**Ministry of Justice**

**Setting of the Personal Injury Discount Rate**

**A call for evidence**

**April 2024**

## INTRODUCTION

The setting of the personal injury discount rate is an emotive one. Insurers are already arguing that car insurance premiums will be affected by any change to the Personal Injury Discount Rate (PIDR). Of course, their shareholders and bottom-line will be affected by the setting of the rate, but pause and think about the effect that it will have on the injured individual whose life has been devastated by negligence. Every pound received in compensation is crucial to that individual's quality of life and wellbeing.

PI awards are compensation, they are not a windfall. As a general aim when making an award of damages the court is to put the injured party in the same position as they would have been in if the negligence had not occurred. Damages therefore aim to restore the individual to their pre-negligence position. If at any time their compensation in the future does not cover their full losses due to investment risk, then we have all failed in our ability to give that person the legal compensation they should be afforded under this basic principle of law.

That said we note that there is a risk of overcompensation, the Court of Appeal in England and Wales in *Swift v Carpenter*[1] said "The principles of law by which this Court are bound can be summarised in two propositions: firstly, that a claimant injured by the fault of another is entitled to fair and reasonable, but not excessive compensation. Secondly, as a corollary of that fundamental principle, in relation to the head of claim with which we are concerned, the award of damages should seek so far as possible to avoid a 'windfall' to a claimant, or more realistically to his or her estate … if it were to prove impossible here to award a claimant full compensation without a degree of overcompensation, then it seems to me likely that the principle of fair and reasonable compensation for injury would be thought to take precedence."

When pursuing a claim, a claimant is only arguing for what they are entitled to in law, and with that in mind we must stress the importance of ensuring there is minimal investment risk for claimants. It

[1] *Swift v Carpenter*[1] [2020] EWCA Civ 1295 at paragraph 205

should not be forgotten that the move to a risk-based discount rate in 2019[2] was a significant change to the way in which the discount rate was calculated. We have never believed that the assumptions adopted in the 2019 Government Actuary analysis were correct. Even with the Lord Chancellor's 0.5% adjustment to reduce the projected level of under compensation, one third of claimants were expected to be unable to 100% meet their financial losses. The financial instability and high inflation that have prevailed since then have greatly amplified that expected level of under compensation. It also illustrates why the law ought not to require individual claimants to take such investment risk; each of them only receives their own compensation sum, so unlike insurers and institutional defendants, each claimant cannot play the numbers game.

## CLAIMANT UNIVERSE

**Question 1: Please provide evidence relating to the numbers of claims split by value and length of awards (By length we mean the period damages were awarded for in the damages schedule and therefore the period of time a claimant will invest their award. Preferably split into periods of 10, 20, 30, 40, 50, 60, 70, 80+ years).**

APIL and The Forum of Complex Injury Solicitors (FOCIS) worked jointly on a data collection for this call for evidence. The work was undertaken in this way to ensure minimum overlap. The results of the exercise are included in FOCIS response.

**Question 2: In relation to the evidence you have provided for Question 1 above, please provide details on the split between: a) The various heads of loss i.e., the value of different components in claimants' damages schedule such as care management and care costs (and how these change over time); b) The shape of these heads of loss before allowing for inflationary increases i.e., flat, increasing or decreasing; and c) The term over which these heads of loss are awarded i.e., for life or a fixed period.**

See question 1 regarding the data collected. See question 6 on inflation.

**Question 3: Based on the evidence supplied in 2018/2019, the Government Actuary's advice to the Lord Chancellor assumed the representative claimant invested over a period of 43 years. Does 43 years remain a suitable assumption (please explain the rationale and evidence for your response)?**

The 43-year term was based on the responses to the 2018/19 review in which it was suggested that the average duration for personal injury cases was between 40 and 45 years. The

[2] Statement placed by the Rt Hon David Gauke MP, Lord Chancellor, in the libraries of the Houses of Parliament on 15 July 2019

Government Actuary therefore assumed that a representative claimant would invest over a period of 43 years.

Looking at the ONS 2016-2018 data, life expectancy for someone born in that period was to age 79.2 for males and 82.9 for females. On a simple basis this gives an average life expectancy from birth of 81.03. Working backwards from the MoJ/GAD current assumption on an investment period of 43 years this would make the average age of a claimant at settlement to be approximately 38.03. These numbers are prior to making the common adjustments that arise in serious injury claims for impairment of life expectancy consequent to the injury sustained. Plus, in the context of clinical negligence claims it is common for the claimant to have underlying health conditions that impairs their life expectancy to lower than the ONS average.

Consequently, in determining if the period of 43 years is a suitable investment period for a representative claimant we need to consider if there have been any significant changes to the average age of a claimant at settlement, or to the average life expectancy of an appropriate cohort of claimants with significant future loss claims who by definition will have a serious injury.

Based on the most recent data from the ONS, life expectancy at birth in the UK in 2020-2022 was 78.6 years for males (down 38 weeks from 2017-2019) and 82.6 years for females (down 23 weeks from 2017-19).

Similarly, life expectancy at age 65 in the UK in 2020-2022 was 18.3 further years for males (down 22 weeks from 2017-2019) and 20.8 further years for females (down 15 weeks from 2017-19). The decline means that life expectancy for those aged 65 in 2020-2022 has dropped back to the level of those at age 65 in 2011-2013.

It is also worth noting that COVID-19 led to increased mortality in 2020 and 2021, which is reflected in the above data.

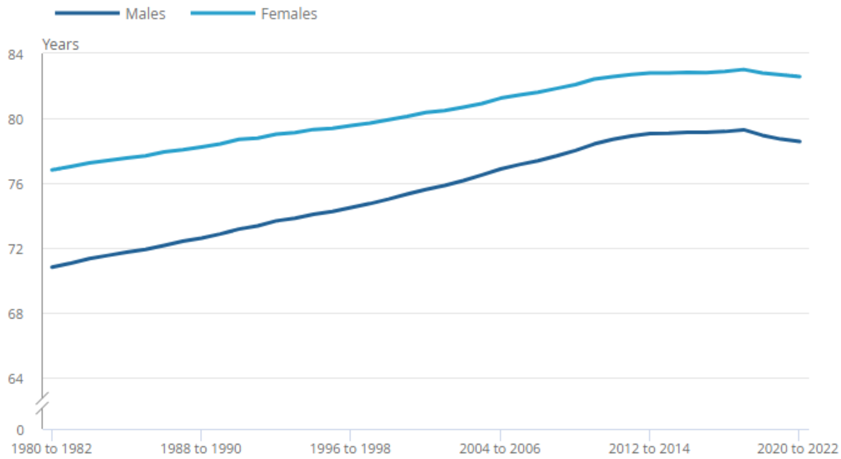
Based on the above, average life expectancies are as follows:

**Figure 1 – Male and female life expectancies 2020-2022**

| | **Male** | **Female** |
|---|---|---|
| For those born in 2020-2022 | 78.6 | 82.6 |
| For those at age 65 in 2020-2022 | 83.3 | 85.8 |

The below chart shows life expectancy at birth for males and females and illustrates how the 2020-2022 data has fallen to approximately the level of 2010-2012:

**Figure 2 – Life expectancy trend 1980 to 2022**




*Source: https://www.ons.gov.uk*

Furthermore, since the setting of the previous discount rate, the Ogden 8th Edition has been released. The multipliers within the Ogden 8th Edition are based on 2018 mortality rates (published at the end of 2019). As noted in the Ogden 8th Edition the overall predicted life expectancy has reduced by 1-2%, however this increases to a reduction of approximately 8-9% for older claimants.

APIL and The Forum of Complex Injury Solicitors (FOCIS) worked jointly on the data collect for this call for evidence. The results of the exercise are included in FOCIS response and that data includes reference to a lower assumed average life expectancy for seriously (and fatally) injured claimants, which APIL supports.

**Question 4: Are there any cohorts of 'alternative representative claimants' that you believe have characteristics which are materially different from the representative claimant defined above, and who should therefore be considered separately when modelling claimant outcomes? Please define the characteristics of these cohort(s).**

We do not believe that there should be separate modelling, every claimant is different but we can't see how the myriad of differences between them would result in a reliable modelling exercise.

**Question 5: Where available please provide evidence or data on actual mortality experience relative to claimant life expectancy when awards are granted.**

It is worth noting that Part 2, S.4(2)(b) and (c) of the Civil Liability Act 2018 (CLA) limits the Lord Chancellor to setting the rate applicable to the loses within the period for which they are awarded. It is also important to understand that no damages will ever be awarded for losses beyond the claimant's life expectancy. There is however, always the risk that a claimant will outlive that projected life expectancy. The estimates that underpin the Ogden tables result from a cohort of mortality estimates taking into account the possibilities of claimants living for different periods. There is always a risk therefore that compensation will have to last longer than accounted for. This longevity risk affects how a claimant will invest their money. This is a risk that should be factored into the composition of the portfolio, as the claimant will need active investment advice to manage that risk. See comments below on active versus passive management question 16.

## INFLATION

### Question 6: Please provide evidence of the rates of inflation which apply to claimants' damages overall and split by different heads of loss (including any projections of damages inflation produced for other purposes – such as reserving at an insurance company).

APIL and FOCIS worked jointly on the data collect for this call for evidence. The results of the exercise are included in FOCIS response.

Inflation as a matter of law must be ignored when calculating future losses (see eg. Cooke v. United Bristol Health Care [2003] EWCA Civ 1370 which related to significantly higher health care costs inflation than RPI). Inflation can only be accounted for in the PIDR so unless a PPO is sought/offered it is will be very common for an award for some heads of loss to be badly eroded by inflation.

Most of a claimant's long-term needs will be for specialist goods and services. We consider CPI+1% to be the minimum appropriate inflationary measure for the discount rate. Disability aids and equipment do predominantly relate to purchasing goods, but many of them are low production specialist equipment which is not included in the CPI basket and are not subject to a fully competitive market for goods. Many of them are imported and are so specialist that they fall outside of the scope of the limited number of post-Brexit trade deals. Producers will often need to recoup significant research and product development costs across a relatively small number of customers. A prime example of this is to consider the comparative cost of the prosthetic that the same prosthetist would recommend today when contrasted to that recommended 20 years ago to a claimant with the same level/type of amputation. That cost has almost tripled, so significantly more than CPI inflation.

Future loss of earnings is a loss that obviously rises in line with earnings inflation. We would be surprised if any reputable expert economist would argue otherwise and in the common law jurisdiction cases in which this point has featured the defendant's experts have not even seriously attempted such an argument[3]. It would also be contrary to the full compensation principles to expect claimants to take more investment risk with their future loss of earnings[4]. That would not be

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[3] *Colonial Insurance Company Limited v Thomson* (conjoined with *Harvey v Warren*) Court of Appeal for Bermuda in CIVIL APPEAL No. 13 of 2015

[4] The Civil Liability Act (2018) confirmed that when setting the personal injury discount rate the Lord Chancellor must have regard to the actual investments made by investors of relevant damages'

Section (3) In making the rate determination as required by sub-paragraph (2), the Lord Chancellor must make the following assumptions—

(d) the assumption that the relevant damages are invested using an approach that involves—
(i) more risk than a very low level of risk, but
(ii) less risk than would ordinarily be accepted by a prudent and properly advised individual investor who has different financial aims.

putting them back into anything like the position they would have been in had they never suffered the negligence inflicted by the defendant.

Future medical treatment and therapies is another major head of loss for seriously injured claimants, the majority of which is earnings related and where historically inflation is on average materially higher than CPI.

Housing costs are another major head of claim, but we contend should be excluded from the future loss total before considering the inflationary weighting of the heads of loss that remain. Since the Court of Appeal's decision in Swift v Carpenter the cost of buying alternative accommodation is no longer dependant on PIDR, as the reversionary interest is calculated using the life expectancy not a PIDR derived multiplier. In addition, the accommodation award funds are rapidly spent on purchasing and adapting a property to meet the claimant's needs. In fact, due to the reversionary interest deduction, they often have to effectively be supplemented for other components of compensation (e.g. the general damages awards). Hence there is usually no balance left to invest.

Claimants who lack mental capacity will often have a significant head of loss for the cost of a professional deputy. Once again that is an earnings-related cost as it predominantly relates to the cost of time spent by that professional (usually a solicitor).

**Question 7: Please provide evidence of whether these rates of inflation are linked to defined inflationary measures such as RPI, CPI, CPIH, AWE, ASHE 6115 (or other); and what the reasons for such linkages are.**

See question 6 above. In addition, the indices used in PPOs have followed expert advice and been very carefully scrutinised by the legal teams for both parties, then by the court. Those indices are typically as follows:-

Care and Case Management – ASHE 6115;

Loss of Earnings – AWE or the most closely aligned ASHE category to the claimant's profession/grade;

Deputyship – these tend to be linked to ASHE or RPI;

Medical Treatment and therapies – HCHS now replaced by RPI.

**Question 8: Is the 2019 position that the representative claimant's damages are inflated at a rate of CPI+1% (as shown in paragraph 28 above) on average still a suitable assumption and if not, how would you change it (please provide evidence/reasoning for your response)?**

We consider CPI+1% to be the minimum appropriate inflationary measure for the discount rate given that most of a claimant's needs will be for specialist good and services.  If anything, as referred to in the data analysis by FOCIS, the average weighting of future losses points to those related to earning inflation materially exceeding 50% of future losses. Once accommodation claims are excluded that data suggests an even greater proportion of the remaining future losses are related to earnings inflation.  In the medium to long term most economists would expect earnings inflation to outpace prices inflation by 1.5-2%.  Consequently, we contend that CPI +1.25% would be a better match to the likely inflation that most seriously injured claimants will experience in meeting their injury related needs in the future. See question 6 above for further details.

