not be the same as pure medical inflation. The example in the UK of care costs reducing due to increased capacity in the labour market, at a time the general CPI rose, is an example of the dangers of such an index.**

**In answer to the question at para (d), there are many costs which a severely injured party may experience going forward. These include costs not associated with medical inflation – e.g. some care costs provided by care assistants, property maintenance, vehicle expenses, utilities etc.**

6. Please outline any other views that you may have regarding the proposed legislation.

- (i) Please note that this reply is an Insurance Ireland reply on behalf of our members. We attach a two-page document outlining Insurance Ireland's position on PPOs. Our reply to this questionnaire and the attached document were developed by a working group of Insurance Ireland members.**
- (ii) PPOs should be restricted to catastrophic cases in excess of €2m only and the legislation should include a definition of what constitutes a catastrophic injury.**
- (iii) PPOs should be introduced for State claims only where there are no security issues regarding the long-term funding of such payments.**
- (iv) Legal reforms should be introduced in advance of any PPO legislation to facilitate both the speed and consistency of catastrophic injury settlements and to ensure that vested interests do not get an opportunity to hyper inflate the care and medical requirements necessary to meet the real and actual needs of the injured party. Similarly reform is also necessary in the area of legal costs adjudication to ensure a realistic framework is in place from day one. It would be unacceptable if costs were measured or assessed on the basis of the notional or actual capitalised value for pricing annuity purposes of the PPO, thus creating a potential windfall for claimant solicitors.**
- (v) The index used to underpin PPOs should accurately reflect the up to date position on wages of care assistants and professional carers as well as medical and assistive aids. The legislation should include a definition of what constitutes medical items as it is common to see such items as cars, wheelchairs, stair lifts, computers, holidays, residential accommodation, routine household maintenance and other household items being included in claimant actuarial reports as being subject to medical inflation, which is not the case.**
- (vi) Indications are that reinsurance capacity available to the Irish insurance market would decline as some reinsurers would likely exit the market as was the case in the UK when PPOs were introduced. This would reduce competition and , when combined with significantly increased costs associated with PPOs for reinsurers, could significantly increase premiums**

for classes of business where PPOs are likely to be awarded. In addition, the appetite for underwriting medical indemnity could be severely reduced.

- (vii) Any changes to indexation, e.g. through the use of new introduced indices, could have the unintended consequences of raising the costs of all serious, sub-PPO injury claims, thereby driving insurance premiums upwards. We would also refer to the discount rate in this context. If PPOs were to be introduced for insurance industry claims then it is likely that insurers would be asked to write a cheque to, say, the NTMA to ensure security of payment. However, in this circumstance, a method for calculating the lump sum cheque amount would need to be derived and all the assumptions agreed. This would involve selecting appropriate inflation and discount rates. If the discount rate chosen were lower than that currently used by the Courts, which is likely, then the Courts would likely adopt that discount rate for all lump sum injury claims that are not being settled as PPOs. This would significantly increase the cost of all injury claims and thus significantly increase premiums for these classes of business. This is one of the most serious unintended consequences of introducing PPOs for insurance industry claims.
- (viii) Some classes of insurance ( e.g. Employers' Liability, Public Liability, household liability, travel) are sold with limits of indemnity and are non-compulsory. Depending on the level of cover provided by the policy, the limit of indemnity may not be sufficient to fund a PPO. Careful consideration would need to be given as to how to address these issues.

#### **PERIODIC PAYMENT ORDERS – INSURANCE IRELAND POSITION**

1. Insurance Ireland acknowledges the advantages of Periodic Payment Orders (PPOs) as outlined in the Report of the High Court Working Group on Medical Negligence and Periodic Payments of which Insurance Ireland was a member.
2. We would advocate them as a solution for State Claims Agency (SCA) claims – where security is not an issue.
3. However we would point to the unacceptable security issues of depending on individual general insurers over the long-term for PPOs.
4. Other possible options are to allow PPOs secured by the payment of a lump sum to the NTMA, a life assurance company or a mutual pool. However there are major disadvantages associated with these options, which lead us to the conclusion that PPOs should be trialled on SCA cases in the first instance.
5. PPOs secured by the payment of a lump-sum to the NTMA would mean that the risk would be transferred to the State (investment, inflation and

mortality) and this may not be an attractive option from the Government's perspective.

6. PPOs secured by the payment of a lump sum to a life assurance company is not a viable option. The market has proved too small in the UK to provide a solution due to the unavailability of suitable impaired life annuities and the absence of assets of suitable duration and type e.g. there are no indexed linked assets that are pegged to ASHE (or a percentile of ASHE) either in quantum or of the appropriate duration. This is also a very illiquid market over a certain duration. In short there is no reasonable prospect of an Irish market for this.
7. PPOs secured by the payment of a lump sum to a mutual pool is not a viable option either. A similar pool arrangement for the indexation of PPOs in France has effectively just been "closed to new business" (for accidents from 1 January 2013) from the end of 2012 due to the build-up of a significant deficit.
8. We believe that there would be significantly increased costs for motor policyholders should PPOs be introduced at this time. This is an additional good reason to defer until we learn from the experience in the SCA. Several issues would need to be addressed in advance of introducing PPOs beyond the SCA, including the following:
  - The introduction of PPOs could see an entire industry build up around the treatment of catastrophically injured claimants, from the date of accident. Claims reforms would be essential to ensure that a proportionate approach is adopted by all sides;
  - The discount rate is critical – applying current market conditions would significantly increase costs on the introduction of PPOs – together with its (unintended consequences) impact on all injury claims. This would inevitably lead to an increase in all injury claims payments, with consequent detrimental impact across the entire economy;
  - It is very unclear how to approach the treatment of periodic payment orders where either a liability class is non-compulsory (e.g. EL, PL, travel insurance, household liability), or where there is typically a limit of indemnity that would not fund a normal PPO.
9. Finally, indications are that reinsurance capacity available to the Irish insurance market would decline as some reinsurers would likely exit the market as was the case in the UK when PPOs were introduced. This could significantly increase premiums for classes of business where PPOs are likely to be awarded. In addition, the appetite for underwriting medical indemnity could be severely reduced.

