Review of the present arrangements for the payment of ill health pensions and injury on duty awards to former police officers

Report prepared by David A Scoffield QC
at the request of the Northern Ireland Policing Board

November 2014

Preface

I was initially asked to undertake a 'health check', on behalf of the Northern Ireland Policing Board, of the present arrangements for the payment of ill-health pensions and injury on duty awards to former police officers and agreed to do so. This seemingly straightforward request masked the complexity of the task which later unfolded.

This is an area of law which is complicated, both in terms of the statutory provision made for it and some of the concepts which are involved. It is also, especially in the particular circumstances of policing in Northern Ireland, much more contentious than I initially could have thought. Indeed, a number of the issues giving rise to the need for the review I was asked to undertake are, to some extent, related to the broader question of how Northern Ireland copes with the effects of its troubled past. It was certainly clear to me from consultation with those organisations representing former police officers that emotions can run high when dealing with the provision made for such officers through the injury benefits scheme. Moreover, the sheer extent of applications in Northern Ireland as compared with the rest of the United Kingdom has placed a severe strain on the scheme and those who administer it, which has been exacerbated further by litigation within the last number of years which has fundamentally questioned the manner in which certain aspects of the scheme had come to be applied.

The following report will, I hope, clarify a number of issues which have been raised with me by the Policing Board for consideration. Perhaps more than anything, however, it points up that there is further work to be done at both the legislative and policy levels. I have no doubt that further challenges lie ahead before the administration of ill-health pensions and, particularly, injury on duty awards for former police officers in Northern Ireland is restored to an even keel. Hopefully, this report will make at least a modest contribution to the progress towards that goal.

David A Scoffield QC

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November 2014

Acknowledgements

I am grateful to all those who have assisted me in the conduct of the review I was asked to undertake by the Policing Board and in the preparation of this report. This includes all of those whom I met in the course of the consultation meetings the Board asked me to undertake (who are listed in Appendix C to this report).

Special thanks go to the Crown Solicitor for Northern Ireland, Mr Jim Conn; and, in particular, Mrs [redacted] of the Crown Solicitor's Office, for all of her administrative support and assistance. I am also grateful to Ms [redacted] BL, who carried out a helpful review of the relevant legislation and the various amendments to it, which has been of great practical assistance to me.

Thanks are also due to the staff of the Policing Board who have provided me with information, who have facilitated me in the conduct of this review, and who have shown great patience in awaiting its eventual completion. These include in particular, but are not limited to, Mr Sam Pollock, Mr Peter Gilleece, Mr [redacted], Mr [redacted] and Ms [redacted].

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CHAPTER 1

INTRODUCTION, TERMS OF REFERENCE AND EXECUTIVE SUMMARY

Introduction

1.01 I have been instructed by the Crown Solicitor's Office, on behalf of the Northern Ireland Policing Board ('the Board'), to conduct a review of the present arrangements for the payment of ill-health pensions and injury on duty awards to former police officers.

1.02 When initially approached about this work, it was suggested to me that the nature of the review would be a 'health check' of the operation of the arrangements, with particular regard to their legality and procedural effectiveness. It soon became clear, however, that there was and is a considerable degree of contention and disenchantment on the part of a range of interested parties in relation to the operation of the present arrangements by the Board and other bodies involved; and that it was hoped that the review I have been asked to undertake would deal, in some way, with some of the concerns which had arisen.

1.03 To this end, the Board was keen that I should meet with a range of parties or 'stakeholders' who had an interest in the administration of the arrangements for the payment of ill-health pensions and injury on duty awards. I duly did so and found the contributions of those I met to be both interesting and of assistance.

1.04 It is important at the outset of this report, however, to understand clearly the nature of the present review and, in particular, the limitations of the exercise I have been asked to conduct. I have already sought to explain these in the course of consultation with interested parties where this was appropriate, or where I felt that expectations of the outcome of the process may be unrealistic.

1.05 I am a senior counsel practising in Northern Ireland in the field of public law. I am not a policing expert, a pensions expert, an expert in occupational health, nor even an expert in employment law. The nature of the task I have been set must accordingly be viewed in this light.

Primarily, the following report consists of legal advice to the Board on a number of questions or issues which have been raised with me. It concerns the nature and effect of the present statutory arrangements and how they can and should, in my view, be operated. This is essentially a matter of legal analysis.

1.06 Inevitably, an exercise of this kind will involve questions of interpretation and judgment. Where this may be so, rather than the mere giving of uncontentious legal advice, I have sought to make this plain in the interests of transparency. There are areas where the statutory scheme permits different approaches to be taken or where it might be viewed in different ways. Where that is so, I have sought to make suggestions where I feel this appropriate; but recognize that, ultimately, these issues are matters for the Board, or other relevant body, to determine for itself in the exercise of any relevant statutory function, subject ultimately to the oversight of the High Court in the exercise of its supervisory jurisdiction.

1.07 As appears below, the terms of reference which have been set for me also permit me, or on occasions may be thought to require me, to stray into areas which are properly matters of policy. This is particularly so because I have been asked to identify "limitations in the legislative framework and policy guidelines". Plainly, I am not a policymaker in this area, much less a legislator. It is not for me (nor, for that matter, for the Board) to re-write the law on the issues which are the subject of this review.

1.08 Accordingly, I have generally sought to confine comments on this aspect of my terms of reference to instances where the statutory scheme, or some policy approach on the part of a relevant public body, appears to me to be thwarting the existing statutory purposes[1]; or where the existing arrangements have given rise to widespread dissatisfaction or undue difficulties in their operation which ought obviously, in my view, to be addressed by some legislative or policy intervention. What use is made of any such comment on my part is a matter for others; but I am aware from consultation with representatives of the Department of Justice that it is continuing to keep the operation of the present arrangements under review and is open to dialogue, including with the Board, about further legislative development.

[1] Although recognizing, as discussed in further detail below, that discernment of the statutory purposes themselves may be a contentious issue.

Terms of reference

1.09 The terms of reference which were set for me and provided to parties interested in the review are set out at Appendix A to this report. They contain an introductory section which gives some background to injury on duty awards and identifies a number of the central issues which have emerged for consideration in the course of consultation with stakeholders (namely, the use of reviews and, in particular, their nature and effect where the former officer concerned attains the age of 65).

1.10 The operative part of the terms of reference is in the following terms:

> "In July 2013 the Board agreed to engage Senior Counsel to review the Board's existing administrative process within the current statutory and policy framework.
>
> Mr David Scoffield QC was appointed to carry out the review.
>
> The review will include:
>
> 1. Consultation with stakeholders;
>
> 2. An examination of the legislative landscape and regulatory policy framework for the administration of injury on duty awards, including any limitations;
>
> 3. Consideration of recent Pension Ombudsman and Medical Appeal Tribunal decisions;
>
> 4. Analysis of the processes and procedures followed by the Board in accordance with legislation and policy; and
>
> 5. Identification of any limitations in the legislative framework and policy guidelines."

1.11 In addition, my attention was drawn by the Northern Ireland Retired Police Officers' Association to a letter which had been sent from the Chief Executive of the Policing Board to Mr Jim Allister QC MLA, dated 12 November 2013, in which he indicated that I had been "authorized… to assist the Board in a *root and branch review* of how [injury on duty] applications, reviews and appeals should be administered". I do not understand this particular wording to represent any

extension of my terms of reference set out above but, rather, merely to represent a short-hand description of them (and within the limitations I have identified at paragraphs 1.04 to 1.08 above).

1.12 I expressly make clear, however, that my understanding of the Board's instructions to me is that I am free, entirely as I see fit, to make comment upon, including criticism of, any element of the arrangements or the Board's administration of them; and that I am to approach my task entirely independently.

The views of interested parties

1.13 I have listed the interested parties with whom I consulted in Appendix B to this report. Several of those consulted[2] provided detailed written representations, as well as meeting with me. I have found these extremely helpful.

1.14 I have not set out a comprehensive statement of the various representations made to me but refer throughout the body of this report to several of the points made by the various consultees. The following is an extremely brief summary of the nature of each of the bodies consulted and the general position adopted by each:

(a) **The staff of the Policing Board**. I had an opportunity to speak to a range of staff at the Policing Board, ranging from the Chief Executive, the Director of Policy and Head of the Police Administration Branch to staff involved in the day-to-day administration of the injury benefits schemes.

A central issue raised by them was the administrative, staffing and financial burden of the operation of the present system – particularly given the level of challenge to Board decisions through a variety of mechanisms[3] – which it is thought simply cannot be maintained. A related factor is that the Regulations are modelled on English provisions but not at all tailored for the specific issues raised by policing in Northern Ireland[4]. Staff are

[2] For instance, the Police Federation of Northern Ireland (PFNI), the Northern Ireland Retired Police Officers Association (NIRPOA), and the Disabled Police Officers' Association (DPOA).

[3] Various appeal routes; judicial review challenges; and complaints to the Pensions Ombudsman.

[4] So, for instance, in very round figures, in England and Wales where there are over 40 police forces, there may be around 100 cases *per* year (with 30-40 of those in the largest force, the Metropolitan Police Service); whereas in Northern Ireland there may be as many as 10-20 cases *per* week.

overwhelmed both by the volume of cases being dealt with and by the expectations of, and engagement[5] with, former officers involved in the process.

Two key issues which were identified as being highly contentious and on which advice would therefore be of assistance were (i) the precise role of the SMP in reviewing the initial injury where a review is held and (ii) the approach to officers in receipt of an injury on duty award who reach age 65.

In addition, concerns were indicated in relation to two important areas where it was thought that the Department could be of greater assistance than it is at present, namely (i) the provision of more detailed guidance as to whether, and if so how, reviews at compulsory retirement age or age 65 should be occur in light of the withdrawal of the previous guidance after the *Simpson* and *Slater* cases; and (ii) the encouragement of IMRs to provide implementation dates in cases with which they deal on appeal.

(b) **The members of the Policing Board** with whom I consulted were extremely interested in the issues raised in this review but were also unclear about what precisely the Board *members'* role was, given that the administration of injury benefits is generally dealt with on a case-by-case basis and by Board officials. A view was expressed that the Board members had never been presented with the central issues raised in this review in a comprehensive way for consideration (although it is clear that a number of them have fallen for consideration by the Board, particularly through its Human Resources Committee, in recent years in some fashion or other). Hopefully the provision of this report will provide an opportunity for this to occur insofar as Board members consider this is appropriate. Various aspects of the detail of the administration of the statutory scheme were discussed.

(c) **The Police Federation for Northern Ireland (PFNI)** represents serving and retired police officers in Northern Ireland. They attended the consultation meeting with me accompanied by a representative from Edwards & Company, a firm of solicitors which often

[5] This engagement being sometimes emotional or even aggressive or abusive; and often persistent. In this context, it is to be recalled that many officers have genuine concerns about their own financial position; many are frustrated by delays within the system, which they legitimately view as having reached an unacceptable level, or are seriously aggrieved at perceived unfairness in how they have been treated by the establishment generally; and many are, regrettably, suffering from mental health difficulties related to their injury on duty or other factors.

acts for the Federation or its members and which has a high degree of knowledge and experience of the injury benefit and IOD arrangements.