## INVESTMENTS

### Question 9: What asset classes should be included in a "low risk" portfolio, and are there any asset classes that are not generally available and/or suitable for personal injury claimants (please provide reasoning and/or evidence in support of your views)?

Paragraph 4 at Part 2 of the CLA 2018 states the following in respect of the assumptions that Lord Chancellor must make for the purposes of determining the PIDR (our emphasis added):

*4 (1) The Lord Chancellor must comply with this paragraph when determining under paragraph 2 or 3 whether the rate of return should be changed or kept unchanged ("the rate determination").*

*…*

*(3) In making the rate determination as required by sub-paragraph (2), the Lord Chancellor must make the following assumptions—*

*(a) the assumption that the relevant damages are payable in a lump sum (rather than under an order for periodical payments);*

*(b) the assumption that the recipient of the relevant damages is properly advised on the investment of the relevant damages;*

*(c) <u>the assumption that the recipient of the relevant damages invests the relevant damages in a diversified portfolio of investments</u>;*

*<u>(d) the assumption that the relevant damages are invested using an approach that involves—</u>*

*<u>(i) more risk than a very low level of risk, but</u>*

*<u>(ii) less risk than would ordinarily be accepted by a prudent and properly advised individual investor who has different financial aims.</u>*

*…*

*<u>(5) In making the rate determination as required by sub-paragraph (2), the Lord Chancellor must—</u>*

*<u>(a) have regard to the actual returns that are available to investors;</u>*

*(b) have regard to the actual investments made by investors of relevant damages; and*

*(c) make such allowances for taxation, inflation and investment management costs as the Lord Chancellor thinks appropriate.*

On the basis of the assumptions that the Lord Chancellor must make in determining the PIDR, it is our view that exposure to the following asset classes (in varying proportions, is ultimately dependent upon individual claimant circumstances) should exist within a "low risk" portfolio:

- Cash – e.g. deposit accounts and money market funds
- Bonds – e.g. government and corporate bonds (UK and overseas)
- Equities – e.g. shares listed in the UK and overseas
- Alternative assets – e.g. property, infrastructure, private equity, derivatives

These are broad descriptors of asset classes and within each there will be many sub-classes, some of which might reasonably be included within a claimant's portfolio, and some not. However, the inclusion of each of these asset classes in broad terms ought to ensure a suitable degree of diversification.

In setting the current discount rate of -0.25%, the Lord Chancellor relied on advice from the Government Actuary Department (GAD), which assumed that personal injury investors would invest the whole of their award of damages in line with GAD's 'Central Model Portfolio', allocated as follows:

**Figure 3 – GAD Central Model Portfolio asset allocation**

| | | |
|---|---|---|
| Matching Assets | Cash | 10.00% |
| | Gilts | 30.00% |
| | Corporate Bonds | 17.50% |
| | | **57.50%** |
| Growth Assets | Equities | 32.50% |
| | Alternatives | 10.00% |
| | | **42.50%** |

Whilst it is our view that the range of assets included within the GAD model portfolio is apt, we do not agree that the proportions invested into each are either a) appropriate, or b) representative of how claimants actually invest their award of damages. Nor are they consistent with the requirement of s4(2)(d)(ii) as the IFAs and professional deputies with whom we have spoken consistently tell us that they are not "less risk than would ordinarily be accepted by a prudent and properly advised individual investor who has different financial aims". This point was recently accepted by HHJ Hilder when giving judgment in *IMTC v PW and PGO [2024] EWCOP* at paragraph 76 when she said "I also accept that management of damages awards is a specialist expertise, significantly different to the management of earned or inherited wealth, with a relatively small pool of firms offering such expertise and experience." In doing so she appears to be accepting the evidence of the three professional deputy witnesses (recognised by her as frequent users of the Court of Protection) who gave evidence including at paragraph 70b:-

“as put by Hugh Jones [219]: “*managing the investment of a personal injury damages award for a protected party is an entirely different prospect from managing an investment portfolio for a private client with capacity who may have acquired their wealth through employment, business interests, and inheritance or other means. For protected parties with personal injury damages awards, these funds are, in most cases, the only funds that the client will ever have. These clients will not have the opportunities to earn income from employment or business interests and these funds need to provide for their often complex needs for the rest of their lives. It therefore requires a specialist approach to investment*.”

The above points are is explored further in our response to question 11.

**Question 10: Please provide any evidence you may have on how low-risk claimants who receive lump sum damages awards are both advised to invest and actually invest over the length of their award (including changes over this time). Information should be provided on: a) The split between growth and matching assets, as well as specific asset classes;**

**b) The prevalence of active, passive or semi-passive investment approaches and their resulting impact;**

**c) Consideration of liquidity risk and/or the prevalence of matching cashflow approaches with the aim of meeting the claimant’s income needs as they fall due e.g., through purchase of ‘matching bonds’ or annuities to provide a more known income stream; and**

**d) The prevalence of risk management strategies as a claimant’s investment horizon changes.**

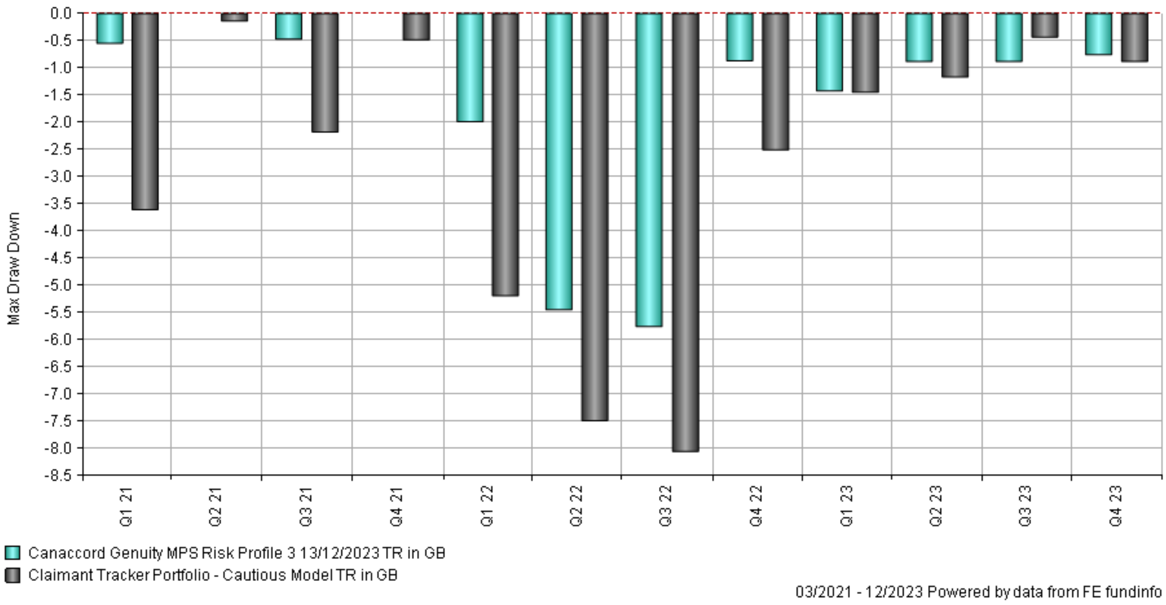
In practice, a claimant would not invest the entirety of their award on day one. Instead, they would hold a suitable sum in cash solutions to cater for their needs, this often represents a large proportion of the value of the award received. Additionally, they must also set aside cash funds to meet income needs during their lifetime so as to mitigate the risk of having to withdraw from the investments at a time when values have fallen.

Of the portfolios GAD modelled, APIL would consider, the GAD Cautious Model to be more aligned to the way in which claimants invest. However additional consideration needs to be taken of the weighting between the matching assets (cash, GILTs and bonds). We believe that the cash component would typically be significantly in excess of the 10% assumed in the Cautious (and Central) model and instead would usually be closer to 30% of the award with the accompanying weighting of GILTs and bands at more like 40%. It is important to note that for the purposes of modelling some of this cash will not be managed assets, but will be cash kept outside of the portfolio.

APIL's working group included financial planning expert Paul Rosson from Adroit Financial Services. As regards the use of passive investment strategies, Adroit advise they do not recommend such an approach for their clients who are investing personal injury damages. Whilst portfolios may contain some degree of passive investment, for example via the use of tracker funds or exchange traded funds (ETFs), these would generally only be used in limited circumstances. Their view is that, an active investment approach, usually achieved via the instruction of a discretionary fund manager, is the most appropriate way for a claimant to invest their award of damages. This is not necessarily to achieve consistent outperformance as compared against any particular benchmark or strategy; rather it is to provide the claimant with an appropriate and adequate level of downside protection when markets are performing poorly. This has been vividly illustrated by the poor performance (relative to inflation) of the markets since the PIDR was last set in 2019.

This is illustrated by the chart below. The chart shows the maximum level of drawdown (reduction in portfolio value) each quarter, over the last four years, for a fully passive portfolio[5] versus an actively managed portfolio[6], where the asset allocation of each is broadly in line with the GAD Cautious Model Portfolio:

**Figure 4 – Maximum drawdown of active vs. passive portfolio**




As can be seen, the passive investment strategy has consistently fallen in value more than the active strategy over this period. The ability of the investment manager in this instance to shelter the portfolio from downside risk is clearly evident and reinforces our view that such a strategy is appropriate for claimants. It should not be forgotten that seriously injured claimants, unlike many other types of investors, do not tend to have any other ways (e.g. wages) to supplement their

[5] Comprising 12.5% Vanguard Money Market, 35% iShares UK Gilts All-Stocks, 22.5% iShares Corporate Bond, 22.5% iShares World Equity Index and 7.5% Aviva Target Return.

[6] Represented by Canaccord Genuity MPS Risk Profile 3.

portfolios. Plus, they need the funds not just to maintain their standard of living but also to meet core disability related needs.

Ongoing active management of a claimant's portfolio also allows for a suitable decumulation strategy to be planned and implemented, particularly as the claimant reaches the latter stages of the investment duration.

For example, the inclusion of assets such as Structured Products or direct holdings in government/corporate bonds held to redemption, which can deliver a known rate of return over a given period, can be useful in matching a claimant's portfolio cashflows to their income needs. These types of investments require careful and thought-out advice and cannot be delivered by a passive investment strategy.

Again, this emphasises the need for claimants to be 'properly advised' (as stipulated in CLA 2018) and invest in an actively managed strategy, which will carry commensurate cost throughout the claimant's lifetime.

**Question 11: Do you believe the <u>investment strategy that was assumed</u> to be adopted by the representative claimant in the 2019 Government Actuary's analysis (as described in paragraphs 33 to 36 and Table 1 above), remains appropriate? If not, how would you change it for a current view of the representative claimant or alternative representative claimants?**

The move to a risk-based discount rate in 2019[7] was a significant change to the way in which the discount rate was calculated. We have never believed that investment strategy nor the assumptions adopted in the 2019 GAD analysis were correct. Even with the Lord Chancellor's 0.5% adjustment to reduce the projected level of under compensation, one third of claimants were expected to be unable to 100% meet their financial losses. The financial instability and high inflation that have prevailed since then have in reality greatly amplified that expected level of under compensation.

The current PIDR assumes that the entirety of the monies are invested on day one in line with the central model portfolio, which adheres to the risk assumption as stipulated in the Civil Liability Act 2018, i.e.: the assumption that the relevant damages are invested using an approach that involves—

> (i)more risk than a very low level of risk, but
> (ii)less risk than would ordinarily be accepted by a prudent and properly advised individual investor who has different financial aims.

In our response to the Government's consultation on exploring the option of a dual/ multiple rate we explained in detail why we did not believe that the assumed investment strategy was representative of how claimants invested. As also evidenced in our response to question 10, it is

[7] Statement placed by the Rt Hon David Gauke MP, Lord Chancellor, in the libraries of the Houses of Parliament on 15 July 2019

our view that the GAD Central Model Portfolio is not an appropriate investment strategy for the representative claimant based on the analysis conducted by Adroit Financial Planning.

In practice, a claimant would not invest the entirety of their award on day one. Instead, they would hold a suitable sum in cash solutions to cater for their short term needs and this often represents a large proportion of the value of the award received. Additionally, for reasons already set out, they must also set aside funds to meet income needs, so as to mitigate the risk of having to withdraw from the investments at a time when values have fallen or in ways that precipitate an unplanned tax liability.

