Keoghs

Civil Liability Bill: Proposed Amendments

Since Lord Faulks submitted the first four proposed amendments to the Civil Liability Bill, there have been a further 33 proposed amendments. A "marshalled list" of the amendments was published on 8 May 2018. These are summarised and briefly explained below.

Proposal from	Outline of proposal	What this means
Lord Hodgson of Astley Abbotts	55 Page 7, line 31, at end insert— "( ) Rules of court under subsection (1) must draw attention to aspects of orders for periodical payments which may make them more suitable in cases where individuals have long-term injuries or are risk averse."	This amendment seems intended to reinforce the suitability of periodical payments for certain types of case.

Keogh

Lord Faulks	Page 7, line 34, at end insert— "( ) In deciding whether it is appropriate to take a different rate of return into account, the court should consider— (a) the particular nature of the loss in respect of which damages are sought; and (b) any offer by a defendant to agree a periodical payments order."	Allows the court to adopt a different rate of return for different heads of damages and also to take into account any offer made by a defendant to agree a PPO. Lord Faulks appears to have withdrawn his proposed amendment allowing the court to take into account the likelihood of a claimant seeking or receiving medical treatment or social care from the NHS or local authority.
Lord Hodgson of Astley Abbotts	Page 7, line 36, at end insert "or for different periods or descriptions of future pecuniary loss"	Allows the Lord Chancellor to prescribe different rates of return for different classes of case - this extension would allow the LC to prescribe different rates for different periods or type of future loss.
Lord Hodgson of Astley Abbotts	Page 8, line 12, leave out "within the 90 day period following" and insert "on"	Proposes that the first review must be started on commencement rather than within 90 days of commencement.
Lord Faulks	Page 8, line 12, leave out "90" and insert "10"	Proposes that the first review must be started within 10 days of commencement.
Lord Marks of Henley-on-Thames	Page 8, line 12, leave out "90" and insert "30"	Proposes that the first review must be started within 30 days of commencement.

Lord Hodgson of Astley Abbotts	Page 8, line 14, leave out "within the 3 year period following the last review" and insert "if the procedure set out in sub-paragraph (3A) applies. (3A) The expert panel under paragraph 5 must advise the Lord Chancellor to undertake a review of the rate of return when it considers that the nature of return on investment has changed sufficiently to justify such a review. (3B) Where a review under this paragraph has not taken place for a period of 12 months, the expert panel must report to the Lord Chancellor as to why it considers that no review is necessary."	Changes the basis of reviews from an automatic review every three years to a review taking place whenever the expert panel advises the LC that the rate of return has changed sufficiently to justify a review. If no review has taken place for 12 months the expert panel must report to LC why.
Lord Faulks	Page 8, line 15, leave out "3" and insert "5"	Subsequent reviews to be carried out every five years instead of every three years.
Lord Hodgson of Astley Abbotts	Page 8, line 17, leave out "within the 90 day period"	LC to decide when on commencement the first review is to be started rather than having 90 days to start it.
Lord Marks of Henley-on-Thames	Page 8, line 17, leave out "90" and insert "30"	First review to be started within 30 days instead of 90.
Lord Hodgson of Astley Abbotts	Page 8, line 19, leave out "within the 3 year period following the last review,"	LC to decide when a subsequent review is to be started rather than having a prescribed three year period.
Lord Hodgson of Astley Abbotts	Page 8, leave out lines 22 to 24 Page 8, leave out lines 25 to 28	Delete the definitions of when the 90 day and three year periods start as they are not relevant if the periods are removed as suggested by LH.

Lord Marks of Henley-on-Thames	Page 8, line 22, leave out “90” and insert “30” Page 8, line 23, leave out “90” and insert “30”	To be consistent with the earlier proposed amendments about time periods for first review.
Lord Faulks	Page 8, line 25, leave out “3” and insert “5”	To be consistent with a five year review period.

Lord Marks of Henley-on-Thames	Page 8, line 32, leave out from beginning to end of line 15 on page 9 and insert— “Determining the rate of return on the first review 2 (1) This paragraph applies when the Lord Chancellor is required by paragraph 1(2) to conduct a review of the rate of return. (2) The Lord Chancellor must review the rate of return and determine whether it should be— (a) changed to a different rate, or (b) kept unchanged. (3) The Lord Chancellor must conduct that review and make that determination within the 90 day review period. (4) In conducting the review, the Lord Chancellor must consult— (a) the Government Actuary, and (b) the Treasury. (5) The Government Actuary must respond to the consultation within the period of 60 days beginning with the day on which the Government Actuary’s response to the consultation is requested.	Suggests first review should be completed within 90 days (instead of 180 days) and only consult Government Actuary and Treasury. GA must respond within 60 days of being asked to provide a report by LC. Subsequent reviews should be completed within 180 days and must consult the Treasury and the expert panel. Expert panel must respond within 90 days to being asked to provide a report by LC.

(6) The exercise of the power of the Lord Chancellor under this paragraph to determine whether the rate of return should be changed or kept unchanged is subject to paragraph 3.

(7) When deciding what response to give to the Lord Chancellor under this paragraph, the Government Actuary and the Treasury must take into account the duties imposed on the Lord Chancellor by paragraph 3.

(8) During any period when the office of Government Actuary is vacant, a reference in this paragraph to the Government Actuary is to be read as a reference to the Deputy Government Actuary.

(9) In this paragraph "90 day review period" means the period of 90 days beginning with the day on which the Lord Chancellor decides (under paragraph 1) to be the day on which the review is to start.