### **3. Irish Society of Actuaries**

#### **Response to Department of Justice and Equality consultation on Legislation on Periodic Payment Orders**

**September 2014**

#### **A. Introduction**

A1 The Society of Actuaries in Ireland (“Society”) is the professional body representing the actuarial profession in Ireland. Many of our members work in the non-life and life (re)insurance industry. Some carry responsibilities relating to the determination of technical provisions for insurance liabilities. Others are engaged in designing, pricing and underwriting products and in managing the risks inherent in insurance portfolios. Many also carry broader management responsibilities, including strategy planning and implementation. We can therefore draw on a wide range of expertise when we contribute to debate on insurance matters.

A2 One of our primary goals is to make informed and impartial contribution to debate on matters of public interest where an actuarial dimension can add value. We therefore welcome the invitation of the Department of Justice and Equality to contribute to a consultation on Legislation on Periodic Payment Orders. We hope that our input will be useful to the Department’s ongoing work on considering whether there are obstacles that stand in the way of extending PPOs to private defendants, and if so, how these obstacles might be addressed.

A3 We focus in this paper on PPOs against private defendants where third party non-life insurance cover is in place in respect of some or all of the event that gave rise to the PPO. Where no insurance cover is in place, it may be appropriate in any event for certain claims to be settled by means of PPO, in the interest of consistency of treatment across claimants; however, the question of the security of continuity of benefit payments may require even greater attention in this case.

#### **B. Payment of benefits under PPOs**

B1 It is useful to consider first what arrangements might be made for the payment of PPO benefits, as this may inform decisions on other questions, such as what the scope of PPOs should be.

B2 In its October 2010 Report<sup>1</sup>, the Working Group on Medical Negligence and Periodic Payments identified security of payments as a key issue. The Group proposed that courts should be empowered to make PPOs only where satisfied that the continuity of payment under the order is reasonably secure.

We agree that this is a critical consideration in deciding whether, and if so how, PPOs should be extended to private defendants.

- B3 Options that exist for payment of PPO benefits, in cases where non-life insurance cover is in place in respect of some or all of the event that gave rise to the PPO, include:
- (a) The liability rests fully with the non-life insurer;
  - (b) The insurer has the option, or is required, to transfer the liability to an insurance pool;
  - (c) The insurer has the option, or is required, to transfer the liability to a State agency. We agree with the Medical Negligence and Periodic Payments Working Group that the NTMA would be a logical choice, given its multiple treasury functions on behalf of the State.

Each of these has different implications in terms of security of continuity of payment, as discussed below. Ensuring complete security under options (a) or (b) would, we suggest, require State involvement, which may be to fulfil any shortfall in the event of the failure of an insurer or the insurance pool, or to dictate how such a shortfall is to be met (e.g. through some form of levy on insurers).

***Option (a) – liability rests with non-life insurer***

- B4 If PPOs are set up in such a way that the liability rests fully with the non-life insurer: Non-life insurers have expertise in establishing the quantum of benefits, evaluating risks, determining reserving and capital requirements and implementing appropriate asset/liability matching strategies for insurance portfolios where claims are settled by means of lump sums. However, the nature of a PPO is very different. Therefore, a number of issues may arise, as set out below. Note that we assume that benefits payable under PPOs will be subject to review only in very limited circumstances, though stepped increases at specified dates may be built into the PPO (see Section C, paragraph 3.2 and response to question 4).
- (a) PPOs are likely to increase the risks and uncertainties inherent in insurance portfolios:
    - (i) PPO liabilities are typically significantly longer than any other insurance or pensions liabilities, and may extend for durations of 80 years or more. Moreover, they are typically payable to persons who have suffered catastrophic injuries and are unlikely to experience standard mortality or morbidity rates. There is little, if any, reliable morbidity or mortality experience

data available internationally to value liabilities of this type, and (as far as we are aware) there is no Irish-specific data.

- This will create uncertainty in the pricing of products and in the valuation of liabilities. This, in turn, may lead to higher prices and to a need for insurers to hold increased amounts of capital.
  - It may also lead to inconsistency between insurers in pricing and reserving assumptions. Inconsistency in assumptions may mean that the least prudent assumptions are "rewarded" through a lower adverse impact on profit and a lower impact on pricing. This may, however, have a negative impact on the security of payment of benefits in the medium- to long-term.
- (ii) Achieving adequate matching of assets and liabilities is likely to be very difficult, if not impossible.
- As indicated, some PPOs will be payable for many years - but there are no assets available of sufficiently long duration to match these liabilities. This means that insurers will bear reinvestment risks above and beyond current investment risks and in addition to the risks mentioned above.
  - One possibility is that the government could issue long-dated securities linked to an appropriate index. This would certainly be helpful. However, even then, the range of securities would probably be limited, and it is unlikely that individual insurers would be able to achieve adequate matching, given the relatively small number of PPOs that any given insurer will carry and the unique circumstances of each PPO.
- (b) It should also be noted that Solvency II brings onerous capital requirements for PPO-like liabilities. This will put further financial stress on insurers. Another consideration is that the capital requirements for PPO claims are higher than for lump sum claims, since the investment risk is now with the insurer and will stay with it for longer.
- (c) Most insurers will look to reinsurers to take on the cost of potential large claims that would otherwise destabilise the insurer's results and possibly jeopardise solvency.
- (i) However, reinsurers will also face the issues identified above. Therefore, it cannot be assumed that reinsurers will be willing to provide cover to the extent required.