In addition to the assumptions around how much cash is held by a claimant there is also the assumption regarding the level of advice received and how a claimant invests. A claimant will be inexperienced in financial matters and has, in many cases, built up debts throughout the life of the claim. The financial advisor will put in place a strategy to ensure that the individual's award lasts for the rest of their lives. A financial plan is therefore more than just a question of where to invest the award. The planning will need to include:

- advice to repay any outstanding debts;
- examination of short term capital requirements, such as a property purchase and/or adaptation and any equipment and vehicles which may be required;
- detailed budgeting to calculate the ongoing budget for items such as care, case management and other ongoing expenditure;
- risk assessment to establish the recipient's 'investment risk tolerance';
- cash flow forecast to establish the level of return required to ensure that the award (taking account of regular required withdrawals) can last for the remainder of the claimant's actual lifetime (which may well be longer than their life expectancy). Generally the claimant would be advised to hold the first five years' capital and income requirements on cash deposit: investing these sums in a diversified portfolio would be a highly risky strategy;
- build a diversified portfolio of investments designed to meet the individual's income and capital needs throughout their lifetime;
- annual review of the cash flow model and risk appetite: the investment portfolio to be amended / adjusted as and when required to ensure that the award remains on track to last the remainder of the claimant's life expectancy. Adjustments may be required when either there is either an under or overspend or if the portfolio has under or over performed.

GAD's reasoning for using a low level for expenses was that using higher rate would not accurately reflect the return assumptions which are based on a static asset allocation and investment into passive funds. Again, this is not a reflection of how investment portfolios for claimants are established.

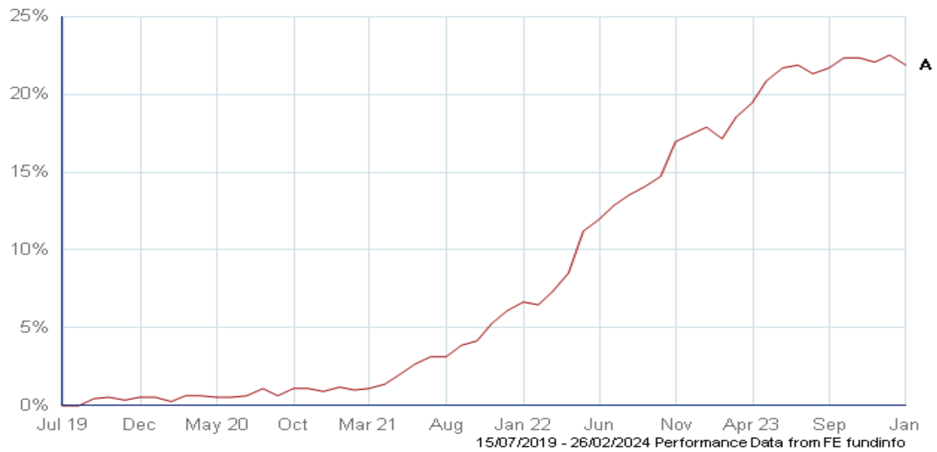
Even if the client had a portfolio which was constructed using passive investment funds, the claimant would require an investment professional (whether it be a financial adviser or a discretionary fund manager) to set the asset allocation and adjust the portfolio so it does not fall out of kilter with the risk mandate or asset allocation.  This would be required even if we were to consider a static asset allocation for the entire investment term as the allocation would naturally move based on market performance.

With that being said, it is unlikely that a claimant would hold a portfolio constructed using only passive funds.  Whilst passive funds can offer a cheap way to track an investment market, which can add value in times of market growth, there is little protection in a declining market, as the same funds would track the negative performance too.  Whilst it would not be a claimant's intention to achieve a high rate of growth, any individual making an investment would want to achieve a positive return.  The best way in which to do so is to restrict losses in times of market decline and take advantage of opportunities in times of market growth.  In our view the only low-risk way for a seriously injured claimant , to go about this, and meet fluctuating needs over several decades, is to invest in an actively managed portfolio.

### Question 12: To what extent has the way claimants are advised to, and actually, invest been affected by recent changes in economic conditions (e.g., high interest and inflation rates)?

As has been widely reported, general inflation (measured by CPI) has risen dramatically in the last two years, as demonstrated in the chart below:

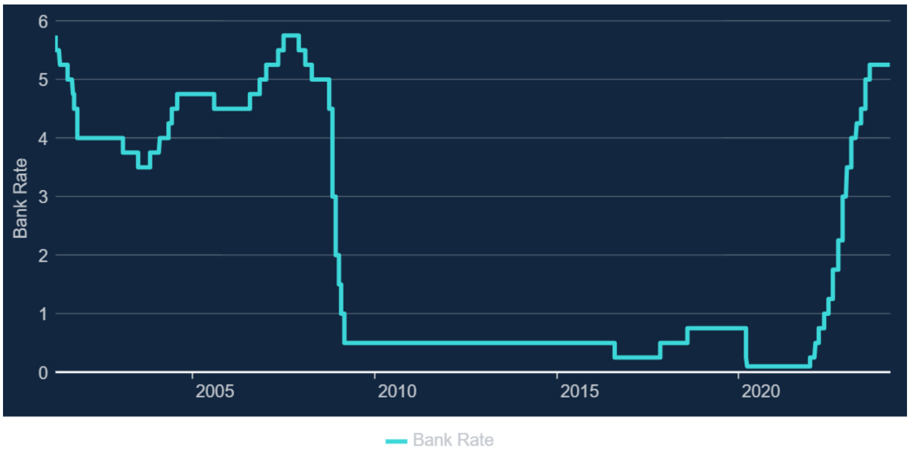
**Figure 5 – Cumulative CPI July 2019 to date**




There were three main reasons for the sharp rise; the first was the Covid pandemic. To start with, it led to a big shortage of products and services. That was followed by a sudden huge demand for them. This was followed by Russia's invasion of Ukraine which caused a second big shock to European and to some extent the global economies as it had a huge impact on energy and food prices.  Shortly after, there was a shortage in the number of people available for work in the UK. Thousands of people dropped out of the workforce following the pandemic and consequent to Brexit. That pushed up the cost of hiring people. Employing people is a large part of costs for many businesses, so some of them put up their prices to cover those costs.

To combat rising inflation, the Bank of England have steadily increased interest rates as shown in the chart below:

**Figure 6 – Bank of England base rate 2000 to date**




The current base rate is 5.25% which has led to inflation decreasing from a high of 11.1% down to 4%.  The Bank of England makes a decision regarding interest rates every 6 weeks by considering the state of the economy in terms of how quickly prices are rising (general inflation), how the UK economy is growing (generally measured by GDP) and how many people are in work.

In its most recent decision on 31st January 2024, it decided to keep the rate at 5.25%.  This was on the basis that GDP remained subdued and it saw potential risks from disruption to shipping through the red sea from the middle east.

We are advised that recent economic conditions have changed market behaviours within all asset classes, particularly in cash and fixed interest assets.

The images below show the average interest rates in 2019 when the PIDR of -0.25% was first set, and the current rates available for easy access accounts:

**Figure 7 – Average savings rates December 2018 to December 2019**

| Average savings rates | Dec-18 | Jan-19 | Mar-19 | Jun-19 | Sep-19 | Dec-19 |
|---|---|---|---|---|---|---|
| Easy access | 0.64% | 0.64% | 0.64% | 0.62% | 0.64% | 0.61% |
| One-year fixed bond | 1.47% | 1.45% | 1.48% | 1.45% | 1.37% | 1.25% |
| Two-year fixed bond | 1.65% | 1.65% | 1.64% | 1.59% | 1.44% | 1.35% |
| Five-year fixed bond | 2.15% | 2.15% | 2.18% | 2.08% | 1.95% | 1.77% |

Averages based on £10,000 gross rate. Source: Moneyfacts.co.uk

**Figure 8 – Sample savings rates as at February 2024**

| Provider | Account name | Interest rate (AER) | Min/max deposit | Account access | |
|---|---|---|---|---|---|
| paragon Paragon Bank | Double Access Account Issue 6 | 5.16% | £1,000 / £500,000 | Online | |
| BEEHIVE MONEY Beehive Money | Limited Issue Easy Access Issue 4 | 5.12% | £1,000 / £85,000 | Mobile Banking / Online | |
| Sponsored wealthify Wealthify powered by ClearBank | Instant Access Savings Account * | 4.91% | £1 / £99,999,999 | Online / Mobile | More info * |
| Variable interest rate. Unrestricted, free withdrawals. Interest paid monthly. Please note there are no restrictions on the amount you can deposit. | | | | | |
| Close Brothers Close Brothers | Easy Access Account (Issue 2) | 5.12% | £10,000 / £2,000,000 | Online | |

The chart below shows how the major asset classes (as used in the GAD central model) have performed in the wake of the shocks that global economies have experienced in the last five years. The asset classes are represented by unit trust sector averages, and returns are therefore net of fund management charges, but gross of financial advice costs and platform charges:

**Figure 9 – Asset performance over last five years**


As can be seen, the lower risk or 'matching assets' such as UK Gilt funds and other fixed interest funds have suffered sharp declines, particularly over the period that inflation started to increase, leading to a negative cumulative return over the last five years especially when contrasted to CPI +1%. With cautious portfolios such as the GAD Central Model, returns would have been hampered by the heavier weighting towards the 'matching' assets.

**Question 13: Please provide evidence which demonstrates how the following circumstances and/or characteristics affect claimant investment behaviours in practice:**

**a) Size or length of award (including the effect of any interactions between these two variables); b) Availability of other income, including PPOs; c) Existence and requirements of financial dependants (e.g., spouse, civil partner, children); and d) Other factors or characteristics you deem relevant.**

**Size or length of award**

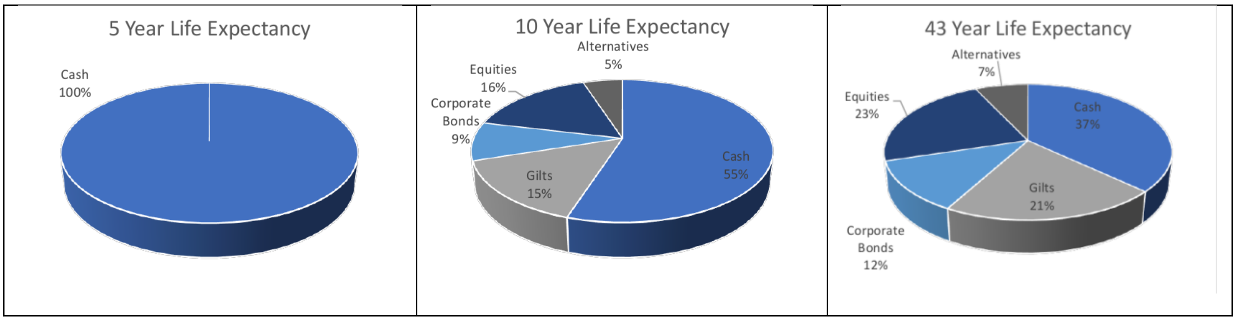
The larger the award the more flexibility the claimant would have in terms of how they manage their financial affairs. Others may have injuries which will mean their health deteriorates over time in which case they may have to save in the earlier years in anticipation of higher care costs, aids and mobility equipment in the future, or because of the real risk they will outlive their life expectancy.

The investment behaviour is needs based rather than as a direct result of the size of the award. Financial advisers prepare cash flow models which can help to show the long-term picture based on a predicted long-term budget and a modest investment return. Those with larger awards generally don't require a large return and may only need their award to match inflation after tax and charges to maintain the buying power. These types of clients are generally risk averse and only wish to take just enough risk to achieve a return in line with inflation over the long term. As such they may opt to hold larger sums in cash and invest a smaller proportion.

However, some clients may require the returns from their portfolio to provide a positive real return to generate growth on the funds to ensure they can afford certain needs in the future. These clients may need to achieve a return above inflation which may require more risk to be taken, with all that entails. This may be reflective of claimants who have endured a liability compromise during litigation and therefore are awarded a percentage of the full agreed claim value.

Clients who have a limited life expectancy or a shorter time horizon for investment would generally have portfolios weighted towards cash, whereas those who have a longer life expectancy (generally 10+ years) would likely look to invest a part of their damages into a mixed asset investment portfolio. As the time horizon increases the appetite and need for investment increases too. The charts below show Adroit's recommendations for a financial plan for a claimant with life expectancies of 5 years, 10 years, and 43 years:

**Figure 10 – Appropriate asset allocations based on 5 year, 10 year and 43 year durations**




It should be noted that this is not necessarily the asset allocation of the invested element of their portfolio, but the overall allocation of their total award in year one. For example, in the 10-year life expectancy chart this could be based on 50% of the total award being invested, whilst the remaining 50% is held in cash deposits.

Volatility is diluted over longer periods of time as the investment value has a longer period to recover from losses. For those who have a limited time horizon Adroit advise they would generally choose lower risk asset classes to invest in to avoid large capital losses which could have a large detrimental impact on the standard of living and the ability to afford the disability related items or services they require.

**Availability of other income, including PPOs**

Paragraph 59 Part 2, paragraph 4(3)(a) of the CLA 2018 specifies that the Lord Chancellor must assume that damages are paid in the form of a lump sum (rather than under a periodical payment order (PPO)). So, it is important to recognise that these points must not be considered by Lord Chancellor, GAD or expert panel as part of the PIDR review.

The main reason a claimant would invest would be to maintain the purchasing power of the funds awarded to them over the required term, to generate the required cash flows for future expenses. This may be for specialised needs which may not have been required but for the injury caused by negligence. To put this into perspective, if we consider an individual who is now only able to work on a part time basis due to injury, they may require the capital awarded to provide for their total household expenditure as well as any specialised needs for the injuries sustained. Whilst they may still have earnings and potentially some state benefits income, the likelihood is that the capital awarded would need to fund other expenditure needs on top of their general living costs. In this scenario it is unlikely that the investment behaviour would change. The individual would still have a need to invest to generate future cash flows however they would not want to take any more risk than necessary to do so as it could affect their standard of living.