Although a variety of issues were raised by the Police Federation, in relation to several aspects of the system, the Federation was principally concerned with the issues of reviews and, especially, those conducted for former officers at age 65. The Federation felt that it was proper for reviews to be held and accepted that a 5 year interval was a 'decent benchmark' in terms of allowing time for any significant change in an officer's circumstances; but argued strongly that reviews should *not* be carried out automatically at age 65, nor should there be automatic 'zero-rating' or reduction to Band 1 (which produced the same practical result). This was thought to be especially unfair in relation to officers who had been told that their particular banding was "for life" (or words to that effect).

(d) **The Northern Ireland Retired Police Officers' Association (NIRPOA)** specifically represents retired police officers in Northern Ireland. It plainly has a keen interest in the matters which are the subject of this review concerning, as they do, former officers. There was a high degree of overlap between the concerns raised and points made to me on behalf of PFNI on the one hand and those made on behalf of NIRPOA. In addition to the issues of whether and how the review system ought to operate, the NIRPOA submissions also focused on an alleged lack of consistency in approach on the part of the Board and a suggestion that, whilst the Board was maintaining that it was *not* automatically zero-rating officers aged 65, its direction to the appointed SMPs nonetheless had this purpose and effect.

(e) **The Disabled Police Officers Association of Northern Ireland (DPOANI)** has around 150 members, I was told, who meet the Association's criteria for membership. Membership is open to both serving and retired officers who have sustained serious injuries which account for disablement of 35% or more or an industrial injury award of 20% or more. The Association's representations also focused on the issue of reviews. Their particular concerns related to (i) how often reviews should be conducted in general; (ii) whether there should be review of officers at age 65, which the Association contended amounted to age discrimination; and (iii) whether there should be reviews of those who had been told that their award was "for life" or words to that effect. The Association suggested that an officer should not be reviewed unless their injury had substantially altered and that there

should be an obligation on the Board to show this before the officer was called for review. The Association also provided me with the results of a survey of its members it had undertaken in February 2013 in relation to issues concerning injury on duty awards.

(f) **The Police Service of Northern Ireland** representatives with whom I met had a number of perspectives on the issues raised in this review. It was emphasized to me that the issue of IOD awards was a very significant financial issue for the police and that, in particular, there were difficulties with its lack of predictability, which hampered business planning. A lack of control on the part of the PSNI was also identified as a potential issue, since in other forces such pensions issues are delegated to the Chief Constable but in Northern Ireland these are dealt with by the Policing Board. Issues around the management of medical retirement generally were discussed; as were the arrangements for initial awards and reviews. The PSNI was critical of the appeals system and told me they were on record as having said it is not fit for purpose.

Again, the pressure on Human Resources staff by reason of the sheer amount of applications was mentioned as a concern; and the inter-relationship of the PSNI and the Board in relation to the administration of the scheme was discussed.

It was particularly helpful to have the input of Dr Crowther of the PSNI Occupational Health and Welfare Unit (OHW), who has considerable experience of police injuries of all kinds. He candidly expressed the view that it was difficult for a doctor to assess an issue such as earning capacity, since this is really an actuarial (rather than medical) question. He also expressed the view that it can be very difficult for an SMP to determine the factual question of whether the injury is a qualifying injury under the Regulations. He felt that the doctor's role should be limited to commenting on loss of function. As appears below, this was a theme echoed by the SMPs themselves in their consultation meeting.

It was also helpful to have the input of Mrs Karen Todd, the Head of Police Pensions Branch, who again has considerable experience over several years in this area. Some of the general policy issues around the Regulations which were discussed included: the view that the current Regulations reward longer service where an officer is medically retired, whereas there is a strong case for saying that this is the wrong way round, *i.e.* that an officer whose service has been cut very short by injury should be treated more favourably;

and a potentially fundamental difficulty with the Regulations in that they do not permit an injured officer to continue to be employed by the police but with reasonable adjustments made to their work or working conditions to enable them to remain as police officers even though they may not be able to perform all of the ordinary functions of a police officer.

(g) The officials from **the Department of Justice (DOJ)** with whom I consulted were happy to discuss matters generally but seemed to me to be reluctant to either express candid views about the operation of the present system or any firm policy proposals for reform. I mean this observation as no form of criticism. As to the first issue, there are valid reasons why the Department, or certainly Departmental officials, may wish to avoid commentary on the exercise by the Board, which is independent of the Department, of its functions. One matter of which the Department was acutely aware, and emphasized, is that the Board is the decision-maker under the Regulations (subject to the referral of certain medical questions). In relation to the IMR appeal system, it was also suggested that the Department hosts this simply to ensure the independence of the IMRs from the Board and its appointed SMPs; but that the IMR system could just as easily be hosted by, for instance, the Department of Health, Public Safety and Social Services. As to the second issue, policy reform, I have no doubt that the Department would not wish to prejudge any consultation it might itself undertake on such matters at a later date and that it will also be aware that reform in this area could potentially be politically contentious. Possible reforms in line with amending legislation which might be brought in in England and Wales were discussed in general terms[6].

(h) **The Selected Medical Practitioners (SMPs)** were able to describe the operation of the system from their perspective, as the doctors to whom important questions under the statutory scheme are referred for consideration and determination. I formed the view that they were plainly conscientious and professional. However, they indicated that there were a number of areas where they felt that additional support and advice would be of assistance to them and/or where the legislative scheme was difficult to administer as an SMP. In particular, the SMPs felt that their task was, or had become, 'quasi-legal' in character and that greater training and guidance in relation to legal developments (such as

[6] And this is an issue I return to in further detail in Chapter 13.

new case-law which was relevant) would be of benefit to them[7]. A strong view was expressed that the whole process of actually calculating awards is foreign to the SMPs acting, as they are, as clinicians.

On the medical side, one practical and discrete complaint the SMPs had is that the histories provided to them in hearing loss cases is often vague and of little value; as are those where the injury is a very old one in a retrospective claim. This was used as an illustration of the practical difficulty in assessing, for instance, precisely when or how the injury occurred and[8] what the officer's condition was at the time of retirement. The view was also expressed that it is often an extremely difficult judgment to make as to whether or not a condition is permanent.

The SMPs also indicated that they would appreciate clear guidance on the issue which has come to be termed 'revisiting causation' and whether the recent Pension Ombudsman cases mean that it is not possible to look at the issue of apportionment in reviews.

The high number of applications and pressure on PBNI staff and resources

1.15 I have recently been provided with some additional information from the Board about the staff pressures mentioned in paragraph 1.14(a) above. In particular, I have been furnished with some figures which show the extent of the level of IOD applications in Northern Ireland as compared with police forces in England and Wales. The statistics available suggest that most police forces in England and Wales have fewer than 10 IOD applications *per* year. By far the highest figure was for the Metropolitan Police which, with well over 30,000 officers, has had an average of 22 IOD applications *per* year in recent years. By contrast, the PSNI, with less than 7,000 officers, has had between 780 to 1040 IOD applications *per* year in recent years[9]. The difference in these numbers is staggering.

[7] That is not to say that they were not appreciative of the existing mechanisms for this – particularly SMP training provided nationally by the National Police Improvement Authority – which they considered extremely valuable; as well as the regular meetings they have with the Board, at which I understand they are provided with copies of relevant cases.

[8] Even if it was clear how the injury was caused.

[9] With well over 90% of those processed relating to hearing loss.

1.16 There are three principal results of this. Firstly, and obviously, the injury awards system in Northern Ireland costs much more than it does in other parts of the United Kingdom[10]. Secondly, there is very much greater pressure on the PBNI staff who administer the scheme, and the clinicians acting as SMPs, than one might usually expect. And, thirdly, any flaw in the operation of the scheme is magnified to a much greater degree than will be evident in the application of equivalent Regulations elsewhere in the United Kingdom, where relatively few cases are involved.

1.17 In relation to the second of these factors, the current burden of dealing with IOD applications, particularly retrospective applications and reviews, has reached a critical position as far as the Police Administration Branch of the Board is concerned, with some PAB staff themselves being affected by work-related illness as a result[11]. There is a small cohort of staff within PAB to deal with an increasingly unrealistic workload[12].

1.18 I am aware, for instance, that concerns about the resourcing of PAB to meet present and future demand was raised in correspondence in late May 2014 from the Chief Executive of the Board to the Director of Safer Communities within the Department. The correspondence indicated that, on the basis of current demand and resources, an applicant may have to wait a number of years to have an application processed. This is obviously not acceptable.

1.19 The correspondence also set out some figures to illustrate the difficulties. In the last financial year, the PAB processed 325 cases. However, it held approximately 500 applications and 160 appeal cases in a queue to be processed. In addition there are approximately 500 cases awaiting review. Over the past six months, the Board had received an average of 15 new cases *per* week, equating to approximately 750 applications *per* year. Although the Board had increased its resources in the Branch, the Chief Executive was able to indicate frankly that it will remain the case that the Board will receive more IOD applications than it could process. These difficulties are only likely to increase if further potential budget cuts are brought into effect.

[10] Both to administer and also to fund. There was no information available from the Metropolitan Police as to how many IOD awards they presently have in payment but no other police force in England and Wales in respect of whom such information was available had more than 650 IOD awards. By contrast, the PSNI has over 2,300 in payment, with that likely set to rise significantly with the high number of applications in recent times.

[11] Indeed, Dr Crowther, the Board's Chief Medical Adviser, has indicated that "the current difficulties with the administration of police pensions are well known to management and this has been impacting on the well-being of several members of the admin team".

Executive summary

1.20 Throughout this report, and particularly in Chapter 14, I have set out some more specific thoughts as to how reform of the present system might be taken forward; and also, assuming that no such reform occurs or that it takes a considerable period of time, more detailed recommendations about how the Board should be approaching its functions under the scheme as it currently stands. In this summary, I have identified only some very general recommendations on each of these themes. The complexity of the issues at hand is perhaps evident from the length of this report, running to some 300 or so pages. The following synopsis is no substitute for consideration of some of the more detailed reasoning contained elsewhere in this report. However, I hope it is of assistance in providing a high-level overview of my conclusions on some of the key issues.

1.21 My terms of reference encouraged me to identify any limitations in the legislative framework and policy guidelines. In my view, there are four severe limitations within the present statutory scheme, particularly as it relates to former officers, which have given rise to some of the difficulties which directly prompted this review. The fourth of these is really a lacuna within the statutory scheme, which I find difficult to understand.

1.22 In addition, I have identified a significant limitation in the policy guidance available to those operating the scheme; and a further practical limitation which is hindering the administration of the scheme by the Board, exacerbating the inherent difficulties already present.

1.23 The **first** limitation is the extremely cumbersome decision-making process imposed by the statutory scheme, which splits issues into medical questions and non-medical questions, each with separate decision-making processes and appeal routes. Such a process builds into the system a significantly increased risk of delay, confusion and/or conflict between the various limbs administering the scheme. This system seems to me to be unduly complicated. It can operate extremely inefficiently, particularly when one has regard to the opportunity for different appeals of different issues at different times and the option of referring matters back to either medical authority for further consideration. This can give rise to an almost interminable process to reach a final decision in a contested case, at which stage other available routes of challenge also potentially come into play. It is no wonder that both officers and those administering the scheme feel over-burdened by the process when, certainly in contentious cases, it can seem never-ending.

