DAC Beachcroft's response to the Draft Damages (Jersey) Law – Call for Stakeholder Views

About Us

International law firm DAC Beachcroft is the recognised leader in the provision of legal advice to the health and social care sector. With 70 years' experience working in healthcare, the firm provides innovative and practical support to 300+ independent and public sector healthcare client. Our knowledge and quality advice is the aggregate of over 250 experts working across 11 locations in the UK, with access to 32 offices across the globe.

DAC Beachcroft is also one of the largest global insurance/reinsurance practices, with one of the most comprehensive UK legal networks offering coverage across Europe, Latin America, North America and Asia Pacific. We act for all 10 of the UK's top insurers and are the partner of choice for Insurance bodies such as the ABI (Association of British Insurers) for whom Andrew Parker is our key contact.

Whilst DAC Beachcroft do not practice in Jersey, we have been handling clinical negligence cases on behalf of the Minister since 2012 and have an extensive understanding of healthcare provision in the Bailiwick and how clinical negligence claims are compensated there.

As an associate member of the Association of British Insurers (ABI), we have had the opportunity to read its response to this call for views and fully endorse it.

Response

DAC Beachcroft fully supports reforms to the discount rate in the Civil Liability Bill in England & Wales, the Damages (Investment Returns and Periodical Payments) (Scotland) Bill and is pleased to support the Draft Damages (Jersey) Law.

1. **What changes are being proposed to compensation payments in personal injury cases in Jersey?**
2. **Why are the changes contained in the draft Damages Law necessary?**

Full compensation requires a system that neither over- nor under-compensates claimants. DAC Beachcroft believes strongly that a system that reflects a real world approach to investment, rather than a purely theoretical approach, is the best method of achieving a balanced outcome.

The current discount rate in England and Wales and Scotland is based on the decision in *Wells v Wells*, which calculates the discount rate based on Index Linked Government Securities (ILGS). No properly advised claimant would ever invest in ILGS alone, and there is absolutely no evidence that since the discount rate in England and Wales was reduced to minus 0.75% in March 2017 any claimant has invested their lump sum award solely in ILGS. The current discount rate is based on a purely theoretical approach and over-compensates claimants.

The rate of return on ILGS has been significantly affected by a number of factors that have little to do with the way in which claimants invest their damages. These include: quantitative easing by the Bank of England; excess of demand over supply; the regulatory requirements on pension funds; and influx of foreign capital during the financial crisis. All these factors mean that the current rate of return from ILGS is no longer an appropriate indicator to reflect the return on investment which a properly advised claimant could expect to achieve.

DAC Beachcroft supports a statutory basis for the discount rate. The Government rather than the

courts are best placed to consider the appropriate evidence and make a decision that balances the interests of all parties. Claimants must be fully compensated but that should be balanced against a public policy decision to take account of defendants as a group, to the extent that defendants should not be required to over-compensate claimants. Such a requirement has wider consequences for the cost of public provision and for the premium paying public.

It is for these reasons DAC Beachcroft also supports the 0% floor for the discount rate and the policy reasoning for the decision that it would not be appropriate for damages to be to be "recession proof" when all other areas of public provision and private services are not. No properly advised claimant would choose to invest in assets that guarantee a negative return, and it is nonsensical to set a discount rate reflecting that.

3. What problems (potential and actual) are there for doctors in obtaining medical indemnity insurance in Jersey (and Guernsey)?
a). What is the wider context that any such problems are set against?
b). What would be the impact on members of the public accessing healthcare in Jersey and Guernsey if concerns around doctors' indemnity insurance are not resolved?
c). Will the draft Damages Law resolve the problems identified, either partly or fully?

It is DAC Beachcroft's understanding that the current approach of the courts in Jersey has led to claims at levels which would exceed the likely limit of indemnity of any cover held or available in this market. Such circumstances would have an inevitable impact on the availability of affordable cover and on the risk to the Minister as the defendant of last resort.

By basing the discount rate on a real world approach to investment, the draft Law aims to provide full compensation (but not over-compensation) to claimants whilst considering the importance of protecting the public from for the cost of over-compensation.

4. What impact will the draft Damages Law have on recipients of damages awards in Jersey in the future?

The rates set out in the draft Law have been assessed taking account of real world returns on investment, rather than theoretical returns. A dual approach should ensure that those claimants with a shorter investment period, who cannot rely as easily on returns from investment in equities, are not under compensated. A higher long term rate is appropriate.

DAC Beachcroft supports the principle of using a dual rate methodology, a concept already used in other jurisdictions and permitted within the draft legislation in England and Wales and in Scotland.