- As an example of experience elsewhere: in the UK, the motor reinsurance market is increasingly moving towards capitalised products which will move the risk back to insurers after a specified period; and we understand that the introduction of PPOs has led to reinsurers withdrawing from some segments of the market altogether.
- (ii) If there is only a small reinsurance market for PPOs, and/or an uncompetitive market, this will impact on direct writers' capacity to provide insurance cover.
- (iii) Contraction of reinsurance capacity, combined with the risks and uncertainties involved in managing claims settled by PPO, could have a substantial effect on smaller insurers, in particular. If a small insurer becomes liable for a PPO settlement without reinsurance cover, the reserving and capital implications arising from the uncertainties involved may be disproportionately large relative to its capital and reserves. Contraction of reinsurance capacity may therefore lead to some insurers having to curtail the amounts and/or types of insurance covers they provide. It may also discourage new players from entering the market. Both of these effects could restrict competition.
- (d) Further considerations are the administration costs of managing PPO claims over a long period, the uncertainty over possible inflation effects and the need to develop new claims processing systems to deal with recurring rather than lump sum payments.
- (e) Notwithstanding that insurers are subject to extensive reserving, risk management and solvency capital requirements, the new uncertainties and risks that PPOs create for insurers have the potential to reduce the security of payment of benefits below a level that might, at a societal level, be considered acceptable for beneficiaries who have suffered catastrophic injuries and require long-term medical care. It is difficult to quantify the risks identified above, or predict over what timescale they might become material issues. Nonetheless, we suggest that such an analysis be attempted as part of a regulatory impact analysis, if a policy decision to extend PPOs to private defendants and to require insurers to hold the resulting liabilities on their balance sheets is being considered.

***Option (b) – an insurance pool is established***

- B5 Given the issues identified at B4, we suggest that the establishment of an insurance pool to deal with PPO settlements merits careful consideration.



- (a) When the PPO is made, the insurer would (subject to (b)) discharge its liability in respect thereof by making a lump sum payment to the insurance pool.
  - (b) If the PPO provides that it may be varied upwards at a future date (e.g. if specific conditions are met), this may result in a further lump sum payment by the insurer to the pool at that date.
  - (c) If the PPO provides for stepped increases in payments – e.g. where increases in future care needs can be anticipated at outset – these could be reflected in the lump sum paid to the pool at outset, or the insurer could be required to make a further lump sum payment to the pool when the higher payments commence.
- B6 Thus, a pool would allow insurers to convert their PPO liabilities into a lump sum and hence reduce future risks and uncertainties, with positive impacts on capital management and insurance capacity. It would, in effect, facilitate pooling of risks between insurers.
- (a) Issues such as the difficulties in predicting future morbidity and mortality experience, and matching assets and liabilities, would remain. However, the increased scale, compared with the PPO liabilities of any individual insurer, should enable the pool to better mitigate the risks and should therefore increase the security of payment of benefits.
  - (b) The greater scale should also facilitate efficiencies, and therefore cost savings, in the administration of claims.
- B7 We suggest that, if this approach is adopted, it should be mandatory for insurers to transfer all personal injuries claims settled by means of PPOs to the pool. This would ensure consistency across claimants and would prevent insurers from choosing to transfer only their highest risk / most uncertain PPOs to the pool while retaining others on their balance sheet.
- B8 Establishing a pool would require careful planning. Questions to be considered include:
- (a) Who should operate the pool?
  - (b) How should the assumptions underpinning the calculation of lump sum payments to the pool be decided?
  - (c) If these assumptions prove to be too optimistic and further funding is required at a future date, how should this be dealt with? E.g. the pool could have authority to require further payments from insurers.

- (d) If the assumptions prove to be too pessimistic and surpluses arise, how should these be dealt with?
- (e) What steps should be taken to maximise security of benefits, particularly if the legal structure is such that the pool does not have to meet the solvency capital requirements that would apply to insurers? Given the long-term medical needs of the beneficiaries, should the liabilities of the pool ultimately be guaranteed by the State?
- (f) How would reinsurance companies treat payments to a pool? There may be circumstances in which reinsurers would not treat these payments as claim payments. This could pose significant problems for insurers, if, having made payments to the pool, they could not be recovered from the reinsurer (or there was a long delay in recovery).

We would be happy to work with the Department to explore these and other questions, if this would be helpful.