1.24 The difficulties are particularly exacerbated, however, by the fact that the dichotomy between medical questions and non-medical questions seems to me to be poorly drawn. The present system sees SMPs and IMRs having to grapple with legal issues, factual disputes and essentially accountancy assessments, which are plainly not issues of medical judgment. On the other hand, the determination of the date when an officer became permanently disabled, which does seem to me to be an exercise of medical judgment, is left to the Board.

1.25 I recommend that there be a wholesale reconsideration of the way in which IOD award decisions are made. This would plainly need legislative amendment and would have to be taken forward by the Department, after consultation with relevant parties. However, it seems to me that there should be a body with sufficient expertise to deal with all aspects of an application (or review) at the one time, whose decision would then be subject to appeal on one occasion only, whatever the nature of the appeal.

1.26 The **second** major limitation is the failure of the legislation to grapple expressly with the nature and purpose of police officer's injury awards and, in particular, whether their character is primarily an award for life in compensation for an injury sustained *or* more in the nature of a temporary facility to off-set a loss of earnings up to the date when the officer would have been expected to retire. The running sore which the issue of age 65 reviews presently represents is a direct consequence of an ambiguity within the appropriate Regulations as to this issue. [redacted]

[redacted]

1.27 For the moment, the *Simpson* judgment appears to resolve this question clearly in favour of the former interpretation mentioned in paragraph 1.26 above; but there is also support within the Regulations for the converse. The cost to the public purse of the former, more generous type of system is likely to be considerably greater than the latter. It might well be that this is what the Department (and the Executive and Northern Ireland Assembly) wish to provide; but it seems to me that this is an important policy question which it is for elected representatives to determine on its merits, rather than a position which should have been reached on the basis of judicial interpretation of provisions which do not appear to have expressly addressed this issue, much less in the particular context of Northern Ireland policing. This is an issue which should be grappled with head-on in my view by those ultimately responsible for the allocation of public funds for these purposes.

1.28 In the absence of reform expressly addressing (in the legislation itself) how these issues should be dealt with, and therefore on the basis of the statutory scheme and the law as it stands at the moment, my conclusions on the key issues of contention between the Board and those representing former officers which gave rise to this review are as follows:

(a) The Board is required to reconsider a pensioner's degree of disablement at suitable intervals. On the basis of the present Regulations, any such reconsideration requires a reference to the SMP to consider the matter. The determination of what is a suitable interval should, in the first instance, be guided by medical advice provided by the SMP (or IMR, as the case may be). There should be a move away from automatic review for all cases at any fixed interval set in policy.

(b) It ought to remain open to an officer to request a review himself[13] at any time; and the Board should also retain the right to initiate a review at any time if information comes to its attention identifying an apparent relevant change in circumstances.

(c) More limited legislative amendment to that outlined in paragraphs 1.26 to 1.27 above should be considered more urgently to permit a review to be dealt with, at least in the first instance, on the basis of medical evidence provided *without* a reference to an SMP (for example, by the officer's general practitioner or other appropriate clinician). This would avoid the costly and cumbersome process of involving an SMP in cases where the review could adequately be dealt with in a more summary fashion.

(d) Unless and until there is a material legislative amendment or the *Simpson* judgment is held (by a superior court or a competent court in Northern Ireland) to be incorrect or inapplicable, there should be no automatic reviews of officers at age 65 or other compulsory retirement age; nor should any such officer's banding be reduced on the basis of a calculation taking into account that, had he not been injured, he would in any event have ceased to be a police officer.

[13] I should say that, for convenience, I have consistently referred to police officers (and SMPs/IMRs) as males in this report, rather than using a formulation such as 'he or she'; but any such reference should obviously be taken to include females also, as appropriate.

(e) Those officers who were told in clear terms that they would not be subject to review, or words to that effect, should not be further reviewed in the absence of a request from them or some compelling reason why a review is considered appropriate (such a reason not to include merely their attainment of a particular age). SMPs and IMRs should not be precluded in future from designating a case as one for no further review but this should occur only very rarely and guidance should be formulated for them as to when this may be appropriate.

1.29 In light of these conclusions, my recommendations in relation to the currently suspended reviews or appeals, or reviews which took place shortly before the suspension, are as follows:

(i) Any suspended reviews which were prompted merely by the officer's attainment of age 65 or other compulsory retirement age should be abandoned.

(ii) Any suspended reviews which were prompted merely by the 5-yearly review policy should also be abandoned. In the absence of a present culture of the SMP or IMR recommending a time for further review in their report, it may be appropriate to carry out a review in such cases, simply as a matter of checking the present position and to enable medical advice on when further review might be appropriate to be provided. However, in order to alleviate the current pressure on the system, this category of review should not be progressed at present until some legislative amendment is made, or further policy guidance issued, to simplify and speed up the review process.

(iii) Where an officer has had his banding reduced on review as a result merely of his attainment of a particular age, that is to say in a *Simpson*-type case, whether that is subject to appeal or not, this should be looked at again. The appropriate mechanism for doing so is discussed in further detail in Chapter 9. It may be that the Office of the Pensions Ombudsman or an application for judicial review could be used as an appropriate mechanism for referring these cases back to an SMP for further consideration, since without some formal legal intervention the certificate and report provided by the SMP on the review continues to have legal effect and is 'final' under the terms of the Regulations. Again, ideally, such a referral back should not occur until some legislative amendment is made, or further policy guidance issued, to simplify and speed up the review process going forward.

1.30 The **third** major limitation in the statutory scheme is the absence of any time limit on when retrospective IOD applications can be made. This means that it is possible for those administering the scheme to be flooded with applications from former officers in relation to events which occurred many years ago and which can be, accordingly, extremely difficult to assess. It is a quite remarkable feature of the scheme that applications can be made retrospectively with no limitation at all. [redacted] I recommend that a time limit[14] be introduced restricting the ability of former officers to make applications many years after both the relevant events and when the permanent disablement is said to have arisen.

1.31 The **fourth** limitation I mentioned in paragraph 1.21 above, the lacuna, arises as follows. Regulation 22 of the 2006 Regulations reflects a principle against double recovery, whereby damages or compensation received by an officer in respect of an injury are subtracted from certain awards payable to him under the Regulations as a result of that injury. Strangely, although this is the case where a disability gratuity is payable under regulation 11, it is *not* presently the case where a police officer's injury award (consisting of a gratuity and injury pension) is payable under regulation 10.

1.32 In certain circumstances a police officer, or former police officer, in Northern Ireland may bring a civil claim for compensation arising out of an injury he has sustained in the execution of his duty[15]. The most common example – and by far the most common type of IOD claim – relates to hearing loss which service in the police has either caused or to which it has contributed. Under the Regulations as they presently stand, the officer could be paid a significant sum from public funds in compensation for sustaining this injury in satisfaction of his legal claim, including an element for loss of earnings or loss of earning capacity, and then proceed to make a claim for an IOD award under the 2006 Regulations in respect of exactly the same injury[16]. This effectively results in the

[14] [redacted]

[15] This may be against the Chief Constable or some other party who has in some way caused or contributed to the injury in breach of some duty owed to the plaintiff officer.

[16] This is a matter which would no doubt feature in any political debate, such as is proposed in paragraph 1.27 above, about whether the present scheme is overly generous. Few would seriously dispute that a police officer, or retired officer, is entitled to be compensated where he has been injured as a result of negligence on the part of his employer; nor that the public purse should compensate an officer where he is injured in the execution of his duty, without his own default, in circumstances where he can no longer continue in police employment and no-one is liable to compensate him under the ordinary rules of civil liability. However, where there are officers – and perhaps a considerable number of officers – who have voluntarily retired with

officer being compensated twice in respect of the same injury in a way which is not permissible where he would be entitled to a disablement gratuity but, on the current wording of the Regulations, is permissible where he seeks an injury award (including a gratuity and injury pension). It seems highly unusual that the Regulations would prohibit this in some circumstances but permit it in others; and it seems to me difficult to justify. I would accordingly recommend that the legislation be amended to prohibit such double recovery in respect of regulation 10 awards also. Further discussion of this is contained in Chapter 12.

1.33 The **fifth** major limitation I have identified is the present state of policy guidance in Northern Ireland for those administering the ill-health retirement and IOD schemes. At one and the same time there is an absence of relevant guidance at the moment in the key area of contention, namely the approach to reviews at compulsory retirement age or state pension age, following the withdrawal of such guidance in the light of the *Simpson* and *Slater* litigation; and also a plethora of potentially relevant policy guidance on other aspects of the system, not all of which is consistent or up-to-date, issued by a range of bodies throughout the UK.

1.34 It seems to me that one authoritative Northern Ireland specific document should be issued, agreed at least between the Board and the Department (but preferably also with the staff side), to be used as the basis for the Board and medical authorities operating the scheme. Ideally, this would occur after any legislative amendment of the scheme, whether major or more limited; but, in the absence of such amendment, clear and appropriate policy guidance may also assist to streamline the operation of the system in the meantime.

1.35 I also recommend that, in the course of such a further review of Northern Ireland specific policy guidance in this area, serious consideration should be given to abandoning the currently recommended method of calculating percentage disablement, including detailed reliance on the ASHE survey and comparison with the officer's notional uninjured police salary, in favour of a much more basic approach, whereby the relevant medical authority would simply make a judgment in the round as to the severity of the impact of the duty injury on the officer's earning capacity, so as to select the officer's appropriate band without the need to calculate a specific percentage disablement figure.

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a generous severance package under the Patten scheme, and who have been compensated though an action against the Chief Constable for hearing loss, there is an important debate to be had as to whether it is an appropriate use of public funds to further compensate them for the same injury on the basis that it permanently disabled them from continuing in police employment.

1.36 The **sixth** major limitation I would identify with the operation of the injury awards system – which is not, in fact, a limitation in either the legislative framework or policy guidelines – is the familiar issue of resources. I have referred at paragraphs 1.14(a) and 1.15 above to the pressure the Board is under at the moment in terms of coping with the sheer weight of applications, reviews and appeals and the related enquiries and correspondence, which has become intolerable.

1.37 Dr Crowther has expressed the view that, "… ultimately the current pressures on the staff in pensions admin [in the Police Administration Branch of the Board] will only be dealt with when the process is clearly mapped, supported with appropriate IT, staff and management at all levels commensurate with the legal obligations in the Police Pension Regulations". I wholly endorse this sentiment. A review of policy guidance as referred to immediately above should hopefully assist with the clear 'mapping' of the process; and the other steps recommended within this report will, I hope, if implemented, ultimately result in a more easily shouldered burden for NIPB staff[17] administering the ill-health retirement and injury benefits schemes.

1.38 However, at least in the short to medium term, it seems to me that there is an urgent need for additional staff support in this area. I am all too aware that there is a very challenging budgetary position within the Board at the moment, as with many other areas of public service and administration, and that there are many competing priorities of which I am completely unaware. It is also obviously not my function to advise the Board as to how to direct its limited resources; however, I have been asked to identify limitations with the present operation of the system and this seems to me clearly to be one such limitation.