The same can be said if and when a PPO is available. Whilst a PPO can provide guaranteed, tax free and inflation proofed payments for the claimant’s lifetime, it is usually awarded for particular heads of damage, most commonly limited to care and case management. The claimant would not need to bear the investment risk in relation to that particular head of damage but would likely still need to invest the residual lump sum awarded for the other heads of damage to generate the cash flows required for those other needs. Once again, they would only opt to take the necessary risk.

See further our answer to question 29.

**Existence and requirements of financial dependants (e.g., spouse, civil partner, children)**

A claimant with financial dependants may have a lower capacity for loss when considering their risk profile, as they may fear how the standard of living of the dependant may also be affected by market volatility if they are reliant on capital awarded as damages to fund their expenditure needs. This may lead to them wanting to adopt a lower risk profile but again it would be needs based i.e. they would opt to take only the amount of risk required to provider for their cash flow needs.

It should not be forgotten that full compensation is intended to provide restitution of the claimants quality of life. In serious injury claims that will often involve compensating for loss of earnings which the claimant and their family would otherwise have enjoyed to maintain their quality of life and from which the claimant may well have expected to have saved to have enabled them to leave an inheritance to their family.

## Question 14: How have historical changes to the PIDR which impact the size of the award, affected how low-risk claimants have been advised to or actually invest their award (please provide evidence and/or reasoning in support of your answer)?

The main differences we have seen as a result of the changes to the discount rate are the risk profiles adopted by claimants.

As mentioned before claimants usually invest their money in order to maintain the purchasing power of their funds and generate the appropriate cash flows for future purchases. They would want to do this by taking as little risk as possible, although they accept that some investment risk has to be taken as it cannot be achieved through cash deposits over the long term.

The level of risk that they would opt to take is therefore determined by the required rate of return in order for the capital to provide for their cash flow needs.

The discount rate and size of award are inversely proportional i.e. as the discount rate increase, the quantum value for the same annual loss would reduce.

In the table below Adroit has set out the quantum value of a £50,000 annual expense for a 40-year-old male with unimpaired life expectancy under each discount rate, using Ogden Table 8th Edition, Table 1:

**Figure 11 – Quantum value of £50,000 annual expense at discount rate of 2.5%, -0.25% and -0.75%**

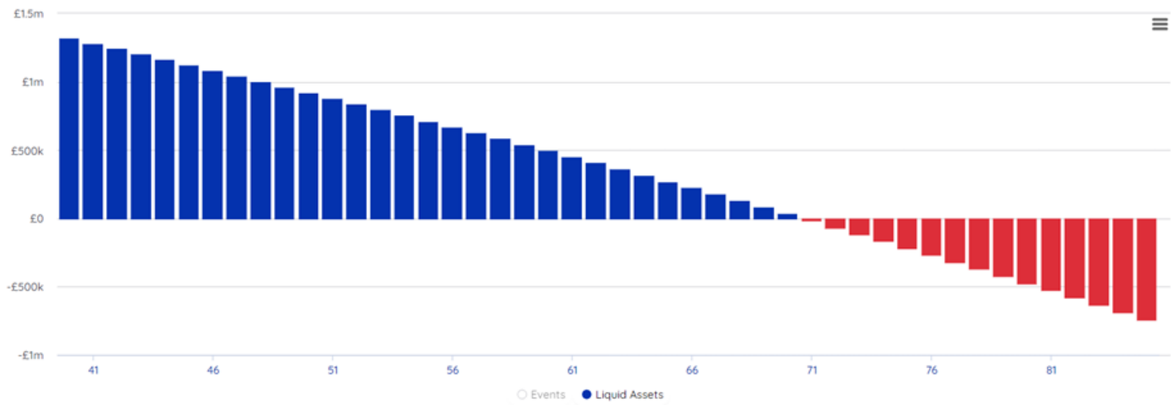
| | **2.50%** | **-0.25%** | **-0.75%** |
|---|---|---|---|
| **Life Multiplier (Male aged 40)** | 26.35 | 47.63 | 54.10 |
| **Annual Expense** | £50,000 | £50,000 | £50,000 |

| | | | |
|---|---|---|---|
| **Capital Value of Expense** | £1,317,500 | £2,381,500 | £2,705,000 |

There is a significant difference between the capital value of a £50,000 annual expense under the old 2.50% discount rate model compared to the current -0.25% model. A claimant who settled their claim under the 2.50% PIDR would therefore require a greater rate of growth in order to provide for the £50,000 annual expense for the required term (i.e. up to 45 years). This would result in the conundrum of either needing to take a higher level of risk for a greater chance of achieving the required rate of return, or simply accepting the funds will run out and hoping that adequate State support will exist when that happens.

To demonstrate this, the following basic cash flow model shows the longevity of the sum of £1,317,500 assuming £50,000 is drawn each year, increasing in line with inflation of 3% per annum, this is based on CPI+1%, and an underlying long-term assumption of CPI running at 2% per annum) , until the age of 85. Within the model it is assumed that investments generate a return of 4% net per annum:

**Figure 12 – Sustainability of £50,000 pa drawdown from capital sum of £1,317,500**




The model shows that the capital of £1,317,500 would be exhausted by the time the claimant reaches 71 years of age, some 14 years earlier than required. In order for the capital to last the full term the required real rate of return would be 6.25%.

It is important to emphasise that this is net of inflation, so assuming inflation averages 3% per annum, this would broadly equate to a nominal return of 9.25%.

The table below shows the results of similar modelling for capital awarded under other discount rates:

**Figure 13 – Required rates of return to meet expenses of £50,000 per annum for a 40 year old male with unimpaired life expectancy**

| | **2.50%** | **-0.25%** | **-0.75%** |
|---|---|---|---|
| **Life Multiplier (Male aged 40)** | 26.35 | 47.63 | 54.10 |

| | | | |
|---|---|---|---|
| **Annual Expense** | £50,000 | £50,000 | £50,000 |
| **Capital Value of Expense** | £1,317,500 | £2,381,500 | £2,705,000 |
| **Real Rate of Return to provide for cash flows to age 85** | 6.25% | 2.8% | 2.19% |

Since the setting of the current discount rate in 2019, CPI has averaged 4.63% per annum. This would make CPI+1%, 5.63%. Therefore, at negative 0.25% in the above example where the required real rate of return is 6.25%, the nominal rate of return becomes 11.88% - a return that is simply unachievable.

Conversely those who settled claims under the -0.75% discount rate would be able to invest their damages in a portfolio closer to that of the GAD Cautious model. This would likely have 30% in growth assets with 70% in matching assets. They would also need to hold larger cash sums to cover expenditure which would in turn help to dilute volatility of their investment portfolio, ultimately facing lower risk within their entire portfolio over the long term.

## Question 15: To what extent do environmental, social and governance (ESG) considerations shape claimants' investment advice and approaches (please provide evidence to support your view)?

ESG investing is increasingly popular as investors become more concerned with environmental factors. As a result Adroit advise they have seen investment managers take ESG considerations a lot more seriously and including them within their central investment proposition. As such there is often a natural ESG consideration even if a fund, portfolio or service is not marketed as being ethical or ESG investment.

Brooks Macdonald are one of the investment managers Adroit work with who have said they integrate ESG portfolios into their central investment proposition. Within their due diligence pack which they provide to advisers they state:

> *"To us, acting as a responsible investor means we act as responsible stewards of our clients' capital by integrating consideration of Environmental, Social and Governance (ESG) factors into our investment processes and active ownership practices. ESG integration is the explicit and systematic inclusion of ESG issues into investment analysis and decision making. We believe that an investments ability to identify and effectively manage ESG risks and opportunities increases the likelihood of it delivering strong long term, risk adjusted returns. With increasing policy, regulatory and societal focus the potential materiality of ESG considerations is becoming more evident. Our approach therefore aims to assess the exposure to, and management of ESG factors, complementing our wider analysis and enabling us to make more informed investment decisions. We believe that by incorporating an assessment of ESG risk into our investment process we have a more holistic understanding of investment risk which, taken alongside our view of the investment opportunity, is designed to improve client outcomes. Active ownership means we actively monitor for ESG risks throughout the life of a buylist investment,*

*exercise ownership rights (including voting on company resolutions) and engage with companies and fund managers on ESG matters that can have a material impact on our client's investments. We are continually looking to improve our approach and therefore incorporate any change as our investment research is periodically reviewed. Investment research that has not been updated since the latest changes to our approach may therefore reflect the framework used in an earlier iteration of our Responsible Investment Policy Statement"*

Some providers do offer specific ethical or ESG funds however in Adroit's experience they are a little more expensive in terms of the underlying charges figure compared to a typical investment fund, which is not marketed as an ethical fund.

Whilst Brooks Macdonald have integrated ESG considerations into their entire investment solution, they do have two specific ESG multi asset solutions; the BM RIS 'Advance' strategy and the BM RIS 'Avoid' strategy. Paul Rosson was able to reviewed the factsheet of the RIS Advance MPS aligned to a low to medium risk profile and compared it to the BM MPS low to medium risk strategy in terms of the costs.

The factsheets are attached and show that the RIS Advance strategy has an on-going charges figure of 0.61%, whereas the BM MPS low to medium risk strategy has an OCF of 0.46%.

Whilst investors may be conscious of ESG considerations when investing their funds, it doesn't always mean they have a preference to opt for any specific ESG funds. Instead, they are relatively happy to invest with investment managers who are able to demonstrate that it is a key consideration of their central investment proposition. As such there is not often a difference in the advice or the investment solutions offered, although those with a specific preference for an ESG marketed fund may be subject to higher investment charges. However, ESG considerations re-enforce the point that active management is required.

## INVESTOR EXPENSES

### Question 16: Please provide any evidence available on the type and level expenses faced by claimants, assuming a low-risk investment portfolio is adopted. Respondents may wish to follow the grouping at paragraph 39 above and should add any other investment related expenses they believe are relevant. Answers should, where possible, highlight any differences in expenses due to the: a) Size of claimant award; b) Adoption of a passive or active investment approach; and c) Claimant time horizon (and how this changes over time).

The costs and charges faced by investors are now more transparent than ever before, largely as a result of the Financial Conduct Authority's (FCA) Consumer Duty rules that came into force on 31st July 2023. These set the standard of care that financial advice firms should give to clients.

Consumer Duty includes four 'outcomes' which are a suite of rules and guidance setting expectations for conduct in four areas that represent key elements of the relationship between the financial advice firm and the client, one of which being in respect of price and value.

In setting the current discount rate, the Lord Chancellor received advice from the Government Actuary which assumed that expenses incurred by claimants amounted to 0.6% to 1.2% of their fund value per year, as detailed in Figure 14 below:

**Figure 14 – Investment costs assumed by Government Actuary in 2019**

| Expense | Ongoing Charge p.a. |
|---|---|
| Adviser fee | 0.25% to 0.50% |
| Fund manager fee | 0.25% to 0.50% |
| Platform fee | 0.10% to 0.20% |

These costs are not reflective of the reality claimants experience when investing their damages.

It is a requirement of the CLA 2018 that a claimant is assumed to be a 'properly advised' investor. In our experience, a properly advised investor, holding a suitable portfolio of appropriately and carefully managed investments, would expect to pay the following costs:

- Financial adviser fees – charged by Independent Financial Advisers for advice on financial planning.
- Discretionary management fees – fees charged in respect of active investment management.
- Underlying fund charges – costs in relation to the underlying investment funds and/or securities, including transactional charges.
- Other costs – Platform/investment wrapper charges (if applicable).

Additionally, where a financial adviser recommends and implements a bespoke portfolio with a discretionary fund manager, VAT is generally charged on the financial adviser fee and the discretionary manager fee. This is based on guidance provided by HMRC (HMRC VATFIN7600), which states:

> *The service provided by the IFA is a taxable introduction to a taxable management service. It is not correct for IFAs to look through to the selection and purchase of VAT exempt assets by the discretionary investment manager and treat their services as being exempt introductions to a series of VAT exempt transactions.*

Adroit advise us that in their history of advising personal injury clients, they have never advised a client to invest entirely in passive funds; they consider that such an approach is ill-equipped to provide adequate downside protection in volatile market conditions.

By its nature, a passive investment will track the market or index it is seeking to replicate, regardless of the prevailing economic or investment climate, whereas an active investment manager can take steps to mitigate losses in a falling market by taking any steps it deems appropriate and necessary. It is partly for these reasons why generally personal injury claimants are advised to invest via a discretionary fund manager who can actively manage the portfolio.

In the main, investment costs are charged as a percentage of the sum invested, which in turn means that they stay proportionate regardless of the amount invested, although in some instances very small or very large value portfolios may see disproportionately higher or lower charges, respectively.