The draft Law does not detail the mechanism for future reviews of the rates. The short term rate is more likely to be susceptible to external factors and may therefore require more frequent review. The long-term rate should rarely change, since it should not be affected by short-term or even medium-term factors. Whilst the long-term rate should be considered as part of any review process, change would only be needed if there is evidence of a permanent shift in the returns expected over the longer-term.

The draft Damages Law also allows for the court to make Periodical Payment Orders (PPO) in specified circumstances. This allows the claimant a choice as to how to take their award of damages.

The rates proposed in the draft Law will reduce the sums of money received by the claimant, as

against current awards but it is highly likely that current awards significantly over-compensate claimants. Claimants will now have more choice as to the form of the award and level of risk that they are prepared to take because PPOs will be available. For those claimants that prefer a lump sum award, the sum recoverable will be discounted appropriately, reflecting a real world approach to accounting for inflation based on the length of the investment horizon.

5. What will be the impact of introducing a statutory discount rate for damages awards?
a) What discount rates have been set with regards to damages awards up until now?

Political accountability is needed and important when setting the rate. As such, the power to set the rate should rest with the appropriate Minister so that a policy decision is taken for which the decision maker is politically accountable rather than the judiciary attempting to consider evidence on the issue.

The discount rate is a decision of public policy. The claimant must receive full compensation, but not over-compensation and the interests of defendants (including state-funded bodies) must also be accounted for in that decision. If those interests are not accounted for, then there are implications for the cost of healthcare and insurance costs. The courts cannot be expected to take such policy matters into consideration.

The Damages Law will bring Jersey into line with mainland UK where the setting of the discount rate is already statutory. This will remove the incentive for UK claimant firms to support the arguments on the discount rate currently being run in Jersey, which we suspect are being used to influence current thinking as to the appropriate discount rate in England and Wales and Scotland.

6. What will be the impact of putting into statute the power of the court to make periodic payment orders for damages awards?

Allowing courts to make PPOs will bring Jersey into line with England & Wales and Scotland. PPOs allow risk-averse claimants a lower risk option as to how their damages are awarded. DAC Beachcroft supports the ABI's comments on the draft Law on variable PPOs. We highlight two specific issues below.

<u>Variable PPOs</u>

The draft Law is too wide, and lacks the necessary elements of control. We do not repeat the reasoning which is already set out in detail in the ABI's response, but do reiterate the requirement for three specific controls:

1. the requirement that the variation be limited to the chance of specific circumstances, defined in advance at the time of settlement, occurring;

2. the restriction of such circumstances to the chance of a serious medical condition: any other anticipated future changes (such as the likelihood of care needs increasing when the claimant gets older) can usually be dealt with in the initial award itself;

3. the assessment of the initial award having to ignore that chance in valuing the claim.

DAC Beachcroft considers that the wording of Article 4(8) to 4(10) of the draft Law lacks the necessary clarity to control the use of variable orders and introduces an unwelcome element of uncertainty by reference to just "a material change of circumstances since the order was made". The detail of what is

intended should be set out in the draft Law, rather than being left to Rules of Court made by the Superior Number of the Royal Court.

The parameters within which variable orders operate could technically be contained in Rules of Court, but they derive from policy considerations which would be matters for the States to consider. We commend the section in the ABI's response that sets out the comparison with how this was dealt with in England and Wales and is currently being addressed in Scotland.

DAC Beachcroft would be very happy to provide further input on the practical issues around the drafting of the variable PPO section should any further input be required.

Security of payment

The Damages Law requires that a court will not make an order for PPOs unless satisfied that the continuity of payment is reasonably secure. It is not anticipated that the requirement for continuity of payment to be reasonably secure will have any significant effect on the number of PPOs.

The majority of claims against insurers are protected by the Financial Services Compensation Scheme which is the statutory fund of last resort. The Law allows that the Minister for Treasury and Resources can prescribe by Order as secure a public body, which is defined as 'such body being one which appears to the Minister to exercise functions of a public nature'.

Accordingly, in addition to insurers whose policies are protected by the FSCS, PPOs can be offered by public sector bodies backed by the government. This includes bodies with a statutory requirement to provide a service to comply with government obligations, such as the Motor Insurers' Bureau (MIB), which compensates the victims of uninsured drivers. The MIB has already satisfied the courts in England & Wales that the payments it makes are reasonably secure, because it is funded by the insurance industry and also because the government is currently required by EU Directives to establish a compensation scheme for such victims.

These compensators will together in practice handle virtually all personal injury claims in which a PPO might be appropriate. The provisions governing when payment is assumed to be reasonably secure are the same as those already enacted for the rest of the UK. These could be enhanced by (in line with the case law in England and Wales) including reference to payments made by the MIB, e.g. by amending Article 4(4) to add-

> "(d) the source of payment would be the Motor Insurer's Bureau being the Company of that name incorporated on 14 June 1946 under the Companies Act 1929."

DAC Beachcroft LLP
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