1.39 Moreover, the difficulties which NIPB staff have processing and dealing with applications, reviews and appeals has a knock-on effect, leading to dissatisfaction on the part of the officers concerned, further complaint, additional pressure and loss of morale on the part of the Board staff and therefore a spiral of the problems. Relatively modest additional funding for staff in PAB may in fact have a significant effect in reducing some of these difficulties; and, conversely, even relatively modest budget cuts may have a significant effect in increasing them. I am conscious that this is a matter already under discussion within Board management.

1.40 The question of resources is a matter which factors into the discussion of whether the administration of injury on duty awards for former officers should remain with the Board at all or

[17] And, for that matter, other stakeholders.

whether it might more appropriately be dealt with by the Chief Constable. This is a question which I believe warrants serious consideration, which I touch upon in Chapter 12 of this report.

1.41 In summary, the circumstances giving rise to the review which I have been asked to undertake, and the broad limitations I have identified above in the operation of the present statutory scheme, have led me to the conclusion that the arrangements are buckling under their own weight in Northern Ireland. This is largely because of the massive number of applications in Northern Ireland, which in turn arises from the peculiar nature of policing in this jurisdiction over many years, but which has resulted in the Board being unable to cope with the burden of administering the system. Given that successful applications must be kept under review pursuant to regulation 35, and that unsuccessful applications tend to be the subject of challenge, leading to reconsiderations and various levels of appeal, it is difficult for the Board to ever really 'clear' a case from its workload permanently. Consequently, the workload simply continues to build.

1.42 The difficulties with the legislation itself, and the lack of clear policy guidance to those administering it (which it must be admitted were hugely exacerbated by the litigation in England and Wales in recent years which has thrown the operation of the review system into some disarray), have multiplied this problem. Whilst the huge number of applications in Northern Ireland may be able to be dealt with if the procedure was straightforward and quick and easy to administer, and whilst the problems with the scheme and lack of clear policy guidance may have been able to have been overcome if the number of applications was very small[18], the combination of these factors has resulted in a critical situation.

1.43 I accordingly recommend that steps are taken, along the lines suggested for consideration above, to ameloriate the situation as expeditiously as possible – in the interests of both the former officers concerned and those administering the scheme[19]. There are some immediate actions recommended at paragraph 1.29 for the Board. However, the burden of improving the system more generally now seems to me to really rest with the Department, as the body ultimately responsible for the Regulations and their amendment, for the issue of any central guidance in Northern Ireland relating to the Regulations, and indeed for the funding of the injury benefits scheme. In the first instance, however, I commend this report to the Board for its consideration.

[18] As elsewhere in the United Kingdom.

[19] Principally the Board staff and the SMPs but also the Departmental officials dealing with appeals and their appointed IMRs.

CHAPTER 2

THE STATUTORY SCHEME

The importance of the statutory scheme

2.01 The arrangements for police officers' ill-health pensions, injury on duty awards and other related awards are set out in a number of detailed statutory provisions. They are part of the law and not merely in the discretion of a body such as the Policing Board. The Board, and other relevant public authorities, must act in accordance with the statutory scheme and seek to administer it in a manner which is consistent with its purpose and effect.

2.02 Central to any discussion about how the present arrangements operate, therefore, is a proper understanding of what the statutory scheme says and what it is intended to do. Unless and until the statutory scheme is amended by the legislature, those administering the scheme and interested in its operation are, to a large degree, 'stuck' with what it provides. It is not open to them to simply pretend that the law is otherwise than it is. For this reason, it is unsurprising that my terms of reference set as my first task, after consultation with stakeholders, an "examination of the legislative landscape".

The statutory purpose

2.03 Just as important as understanding how various discrete statutory provisions operate is an understanding of how the statutory scheme hangs together as a whole. The principles of public law make clear that public authorities must act in accordance with the purpose and intention of the statutory provisions which govern the exercise of their functions[20]. Sometimes the purpose and intention of statutory provisions will be clear; other times not. The task of discerning the legislative intention can be particularly difficult where, as here, the statutory mechanisms are complex,

[20] See, for instance, *Padfield v Minister of Agriculture, Fisheries and Foods* [1968] AC 997 in which the House of Lords enunciated and applied the principle that statutory powers were conferred so that they could be used to promote the policy and objects of the statute, which were to be determined by the construction of the statute, which was a matter of law for the court. See also the invocation of the *Padfield* principle in this very sphere, in relation to the English Regulations, by King J in paragraph [7] of *R (Haworth) v Northumbria Police Authority* [2012] EWHC 1225 (Admin).

intricate, perhaps often amended, and not easy to read together as a coherent whole. Nonetheless the importance of the task of seeking to clearly discern the statutory purpose remains.

2.04 This is a key aspect of the present review; since it became clear to me in the course of consultation with interested parties that there were differing understandings and expectations of what the statutory scheme was designed to, or should, do. I return to this theme later in this chapter and elsewhere in this report. But towards one end of the spectrum is the view that the awards established in the relevant Regulations are purely a means of arithmetically compensating a police officer for loss of earning capacity when he suffers certain injuries which hinder his police career; and at the other end of the spectrum is the view that the awards established in the relevant Regulations are the primary means of recognizing and rewarding the service and sacrifice of those injured in the fight against crime or terrorism. For those whose view tends towards the latter interpretation, it is understandable that the outcome of determinations and reviews can prove to be particularly emotive.

2.05 In recent years, the guidance issued by the Home Office and Northern Ireland Office appears to have taken the view that the statutory purpose – at least in relation to the particular awards payable to former officers and under consideration in this review – is much closer to the former interpretation, rather than the latter interpretation, mentioned in the preceding paragraph.

2.06 Indeed, there is considerable support for the proposition that an injury pension under the Regulations is, at its heart, a form of payment designed principally to compensate for loss of *earning capacity*. However, this invites a more sophisticated debate about whether loss of earning capacity in an injured police officer is a personal characteristic, much like the injury or condition which gives rise to it, continuing beyond what would usually be retirement age; or whether it is a simple expression of the reality of the employment market, including compulsory retirement ages, where an individual's employability, at least for certain types of work, can decrease significantly at a particular age. This fundamental difference in outlook permeates a number of the difficult issues which have been identified to me as areas where there is considerable dissatisfaction, or a clash of expectations, in relation to the operation of the scheme.

2.07 As appears further below[21], the *Simpson* judgment referred to in my terms of reference appears to me to give a clear answer on these issues, including by reference to earlier case-law

[21] And particularly in Chapter 7 where it is discussed in some detail: see paragraphs 7.13 to 7.49.

which is said to support the conclusion reached in *Simpson*. As I note in paragraph 7.28 below, the judgment in *Simpson* seems to me to:

> "… represent a fundamental and deep-rooted finding about the nature and purpose of the statutory scheme, including that disability is a 'gateway' to the benefit; that once that gateway has been passed through, the officer is compensated for the impact of the injury on what he is capable of doing (irrespective of whether, realistically, he would have been employed to do what he is now incapable of doing); and that such an entitlement is designed to be a life entitlement."

2.08 Although there is, of course, a debate which may still be had as to whether this is objectively the best interpretation of the relevant Regulations[22], and perhaps more interestingly still whether the legislature appreciated at the time of making the Regulations that this was the nature of the scheme it was creating[23], certainly, for the moment, this represents an authoritative view on the nature and effect of the English analogue of the relevant Regulations in Northern Ireland, which are in materially identical terms. For reasons also discussed below[24], I consider it unlikely that a court in Northern Ireland – certainly at first instance – would reach a different conclusion on the nature and effect of the relevant Regulations here, simply because this results in a greater administrative and financial burden in the Northern Ireland context. This issue about the competing views of the purpose of the Regulations, or perhaps more accurately the awards which are the main focus of the present review, is considered further in the course of my discussion of the *Simpson* judgment.

The empowering provisions of primary legislation

2.09 The relevant Regulations, discussed further below, are made under rule-making powers conferred by the Police (Northern Ireland) Act 1998 ('the 1998 Act') and the Superannuation (Northern Ireland) Order 1972 ('the 1972 Order').

2.10 Section 25 of the 1998 Act provides (insofar as material):

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[22] An issue also addressed in Chapter 7 in my discussion of whether the *Simpson* case was correctly decided: see paragraphs 7.32 to 7.49.

[23] And whether it would do so again; or do so in the Northern Ireland context, with the extremely high number of police injuries sustained here in comparison with the rest of Great Britain by very reason of the Troubles.

[24] See paragraphs 7.08 to 7.12.

"(1) Subject to the provisions of this section, the Department of Justice may make regulations as to the government, administration and conditions of service of members of the Police Service of Northern Ireland.

(2) Without prejudice to the generality of subsection (1), regulations under this section may make provision with respect to —

…

(j) the hours of duty, leave, pay and allowances of members of the Police Service of Northern Ireland;

(k) the pensions and gratuities in respect of service as a member of the Police Service of Northern Ireland (including provision for the recognition for the purposes of such pensions and gratuities of service otherwise than as a member of the police force and for the payment and receipt of transfer values or of other lump sums made for the purpose of creating or restoring rights to such pensions and gratuities); …

…

(5) In relation to any matter as to which provision may be made by regulations under this section, the regulations may, subject to subsection (3)(b) —

(a) authorise or require provision to be made by, or confer discretionary powers on, the Department of Justice, the [Policing] Board, the Chief Constable or other persons; or

(b) authorise or require the delegation by any person of functions conferred on him by or under the regulations.

…

(8) The Department of Justice shall consult both the Board and the Police Association before making any regulations under this section, other than regulations made by virtue of subsection (2)(j), (k) or (l)."

2.11 The original references to the Secretary of State for Northern Ireland in these provisions were amended to references to the Department of Justice by virtue of the Northern Ireland Act 1998

(Devolution of Policing and Justice Functions) Order 2010[25].

2.12 Section 26 of the 1998 Act makes similar provision empowering the Department of Justice to "make regulations as to the government, administration and conditions of service of reserve constables"[26], including regulations making provision with respect to "the retirement of reserve constables", "the remuneration and allowances of reserve constables" and "the application to reserve constables, subject to such modifications as may be prescribed by the regulations, of any provision made under section 25 or any other statutory provision with respect to pensions or gratuities payable to or in respect of members of the Police Service of Northern Ireland"[27].

2.13 Article 15(c) of the 1972 Order[28] provides that:

> "Article 14 (except paragraph (5)) shall apply in relation to… regulations relating to pensions under section 25 or 26 of the Police (Northern Ireland) Act 1998, as it applies in relation to regulations under Article 9, 11 or 12."

2.14 Article 14 of the 1972 Order is therefore relevant to the 1988, 2006 and 2009 Regulations[29] insofar as they relate to pensions. It provides (excepting paragraph (5) and otherwise insofar as material), as follows:

> "(1) Any regulations made under [sections 25 or 26 of the 1998 Act] may be framed so as to have effect as from a date earlier than the making of the regulations.
>
> (2) Subject to paragraph (3), any regulations made under [sections 25 or 26 of the 1998 Act] may be framed –
>
> (a) so as to apply in relation to the pensions which are being paid or may become payable under the regulations to or in respect of persons who, having served in an employment or office service in which qualifies persons to participate in the benefits for which the regulations provide, have ceased to serve therein (whether or not they have subsequently

[25] SI 2010/976. See article 4(1); Schedule 3, paragraphs 9 and 10.
[26] See section 26(1).
[27] See section 26(2)(c), (f) and (g) respectively.
[28] As amended by the 1998 Act (see paragraph 6 of Schedule 4 to the 1998 Act).
[29] These full title of each of these Regulations is given below.

recommenced any such service) or died before the regulations come into operation; or

(b) so as to require or authorise the payment of pensions to or in respect of such persons.