By way of illustration, the tables below set out the costings in respect of portfolios managed by three different discretionary fund managers (DFMs), based on amounts of £250,000, £1,000,000 and £3,000,000, showing the overall annual cost of investment in each instance:

**Figure 15 – Sample of investment costs for £250,000 portfolio**

| Expense | DFM 1 | DFM 2 | DFM 3 | Average |
|---|---|---|---|---|
| Adviser fee (inc. VAT) | 0.60% | 0.60% | 0.60% | 0.60% |
| DFM fee (inc. VAT) | 0.60% | 0.84% | 0.60% | 0.68% |
| Underlying fund charges | 0.36% | 0.32% | 0.30% | 0.33% |
| Other costs | 0.07% | 0.00% | 0.02% | 0.03% |
| | **1.63%** | **1.76%** | **1.52%** | **1.64%** |

**Figure 16 – Sample of investment costs for £1,000,000 portfolio**

| Expense | DFM 1 | DFM 2 | DFM 3 | Average |
|---|---|---|---|---|
| Adviser fee (inc. VAT) | 0.60% | 0.60% | 0.60% | 0.60% |
| DFM fee (inc. VAT) | 0.60% | 0.84% | 0.60% | 0.68% |
| Underlying fund charges | 0.36% | 0.32% | 0.26% | 0.31% |
| Other costs | 0.02% | 0.00% | 0.02% | 0.01% |
| | **1.58%** | **1.76%** | **1.48%** | **1.60%** |

**Figure 17 – Sample of investment costs for £3,000,000 portfolio**

| Expense | DFM 1 | DFM 2 | DFM 3 | Average |
|---|---|---|---|---|
| Adviser fee (inc. VAT) | 0.60% | 0.60% | 0.60% | 0.60% |
| DFM fee (inc. VAT) | 0.60% | 0.64% | 0.55% | 0.60% |
| Underlying fund charges | 0.36% | 0.44% | 0.26% | 0.35% |
| Other costs | 0.01% | 0.00% | 0.01% | 0.01% |
| | **1.57%** | **1.68%** | **1.42%** | **1.56%** |

The average overall costs range between 1.56% and 1.64% per annum. It will be noted that the overall costs of investments tend to decrease in percentage terms, the greater the sum invested, largely on account of the economies of scale achieved and the greater dilution of fixed costs that are incurred within a portfolio.

Where a claimant's time horizon is shorter (e.g. less than 10 years), and this then limits the amount they can reasonably commit to being invested, the aggregate portfolio costs may be lower on account of a greater proportion of their award being held as cash. In such a scenario, the claimant may still benefit from financial advice, in respect of maximising cash returns for example, and would therefore still face some costs, but not to the extent of those set out above.

However, for the representative claimant with a time horizon of 43 years, Adroit consider the range of 1.56% to 1.64% per annum to be a more accurate reflection of the actual costs faced by claimants, than those assumed in the setting of the current discount rate.

There is little to suggest that these costs would significantly alter over time, whether increasing or decreasing, as the need for a suitably managed portfolio would persist throughout the claimant's lifetime. In a claimant's latter years, there may be a transition from growth assets into matching assets as the ability to be exposed to investment risk diminishes, but this would be unlikely to result in any material change in cost, as the cost of holding and managing matching assets is similar to that of growth assets.

See further our below response to question 17 and the data on investment management charges collected by FOCIS, Irwin Mitchell and Digby Brown.

### Question 17: Do the expense groupings, values and approach assumed in the 2019 analysis, as set out in Table 2 above, remain suitable for the representative claimant (or alternative representative claimants)? If not, what do you deem appropriate? Please provide evidence and/or rationale to support your answer.

The expense groupings assumed in the 2019 analysis are broadly reflective of the types of costs incurred by investors, though it is our view that the assumed values ascribed are not representative of the true costs incurred by a 'properly advised' claimant.

The Government Actuary stated in respect of expenses and tax, in his advice to the Lord Chancellor in 2019:

> *7.36 Based on the evidence provided and other relevant sources considered, I believe it reasonable to assume that claimants would incur expenses and tax charges of between 0.6% to 1.7% pa including all the adviser fees.*

However, a figure of 0.75% pa was eventually adopted, which is very much at the lower end of this range.

When arriving at the assumed figure of 0.75% pa, the Government Actuary explained:

> *7.37 I believe that a 0.75% pa allowance for expenses and tax is reasonable and is consistent with the modelling approach I have adopted. Note:*
>
> - *I have not sought to set assumptions for each individual component of the claimant's tax and expenses, rather consider the overall allowance in the round and in the*

*interests of avoiding spuriously* [sic] *accuracy, and as is consistent elsewhere in my report, quoted an assumption to the nearest 0.25% pa*

- *I believe it to be appropriate to set the allowance for expenses and tax towards the lower end of the range suggested by the evidence because:*
    - *this most closely reflects the level of expenses that I would expect for the investment returns that I have modelled – namely passive returns from a static asset allocation and with an unchanging investment objective*
    - *I do not believe that the full 0.5% adviser fee should be reflected in setting an expense allowance as this is to some extent providing an active approach that I have not included in my modelling – in particular such advice would likely recommend regular changes to the portfolio throughout the drawdown of the award to better reflect the claimant's needs that I have not modelled*
    - *the impact of tax illustrated above is based on the claimant's tax position when they initially receive their award. As they make withdrawals from the fund, I would expect the claimant's tax liability to reduce and so the tax obligation over the lifetime of the award will be lower than those shown above*
    - *it is reasonable to assume that claimants act as rational consumers and will compare charges and services provided by potential funds and, for two funds that provide the same service, choose the fund with the lowest fees, or only choose funds with higher fees if they provide additional value and/or returns.*

As stipulated in the CLA 2018, the Lord Chancellor must consider how claimants actually invest their award of damages. In advising personal injury clients, Adroit would generally advise that they invest via a discretionary fund manager who can actively manage the portfolio and better protect against downside risk, restricting capital losses as much as possible.

Investing in active funds, or having some form of active management within a portfolio e.g. by utilising a discretionary fund manager is not to generate greater return but to provide a structured financial plan to limit loss or recover loss where there has been an impact on their investment. This is particularly crucial in the earlier years and later years of the investment term.

The importance of each service provider's role should also not be overlooked. With a typical claimant investment, there should be a financial adviser, a discretionary fund manager as well as the underlying holdings which may include additional fund managers depending on the composition of the portfolio. Each entity would have their own role to play to assist the client in ensuring the award can be utilised effectively towards their needs;

**Financial Planning** – this entails structuring a client's finances to ensure that their financial objectives can be met. It is mainly conducted by an Independent Financial Adviser (IFA) whose role is to discuss and document the client's personal and financial circumstances, their needs, objectives, assets liabilities, income expenditure attitude towards investment risk and capacity for loss. It is then their job to research and recommend a suitable financial plan including the relevant financial solutions, encompassing the relevant tax wrappers, cash solutions and investment products. They are also responsible for the on-going servicing of the financial plan including regular reviews of the financial solutions to ensure they remain suitable throughout the investment term. This could include performing tax calculations or making additional recommendations to provide suitable liquidity in a tax efficient manner throughout the life of the plan.

**Investment Management** – this entails the construction and management of a suitable investment portfolio as part of the wider financial plan. Whilst this can be undertaken by an IFA, the use of Discretionary Fund Managers (DFM) can offer greater focus and a wider range of investments, with an actively managed approach for greater control of income, growth and risk in line with a given mandate.

On this basis, and based on the evidence provided in our response to question 16, the actual costs incurred by claimants are more aligned with the following estimate provided by Adroit:

**Figure 18 – Estimated Claimant investment expenses**

| **Expense** | **Ongoing charge p.a. (Range)** | **Ongoing charge p.a. (Midpoint)** |
|---|---|---|
| Adviser fee (inc. VAT) | 0.60% | 0.60% |
| DFM fee (inc. VAT) | 0.60% to 0.68% | 0.64% |
| Underlying fund charges | 0.31% to 0.45% | 0.38% |
| Other costs | 0.01% to 0.03% | 0.02% |
| | | **1.64%** |

In addition FOCIS obtained data as part of the 2019 MoJ call for evidence on the discount rate, which clearly demonstrated that an over whelming majority, some 64.3%, of the 389 portfolios, incurred investment charges of 1.5% and above (including 6.4% in excess of 2%). In comparison, only a small minority of claimants (4.9%) incurred charges below 1% and only 35.7% of the portfolios incurred charges of 1.5% and below. Furthermore, when looking solely at the 169 portfolios whose value fell below £1.5m, 74% of portfolios incurred charges between 1.5% and 2.0%, only 12.5% incurred lower charges and 13.6% incurred charges of 2% or more[8].

Likewise, in the Irwin Mitchell response to the MOJ's 2023 call for evidence, they provided evidence from their Court of Protection team who had analysed investment charges over 953 portfolios collected from 22 providers. This analysis showed average fees of 1.51%. This is a close match to the above 2019 FOCIS data set.

[8] Page 19 FOCIS' response to the MoJ call for evidence on the discount rate 2019. See also Appendix 1 FOCIS data in relation to investment charges.

We are also aware that Digby Brown have collated evidence relating to 22 portfolios, arising from Scottish cases, which have been established over the last 4 years. The average fees in respect of investment advice and management charges were 1.76%. In 20 of the cases, 90.9% of the cohort, the charges were over 1.6%. All of the cases involve active management as the needs of each individual client vary, and detailed discussions about risk, and required return are vitally important.

We cannot therefore conclude that the allowance of 0.75% pa was ever suitable in respect of expenses, let alone the combination of expenses and tax. Nor is it suitable today.

## TAXATION

### Question 18: What types and rates of taxation typically apply to claimants on their investment returns, and how does the distribution of these vary by size, length of award and remaining claimant time horizon? Please consider a current view of the representative claimant or alternative representative claimants.

Tax, by its nature, is a personal matter and difficult to determine for a large cohort of investors with a range of profiles.

The returns generated by investments held by claimants will be subject to different levels of taxation, depending upon whether the returns are classed as interest (for example, cash deposits or bond yields), dividends, or capital gains. The prevalence of the different types of returns will also dictate to what extent claimants are able to make use of the various tax allowances available.

The types of taxation that typically apply to claimants, and the allowances generally available, are as follows (based on 2024/25 rates):

**Figure 19– Tax allowances and rates**

**Allowances**

| | |
|---|---|
| Income Tax Personal Allowance | Tax-free allowance up to £12,570 |
| Personal Savings Allowance | £1,000 for basic rate taxpayers<br>£500 for higher rate taxpayers<br>Not available for additional rate taxpayers |
| Dividend Allowance | First £500 of dividend income taxed at 0% |
| Capital Gains Tax Allowance | £3,000 |

**Income tax bands and rates (after personal allowance)**

| Rate | Tax band | Income Tax rate | Dividend Tax rate |
|---|---|---|---|
| Starting Rate for Savings | £0-£5,000 | 0% | n/a |
| Basic rate | £0-£37,700 | 20% | 8.75% |
| Higher Rate | £37,701 - £150,000 | 40% | 33.75% |
| Additional Rate | £150,000+ | 45% | 39.35% |

**Capital Gains Tax rates (after allowance)**

| Rate | Tax rate |
|---|---|
| Gains which when added to taxable income fall in basic rate band | 10% |
| Gains which when added to taxable income fall in higher/additional band | 20% |

Liability to Income Tax falls due as the income is received.

Capital Gains Tax on the other hand only becomes liable when an asset is sold. It is often the case that, particularly in the early years of investment when short term income needs have already been planned for by setting aside sufficient cash reserves, and a suitable cash contingency established to meet ad-hoc capital requirements, claimants do not need to draw down on invested capital for several years.

However, to ensure that large latent capital gains do not amass within a portfolio, advisers will recommend that the annual CGT allowance is used each year, by realising a controlled level of gain and thereby ‘rebasing’ the acquisition cost of the assets held.

This reinforces the need for claimants to be properly and actively advised on an ongoing basis.

It is worth noting that since the discount rate was last set in 2019, the annual Capital Gains Tax allowance reduced from £12,300 to £6,000 in the 2023/24 tax year, and reduced again, from £6,000 to just £3,000, from April 2024. This will have a significant impact on claimants, as a greater proportion of the investment gains they make will be lost to taxation.

The extent to which a claimant suffers taxation, and the frequency with which this falls due, will depend upon the returns (both income and capital gain) generated by the portfolio over the claimant’s lifetime.

Adroit asked a discretionary fund manager who they regularly consult and recommend for personal injury investor portfolios, to provide their assumptions for asset returns. This is a forward looking approach, but based on historic returns. To provide their return assumptions, they considered 10 year annualised returns and extrapolated forward to reflect the current investment climate.

Their estimates are as follows:

- Cash – 1.5%
- Gilts – 2.0%
- Bonds – 2.0%

For taxation purposes, the returns from cash, gilts and bonds are taxed as income.

However, returns from equities will be taxed as both income (dividends) and capital gains (growth). In view of this, when considering taxation, it is helpful to understand what proportion of return might be in respect of income and what proportion in respect of capital gain.

Based on data over the last 30 years, equities as measured by the FTSE World index, have delivered annualised returns as follows (source: Financial Express Analytics):

**Figure 20- Equity returns including and excluding dividends**

| **Index** | **Annualised Return** |
|---|---|
| FTSE World (exc. dividends) | 6.21% |
| FTSE World (inc. dividends) | 8.63% |

From this, we can extrapolate, in broad terms, that the annualised dividend returns have been 2.42% per annum (i.e. 8.63%, less 6.21%).

