

24 August 2018



Your Ref: LRC/TOP/56

ACTUARIAL SOCIETY  
of  
H O N G K O N G  
香 港 精 算 學 會

The Law Reform Commission of Hong Kong  
4/F, East Wing Justice Place  
18 Lower Albert Road  
Central  
Hong Kong

**For the attention of Mr. Peter H H Wong, Secretary and  
Ms. Kitty Fung, Secretary, Periodical Payments for Future Pecuniary Loss in Personal  
Injury Cases Sub-Committee**

Dear Mr. Wong and Ms. Fung,

**Re: Consultation Paper on Periodical Payments for Future Pecuniary Loss in Personal  
Injury Cases**

The Actuarial Society of Hong Kong (“ASHK”) has reviewed the Periodic Payment Orders (“PPO”) consultation. Below, we have responded, where appropriate, on behalf of the actuarial profession with respect to the technical implications that may arise through the introduction of the PPOs.

Please be aware that the ASHK is a professional body that represents the interests of Actuaries practicing in the Hong Kong market. As such, we have refrained on commenting on some of the questions below where the response is based on varying public opinions, as opposed to our assessment of the technical and market implications of the introduction of PPOs.

Overall, we note the following:

- The introduction of PPOs does add an additional lever in addressing the risk that awards provided to claimants may be inadequate due to the risk of funds being mismanaged or the future cost of care and general inflation being higher than originally anticipated.
- The introduction of PPOs will add greater complexity to the calculation of reserves required to be held by an insurer and the estimated total cost of a claim. As such, the added uncertainty and duration of payments will require insurers to hold additional capital, thereby increasing the premium rates.

- The administration of PPOs will be an added cost which may result in higher premiums charged to policyholders
- There may be potentially unintended consequences where the claimant has the option or non-option to choose a PPO settlement. A material number of cases are currently settled out of court for insurers and there may be potential implications to these costs of settlement as a result of the introduction of PPOs.

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

### **Periodical Payment Orders**

#### **Question 1**

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

ASHK:

The ASHK has no comment.

#### **Question 2**

Subject to Question 1 above, we invite submissions as to:

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

ASHK:

With respect to:

- (1) The revision of net rates of return is generally not undertaken on a regular basis. The changes observed in recent history have been significant, in terms of

quantum changes. Any authority empowered to fix and conduct periodical revision, should consider:

- a. Conducting these reviews on a more frequent basis to better ensure quantum of discount rate movements can be managed in a more gradual manner
  - b. Disclose the methodology and assumptions in arriving at the discount rates
- (3) We suggest that the reviews could be undertaken on a more frequent basis (such as annually). The stakeholders we would expect include relevant economists, actuaries, the Hong Kong Federation of Insurers, Insurance Authority, courts and representatives of claimants and injured parties. Longitudinal studies of the use of court awards may also be worth considering, alongside the types of support that can be offered to claimants in managing their finances over the long term.

For all other questions raised in this section, the ASHK has no comment.

### **Question 3**

Subject to Question 1 above, we invite submissions as to:

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

ASHK:

- (3) It is not necessary that PPOs be awarded for all heads of damage. The benefit of awarding a PPO is to ensure that risks relating to the future sufficiency of funds are managed and that risks arising from higher than expected inflation and the dissipation of the award by family members/friends is minimised.

For all other questions raised in this section, the ASHK has no comment.

#### Question 4

Subject to Question 1 above, we invite submissions as to:

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

ASHK:

- (2) The scope for review introduces additional operational costs and uncertainties for insurers in estimating the ultimate cost. For significant medical deterioration or improvement, the scope with which these trigger a review may need to be more clearly defined – for example, if the deterioration in medical condition is an independent event or if it can be proved to be directly related to the original claim. Conversely, the potential for medical advances may mean injuries and the cost of some types of care may reduce significantly or be treatable.
- (3) This is a risk can already be covered through life insurance. It may not be necessary to use the court mechanism for such an event, however, there may need to be some up-front consideration at time of award – as is the case in most circumstances where an individual would be the recipient of a material monetary sum, financial advice should be sought.

For all other questions raised in this section, the ASHK has no comment.

## Question 5

Subject to Question 1 above, we invite submissions as to:

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

ASHK:

- (1) In the case that this is provided by an insurer, the court would need to consider or involve the insurance authority in forming that assessment.
- (2) It is unclear as to what the insurance industry's appetite is for offering coverage that includes PPO payments. There are examples where government back schemes have been established as such risks are uninsurable (or there is limited to no appetite from insurers). However, the issue with PPOs is not that certain risks are uninsurable, it is the nature and quantum of award that insurers may have limited appetite for – there may need to be consideration to the extent an additional Government backed scheme may be required in the event insurers are unable to assess the costs arising from PPOs or unwilling to bear the risk.

We also note that the procurement of annuities or similar investment products is already an option open to claimants under lump sum settlements.

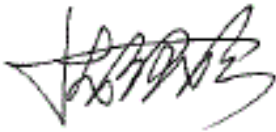
For all other questions raised in this section, the ASHK has no comment.

We would be pleased to discuss our views with you and to answer any questions or respond to any comments that you may have.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Simon Lam', written in a cursive style.

Simon Lam  
President  
The Actuarial Society of Hong Kong

A handwritten signature in black ink, appearing to read 'Trinity Pong', written in a cursive style.

Trinity Pong  
Chairperson of Non-Life Committee

A handwritten signature in blue ink, appearing to read 'Jonathon Ko', written in a cursive style.

Jonathon Ko  
Leader of Periodic Payment Orders Taskforce  
Non-Life Committee of the Actuarial Society of Hong Kong