…

(4) In the foregoing provisions of this Article "pension" includes allowance and gratuity."

2.15 Accordingly, the Regulations are permitted to be retrospective in effect and are also permitted to make provision for former members of the Police Service[30].

The relevant Regulations

2.16 An application for ill-health retirement will be considered in accordance with the Royal Ulster Constabulary Pensions Regulations 1988 ('the 1988 Regulations') or, alternatively, the Police Pension (Northern Ireland) Regulations 2009 ('the 2009 Regulations')[31] (collectively, 'the Pensions Regulations').

2.17 Applications for injury on duty awards are considered in accordance with the Police Service of Northern Ireland and Police Service of Northern Ireland Reserve (Injury Benefit) Regulations 2006[32] ('the 2006 Regulations'). These Regulations removed injury awards from both the 1988 Pension Scheme and the New Police Pension Scheme of 2006 in order that they should now be dealt with under their own discrete statutory rule.

[30] Although where this latter course is taken, any new regulations should not put a member into a worse position without his first having been given an opportunity to elect that they should not apply (or only apply to a limited extent): see article 14(3) and (3A) of the 1972 Order.

[31] Which revoked the Police Pension (Northern Ireland) Regulations 2007: see regulation 1(4).

[32] SR 2006/268.

The 2006 Regulations

2.18 The focus of the discussion in this report is on the 2006 Regulations[33], principally because they are the Regulations which are specifically tailored to provide for injury benefits and also because this is the area in respect of which most controversy has arisen. The Pensions Regulations have a much wider purview, much of which is not relevant for present purposes. Importantly, however, the key features of the statutory architecture are consistent whether one is considering the 2006 Regulations or those elements of the Pensions Regulations, in either their past or present form, which deal with medical or injury issues. In these circumstances, it is convenient to refer primarily to the 2006 Regulations, with relevant cross-references to equivalent provisions of the Pensions Regulations where appropriate. The points made in each case are essentially transferable between the three sets of Regulations.

2.19 The 2006 Regulations were made on 20 June 2006 and came into operation on 25 June 2006 but have effect from 6 April 2006[34]. They essentially revoked the 1988 Regulations insofar as those regulations had made provision for injury on duty awards; but replaced the relevant provisions of the 1988 Regulations in this regard with similar regulations; and also made provision that anything done under the 1988 Regulations should continue to have effect as if done under the 2006 Regulations[35].

2.20 Part 1 of the 2006 Regulations contains a number of important general provisions, several of which are discussed at length below[36].

2.21 Part 2 of the Regulations deals substantively with awards payable on the injury or death of a police officer. It provides for:

- **Police officer's injury awards**[37], where the officer ceases to be a police officer and is permanently disabled as a result of an injury on duty, entitling him to a **gratuity** and an

[33] And where I simply use the phrase 'the Regulations', unless the context plainly indicates otherwise, this is a reference to the 2006 Regulations.

[34] See regulation 1.

[35] See regulations 8 and 9. The same method of calculation of pensionable pay, average pensionable pay and aggregate pension contributions is also carried forward from the 1988 Regulations: see regulation 3.

[36] Particularly in Chapter 4 dealing with key concepts.

[37] Which apply where a person ceases or has ceased to be a police officer and is permanently disabled as a result of an injury on duty: see regulation 10 and Schedule 3.

injury pension. The gratuity is calculated by reference to the officer's degree of disablement and his average pensionable pay[38]; and the injury pension is calculated by reference to the officer's degree of disablement, his average pensionable pay and the period in years of his pensionable service[39]. Such an injury pension is to be reduced on account of industrial injuries benefit or reduced earnings allowance which relates to the injury, or incapacity benefit or severe disablement allowance, all of which are payable under the Social Security Contributions and Benefits (Northern Ireland) Act 1992.

- **Disablement gratuities**[40], where the officer ceases to be a police officer and within 12 months of the injury on duty becomes totally and permanently disabled, entitling him to a gratuity. This gratuity is calculated either by reference to the officer's pensionable pay or his remuneration during his last 12 months of service and the amount of his aggregate pension contributions[41].

- **Adult survivors' special awards**[42], where there is a qualifying[43] adult survivor of a police officer who dies or has died as a result of an injury on duty, who is entitled to an award comprising an adult survivor's special pension[44] and a gratuity[45]; and **adult survivors augmented awards**[46], where one of the specified aggravating features applies in relation to the death[47], in which case the special pension and gratuity are augmented.

[38] See Schedule 3 to the 2006 Regulations, paragraph 1.

[39] See Schedule 3 to the 2006 Regulations, paragraph 3.

[40] Which apply where a person receives or received an injury on duty, ceases or has ceased to be a police officer, and within 12 months of receiving the injury becomes or became totally and permanently disabled as a result of the injury.

[41] See regulation 11(2).

[42] See regulation 12.

[43] That is to say, a person who at the time of the death of the police officer was his spouse, civil partner or nominated cohabiting partner (see regulations 12(1A), (1B)-(1D)); who meets the requirements of regulation 12(6); is not limited by virtue of a separation without an obligation to provide financial support pursuant to regulation 14; and who is not disqualified by remarriage, etc, pursuant to regulation 15.

[44] Calculated in accordance with regulation 12(3)-(5): see regulation 12(2)(a). However, a gratuity may be paid in lieu of an adult survivor's special pension in certain circumstances if the survivor consents and the Board is satisfied that there are sufficient reasons for doing so: see regulation 23 (subject to regulation 25).

[45] Calculated in accordance with regulation 12(2)(b)

[46] See regulation 13.

[47] See regulation 13(1)(a)-(e), including, for instance, where the officer was violently attacked, where the injury was sustained in the course of effecting an arrest or preventing an escape from custody, or where the officer was seeking to save or protect life in dangerous circumstances.

- **Children's special allowances**[48], where there is a qualifying[49] child of a police officer who dies or has died as a result of an injury on duty, who is entitled to a special allowance[50]; and **children's special gratuities**, where one of the specified aggravating features applies in relation to the death[51] and there is no adult survivor entitled to a gratuity, in which case an additional gratuity is payable to the child.

- **Adult dependent relatives' special pensions**[52], where there is a qualifying[53] relative of a police officer who dies as a result of an injury on duty, who was substantially dependent on the officer immediately before his death, who may be entitled to a special pension at the discretion of the Policing Board[54].

- **Death gratuities**[55], where a police officer dies or has died as a result of an IOD, payable to a qualifying[56] adult survivor, child or dependent relative (as the case may be).

2.22 Given the terms of reference of this review and their focus on awards to former officers, my emphasis is obviously on police officers' injury awards under regulation 10 (for former officers who are permanently disabled)[57] and disablement gratuities under regulation 11 (for former officers who are totally and permanently disabled), although I understand that the latter are quite rare. The police officer's injury award under regulation 10 – comprising of a one-off gratuity and then a continuing injury pension – is what is commonly referred to as an injury on duty or IOD award in this context.

[48] See regulation 16.
[49] Subject to the detailed limitations set out in regulation 18.
[50] Which may also be commuted to a gratuity in certain circumstances: see regulation 24 (subject to regulation 25).
[51] The same conditions as are specified in regulation 13(1) in relation to the payment of an adult survivor's augmented award.
[52] See regulation 19.
[53] See regulation 19(1)(a)-(d).
[54] See regulation 19(2) and (3).
[55] See regulation 20.
[56] That is to say, an adult survivor not disqualified from a special award under regulation 14 or 15, child not disqualified from a special allowance under regulation 18, or a dependent relative to whom a special pension may be paid under regulation 19: see regulation 20(3).
[57] Formerly member's injury awards under regulation B4 of the 1988 Regulations.

2.23 An important table is contained within paragraph 3 of Schedule 3 to the 2006 Regulations setting out the degree of disablement 'bands'[58] and then the relevant percentage of average pensionable pay which is payable as a gratuity; as well as minimum income guarantees (MIGs)[59] depending on one's period of service. This is the key provision which is relevant to determining the amount of an injury pension under regulation 10. As noted above[60], the elements used to calculate an injury pension are the officer's degree of disablement, his average pensionable pay and the period in years of his pensionable service. The basic approach is that the greater the degree of disablement, the greater the MIG will be as a percentage of the officer's average pensionable pay; and the MIG also increases the longer the officer has been in service.

2.24 The Regulations also contain detailed provisions for the financial calculation of awards (on the basis of pensionable pay)[61], discussion of which are not relevant for present purposes.

2.25 There is also, obviously, some overlap between the provisions of the 2006 Regulations and relevant Pensions Regulations. For instance, regulation 21 of the 2006 Regulations provides for certain gratuities payable under the 2006 Regulations to be reduced by reference to amounts paid (or treated as paid) under certain provisions of the Pensions Regulations[62]. Additionally, regulation 26, designed to prevent duplication, provides that where a person would be entitled to receive payments on account of more than one award in respect of the death of the same person under the 2006 Regulations and the relevant Pensions Regulations[63], he shall be entitled to receive only one of the awards[64] (at his selection or, in default of selection, whichever is the greater).

2.26 It is also convenient to mention that certain gratuities under the 2006 Regulations are also to be reduced by reference to any damages or compensation recovered by any person in respect of the death or disability to which the gratuity relates[65]. This does not include a gratuity or pension payable under regulation 10; although does, curiously, include a disablement gratuity under

[58] Discussed at paragraphs 4.43 – 4.44 below.
[59] Again expressed as a percentage of average pensionable pay.
[60] See paragraph 2.21, first bullet point.
[61] See, for instance, regulations 3 and 4.
[62] Whether the 1988, 2007 or 2009 Regulations.
[63] For instance an adult survivor's special or augmented award under regulation 12 or 13 *as well as* an adult survivor's pension under the relevant Pensions Regulations (Part C of the 1988 Regulations, regulation 38 of the 2007 Regulations or regulation 38 of the 2009 Regulations).
[64] Unless the awards are calculated by reference to different periods of pensionable service and there is no increase in accordance with Part E of the 1988 Regulations: see regulation 26(2).
[65] See regulation 22.

regulation 11. I return to this issue in Chapter 12; but it seems to me that there is an important lacuna in the Regulations in this regard.

2.27 Part 3 of the 2006 Regulations contains various supplementary provisions. Part 4 makes detailed provision for appeals and medical questions. These provisions are examined in detail in Chapter 6. Part 5 makes provision for revision and withdrawal or forfeiture of awards. Regulation 35, in particular, is relevant. It contains the review provisions which are discussed in detail in Chapter 7 and which have been the subject of much of the controversy giving rise to the need for the present review. Part 7[66] provides that the Regulations apply *mutatis mutandis* to members of the Police Service of Northern Ireland Reserve.