***Option (c) – liability is transferred to the NTMA***

- B9 Another possibility is that the NTMA would take on responsibility for administering claims settled by PPO. Allowing, or indeed requiring (see B8), insurers to discharge PPO liabilities by making a lump sum transfer to the NTMA would be optimal for PPO beneficiaries in terms of ensuring the security of benefit payments.
- B10 As with option (b), the question of how the assumptions underpinning the calculation of lump sum payments to the NTMA should be decided would need careful consideration.
- B11 If the NTMA assumed the risk of funding shortfalls as a *quid pro quo* for the fact that surpluses may arise and be retained, the arrangement would also remove uncertainty for insurers (albeit at a cost – the fact that the uncertainty would now be borne by the NTMA would be reflected in the transfer terms).
- B12 An argument can perhaps be made that it is not appropriate for insurance risks to be transferred to a State-backed agency and for the State, and hence the public purse, to bear the risk that the transfer terms turn out to be inadequate. On the other hand, this may be deemed acceptable in the limited circumstance of PPOs, in the interest of providing financial security to persons who have extreme medical care needs. Moreover, the risk currently exists that a lump sum settlement will prove to be insufficient to finance long-term care needs and that costs will fall back to the State through the social welfare system. We have not considered this question in depth.

## C. Consultation questions and responses

1. Please indicate your views as to whether the legislation should provide for:
  - (a) periodic payment orders to be limited to catastrophic injury cases only;
  - (b) periodic payment orders to be available in relation to personal injuries claims above a certain cost and in which the person requires long-term care.
- 1.1 For reasons of equality/fairness and the lack of clarity of a definition of catastrophic injury, we would propose (b) (while acknowledging that “long-term care” would then need to be defined). We would add that the key determinant should be the long term care cost. However, (b) implies greater volumes of PPOs and hence the issue of security of payment (highlighted in the October 2010 Report of the Working Group on Medical Negligence and Periodic Payments) is more important.**
2. Please indicate your views on whether a settlement involving a periodic payment order should be:
  - (a) mandatory in all cases;
  - (b) mandatory when requested by the parties; or
  - (c) left to the discretion of the court.
- 2.1 These cases are relatively few in number, but each case is unique, so we would favour (c).**
- 2.2 In some cases, there will be a need for a lump sum payment in addition to recurring payments, to cover immediate special needs (e.g. housing changes, vehicle and assistive equipment purchases, etc).**
- 2.3 Consideration will need to be given to details such as how to structure benefit payments where only part of the liability is covered by insurance (e.g. cover under employer’s liability, household and travel insurance is typically subject to a fixed limit), and how to deal with claims where either the claimant or the defendant is not resident in the State.**
3. Please outline your views as to how the security of payment for a periodic payment order should be guaranteed.
- 3.1 As indicated at B10, allowing, or indeed requiring, insurers to discharge PPO liabilities by making a lump sum transfer to a State-backed agency would be**

optimal for PPO beneficiaries in terms of ensuring the security of benefit payments.

**3.2** If the decision of Government is that PPO liabilities should instead remain with individual insurers or with an insurance pool without some form of State protection, then we do not believe that it would be possible to absolutely guarantee security of payments. In this instance, decisions need to be made as to the allowable scope of PPOs – balancing claimants’ needs to have their long term care needs addressed with insurers’ needs to be able to manage and mitigate the risks that they underwrite. From a societal perspective, both are legitimate and, indeed, important needs.

- PPOs that can be revisited in the event of any deterioration in the beneficiary’s medical condition, or in the event of increases in medical care costs for any other reason, would be optimal from the beneficiary’s point of view.
- However, for the reasons set out at B4, we think that the implications for (re)insurers in terms of reserving and capital requirements could be quite significant. Recent experience in the UK has shown a contraction in reinsurance capacity. If this experience was repeated in Ireland, it would have consequences for the direct market.
- A more balanced approach is therefore needed, such as that suggested at the response to question 4.

4. Please indicate your views with regard to:

- (a) the circumstances in which periodic payment orders should be varied;
- (b) the possibility of providing for stepped payments to address specified changes in a claimant’s care needs.

*The circumstances in which periodic payment orders should be varied*

**4.1** As indicated at the response to question 3, a system under which PPOs could be varied at any time to allow for any unforeseen deterioration in the recipient’s condition, or in the costs of medical treatment or other relevant expenses, would be optimal from the recipient’s point of view. However, there would be no certainty for the defendant if PPOs could be varied at any time. Allowing this degree of reviewability could make PPOs prohibitively risky for providers and this would be reflected in insurance premiums and in insurers’ capacity to provide cover.

**4.2** As a more practicable approach, we suggest that, where there is uncertainty at the time of the initial award as to the full extent of the

condition of the injured, and where there is a reasonable expectation at that time that a clearer determination can be made at a future date, then the possibility for variation on specific conditions (e.g. the delayed onset of epilepsy as a consequence of the event which gave rise to the PPO) could be allowed for at the outset. For example: initial award of €X p.a. which may be increased to €Y p.a. based on a specific test/diagnosis and Court approval (it may also be appropriate to include constraints as to the period during which such test/diagnosis must be performed). We would expect the proportion of such cases to be small.

- 4.3 Note that if legislation is introduced at a future date that extends on a retrospective basis the scope to vary PPOs, this could have a very destabilising effect on the insurance market and, if applicable, on any insurance pool established for the purposes of PPOs.

*The possibility of providing for stepped payments to address specified changes in a claimant's care needs*

- 4.4 This makes sense as it is just a further refinement of the concept of meeting the care needs as they fall due, e.g. a pre-determined step-up in care needs at certain life stages. We would expect such cases to be quite common. It is quite common currently for this to be allowed for in lump sum settlement calculations.