Using the asset returns assumed above, we can consider the taxation position for the representative claimant (i.e. an investment duration of 43 years) basing this on a range of investment portfolio values. For this purpose, we have used, what were described as medium (£1,000,000) and large (£3,000,000) claim values set out in the Government Actuary's 2019 advice, as shown below:

**Figure 21 – Excerpt from Government Actuary's advice showing illustrative tax drag**

| | | Claimant profile | | |
|---|---|---|---|---|
| | | A | B | C |
| Description | | Small claim | Medium claim | Large claim |
| Award size (£) | | 100k | 1m | 3m |
| Other income (£ pa) | | 25k | 10k | none |
| Investment Strategy / Assumed income yield | Cash | 10% / 0.5% pa | | |
| | Bonds | 47.5% / 2% pa | | |
| | Equity | 42.5% / 3.5% pa | | |
| Tax drag on return[10] | | 0.0% pa | 0.2% pa | 0.5% pa |

For reasons already set out (see response to question 11), we consider the GAD Cautious Model Portfolio to be an appropriate representation of how claimant's actually invest their awards we do not however, accept that £100K is representative of  a catastrophic injury claim, nor would be categorise awards of £1 million as being "medium" nor is £3 million truly representative of large claims.  Please see the data submitted as part of the FOCIS/ APIL data collection exercise that FOCIS will submit, that shows it is not unusual to have claims in excess of 10 million pounds. It is important to note the larger the claim the greater the impact of taxation upon the award.

**£1,000,000 claim**

The table below shows how the award would be apportioned between cash, bonds and equities, and the resultant income yields generated by each:

**Figure 22 – Estimated income yields from £1,000,000 portfolio**

| | **GAD Cautious Model Portfolio** |
|---|---|
| **Cash** | **12.5%** |
| Sum Invested | £125,000 |
| Income Yield (%) | 1.5% |
| Income Yield (£) | £1,875.00 |

| | |
|---|---|
| **Gilts/Bonds** | **57.5%** |
| Sum Invested | £575,000 |
| Income Yield (%) | 2.0% |
| Income Yield (£) | £11,500.00 |

| | |
|---|---|
| **Equity** | **30.0%** |
| Sum Invested | £300,000 |
| Income Yield (%) | 2.4% |
| Income Yield (£) | £7,260.00 |
| | |
| **Total (Interest)** | £13,375.00 |
| **Total (Dividends)** | £7,260.00 |
| | **£20,635.00** |

The income received would be taxed as follows:

- Interest of £13,375:
  - Nil on first £12,570 (Personal Allowance) = £0
  - 0% on remaining £805 (Starting Rate for Savings) = £0
- Dividends of £7,260:
  - Nil on first £500 (Dividend Allowance) = £0
  - 8.75% on remaining £6,760 = £591.50

This gives a total income tax liability of £591.50.

In respect of capital gains, based on estimated capital growth of 6.21% on the £300,000 held in growth assets, there would be a potential taxable gain of £18,630 in year one, albeit as already set out until any gain is actually realised, it remains latent within the portfolio.  Based on 2024/25 tax rates, this gives a notional liability of £1,563 (£18,630 minus £3,000, multiplied by 10%).

The overall (part actual/part notional) tax liability is therefore £2,154.50, representing around 0.22% of the portfolio value of £1,000,000.

**£3,000,000 claim**

The table below shows how an award of £3,000,000 would be apportioned between cash, bonds and equities, and the resultant income yields generated by each:

**Figure 23– Estimated income yields from £3,000,000 portfolio**

| | **GAD Cautious Model Portfolio** |
|---|---|
| **Cash** | **12.5%** |
| Sum Invested | £375,000 |
| Income Yield (%) | 1.5% |
| Income Yield (£) | £5,625.00 |
| | |
| **Gilts/Bonds** | **57.5%** |
| Sum Invested | £1,725,000 |
| Income Yield (%) | 2.0% |
| Income Yield (£) | £34,500.00 |
| | |
| **Equity** | **30.0%** |
| Sum Invested | £900,000 |
| Income Yield (%) | 2.4% |
| Income Yield (£) | £21,780.00 |
| | |
| **Total (Interest)** | £40,125.00 |
| **Total (Dividends)** | £21,780.00 |
| | **£61,905.00** |

The income received would be taxed as follows:

- Interest of £40,125:
  - Nil on first £12,570 (Personal Allowance) = £0

- 0% on £5,000 (Starting Rate for Savings) = £0
- 0% on £500 (Personal Savings Allowance for higher rate taxpayer) = £0
- 20% on remaining £22,055 (Basic Rate) = £4,411.00

- Dividends of £21,780:

- Nil on first £500 (Dividend Allowance) = £0
- 8.75% on £9,645 (remaining Basic Rate) = £843.94
- 33.75% on remaining £11,635 = £3,926.81

This gives a total income tax liability of £9,181.75.

In respect of capital gains, based on estimated capital growth of 6.21% on the £900,000 held in growth assets, there would be a potential taxable gain of £55,890 in year one (remaining latent within the portfolio until realised). Based on 2024/25 tax rates, this gives a notional liability of £10,578 (£55,890 minus £3,000, multiplied by 20% - as a higher rate taxpayer).

The overall (part actual/part notional) tax liability is therefore £19,759.75, representing around 0.66% of the portfolio value of £3,000,000.

On the basis of the above, it can be see that the current GAD assumptions regarding tax drag are broadly appropriate for awards of up to £1 million. However, for the many larger value awards, the assumptions made in respect of taxation significantly understate the tax paid by claimants.

Furthermore, the analysis above is based on the GAD Cautious Model Portfolio, and if this exercise is repeated using the GAD Central Model Portfolio then the tax drag would increase due to the higher equity content of, and therefore greater overall returns from, the portfolio.

### Question 19: How might your answer to Question 18 change if a claimant had other annual taxable income of at least an amount to meet the threshold for personal income tax, or other reasonable level of taxable income? Please support this with any evidence or data on what other taxable income claimants typically have.

The analysis set out in our response to question 18 is based on the premise that a claimant has no other taxable income, and therefore has full use of the personal income tax allowance, and savings/dividend allowances.

In the event that a claimant has other taxable income, this would increase the taxation drag on their invested award since a greater proportion of the income and gains generated by the investments would fall to be taxed.

Taking the example used at Figure 22, the 'medium value' claim of £1,000,000, we can analyse the impact of this. As Figure 22 showed, the illustrative claimant's portfolio generated income and dividends as follows:

| | |
|---|---|
| **Total (Interest)** | £13,375.00 |
| **Total (Dividends)** | £7,260.00 |
| | **£20,635.00** |

This resulted in an income tax liability of £591.50.

If this claimant was also receiving a pension of £15,000 per annum (having taken early retirement from their employer on grounds of ill-health in consequence of their personal injury), the income tax position would be as follows:

- Pension of £15,000:
  - Nil on first £12,570 (Personal Allowance) = £0
  - 20% on remaining £2,430 = £486
- Interest of £13,375:
  - Starting Rate for Savings not available as non-savings income exceeds starting rate band
  - 0% on £1,000 (Personal Savings Allowance for basic rate taxpayer) = £0
  - 20% on remaining £12,375 (Basic Rate) = £2,475
- Dividends of £6,000:
  - Nil on first £500 (Dividend Allowance) = £0
  - 8.75% on remaining £6,760 = £591.50

In respect of income tax due in respect of the invested award, this gives a total income tax liability of £3,066.50 (i.e. £2,475, plus £591.50), a significant increase when compared to the position without there being any other income received.

This would potentially have an impact on Capital Gains Tax too, as there is greater likelihood that the claimant would be pushed beyond the Basic Rate of tax, resulting in capital gains being taxed at 20%, rather than 10%.

### Question 20: Do you consider that the 2019 deduction for taxation of between 0.0% and 0.5% per annum (based on the initial award value) remains suitable in regard to the representative claimant or alternative representative claimants (please provide evidence and/or reasoning to support your position)?

No.

Our analysis in respect of the levels of taxation that typically apply to claimants is set out in our response to question 18. The results of this analysis, as compared with the assumptions made by the GAD in 2019 are summarised in the table below:

**Figure 24 – Comparison of tax drag assumptions**

| | **£1,000,000 claim** | **£3,000,000 claim** |
|---|---|---|
| GAD assumption | 0.20% | 0.50% |
| Adroit analysis | 0.22% | 0.66% |

| | | |
|---|---|---|
| **Discrepancy** | **+0.02%** | **+0.16%** |

See further our answer below to question 21

**Question 21: In 2019, a total deduction for tax and investment management expenses over the term of the award of 0.75 per cent was applied (derived from a range of 0%-0.5% based on the initial award value for tax and 0.6%-1.2% for investment management expenses. Do you think this total deduction and how its elements are combined remain appropriate (please provide evidence and/or reasoning to support your answer)?**

No, we do not think that these assumptions were/are correct. The deductions for both tax and investment management expenses significantly underestimate the costs actually faced by claimants.

In respect of investment management expenses, our evidenced responses to questions 16 and 17 conclude that actual costs are in the vast majority of claims for serious injuries in the range of 1.5-2% per annum. As summarised in Figure 28 above, the current assumption made regarding tax drag underestimates the experience of many claimants, particularly those with high value claims. We estimate that the impact of taxation on claimants' portfolios, amounts to between 0.2% and in excess of 1% per annum. On this basis, and taking the mid-points, the overall expense incurred by claimants in respect of tax and investment management amounts to around 2.5% per annum. We therefore remain of the view that the total deduction of 0.75% is inappropriate, being significantly below the reality faced by claimants.

## DUAL RATES

**Question 22: How much additional complexity or difficulty would implementing a dual rate by duration approach add to the litigation process (please provide evidence to quantify this either by time to settlement, additional legal costs and/or any other relevant factors)?**

We are opposed to a move to dual rates as set out in our 2023[9] response.

There would be practical implications of administering a dual rate, for example, a person who is paraplegic would have a significant schedule of loss which includes future expenses needed in the medium term and some in the longer term. Some items would need to be bought every year, and others at longer intervals, such as three, five or ten years. Currently catastrophic injury claim schedules are frequently 50 to 100 pages long with hundreds of individual calculations, so

[9] Ministry of Justice. Personal injury discount rate. Exploring the option of a dual/multiple rate. Call for evidence.

changing the discount model to a dual or multiple rate would significantly increase the complexity and costs of these calculations leading to the risk of error.

As has been the experience in Ontario it would be likely that the parties would be more likely resort to experts to undertake these complex calculations (error over which could result costly professional negligence claims). Another important observation from the experience in Ontario is that to necessarily respond to fluctuating economic cycles including inflation the short-term rate is subject to annual review and has actually changed in most years. These annual reviews cause further uncertainties, delays and costs in the claims resolution process.

Explaining a single PIDR and multiplier to claimants is already a difficult. A change to dual by duration would make it even harder to explain and consequently risks claimants finding it even harder to understand how their claims are calculated. That in turn makes it harder for them to make informed decisions when settlement offers are made.

In setting any dual rate by duration, consideration would have to be given to the investment risk that it is reasonable to expect a claimant to take in the final period of their life. Rather like the initial period, most claimants would be advised against taking significant investment risks at a time when their care and medical needs are likely to be at their highest and when they are exposed to the greatest impact of the longevity risk. Whilst their life expectancy might only be for a further 10 years, they and their advisers will need to plan for the distinct possibility that they may materially outlive that expectation.

**Question 23: Should a dual rate mechanism be implemented, different asset returns would be assumed for the short and long-term. Under this mechanism, what changes to the following characteristics of the representative claimant (or alternative representative claimants) would apply: b) Investment period; b) Damage inflation; c) Investment portfolio; and d) Tax and Expenses assumptions.**

Under a dual discount rate, the investment term may not change however attempting to determine the appropriate length of time for a short-term rate would prove to be incredibly difficult and would require constant review. If short term is considered as anywhere between 0-10 years, then it is likely that the investment portfolio and returns would mirror those available from cash solutions and lower risk assets such as fixed interest, however this could be incredibly variable.

The last two years is a great example of this. The Bank of England's base rate has risen from 0.25% to 5.25% in a two-year period. Over the next two years the base rate is likely to change multiple times again and it is hard to predict where it would land. If a short-term discount rate was set it may need to be reviewed as frequently as the bank of England's base rate as the likelihood is that the damages awarded under a short-term discount rate would only be held in cash or other low risk assets.

The correct inflation rate would also be difficult to determine and again the last two years are a great example of this. Inflation rose from 2-3% to 10-11% in a very short space of time due to economic shocks, geo-political tensions, and the aftermath of a global pandemic. These events can occur at any time and cannot be predicted.

The complexities of implementing a dual/multiple rate mechanism could also be a hindrance to claimants during litigation. Having a dual/multiple rate system is likely to require further calculations and possibly even further expert evidence in order to settle claims, leading to a bigger time delay and cost.

With a short-term rate there will be a need to review the discount rate more regularly, possibly even annually. This is going to be a time-consuming exercise and could lead to greater argument/disparity between parties when negotiating settlements, and therefore a further time delay and greater litigation risk.

**Question 24: Should a discount rate by heads of loss be implemented, different damage inflation assumptions would be assumed for different heads of loss. Under this mechanism, what changes to the following characteristics of the representative claimant (or alternative representative claimants) would apply: a) Investment period (under the single rate methodology, 43 years was previously assumed); b) Investment portfolio (under the single rate methodology, a 57.5% allocation to matching assets and 42.5% allocation to growth assets was previously assumed. Please refer to Table 1 for full details); and c) Tax and Expenses assumptions (under the single rate methodology, a range of 0%-0.5% based on the initial award value for the former and 0.6%-1.2% for the latter, with a total modelled assumption of 0.75% was previously assumed).**

We do not believe that implementation of a heads of loss approach would have any impact on the assumed characteristics of the representative claimant (or alternative representative claimants). The only difference it would make would be to the inflationary assumptions. See our responses above to the questions concerning investment period, portfolio composition and regarding taxation and investment charges.