2.28 Regulation 40, entitled 'payment and duration of awards' is of interest. Regulation 40(1) provides:

> "Subject to the provisions of these Regulations, in particular of regulation 10(2) (limitation on payment of an injury pension to a person who ceased to serve before becoming disabled) and Part 5 (revision and withdrawal or forfeiture of awards), the pension of a police officer under these Regulations shall be payable in respect of each year as from the date of his retirement."

2.29 This would appear to suggest that payments under the Regulations are generally for life, that is to say for each year after retirement. Indeed, this point is expressed more directly in regulation 40(3), which provides:

> "Subject to the provisions of these Regulations, in particular of –
>
> (a) regulation 15 (termination of adult survivor's award on remarriage or other event);
> (b) regulation 18 (limitations on child's special allowance);
> (c) regulation 19(3) (adult dependent relative's special pension); and
> (d) Part 5 (revision and withdrawal or forfeiture of awards),
>
> a pension or allowance *shall be payable for life* and shall be discharged by payments in advance at such reasonable periods as the Board may, in its discretion, determine except that payment on account of a pension or allowance may be delayed, in whole or in part,

[66] Curiously, there appears to be no Part 6 within the Regulations. I suspect that regulations 39-41 ought to have formed Part 6 (which would be consistent with Part 6 of the English equivalent Regulations).

pending the determination of any question as to the liability of the Board in respect thereof, including any question as to the continuance of that liability." [italicized emphasis added]

The 1988 Regulations

2.30 The 1988 Regulations – which for many years contained the comprehensive scheme for 'ordinary' police pensions, ill-health pensions and IOD awards – ought with time to become increasingly irrelevant. This is because they have been revoked and replaced by the 2006 Regulations insofar as IOD awards are concerned[67]; and, insofar as other police pensions (including ill-health pensions) are concerned, officers who became such on or after 6 April 2006 are subject to the 2009 Regulations[68].

2.31 As noted above[69], transitional arrangements are in place to ensure that things done under the 1988 Regulations continue to have effect as if done under the 2006 Regulations, which also carry forward the same essential approach to both the substantive eligibility for awards and the decision-making processes as pertained under the 1988 Regulations.

2.32 In relation to pensions other than injury pensions comprised within an IOD award, the 1988 Regulations will continue to be relevant to many officers who became police officers before 6 April 2006 – and to most of the former officers with an interest in the subject matter of this review – since, with limited exceptions[70], the 2009 Regulations do not apply to such officers. As I have already said, the key provisions of the 1988 Regulations for present purposes (those relating to IOD awards) are essentially replicated in the 2006 Regulations, on which I have focused for the purposes of discussion in this report.

2.33 The remaining provision of the 1988 Regulations which is likely to be of significance in the context of this review is regulation B3, which provides for a member's ill-health award (an ill-health pension). It applies[71] to a police officer who retires or has retired on the ground that he is or was permanently disabled. A 'normal' ill-health pension is different from an IOD award in that the

[67] See regulation 9 of, and Schedule 2 to, the 2006 Regulations.

[68] See regulation 4(1) of the 2009 Regulations. Such officers had previously been subject to the Police Pension (Northern Ireland) Regulations 2007, which first gave effect to the New Police Pension Scheme; but the 2007 Regulations were revoked by the 2009 Regulations (see regulation 1(4)).

[69] See paragraph 2.19.

[70] See regulation 4(2) and following of the 2009 Regulations.

[71] See regulation B3(1).

condition causing the disablement will not be a result of an injury sustained in the execution of duty. However, the concepts of disablement and permanent disablement are still used. The 1988 Regulations' approach to these concepts – set out in regulation A11 – has been materially carried forward into the 2006 Regulations[72] and also into the 2009 Regulations[73].

The New Police Pension Scheme and the 2009 Regulations

2.34 A new police pension scheme was introduced in 2006, known as the New Police Pension Scheme 2006 (usually abbreviated to NPPS). In Northern Ireland this was established by the Police Pension (Northern Ireland) Regulations 2007[74], which have now been replaced by the 2009 Regulations. The explanatory memorandum to the 2007 Regulations, however, explained the NPPS in this way:

> "The new scheme is designed to be more modern and affordable and incorporates features common to many of the modernised schemes across the public sector. The scheme was introduced administratively on 6 April 2006 to coincide with changes to the tax legislation relating to pensions which came into effect on the same day…
>
> The change is politically important in that the introduction of the NPPS represents the first major overhaul of police pensions in over 80 years. The new pension scheme plays an important part in the police modernisation programme. The new scheme, with its more extensive survivor benefits and a rate of pension build-up which does not disadvantage late joiners, makes the police service more attractive to a wider range of recruits in terms of lifestyle and age. This will help to achieve a modern service that reflects the diversity in today's society and is better able to respond to the community's needs. Its contents closely mirror those in the Police Pension Regulations 2006, which relate to constables in England and Wales and the Police Pension (Scotland) Regulations 2007, which relate to constables in Scotland…
>
> All new officers joining the police service for the first time on or after 6 April 2006 are admitted to the NPPS, but can opt out. Officers who joined before 6 April have the option to transfer to the NPPS if they wish. The new scheme maintains the fundamental principles of the 1988 Police Pension Scheme of pension benefits based on final salary and a low normal minimum pension age in recognition of the heavy fitness demands placed on operational

[72] See regulation 6.
[73] See regulation 3.
[74] SR 2007/476.

police officers."

2.35 For present purposes, the key aspect of the NPPS and the 2009 Regulations is their provision for ill-health pensions, since this review is focused on ill-health pensions and injury awards, not 'normal' police pensions. Indeed, since the review is also directed towards the arrangements made for former police officers, the majority of whom will not have been subject to the NPPS, discussion of the 2009 Regulations is probably of limited significance. However, it is helpful to consider what provision has been made in the most modern version of the scheme.

2.36 Under the NPPS there are two levels of ill-health retirement pension. These are a standard ill-health pension and an enhanced top-up ill-health pension. A standard ill-health pension is payable in certain circumstances where the officer is permanently disabled for the ordinary duties of a member of the PSNI. An enhanced top-up ill-health pension is payable in certain circumstances where the officer is permanently disabled for the ordinary duties of a member of the PSNI and, in addition, is disabled for any regular employment. It is paid instead of a standard ill-health pension and is, as the name suggests, enhanced as compared with a standard ill-health pension. For this purpose, "regular employment" means employment for an annual average of at least 30 hours per week. (This is a departure from the previous regime under the 1988 Regulations which provides simply for an ill-health pension where a member is permanently disabled from performing the ordinary duties of a member.) The maximum possible ill-health pension is 35/70ths and there is an associated lump sum of four times the pension.

2.37 If, when an officer joined or rejoined NPPS, he or she was designated by the PSNI (following a medical examination) as being ineligible for ill-health benefits, he cannot receive an ill-health pension, although he might still be required to retire on ill-health grounds. If so, the officer would be entitled to an ordinary pension if aged 55 or over (or, if under 55, entitled to a deferred pension payable at age 65).

2.38 The relevant regulations within the 2009 Regulations dealing with these matters are regulation 26 (dealing with eligibility for ill-health pensions); regulations 27 and 28 (setting out how the standard and enhanced ill-health pensions are calculated); and regulation 6 (dealing with ineligibility for ill-health benefits). If the officer has attained the age of 55 at the time of his retirement, by virtue of regulation 26(1)(c), he is not entitled to an ill-health pension but is simply entitled to an ordinary pension under regulation 24. Both the standard and enhanced top-up ill-health pensions consist of an annual sum payable for life and a lump-sum payment, the standard

ill-health pension being calculated in accordance with regulation 25 as if the officer had been entitled to an ordinary pension at the date of his retirement.

2.39 Under regulation 48, the Board has a discretion – similar to the provision made in regulation K1 of the 1988 Regulations[75] – to review and cancel an ill-health pension. This power arises in certain cases[76], and permits the Board to consider whether the officer's disablement has ceased, significantly worsened or significantly improved. Where it is considered that the officer's disablement for the performance of the ordinary duties of a member of the police service has ceased, the Board may give him notice that if he wishes to rejoin the service as a police officer he will be permitted to do so (in a rank not lower than that held immediately before he retired with the ill-health pension). If he does so, or indeed if he declines to do so, his ill-health pension will be terminated, since he is no longer permanently disabled from being a police officer (the condition for payment of the ill-health pension)[77]. A power of termination also arises where an officer has unreasonably failed to receive medical treatment which would have been expected to have ended his disablement from being a police officer[78].

2.40 There is an interesting comparison to be made here with regulation 35 of the 2006 Regulations, which appears to require the Board to carry out reviews[79], rather than merely granting it a discretion to do so[80]. Moreover, another contrast between the two provisions is that regulation 48 of the 2009 Regulations[81] expressly grants a power to cancel or terminate an ill-health pension, whereas regulation 35 of the 2006 Regulations refers only to the reassessment or revision of an injury pension.

2.41 Part 7 of the 2009 Regulations provides for the procedure to determine eligibility for pensions under the Regulations, including the by now familiar machinery provided first by the 1988 Regulations and, latterly, by the 2006 Regulations, namely: initial determination of eligibility by the

[75] Which no longer permits the cancellation and termination of an injury pension, this now being governed by the 2006 Regulations: see the amendments to regulation K1 made by paragraph 19 of Part 1 of Schedule 2 to the 2006 Regulations.

[76] Principally when certain retirement ages have not been reached.

[77] See regulation 48(1)-(6).

[78] See regulation 48(7)-(10).

[79] This is discussed in further detail below, particularly in Chapter 8.

[80] Compare the wording of regulation 48(1) of the 2009 Regulations: "… the Board may consider, at such times as are specified in paragraph (2) [i.e. such times as the Board may in their discretion determine] whether [the officer's] disablement has ceased, significantly worsened… or significantly improved…'.

[81] And regulation K1 of the 1988 Regulations.

Board (regulation 62); appeal to a tribunal appointed by the Minister for Justice against decisions of the Board on non-medical questions (regulation 63); mandatory reference of certain medical questions in relation to permanent disablement to a selected medical practitioner (regulation 67); appeal from the SMP to an independent medical referee (regulations 68 and 70); and potential reference back to an SMP or IMR in certain circumstances (regulation 69). The nature of these procedures is discussed in further detail in Chapters 5, 6 and 10.

CHAPTER 3

POLICY FRAMEWORK

The role for policy

3.01 My terms of reference have specifically asked me to consider the issue of policy guidelines in this area. In particular, I have been asked to examine the policy framework for the administration of injury on duty awards and to identify any limitations in policy guidelines.

3.02 I address below the legal status of policy, which is not always straightforward. The primary purpose of a public authority adopting a policy, however, is usually to promote consistency in the way in which it deals with individual cases. This not only gives rise to administrative benefits, particularly for the personnel who actually apply the policy, but reduces the risk of complaints that some applicants have been unduly favoured or disfavoured. Clear policy guidance is perhaps most useful where the statutory scheme provides a discretion to the public authority which could be exercised in a variety of ways; or where it uses terms which could be interpreted or applied in a range of ways and where an official 'line' is required to ensure that there is not inequality of treatment arising from inconsistent approaches in different cases. In short, true policy guidance tends to 'fill in the gaps' in a statutory regime[82].