5. Please indicate your preferences as to whether the index used to underpin periodic payment orders should be:

- (a) a currently published general index such as the Consumer Price Index (CPI) or the Harmonised index of Consumer Prices (HICP);
- (b) a subset of the CPI/HICP which specifically covers health costs, that is, COICOP Division 6 in full, or elements of it;
- (c) an index specifically developed for this purpose;
- (d) If (c); (i) should this index track medical and social care costs, such as the ASHE 6115 in the UK? Or (ii) track other costs? (please specify); Or (ii) track other costs? (please specify);
- (e) Any other type of index; please specify.

- 5.1 This is one of the most difficult aspects of PPOs.

- (i) An index that is too granular will exhibit significant volatility, which is not in the interests of any of claimants or insurers. For example, in Ireland, an index based specifically on carer earnings may be quite

unstable, whereas a wider national average earnings index may be less so. UK experience with ASHE 6115 suggests that such a small group does not give stability to the claimants. Since the Irish population is smaller, any index developed in Ireland is likely to be more volatile.

- (ii) Pure price indices will not match cost escalation in the medium/long-run. A wage-related component is essential.
- (iii) There would be difficulty for insurers in finding matching assets. For example, there are no bonds issued to match Irish price inflation. Matching wage inflation is even more difficult. (Note that this would not be an issue if PPO liabilities were discharged by transfer to a State agency).

The above suggests that a wide national average wage index may be most appropriate, with a medical element at a suitable weighting.

- 6. Please outline any other views that you may have regarding the proposed legislation.

#### ***Managing expectations***

- 6.1 From a claimant's perspective, the risks from a lump sum settlement for future care are:

- (i) Care needs change unexpectedly;
- (ii) Investment proceeds are not sufficient;
- (iii) The claimant lives longer than expected.

- 6.2 We believe that, compared to a lump sum settlement, a PPO reduces the risks for an individual claimant. However, PPOs also have risks, and care is needed to ensure that claimants do not have unrealistic expectations. Some examples of issues that can arise:

- (i) The claimant's medical condition may deteriorate or costs of care may increase at a higher rate than the rate of increase in the escalation index. This risk will remain with the claimant, unless it is recognised at time of settlement in the form of a variation order or a stepped payment.

- (ii) A PPO settlement is designed to remove the risks that the claimant lives longer than expected and that the investment proceeds from a lump sum award are below the level assumed in the settlement. Although variable PPO awards can be made, we suggest (see 4.2 above) that the conditions for these to trigger need to be considered in advance. However, it is unrealistic to expect to be able to forecast all possible changes over the claimant's future lifetime (potentially 80 years or more). Thus, the claimant remains exposed to risk that the PPO will not be adequate.

There is also a material issue where there is contributory negligence on the part of the injured person, e.g. in the case of a motor accident. A PPO paying 50% (say) of the annual cost of medical care is of limited use in practice to the injured party. In these circumstances, the settlement may include a lump sum to tide the party over for a number of years, but there is a long-term problem of insufficiency of funds relative to care needs. Of course, PPOs are not intended to solve this problem; nonetheless, it is worth bearing in mind as another example of a situation where it will be important to manage expectations.

#### *Other considerations for Government*

- 6.3 Government may legitimately be concerned that any insufficiency in the amount of a PPO will fall to be met by the general exchequer through social welfare benefits. This could arise if care needs change and suitable top-up arrangements are not in place, or where there is contributory negligence (as discussed above). However, the risk of insufficiency of funds exists also with the current lump sum system of settlement of claims. An advantage of PPOs over lump sums is that, if lifespan proves to be shorter than expected, the PPO ceases, whereas the lump sum has already been paid in full and is not recoverable.
- 6.4 If PPOs are introduced for private defendants and if insurers are required to hold them on their balance sheets or transfer the liability to an insurance pool, the NTMA should consider issuing securities that would enable insurers / an insurance pool to achieve some degree of matching of assets and PPO liabilities. These securities would have to be very long-dated and match to the escalation index selected.

#### 4. Medical Defence Union

### Legislation on Periodic Payment Orders

#### Questionnaire

<b>Name of Person Completing Questionnaire</b>	Mary-Lou Nesbitt, Head of Governmental & External Relations <a href="mailto:mary-lou.nesbitt@themdu.com">mary-lou.nesbitt@themdu.com</a>
<b>Name of Organisation Represented</b>	Medical Defence Union

- 1 Please indicate your views as to whether the legislation should provide for:
- (a) periodic payment orders to be limited to catastrophic injury cases only;
  - (b) periodic payment orders to be available in relation to personal injuries claims above a certain cost and in which the person requires long-term care.

#### MDU response

**Before responding to this questionnaire, it is important to make it clear that the Medical Defence Union (MDU) provides indemnity to its members, including those in Ireland, on a discretionary basis. Discretionary indemnity is not insurance. MDU members are entitled to seek indemnity for clinical negligence claims and to have their request for assistance considered reasonably by the Board of Management of the MDU, but there is no insurance policy and no guarantee that claims will be paid.**

**In England, where periodical payments are available for personal injury cases including clinical negligence claims, organisations providing indemnity on a discretionary basis are not considered by the courts as secure providers for the purposes of periodical payment orders.**

**In response to Q1 we do not support the use of periodical payments in either circumstance.**

- 2 Please indicate your views on whether a settlement involving a periodic payment order should be:
- (a) mandatory in all cases;



(b) mandatory when requested by the parties; or

(c) left to the discretion of the court.