Determining the rate of return on later reviews

2A(1) This paragraph applies whenever the Lord Chancellor is required by paragraph 1(3) to conduct a review of the rate of return.

(2) The Lord Chancellor must review the rate of return and determine whether it should be—

(a) changed to a different rate, or

(b) kept unchanged.

(3) The Lord Chancellor must conduct that review and make that determination within the 180 day review period.

(4) In conducting the review, the Lord Chancellor must consult—

(a) the expert panel established for the review, and

(b) the Treasury.

(5) The expert panel must respond to the consultation within the period of 90 days beginning with the day on which their response to the consultation is requested.

(6) The exercise of the power of the Lord Chancellor under this paragraph to determine whether the rate of return should be changed or kept unchanged is subject to paragraph 3.

(7) When deciding what response to give to the Lord Chancellor under this paragraph, the expert panel and the Treasury must take into account the duties imposed on the Lord Chancellor by

	paragraph 3. (8) In this paragraph "180 day review period" means the period of 180 days beginning with the day on which the Lord Chancellor decides (under paragraph 1(3)) to be the day on which the review is to start."	
Lord McKenzie of Luton	Page 9, line 20, after "determination" insert ", having taken into account the response of the expert panel," 78* Page 9, line 21, leave out ", in the opinion of the Lord Chancellor,"	Changes the wording to "LC must make the rate determination, having taken into account the response of the expert panel on the basis that the rate of return should be the rate that in the opinion of the LC a recipient of relevant damages could reasonably be expected to achieve." Appears to be trying to ensure that the expert panel's response is taken into account in the determination and the rate is set by reference to the rate that a claimant could be expected to achieve rather than what the LC believes the rate to be.
Lord Faulks	Page 9, line 38, after "damages" insert "and the cost of investment advice (if incurred) shall not be recoverable by way of damages"	Seeks to ensure that the cost of investment advice cannot be claimed as a head of damages.

Lord Hodgson of Astley Abbotts	Page 9, line 41, leave out “investments” and insert "investment grade listed debt securities” Page 9, line 47, at end insert— “( ) For the purposes of sub-paragraph (3), “very low level of risk” means the level of risk associated with debt securities of the United Kingdom.”	Changes the basis of investment from investing in a “diversified portfolio of investments” to a “diversified portfolio of investment grade listed debt securities” This also clarifies that references to risk is risk associated with debt securities. A debt security is a commitment by a lender to pay an agreed rate of interest on the borrowed amount over a period of time and when the period ends to repay the money in full. Unlike shares or equity investments there is a specified rate of return and a commitment to pay regular interest.

Keogh's

Lord McKenzie of Luton	Page 10, leave out lines 1 and 2	Removes the clause "That does not limit the assumptions which the Lord Chancellor may make"- thus meaning he is more confined by the legislation as to what he can take into account.
	83* Page 10, leave out lines 5 to 8	Removes the requirement for the LC to "have regard to the actual returns that are available to investors; have regard to the actual investments made by investors of relevant damages."
	Page 10, line 10, after "costs" insert "based on recommendations of the expert panel"	Requires LC to make such allowances for tax, inflation and investment management costs based on recommendations of the expert panel.
	85* Page 10, leave out lines 12 and 13	Again removes the clause "That does not limit the factors which may inform the LC when making the rate determination.
	Page 10, line 24, leave out "For each review of a rate of return,"	Removes the requirement to establish an expert panel for each rate of return and makes it just a requirement to establish an expert panel. The implication is that the expert panel is appointed once and may not change on subsequent reviews.

Keogh's

Lord Marks of Henley-on-Thames **Lord Sharkey**	Page 10, line 36, at end insert— "( ) one appointed member is medically qualified and has experience of changes in medical science and their effects on life expectancy."	Proposes the addition of another expert to the panel of four (actuary, investment manager, economist, consumer investment) – a medically qualified person with experience of medical science and change of life expectancy.
	Page 10, line 36, at end insert— "( ) each of the appointed members approaches the work of the expert panel as an expert with the object of recommending a rate of return that is fair to the interests of both claimants and defendants."	Explicit requirement for the experts to recommend a rate that is fair to claimants and defendants.
Lord Hodgson of Astley Abbotts	89 Page 10, line 36, at end insert— "( ) For the purposes of this paragraph, the Lord Chancellor may adopt the membership and work of an expert panel already established by the Lord Chancellor prior to this Schedule coming into force."	Attempts to give LC the opportunity to appoint an expert panel prior to the passing of the Bill and adopt its recommendations so allowing the rate to be set far quicker than will otherwise be the case.
	Page 10, leave out lines 37 to 40	Removes the clauses terminating the expert panel after it has responded to a consultation and allowing a person to be a member of more than one expert panel at any one time.

	Page 12, leave out lines 19 to 38	Removes some of the Interpretation provisions.
Lord Marks of Henley-on-Thames **Lord Sharkey** **Lord Beecham**	* Insert the following new Clause— "Impact on periodical payment orders (1) Within the period of six months after the coming into force of this Part, the Lord Chancellor must carry out a review of the impact of setting a new rate of return on the extent to which periodical payment orders are made by the courts in respect of future losses sustained by claimants in personal injury actions. (2) The Lord Chancellor must lay a report of the results of the review under subsection (1) before Parliament within eighteen months of the coming into force of this Part."	New clause requiring LC to carry out a review of the impact of a new rate on the extent to which PPOs are ordered by the courts. Review must be carried out within six months and report within 18 months of the Act coming into force.

For further information please contact:

Michael Renshaw

Partner

T: 02381 907019

E: mrenshaw@keoghs.co.uk