3.03 In the present context, an obvious example of a case where policy guidelines might assist is in the approach to what is 'permanent' disablement, since this is an important term used in the legislation which is not defined in any detail. Indeed, this is one of the few issues on which there is relatively clear guidance which has been issued.

3.04 This is also a helpful example, however, of an area where policy guidance may only be useful unless and until a court of competent jurisdiction has given an authoritative ruling as to what the term in question means, in which case a policy which is inconsistent with such a ruling may require

[82] Although one should recognize that there may be different types of policy. Some documents which are described as policy really only explain or describe the statutory scheme and are descriptive, rather than prescriptive, in nature. What I am chiefly concerned with in this chapter is that species of policy guidance which sets out how an authority will approach a particular issue when it has a lawful choice to make as to how to do so.

to be abandoned in favour of the court's view of the legally objective meaning of the term in its context.

3.05 Another example of an area where a policy *might* be appropriate is in relation to when reviews under regulation 35 of the 2006 Regulations will be undertaken, presently fixed at periodic intervals of 5 years. As discussed further below, although regulation 35 appears to require reviews to be undertaken at some stage, it is left to the discretion of the Board as to when this should occur. This is the type of issue where a policy might reasonably be expected to be introduced to ensure consistency of treatment – assuming, of course, that consistency of treatment is an appropriate goal. However, this is not always the case, since some issues require a much more case-sensitive approach[83], in which case the utility of a general policy can be limited. As discussed further below, the timing of reviews may be an area where a more case-sensitive approach would be better.

3.06 I should also say that, although there are clear benefits to a particular authority (such as the NIPB) applying the statutory scheme in a consistent way through the use of policy guidelines, there is no requirement for different authorities (for instance, forces in England and Wales on the one hand and the NIPB on the other) to adopt the same policy guidance. Policy guidance often commences where statutory direction ceases; and authorities are often able, quite legitimately, to adopt different policies in the course of applying the same (or broadly the same) statutory scheme[84].

3.07 In light of this, it is not always necessary for NIPB, or the DOJ, to follow the same policy approach as the authorities in Great Britain. Unless the statutory scheme dictates the answer to a particular question, it may be perfectly legitimate for the authorities in Northern Ireland to take a different approach to that taken by the equivalent authorities in England, Wales or Scotland to a particular policy choice. Indeed, often policy guidance will be framed with specific local requirements in mind.

[83] And indeed, as discussed below, a key precept of public law relating to policies is that there should always be room for departure from the policy where the merits of a particular case so demand.

[84] For instance, there would be nothing inherently unlawful in the Board adopting a policy which saw it conduct regulation 35 reviews more, or less, frequently than some other police force.

3.08 Of course, where different police forces[85] take different views on issues of interpretation or application, or issue guidance which is inconsistent with the approach taken by other police forces, this can itself be a cause of concern and rancour. In correspondence which has been provided to me from the Chief Executive of the Board[86], he has said that:

> "Across police services in the United Kingdom there is a lack of consistency in policies and processes in support of the Regulations, and I have to say the guidance which was withdrawn after the Judicial Review (*Simpson*) was less than helpful, indeed unhelpful in its lack of clear definition.
>
> Many police officers injured on duty, in my view, have a right to feel at least confused and in many cases, perceive that they have been treated inconsistently or unfairly. While I do not believe that police services or police authorities set out to do that, nonetheless the lack of transparency has added to the perceptions which have abounded and have taken on enormous proportions since the Judicial Review."

3.09 These are entirely understandable sentiments, particularly since it appears that in recent years there has been some inconsistency of approach between various police forces, not merely in relation to procedural matters, but in relation to more substantive questions of entitlement under the Regulations. Ideally, a consistent approach across all police forces which are applying materially analogous legislative provisions should be adopted, certainly as to the substance of the legislative scheme's meaning and application.

3.10 Finally, there is a further important factor which it is important to acknowledge in the discussion of the use of policy in this area. It relates to the fact that the relevant Regulations are made, and police injury benefits policy is set at the highest level, by central government (in Northern Ireland, the Department of Justice; in England and Wales, the Home Office) but applied by individual public bodies (in Northern Ireland, the Board; in England and Wales, the police forces themselves[87]). The discussion of the use of policy above has focused on the issuing by a public

[85] I am aware that the PSNI is now referred to as a police *service* rather than a police *force* but use the term 'forces' in this context since that is the commonly used term in relation to constabularies in the rest of the United Kingdom.

[86] To Jim Allister QC MLA, dated 12 November 2013 (provided as part of the NIRPOA submission to me).

[87] I understand that IOD awards are administered by the Scottish Police Authority for all police officers in Scotland; and that the Belfast Harbour Police Commissioners are responsible for administering IOD awards for Belfast Harbour Police. However, in England and Wales, further to the Police Pensions (Amendment) Regulations 2011, responsibility is conferred on Chief Constables for administering pensions and injury

authority of policies to guide *its own* actions or decision-making. However, what was highlighted to me on several occasions in the course of consultation in this review process was a perceived need for clear central guidance (from the Department) *to the Board* so that the Board and others were clear as to how the Department expected the statutory scheme to operate.

3.11 In this context, an important theme communicated to me by Board officials was a feeling that the limited central policy guidance which existed was not always clear; and that, particularly after the *Simpson* and *Slater* litigation in England and Wales and the ensuing withdrawal of some Home Office and Departmental policy guidance, there was now an obvious policy gap, meaning that those interested in and applying the statutory scheme were at a loss to know how the sponsors of the legislation intended it to be operated. This has, in turn, increased the risk of inconsistent views being taken as to how the scheme should be applied[88], even as between the Board and the Department, and increased the scope for contention over what has occurred in particular cases.

The legal status of policy

3.12 The precise legal status of a policy document depends on the individual circumstances of the case and, particularly, whether it is a document with statutory underpinning or accompanied by a statutory obligation imposed upon relevant public authorities to have regard to it. Generally, however, a policy adopted by a public authority, including those in the form of government circulars, will be non-binding[89]; that is to say that it will be a *guide* to how the authority should act, but not a straitjacket, and that the authority will be free to depart from the policy in certain circumstances.

3.13 But that is not to say that a policy cannot have legal effects or, in some circumstances, impose legal obligations. The extent to which it does so, absent some statutory provision clarifying the status of a policy document, will generally depend on the public law doctrine of legitimate expectation. At the very least, the authority will usually be required to have regard to its policy before making a decision or taking an action to which the policy is relevant. It will also often be required to provide a rational reason for departure from the policy; and to provide appropriate

benefits for all police officers (except themselves).

[88] Particularly in relation to reviews and age 65 reviews.

[89] See, for instance, Woolf, Jowell and Le Seuer, *De Smith's Judicial Review* (6th edn, 2007, Sweet & Maxwell) (hereafter '*De Smith*') at paragraphs 5-120 to 5-122.

facilities to make representations to an individual who will be affected by a decision which is contrary to the usual policy.

3.14 In a very limited category of cases, it may be unlawful for the public authority to depart from its policy at all, where the policy has created a legitimate expectation of consistent treatment and where departure from the policy would, in the circumstances, be completely irrational or so unfair as to represent an abuse of power[90]. Much will depend on the context, including whether the policy or circular is advisory in nature only or is designed to set clear criteria for the exercise of statutory powers or discretions[91].

3.15 In the *Simpson* case, Home Office Circular 46/2004 was recognized as being a species of policy which was non-statutory and non-binding. Nonetheless, since it purported to explain the law and give guidance to relevant authorities, it was important that it did so correctly. On this basis, as Supperstone J commented in paragraph [23] of his judgment, it was common case that it should be amenable to judicial review:

> "It is common ground that departmental guidance of the kind at issue in this case is *prima facie* amenable to judicial review on error of law grounds notwithstanding its non-statutory, non-binding status (see *Gillick v West Norfolk AHA* [1986] 1 AC 112, per Lord Bridge at 193G)."

3.16 It is on this basis that the High Court was able to quash such guidance[92], since the Court is the ultimate arbiter of what the law is, including the correct interpretation of any statutory provisions, and it is competent to correct an error of law contained within government policy documents which are designed to explain the law and how it should be applied[93].

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[90] See the discussion in *De Smith* at paragraphs 12-022 to 12-023.

[91] See also *De Smith* at paragraph 12-031

[92] For an example of the High Court in Northern Ireland conducting a similar exercise, see *Re SPUC's Application* [2009] NIQB 92.

[93] See also the decision of King J in the *Haworth* case (discussed at paragraphs 7.151 – 7.158 below). In rejecting a submission on the part of the Police Authority that the Home Office Guidance was the most obvious and accessible source of information as to the purpose of a particular provision within the English Regulations (in relation to referral back to a medical authority) the judge said (at paragraph [53]) that: "… I would agree with the Claimant that such guidance cannot be decisive of this question of purpose which must be determined by reference to the statutory scheme as a whole. As a matter of principle such extra statutory guidance cannot be effective to cut down the scope of a statutory power or to impose limits on the circumstances in which the power… can be exercised unless the limitations can be inferred from the statutory language or the statutory scheme as a whole".

3.17 Finally, there may be cases where guidance issued by one public authority is capable of binding another public authority. Such cases are likely to be extremely limited and much less frequent than cases where a public authority is bound by its own policy (which are themselves comparatively rare). In areas such as the present, the obligation on a body such as the Policing Board will generally be to have regard to Departmental policy and to follow it in the absence of a rational reason for departing from it.

Limitations of policy in this field

3.18 The real benefit of policy guidance in this field, especially in the most contentious areas (such as how and when reviews generally, and age 65 reviews in particular, should be conducted), ought to be that it could give clear advice to Board officials, SMPs, IMRs and affected officers as to how the scheme should operate. This should promote consistency of treatment but also manage expectations.

3.19 The key limitation of such policy, however, as clearly demonstrated by the *Simpson* case (and now the *Slater* litigation), is that it is amenable to testing in the Courts and is not authoritative in the sense of being beyond challenge[94]. Thus, the promulgation of Departmental policy on a contentious matter which is not clearly or decisively settled by the legislation itself may in fact give rise to *further* controversy and acrimony. This is the opposite of what policy is designed to do. The unwelcome result may be litigation challenging the policy, which promotes uncertainty during the course of the litigation and, in the event that the policy is quashed without any clear guidance as to with what it should be replaced, a policy vacuum, as well as further uncertainty about how to deal with cases to which the policy was applied in advance of it having been found to be unlawful.

3.20 Accordingly, there are some areas – of which the issue of age 65 reviews is one, in my view – where a better approach is for the matter to be dealt with clearly and explicitly in the legislation itself, after appropriate consultation, rather than by the adoption of policy which is likely to be the subject of legal challenge. Such a challenge will focus on the correct meaning and interpretation of the Regulations, which ought to be unnecessary if the legislation itself was clear as to how it should be applied. Put another way, if a contentious issue is 'fudged' in the legislative scheme[95], trying to

[94] As the DOJ's Guidance for IMRs notes (at paragraph 22), "The Department of Justice has no authority to give a binding interpretation on a point of law…".
[95] Whether intentionally or unintentionally.

solve it by means of issuing policy can be counter-productive. A better approach will often be to grasp the nettle and deal with the issue by way of legislative amendment[96].