**Question 25: How much additional complexity or difficulty would this approach add to the litigation process, and would this be greater/lesser/about the same as if a dual rate by duration were implemented? Please provide evidence to quantify this either by time to settlement, additional legal costs and/or any other relevant factors.**

See comments in our response to 2023 Call for Evidence and our response to question 22 above.

**Question 26: Should a discount rate by heads of loss be implemented, do you believe that the concept of modelling one representative claimant remains appropriate or is modelling a representative claimant for each head of loss a better approach?**

APIL has no comments to make.

**Question 27: Please provide any additional evidence you or your organisation may have on the practical implementation of such a heads of loss rate model.**

We do not have any additional evidence.

**Question 28: Please provide evidence and/or data to support what heads of loss should be separately identified in such a model.**

APIL and FOCIS worked jointly on the data collect for this call for evidence. The results of the exercise are included in FOCIS response

## PPOs

**Question 29: How readily available are PPOs to claimants in practice and how does this vary by groups of claimants (additional data on groups that are less likely to have a PPO made readily available would be helpful)?**

Paragraph 59 Part 2, paragraph 4(3)(a) of the CLA 2018 specifies that the Lord Chancellor must assume that damages are paid in the form of a lump sum (rather than under a periodical payment order (PPO)). So, it is important to recognise that these points must not be considered by Lord Chancellor, GAD or expert panel as part of the PIDR review. That said APIL is supportive of further separate work being undertaken by the MOJ.

We previously provide evidence of the struggle claimants have to access PPO's. Whilst we acknowledge that a PPO is not in the interest of every claimant and that often a PPO can also often work alongside a lump sum settlement on some heads of loss. This is not cherry picking, just ensuring that the claimant achieves full compensation. Any challenge that the insurer might have in providing a PPO is significantly less that the hardship suffered by the claimant. A survey of APIL members in 2020 that found that claimants struggled to obtain PPOs from insurers, but that they did <u>not</u> struggle to obtain PPOs from NHS Resolution. Of those claimants who had tried to obtain a PPO from an insurer:

- 88% found it difficult to obtain a PPO from an insurer. Their experience is that insurers always or very frequently sought to undertake negotiations on a lump-sum only basis.
- 82% said that insurers, in their experience, always or very frequently made 'lump sum only' part 36 offers and rarely proactively offered a PPO.

In contrast, of those members who had tried to obtain a PPO from NHS Resolution:

- 79% found it <u>easy</u> to obtain a PPO from NHS Resolution.

The Institute and Faculty of Actuaries regularly conducts research on PPO's, their latest research[10] shows that even since the discount rate change in 2019 uptake of PPO's is very low. The number of motor (non-MIB) PPO claims has been broadly decreasing since 2012[11]. Employers' liability and public liability claims fare no better, data shows that since 2015 only one claim has settled by way of PPO[12]. Whilst the claimant should always have a choice, more should be done to increase uptake of PPOs. APIL commissioned YouGov polling in 2021 which suggested that if they were seriously injured as a result of someone else's actions, more than half of people would prefer to receive some or all of their compensation in the form of a PPO:

- 39% of UK adults would prefer to receive some of the compensation in instalments and some as a lump sum
- 15% of UK adults would prefer to receive all of the compensation in instalments
- Just 35% of UK would prefer to receive all of the compensation at once, in one lump sum

This polling and the extensive use of PPOs in cases involving NHSR (and MIB) suggests there is strong claimant appetite for PPOs. The data produced by the IFoA shows that the MIB had more PPO's in 2018 to 2020 than all reporting motor and liability insurers[13]. This coupled with data obtained by APIL through a FOI which confirmed that 219 claims with a value of £1.7 Million plus, were settled by NHSR in 2019/2020, 160 (73%) of those were settled by PPO[14]. This suggests that their willingness to offer a PPO plays a significant part in PPO take up.

In Scotland PPOs are encouraged. Legislation[15] requires that where future losses are over £1million, either the court has to certify that a lump sum award, as opposed to a PPO is appropriate[16], or if it is an agreed settlement, an independent actuary has confirmed that is the position[17]. Other examples could include (1) requiring any Part 36 offers in cases involving future care claims of greater than £500,000 to include a PPO variant, or detailed written explanation of why such an offer would not be possible or not be in the claimant's best interests and (2) pro-active case management of the PPO issue, in applicable cases, at a much earlier stage in proceedings (eg case management conferences).

We recommend that more should be done by the MoJ to increase their use in catastrophic claims. One option in employers' liability and public liability claims would be to make insurance

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[10] Institute and Faculty of Actuaries, Periodical Payment Orders Working Party Update. 2021 Industry survey.

[11] Ibid page 10 and 11. Figure 4.

[12] Ibid page 12. Figure 7.

[13] Ibid page 73 and 74 Figure F 9, F10, F11 and F12.

[14] This response split claims into 'lower-value' claims (claims under £1.7mllion) and 'higher-value' claims (claims valued at £1.7 million+). £1.7 million was chosen as the cut-off point, as this broadly aligned with the IFoA's definition of a 'large' claim.

[15]Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. Section 6

[16] Ibid Section 6 (6) (a)

[17] Ibid Section 6 (6) (b)

compulsory, with unlimited coverage as with RTA insurance. Also implementing a fund of last resort, similar to that for RTA cases administered by the MIB, would assist with making PPOs available to claimants with serious injuries.

### Question 30: What factors influence the take up of lump sums versus PPOs. This could include the preferences and behaviours of one or more of the parties involved in the settlement process and associated litigation strategies?

There are a number of issues that can affect the take up of PPO's versus a lump sum. They include

1. Insurance indemnity level being too low to support a PPO.  The Employers' Liability (Compulsory Insurance) Regulations 1998 only require that the insurance cover should be not less than £5 million. However, even where policies are more than the minimum requirement they are still not at a sufficient level to cover a claimant for their full life expectancy. The regulations have not been reviewed since 1995. We would recommend that this is done urgently and the level of indemnity increased. It would be our preference that indemnity becomes unlimited as with RTA policies, practically this would support the greater uptake of PPO's.

2. Foreign, mutual and self-insured defendants raise practical problems for claimants as they are not considered secure providers.  A claim against a local authority which was self-insured would not meet the criteria for a PPO either. This issue is more difficult to overcome and would need to make all insurance compulsory.

3. Where there are high levels of contributory negligence involved in the claim, the claimant usually finds it very difficult to make a PPO financially viable. For example, a £500,000 claim subject to 50 per cent contributory negligence would make it difficult for the claimant to find enough to fund a proper level of periodical payments for care. The claimant would need to capitalise the lump sum to pay for a proper care regime.

4. In a catastrophic injury case there is often an immediate need for lump sum payment to cover the purchase of a property. The law does not currently allow for the recovery of the total additional monies to purchase outright a suitable property so that it is inevitable that the claimant must "rob Peter to pay Paul" by using as some  of the lump sum compensation allowed for other heads of loss to do this.

## PROTECTED CHARACTERISTICS

### Question 31: Please provide any evidence of how the setting of the discount rate may affect persons with protected characteristics.

Answer provided in response to 2018 and 2023 Call for Evidence.

The discount rate affects those who are seriously injured. Therefore, by definition they are likely to have disabilities characterised under the Equality Act 2010.

Many claimants with claims for catastrophic injuries are children or adults with mental incapacity, thus requiring more extensive financial advice and assistance with investing their compensation. Yet they are adversely impacted by the 2019 assumption that they only require a passive management approach.

In addition to this there is also the discriminatory affect that the proposed changes will have the group of claimants with lower compensation but continuing loss. The proposals will create an expectation that greater investment risk must be taken, leading to a greater risk of under settlement, this departs from the Governments stated committed to full compensation[18]

**Any questions in the first instance should be addressed to Abi Jennings, head of legal affairs at APIL [abi.jennings@apil.org.uk](mailto:abi.jennings@apil.org.uk)**

**Thanks go to APIL members:**

**Julian Chamberlayne, Stewarts Law.**

**Gordon Dalyell, Digby Brown.**

**Stephen Glynn, Deka Chambers.**

**And, to Paul Rosson, Adroit Financial Planning, for his advice and guidance.**

[18] Ministry of Justice. Personal injury discount rate. Exploring the option of a dual/multiple rate. Call for evidence. Page 2.

# MPS

## Low-to-Medium Risk Portfolio Income and Growth

**31.01.2024**

Professional advisers

BROOKS MACDONALD

## Objective

The primary objective of the portfolio is to provide a combination of income and capital growth over the longer term. The portfolio provides exposure to capital markets through a diversified range of UK and international investments. Equity exposure is likely to range between 30-55%.

## Key facts

| | |
|---|---|
| Inception date | March 2005 |
| No. of holdings (incl. cash) | 32 |
| Minimum investment | £20,000 |
| Identifiers | |
| FE/Citi code | MFFI |
| Overall portfolio yield** | 2.73% |
| Initial charges | |
| In specie transfer† | 0.50% + VAT |
| Cash transfer | 0% |
| Ongoing charges (OCF) | |
| Annual management charge (AMC) | 0.75% |
| OCF | 0.46% |
| Transactional & Incidental Charges | 0.14% |
| **Total Ongoing Charge** | **1.35%** |

Other charges

A professional adviser's initial and recurring charge may be added subject to agreement between client and adviser.

Underlying charges may apply which will vary according to the specific assets within the portfolio.

Cash rate

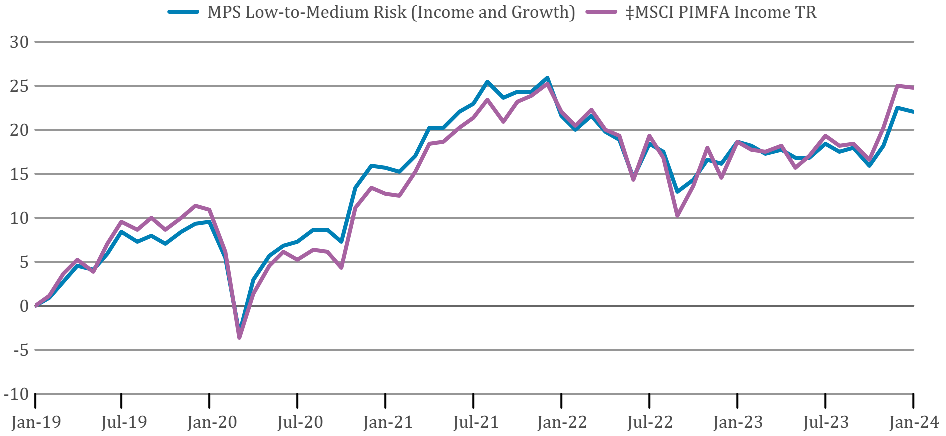
For latest cash rates, please refer to the treasury and cash interest rates on Brooks Macdonald's website.

Please note, interest is paid gross and quarterly. Only interest of £10 and above will be credited to the account.

†No charges apply to internal Brooks Macdonald transfers.

**The yield reflects historic distributions declared over the past twelve months.

## Performance (%)



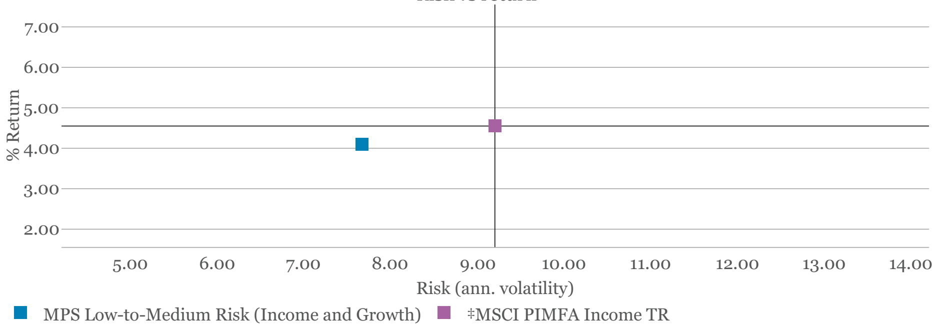

| Discrete 12 month performance to 31 January (%) | 2020 | 2021 | 2022 | 2023 | 2024 |
|---|---|---|---|---|---|
| MPS Low-to-Medium Risk (Income and Growth) | 9.75 | 5.56 | 5.13 | -2.53 | 2.95 |
| ‡MSCI PIMFA Income TR | 10.94 | 1.61 | 8.45 | -2.82 | 5.03 |
| Relative performance | -1.19 | 3.94 | -3.32 | 0.29 | -2.08 |

| Cumulative performance to 31.01.2024 (%) | 3M | 6M | 1Y | 3Y | 5Y | 10Y |
|---|---|---|---|---|---|---|
| MPS Low-to-Medium Risk (Income and Growth) | 5.41 | 3.22 | 2.95 | 5.50 | 22.22 | 64.03 |
| ‡MSCI PIMFA Income TR | 7.02 | 4.43 | 5.03 | 10.69 | 24.79 | 71.18 |
| Relative performance | -1.61 | -1.22 | -2.08 | -5.20 | -2.57 | -7.15 |

| Historical performance from 5 years to 31.01.2024 (%) | Annualised Return | Highest annual performance | Lowest annual performance | Standard deviation | Annualised volatility |
|---|---|---|---|---|---|
| MPS Low-to-Medium Risk (Income and Growth) | 4.09 | 20.73 | -8.62 | 2.22 | 7.68 |

Past performance is not a reliable indicator of future results.
Sources: Brooks Macdonald/Morningstar/‡MSCI PIMFA as at 31.01.24.
All performance figures shown on this factsheet are net of underlying fund charges but gross of Brooks Macdonald's management fees and adviser charges. Deduction of these fees and charges will impact on the performance shown.