#### **MDU response**

**In response to (a) and (b) periodical payments should not be mandatory because some categories of defendants will not be in a position to make the financial commitments required to underpin periodical payments. In response to (c), the court would have to take into account whether the defendant is indemnified by a secure provider. Even if a discretionary indemnifier is regarded as a secure provider by the courts, its directors may not be prepared to allow it to exercise its discretion in respect of a commitment to make payment of an indeterminate aggregate amount over many years.**

(c) Please outline your views as to how the security of payment for a periodic payment order should be guaranteed.

#### **MDU response**

**As we have explained above, some defendants will not be in a position to undertake to provide compensation through a periodical payment.**

**Further a periodical payment could not be considered secure in cases where there is an insurance policy with a financial limit. If the policy limit is lower than the amount the periodical payment is required to fund, the policy will not respond above the stated limit.**

(d) Please indicate your views with regard to:

(a) the circumstances in which periodic payment orders should be varied;

(b) the possibility of providing for stepped payments to address specified changes in a claimant's care needs.

#### **MDU response**

**Defendants' indemnifiers that are not secure providers would not be in a position to give any undertakings to pay, irrespective of whether an order could be varied or provided through future stepped payments. Even if a discretionary indemnifier is regarded as a secure provider, it would have a continuing discretion as regards**

**any variation to a periodic payment order and payment of any increase in this could not, therefore, be assured.**

**In the context of insurance policies where there are limits, it is possible that if a periodical payment were reviewed upwards, the additional sum could breach the limit and thus not be met by the policy.**

- (e) Please indicate your preferences as to whether the index used to underpin periodic payment orders should be:
- (a) a currently published general index such as the Consumer Price Index (CPI) or the Harmonised Index of Consumer Prices (HICP);
  - (b) a subset of the CPI/HICP which specifically covers health costs, that is, COICOP Division 6 in full, or elements of it;
  - (c) an index specifically developed for this purpose;
  - (d) If (c); (i) should this index track medical and social care costs, such as the ASHE 6115 in the UK? Or (ii) track other costs? (please specify);
  - (e) Any other type of index; please specify.

#### **MDU response**

**Where defendants are not in a position to give any undertakings about future payments, the index is irrelevant.**

- (f) Please outline any other views that you may have regarding the proposed legislation.

#### **MDU response**

**The MDU does not have experience of PPO payments in cases where compensation payments are made on a discretionary basis. However, we have observed in England that when PPOs are ordered in clinical negligence cases and paid by the state (the NHS Litigation Authority), the potential sums payable can run into tens of millions (pounds sterling). One of the main considerations with clinical negligence claims in Ireland will be the fact that there are caps on compensation payments for some clinical negligence claims against consultants, and it is very likely that some PPOs would be expected to provide levels of compensations far higher than the cap would allow. If the defendants in these cases are indemnified on a discretionary basis, they would not be in a position to undertake to pay periodical payments. If the defendants are covered by a policy of**

insurance, would the expectation be that the state would provide any additional financial top up over and above the policy limit?

This consideration would apply equally in other areas of personal injury law where insurance policies have a financial limit.

If periodical payments were to be introduced, they should apply only to claims notified after the implementation date. Insurers and other indemnifiers will already have made provision for incidents notified and set their premiums or subscriptions on the assumption claims would be funded on a lump sum and not a periodical basis. They cannot be expected to fund periodical payments retrospectively in circumstances where they were not able to take in sufficient premiums or subscriptions, and indeed to build the prospect of periodical payments into their premium/subscription setting methodology.

Periodical payments introduce an extra layer of administrative costs which build up year on year.

Especially in clinical negligence claims a power to review periodical payments can encourage satellite litigation about matters such as quantum and causation – eg to determine whether a change in the medical condition is a result of the original breach or merely a result of a disease process. There are also legal costs associated with each review application.

## 5. Medical Protection Society

MPS is the world's leading protection organisation for doctors, dentists and healthcare professionals. We protect and support the professional interests of more than 290,000 members around the world. Our benefits include access to indemnity, expert advice and peace of mind. Highly qualified advisers are on hand to talk through a question or concern at any time.

Our in-house experts assist with the wide range of legal and ethical problems that arise from professional practice. This includes clinical negligence claims, complaints, medical and dental council inquiries, legal and ethical dilemmas, disciplinary procedures, inquests and fatal accident inquiries.

Our philosophy is to support safe practice in medicine and dentistry by helping to avert problems in the first place. We do this by promoting risk management through our workshops, E-learning, clinical risk assessments, publications, conferences, lectures and presentations.

MPS is not an insurance company. All the benefits of membership of MPS are discretionary as set out in the Memorandum and Articles of Association.

### **MPS in Ireland**

With a large membership in Ireland, MPS is one of the key stakeholders in the Irish medicolegal system and has significant experience of medical negligence claims in Ireland including serious and catastrophic cases.

### **MPS Questionnaire Responses**

- 1 Please indicate your views as to whether the legislation should provide for:
  - (a) periodic payment orders to be limited to catastrophic injury cases only;
  - (b) periodic payment orders to be available in relation to personal injuries claims above a certain cost and in which the person requires long-term care.

#### **Answer:**

**We consider that it is unnecessary for legislation to limit the availability of periodical payments to cases involving catastrophic injuries. The definition of such an injury may be elusive. In our experience request for PPOs are always driven by the plaintiff's need for significant, long term care and treatment.**

**We do not believe that cost should be a criteria; the decision to order periodical payments should be at the discretion of the court dependant on the needs of the plaintiff.**

- 2 Please indicate your views on whether a settlement involving a periodic payment order should be:

- (a) mandatory in all cases;
- (b) mandatory when requested by the parties; or
- (c) left to the discretion of the court.