**Risk vs return**




The risk vs return chart compares the performance of the MPS portfolio and select benchmarks plotted against risk as defined by the degree of volatility incurred. Typically, the investment with the greatest rate of return incurs the greatest amount of risk. In this factsheet we have used volatility as a measure of risk as this is relatively simple. A higher degree of volatility implies a higher chance of incurring loss in a portfolio for a given time frame. However, it should be noted that there are several other methods of calculating the degree of risk of a portfolio which are not covered in this document.

# MPS

## Low-to-Medium Risk Portfolio Income and Growth

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## Brooks Macdonald investment team

**Mark Shields**

Investment Director, Multi-Asset

**Frank Atkins**

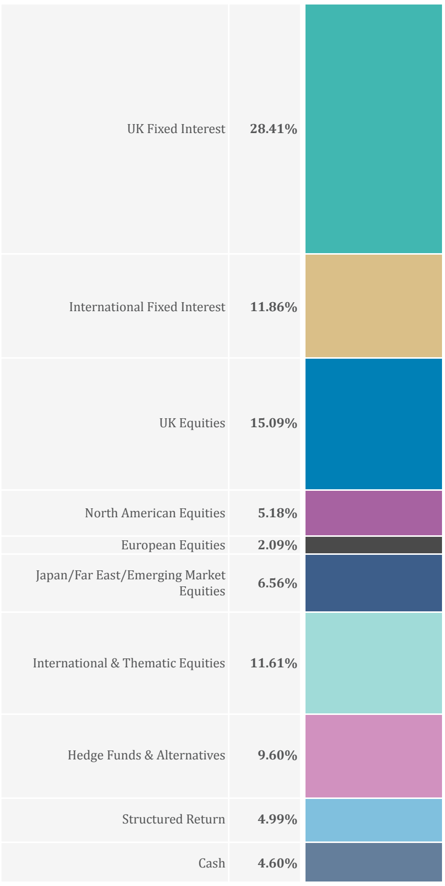
Investment Director, Multi-Asset

**Alex Chittenden**

Investment Manager, Multi-Asset

## Ratings and awards

## Overall sector breakdown




## Portfolio holdings

| Fund | % |
|---|---|
| Allianz Gilt Yield Fund | 3.00 |
| L&G Short Dated Sterling Corp Bd Idx Fd | 6.92 |
| Royal London Short Duration Gilts Fund | 6.82 |
| Royal London Short Term Fixed Inc Enh | 4.87 |
| Vontobel TwentyFour Absolute Ret Crdt Fd | 6.80 |
| FTF Brandywine Glbl Inc Optr | 4.01 |
| JPM Unconstrained Bond Fund | 3.00 |
| L&G Global Inflation Linked Bond Idx Fd | 1.94 |
| Vanguard US Government Bond Index Fund | 2.91 |
| CT UK Equity Income Fund | 2.02 |
| JOHCM UK Equity Income Fund | 4.94 |
| Liontrust Special Situations Fund | 3.14 |
| Vanguard FTSE UK All Share Index UT | 4.99 |
| Dodge & Cox Worldwide US Stock Fund | 1.03 |
| Fidelity Index US Fund | 2.11 |
| JPM US Equity Income Fund | 2.04 |
| L&G European Index Trust | 2.09 |
| Federated Hermes Asia ex-Japan Eq | 3.58 |
| Stewart Investors APAC Ldrs Sstby Fd | 2.98 |
| AXA Framlington Global Technology Fund | 2.19 |
| Fidelity Index World Fund | 1.04 |
| Fundsmith Equity Fund | 2.09 |
| Guinness Global Equity Income | 3.07 |
| Ninety One Global Environment Fund | 0.99 |
| Polar Capital Funds Plc - Healthcare Opps | 2.23 |
| Fortem Capital Absolute Return Fund | 4.83 |
| Neuberger Berman Uncorrelated Strats Fd | 2.79 |
| TM Fulcrum Divers Cor Abs Ret Fund | 1.98 |
| Atlantic House Defined Returns | 2.97 |
| SVS Brooks Macdonald Defensive Capital | 2.02 |
| Cash (£) | 4.60 |

## Important information

This document is intended for professional advisers authorised to give financial advice only and should not be relied upon by any persons who do not have professional experience in matters relating to investments.

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More information about the Brooks Macdonald Group can be found at www.brooksmacdonald.com.

# MPS

## Responsible Investment - Advance

Low Medium Risk

(Income & Growth)

**31.01.2024**

BROOKS MACDONALD

## Objective

The portfolio has the dual objective of aiming to generate income and growth over the longer term within the agreed risk profile, while actively reflecting the investment values of the advance strategy. Equity exposure is likely to range between 30-55%.

## Key facts

| | |
|---|---|
| Inception date* | January 2019 |
| No. of holdings (incl. cash) | 27 |
| Minimum investment | £20,000 |
| Overall portfolio yield** | 2.31% |
| Initial charges | |
| In specie transfer† | 0.50% + VAT |
| Cash transfer | 0% |
| Ongoing charges (OCF) | |
| Annual management charge (AMC) | 0.75% |
| OCF | 0.61% |
| Transactional & Incidental Charges | 0.11% |
| **Total Ongoing Charge** | **1.47%** |

Other charges
A professional adviser's initial and recurring charge may be added subject to agreement between client and adviser.

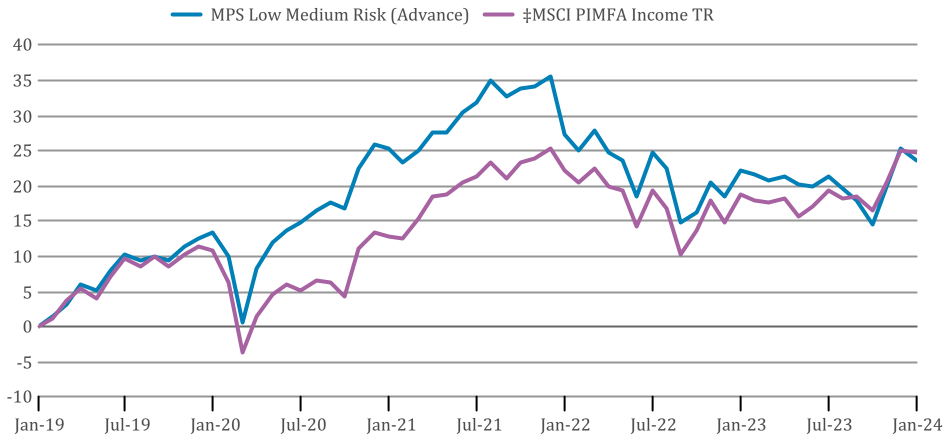
Underlying charges may apply which will vary according to the specific assets within the portfolio.

Cash rate
For latest cash rates, please refer to the treasury and cash interest rates on Brooks Macdonald's website.

Please note, interest is paid gross and quarterly. Only interest of £10 and above will be credited to the account.
†No charges apply to internal Brooks Macdonald transfers.

**The yield reflects historic distributions declared over the past twelve months.

## Performance (%)




| Discrete 12 month performance to 31 January (%) | 2020 | 2021 | 2022 | 2023 | 2024 |
|---|---|---|---|---|---|
| MPS Low Medium Risk (Advance) | 13.54 | 10.43 | 1.47 | -3.84 | 1.06 |
| ‡MSCI PIMFA Income TR | 10.94 | 1.61 | 8.45 | -2.82 | 5.03 |
| Relative performance | 2.60 | 8.81 | -6.98 | -1.02 | -3.97 |

| Cumulative performance to 31.01.2024 (%) | 3M | 6M | 1Y | 3Y | 5Y | Since inception* |
|---|---|---|---|---|---|---|
| MPS Low Medium Risk (Advance) | 7.81 | 1.88 | 1.06 | -1.39 | 23.63 | 26.82 |
| ‡MSCI PIMFA Income TR | 7.02 | 4.43 | 5.03 | 10.69 | 24.79 | 28.97 |
| Relative performance | 0.78 | -2.56 | -3.97 | -12.09 | -1.15 | -2.15 |

Past performance is not a reliable indicator of future results.
Sources: Brooks Macdonald/Morningstar/‡MSCI PIMFA to 31.01.24.
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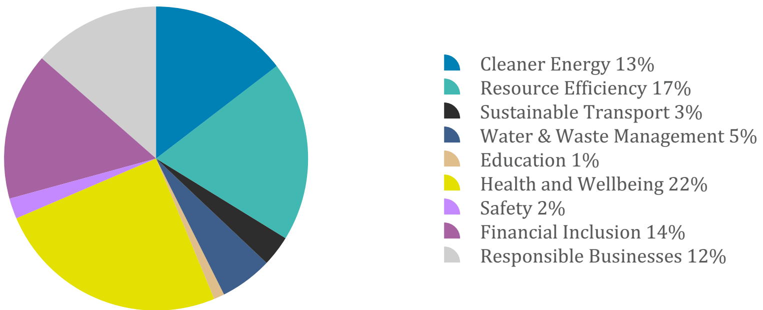
## Sustainability Themes

On a biannual basis we assess the product and service alignment of all of the underlying holdings in the portfolio against our eight sustainability themes, the results of this are shown in the pie chart below. Holdings that have a looser thematic alignment but are making their business models more sustainable are included in the 'responsible businesses' category. For more information on our eight sustainability themes please refer to our RIS bi-annual report.




Information as of 31/12/22

# MPS

## Low Medium Risk (Income & Growth)

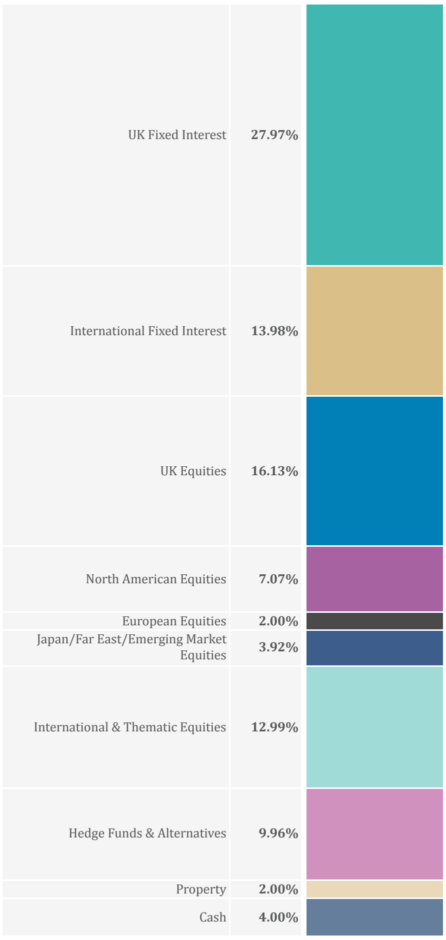
For more details regarding this portfolio please contact your professional adviser.

## Investment Team

T: 020 7499 6424
E: info@brooksmacdonald.com
21 Lombard Street
London
EC3V 9AH

## Ratings and awards

## Overall sector breakdown




## Portfolio holdings

| Fund | % |
|---|---|
| CT UK Social Bond Fund | 4.99 |
| EdenTree Responsible & Sust Shrt Dtd Bd | 5.97 |
| Liontrust Sustainable Future Corp Bd Fd | 3.01 |
| Vanguard UK Government Bond Index Fund | 8.04 |
| Vontobel Fund TwentyFour Sust S/T Bd Inc | 5.96 |
| Brown Advisory Global Sust TR Bd Fd(GBP) | 4.97 |
| Pictet - Global Sustainable Credit | 3.00 |
| Vanguard US Government Bond Index Fund | 3.02 |
| Wellington Global Impact Bond Fund | 2.99 |
| CT Responsible UK Equity Fund | 4.04 |
| EdenTree Responsible and Sust UK Eq | 4.01 |
| Liontrust Sustainable Future UK Gr Fd | 3.03 |
| Royal London Sustainable Leaders Trust | 5.05 |
| Brown Advisory US Sust Gr Fd | 3.55 |
| FTGF CB US Equity Sust Ldrs Fd | 3.52 |
| EdenTree Responsible & Sust Eurp Eq | 2.00 |
| Impax Asian Environmental Markets IRL | 1.94 |
| Stewart Investors Asia Pacific Sstby Fd | 1.98 |
| CT Responsible Global Equity Fund | 2.01 |
| Federated Hermes Sustainable Glb Eq Fd | 3.04 |
| FP WHEB Sustainability Fund | 2.02 |
| Ninety One Global Environment Fund | 2.96 |
| Schroder Global Sustainable Value Eq Fd | 2.96 |
| FP Foresight Global Real Infras Fd | 5.01 |
| VT Gravis Clean Energy Income Fund | 4.95 |
| FP Foresight Sustainable Rl Estt Scs Fd | 2.00 |
| Cash (£) | 4.00 |

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