**Answer:**

**We consider the decision to order periodical payments should be left to the discretion of the court taking into account the wishes and circumstances of the plaintiff.**

- 3 Please outline your views as to how the security of payment for a periodic payment order should be guaranteed

**Answer:**

**In the UK S4 of the 1996 Damages Act provides that the continuity of a payment under an order is reasonably secure if it is provided for by a ministerial guarantee, it is protected by a scheme under Financial Services and Markets Act 2000 ie the Financial Services Compensation Scheme (FCSC) or the source of payment is a government or health service body.**

**The FSCS scheme would cover payments made under PPO where they are self-funded by an insurer, or funded by way of the purchase of an annuity on behalf of the claimant.**

**We understand that no similar scheme exists in Ireland and in any event, MPS is not an insurer so plaintiffs are unlikely to benefit from any such scheme. Theoretically it might be possible to guarantee the payments by the purchase of an annuity but in our experience in the UK there is little, if any appetite for insurers to provide annuities for the type of life long payments required, particularly to young claimants. In addition there is no availability of annuities linked to any index other than the retail price index (RPI). We understand a similar situation exists in the Ireland.**

**Given the fact that courts have now been able to order settlements by way of periodical payments for a number of years, and the failure of the insurance industry to develop suitable annuity products to securely fund such court orders, MPS considers that it is unlikely that such products will become rapidly available in Ireland. If the state wishes to ensure that plaintiffs, in appropriate cases, can be compensated using periodical payments, MPS considers that the best method of securing such payments would be legislation to enable a minister of the government to give a guarantee to a body in terms similar to those of S6 of the Damages Act 1996 (UK).**

4 Please indicate your views with regard to:

(a) the circumstances in which periodic payment orders should be varied;

**Answer:**

**MPS considers the circumstances in which periodical payment order could be varied should be in situations where the possibility of significant deterioration or improvement in the plaintiff's medical condition was identified at the time of the settlement of the claim.**

**We consider that the ability to vary a periodical payment order should follow the provisions in the UK Damages Act in that the ability to vary the order should be contained in the order for periodical payments. Where the court makes a variable order**

- **damages must be assessed or agreed at the outset**
- **on the assumption that the disease, deterioration or improvement will not occur**
- **the order must specify the disease or type of deterioration or improvement**
- **the order may specify a period within which an application for it to be varied may be made and the order must provide that a party must obtain the court's permission to apply for it to be varied.**
- **UK legislation also provides for applications to extend the period for applying for a permission to vary and also provides that a party may make only one application to vary a variable order in respect of each specified disease, type of deterioration or improvement.**

(b) The possibility of providing for stepped payments to address specified changes in a claimant's care needs.

**Answer:**

**We agree that legislation for periodical payment orders should allow for the payment of specified stepped payments to address changes in a plaintiff's future care needs. In our experience, in particular, young plaintiffs are likely to have changing care needs as they move out of education and become adults and it right that periodical payment reflect these needs.**

5 Please indicate your preferences as to whether the index used to underpin periodic payment orders should be:

- (a) a currently published general index such as the Consumer Price Index (CPI) or the Harmonised index of Consumer Prices (HICP);
- (b) a subset of the CPI/HICP which specifically covers health costs, that is, COICOP Division 6 in full, or elements of it;
- (c) an index specifically developed for this purpose;

- (d) If (c); (i) should this index track medical and social care costs, such as the ASHE 6115 in the UK? Or (ii) track other costs? (please specify);
- (e) Any other type of index; please specify.

**Answer:**

**We understand that there is no indexation available which is comparable to the UK ASHE 6115 to track medical and social care costs in Ireland. We suggest that a simple solution would be to calculate the value of future payments based on the consumer price index plus half per cent, which we consider would provide adequate provision to mitigate against the effect of wage inflation.**

- a. Please outline any other views that you may have regarding the proposed legislation.

**Answer:**

- **We consider that any legislation allowing for the payment of compensation by way of periodical payments should give plaintiffs the option of receiving their loss of earnings claim as a lump sum. In our experience most plaintiffs prefer to receive the loss of earnings element of their compensation payment as a lump sum to maximise the flexibility that a lump sum payment can give them, for example to fund the purchase of accommodation.**
- **If loss of earnings is to be covered by periodical payments they should not be indexed on the same basis as the index for care costs.**
- **There should be legislation to ensure that the payments are tax free in the hands of the plaintiff and also legislation to protect the payments in the event of the bankruptcy of the plaintiff**
- **We will also suggest that there is recognition that periodical payment orders may not be appropriate where there are heavily discounted settlements and where discounted periodical payments are unlikely to be sufficient to meet the annual care needs of the plaintiff.**
- **Finally, as a matter of good administration we would suggest that any relevant annual index is published at or around the same date each year and that a standard court order is agreed setting out the methodology for the calculation of the uplift on the periodical payment and to also include a standard review date for each periodical payment to fall shortly after the index is published.**

## 6. Personal Injuries Assessment Board

Ms. Carol Baxter  
Principal Officer  
Civil Law Reform Division  
Department of Justice and Equality

20<sup>th</sup> August 2014

Re: Legislation to provide for Periodic Payment Orders

Dear Carol,

I acknowledge receipt of your letter of the 1<sup>st</sup> of August 2014 in relation to the above matter and welcome the introduction of legislation to provide for Periodic Payment Orders (PPOs).

The shortcomings in providing a lump sum payment based on changing parameters to cover future costs has been acknowledged for some time. Claimants, following receipt of personal injury compensation, may find themselves with insufficient funds as the years pass due to a number of reasons; these include inflation, life expectancy being longer than projected or the use of monies received for purposes other than that intended. Respondents similarly can find themselves overpaying where the claimants life expectancy turns out to be shorter than anticipated when the settlement was agreed. Furthermore, where a claimant runs out of funds they are likely to turn to the State to provide the necessary case, often in circumstances where the State (as the responding party) has already made the lump sum payment i.e. potential for double payment.

I have written previously to our parent Department (Jobs, Enterprise and Innovation) in January 2011 and January 2013 (copy attached) welcoming the introduction of PPOs and offering my views. The Board is an independent statutory body established under the Personal Injuries Assessment Board Act 2003 (PIAB Act 2003). Under section 20(4) of the PIAB Act 2003 the Board is required to assess Motor, Employers and Public Liability personal injury claims on a quasi-judicial basis and by reference to the same principles governing the measure of damages in the law of Tort and the same enactments as would be applicable in the assessment of damages. Any Order to Pay issued by the Board has the same standing as a Court Order. There is no ceiling to the level of awards made by the Board and these awards also involve lump sum payments, allowing for future care/on-going medical interventions arising, for example, from loss of limbs in the case of motor accidents but can equally arise when an employee is involved in a serious accident on a construction site or in a manufacturing utility.

As I understand the report from the High Court Working Group on Medical Negligence and Periodic Payments considered the application of periodic payments



solely within the litigation system. If the Board is to continue to fulfil its statutory functions any legislative change to introduce PPOs would need to cater for the Board's process and procedures, irrespective of the volume of cases arising in either resolution model. In this regard, I welcome your engagement with the Board.

You have kindly copied the questionnaire issued to the Insurance industry and my observations below address the issues raised therein and our considerations arising from our assessment of personal injury claims since 2004.

I understand that the purpose of PPOs is to ensure that the claimant has adequate funds to meet future requirements and that the respondent does not overpay where the projected costs may not be incurred. In such circumstances I believe PPOs should be mandatory in all cases where long term future care, treatment etc. is required, the cost of which can only be fully estimated at the time of settlement. PPOs should also be updated where the claimant's condition/circumstances change to such an extent that the estimated costs at the time of settlement no longer reflect the true position.

The cost of medical care does not move in line with any current index; at the same time it is clear that medical costs are increasing at a much higher rate than heretofore due to the pace of new and advanced medical interventions. Despite the inevitable inflationary impact and with this known driver in mind, to be fair to claimants and responding parties (State insurers or private sector insurers), I believe that an index needs to be specifically developed to reflect the cost of providing for future requirements. This index would also assist in financial forecasting/financial impact analysis, key issues for the State as it moves in this direction. Already in the UK I have heard the Insurance Regulator raising issues concerning the adequacy of reserves to allow for UK PPOs, a relatively new initiative in that jurisdiction.

In addition as I expect is already under consideration, continuity of payment needs to be guaranteed, perhaps by some form of annuity or insurance vehicle devised by the State; this also gives rise to an inherent risk for the State which should also be evaluated. Lessons with insurance backstops used within the banking sector have been learnt both locally and globally over recent years and a reliance on such vehicles would not be without risk and needs full consideration from risk, escalating premium potential and governance perspectives.

I believe that PPOs should be available to all claimants and I would be concerned if the approach is to introduce same solely for claimants pursuing claims against the State. It is my view that the majority of claims to which PPOs apply relate to medical negligence. In this context there is a tendency sometimes to consider medical negligence only in the context of the public health service whereas there is a private medical negligence sector to consider, an insurance sector we do need rather than encumbering all protection vehicles onto the State/exchequer side; in addition there are the claims which can arise from motor, employer liability and public liability accidents which are handled by the Injuries Board.

Any attempt to introduce PPOs solely for claims against the State would in my view leave the State open to legal challenge/judicial review where a claimant who happens to be pursuing a claim against the State could be subject to discharge via a mandatory PPO and another claimant claiming against a private hospital/practitioner/private sector insurer could still receive a lump sum. Indeed with reserving considerations being key (impacting dynamic premium pricing in the market) private sector insurers may wish to retain the option to go down the lump sum or PPO route; the latter even with a guarantee/backstop insurance vehicle could be perceived as cumbersome, now moving these claims into significant long tail reserving. Alternatively the State may be considering taking over all PPOs, back stopping same from exchequer funds with the inherent risk of significant medical cost inflation which may or may not outweigh the savings, taking life expectancy into account.

In summary there are a number of areas which in my view warrant detailed consideration to avoid any possible confusion/unintended consequences:

- The nature of the claim to which PPOs will apply. The draft legislation included with the Report of the Working Group refers to “where the court considers it appropriate in the best interests of the plaintiff”. How will this be interpreted? Mandatory application of periodic payment to future costs/losses when they reach a prescribed limit should perhaps be considered;
- Inclusion of future loss of earnings in the periodic payments and not by consent as proposed;
- Specific provisions to guarantee continuity of payment;
- Provision for the variation of periodic payment orders in all cases.

I would ask that this letter is also brought to Minister Fitzgerald’s attention and I am available to discuss any of the foregoing in further detail if this would be of assistance.

Yours sincerely

Patricia Byron  
Chief Executive.