3.21 For these reasons, I would generally favour clarification and simplification of the statutory scheme itself, rather than an attempt to cure any potential shortcomings in the Regulations by means of the issue of further policy guidance.

Departmental guidance

The Home Office

3.22 In England and Wales, the Home Office issues guidance (often in the form of Circulars addressed to Chief Officers) in relation to the administration of the equivalent statutory scheme to the 2006 Regulations and the Pensions Regulations. I have not been provided with a comprehensive list or copies of these circulars but have considered a number of them, which are available online[97]. Many of these circulars have been used simply to pass on information, to advise of forthcoming or recent legislative amendments or consultations, to report on the outcome of litigation related to police pensions, or to address a particular piecemeal issue which had arisen. I am not aware of any circular setting out, in a comprehensive way, the Home Office's view on how the injury benefit system is to be administered and applied.

3.23 One interesting feature of such a circular (Home Office Circular 025/2007[98]) though, is a brief summary of the purpose and effect of the Police (Injury Benefit) Regulations 2006[99], which is in the following terms:

> "The Police (Injury Benefit) Regulations 2006 came into force on 20 April 2006 with retrospective effect from 6 April 2006…
>
> Entitlement to an injury award is not dependent on the officer being a member of the 1987 scheme or the 2006 scheme. Injury benefits are compensatory payments for those officers

[96] The Regulations themselves could, of course, be the subject of legal challenge but generally on more limited grounds.
[97] Generally in the Home Office section of the National Archives website.
[98] At paragraphs 9-11.
[99] To which I refer in this report on a number of occasions, as short-hand, as 'the English Regulations' (that is to say, the analogue provisions in England and Wales to our 2006 Regulations).

who suffer an injury without their default in the execution of their duties. The benefits payable are made up of both pensions and gratuities. In addition pensions and gratuities are paid to spouses, civil partners, children and adult dependant relatives where the officer dies from such an injury.

The regulations under which these benefits are payable were previously included in the Police Pensions Regulations 1987 and the additional Police (Injury Benefit) Regulations 1987. The 2006 Injury Benefit Regulations separate out and consolidate all regulations relating to injury awards from the main police pension scheme regulations. The benefits themselves remain unchanged. Further details concerning the reasons why injury benefits have been placed on a separate statutory basis were outlined in Annex G of HOC 7/2006." [underlined emphasis added]

3.24 It is interesting that injury benefits are referred to as "compensatory payments", although without identifying precisely what is being compensated. This resonates with paragraph 7.1 of the Explanatory Memorandum to the Police (Injury Benefit) Regulations 2006, which states:

"Police injury awards do not depend on membership of the Police Pension Scheme, but are in effect compensation for work-related injuries. Benefits comprise pensions and gratuities for former officers who are permanently disabled as a result of an injury received without their default in the execution of duty, and survivors' pensions and gratuities for spouses, civil partners, children and adult dependent relatives where the officer dies as a result of such an injury." [underlined emphasis added]

3.25 The closest there seems to be to a Home Office policy document setting out a comprehensive description of the operation of the English Regulations is a lengthy document entitled 'Guidance for Police Medical Appeal Boards' (the 'Home Office Guidance for PMABs'). It is not proposed to set out or discuss the contents of that document in detail in this section of this report; but reference is made to it elsewhere (and particularly in Chapter 4), as appropriate.

3.26 Most of the comments about Home Office policy in the course of this review have focused on Home Office Circular 46/2004 which deals specifically with the conduct of reviews and, in particular, age 65 reviews. This circular is considered in further below.

The NIO and DOJ

3.27 In Northern Ireland such guidance is issued, since the devolution of policing and justice, by the Department of Justice for Northern Ireland. Prior to that, relevant circulars were issued by the Northern Ireland Office. The practice seems to have been to essentially mirror Home Office circulars, tailored for the Northern Ireland context. My attention has been drawn in particular to NIO Circular 06/2007 (which is in materially similar terms to Home Office Circular 46/2004); and NIO Circular 04/2009 relating to the definition of the term 'permanent' disablement.

3.28 The DOJ in Northern Ireland does not appear to have issued a direct equivalent to the Home Office Guidance for PMABs; although there is a shorter document entitled 'Medical Appeals: Guidance to Independent Medical Referees', which was issued in June 2009 ('the DOJ Guidance for IMRs'). In addition, the DOJ has issued a more basic publication (dated March 2011) entitled 'Police Medical Appeals Process: Information for Serving and Retired Officers' ('the DOJ Appeals Leaflet').

3.29 I have considered each of these documents and make reference to them as appropriate below. The latter is more in the nature of an advisory leaflet[100]. It is the former, the Guidance for IMRs, which is more important, since it purports to give advice to IMRs as to how they should approach their task under the relevant Regulations[101].

3.30 However, the DOJ Appeals Leaflet also states[102] that the IMR's assessment "is carried out in line with the Northern Ireland Regulations, the DOJ's IMR Guidance and the relevant Home Office and Police Negotiating Board (PNB) Guidance". It seems, therefore, that, in addition to the DOJ's own Guidance to IMRs, it refers them to the Home Office Guidance for PMABs also, as well as additional PNB Guidance.

[100] And, indeed, it describes itself as a 'leaflet' in section 1, which also carries the disclaimer that "This leaflet is for general guidance only and should not be treated as a complete or authoritative statement of the law".
[101] And, plainly, insofar as it outlines how IMRs will approach issues on appeal from an SMP, it might well influence SMPs to act consistently also.
[102] At section 9.

Home Office Circular 46/2004

3.31 As I have said, the focus of representations made to me in the course of this review in relation to policy was very clearly on Home Office Circular 46/2004 and the equivalent circular in this jurisdiction, NIO Circular 06/2007.

3.32 In their submissions to me NIRPOA in particular, but also PFNI and DPOANI, were heavily critical of Home Office Circular 46/2004. This is unsurprising since the content of this circular has been declared as unlawful in a number of respects by the High Court in England and Wales.

3.33 Much of this circular is not relevant for present purposes. However, paragraph 16 stated:

> "Following consultation with both Sides of the Police Negotiating Board the Home Office have now produced guidance for forces on reviews of injury awards. A copy of this guidance is provided at Annex C. This guidance is intended to help ensure a fairer and more consistent approach from all police authorities reviewing injury awards when the former officer is above the compulsory retirement age for his or her last-held rank."

3.34 It is really only Annex C of the circular, entitled 'Home Office Guidance for Forces on Reviews of Injury Awards, which is of importance in the present context. The purpose of the annex is set out in its introductory paragraphs:

> "This Guidance is being issued to help ensure a fairer, more cohesive approach to the payment of injury benefits to ill-health retired officers who have reached the compulsory retirement age with their Force. A recent survey found that practice in this area was diverse. Some forces automatically reduced degree of disablement benefits to the lowest banding when this age had been reached – others continued to pay benefits at the same rate until the death of the Officer concerned.
>
> It is clear that a more standardised approach is needed to safeguard the rights of the Officer and ensure fair treatment across Forces. After consultation, the following Guidance has been agreed: …"

3.35 The core element of the guidance as to the conduct of reviews, indicating that there is a duty to keep all injury pensions under review, is then as follows:

"Forces have the duty to keep all current injury pensions under review at such intervals as they consider appropriate, including where the former officers concerned are now above the compulsory retirement age."

3.36 The remainder of the annex gives guidance as to how the Home Office considered reviews should be conducted once officers reach compulsory retirement age and also once they reach age 65. The section dealing with officers who reach compulsory retirement age is in the following terms:

"Review of Injury Pensions once Officers reach Compulsory Retirement Age

Once a former officer receiving an injury pension reaches what would have been his compulsory retirement age under the Police Pensions Regulations (55, 57, 60 or 65 depending on the person's force and rank at the point of leaving the police service) the force should consider a review of the award payable, since it is no longer appropriate to use the former officer's police pay scale as the basis for his or her pre-injury earning capacity.

In the absence of a cogent reason for a higher or lower outside earnings level, it is suggested that the new basis for the person's earning capacity, had there been no injury, should be the National Average Earnings (NAE)* at the time of the review. The NAE figure taken should be the average for the population overall. Separate figures for males and females, and regional fluctuations should not be considered. The loss of earning capacity for the purpose of establishing Degree of Disablement should therefore be assessed by reference to the % proportion the person's actual earning capacity bears to NAE.

This procedure should help to ensure that former officers are treated in a consistent way across forces. They will be placed on an equal financial footing with others in the employment market at a time when they could not have been assumed to be earning a police salary.

After a review at compulsory retirement age a force should determine the need and date for the next review. In some cases there may be particular circumstances which make it undesirable to conduct a further review." [underlined emphasis added]

3.37 NAE figures are further explained in the following note:

"*National Average Earnings figures available from National Office of Statistics…*

The NAE figure used should be the one in the most recent New Earnings Survey - Streamlined Analysis. This is an annual pounds and pence figure calculated by using National Insurance contributions. It is validated and produced in October of each year and is, in our opinion, the most robust method."

3.38 The section of Annex C dealing with officers who reach age 65 is in the following terms:

"Review of Injury Pensions once Officers reach Age 65

Once a former officer receiving an injury pension reaches the age of 65 they will have reached their State Pension Age irrespective of whether they are male or female. The force then has the discretion, in the absence of a cogent reason otherwise, to advise the SMP to place the former officer in the lowest band of Degree of Disablement. At such a point the former officer would normally no longer be expected to be earning a salary in the employment market.

A review at age 65 will normally be the last unless there are exceptional circumstances which require there to be a further review."

3.39 Further guidance in Annex C, including notes, is in the following terms:

"Suitable Intervals for Review

It seems to us that whereas it is reasonable for most cases to be reviewed at the compulsory retirement age stage, not all such cases need to be reviewed again at age 65. A police authority would, after concluding the review at compulsory retirement age, be entitled to judge it reasonable not to review a case further where the injury award is already small. This will normally be the case with former officers who were retired injured early in their career. We do not think we can create a specific "minimum" minimum income guarantee under the Police Pensions Regulations in their present form. Each case will have to be considered on the basis of its individual circumstances.

New Cases

Applications received for injury awards from former officers over 65 should not normally be referred to the SMP for consideration.

…

Note 1 - In the case of an officer who is under retirement age but has already left the service for reasons other than ill-health retirement, it is suggested that the comparator used should still be equivalent police salary. This is because, even if the ex-officer had been dismissed, forces would still have discretion to re-employ and he or she could therefore still be deemed capable of earning that salary.

Note 2 - It is clear that NAE will not be a suitable benchmark in all cases - especially on occasion with higher ranking officers who may claim to be capable of earning substantially more than this figure. It was suggested that this Guidance should contain some kind of formulae to proportionately enhance NAE to the level of the higher ranked salary. We would advise Forces to use their discretion as to whether they would like to adopt this approach."

3.40 The guidance in Annex C was 'suspended' following the decision of the Administrative Court in England in the *Laws* case in November 2009 by way of the issue of new *interim* guidance in March 2010[103]. Draft revised guidance was then issued in January 2011, after the decision of the English Court of Appeal in *Laws;* but, by the time of the Administrative Court's decision in *Simpson* in February 2012, even this was outdated as the Home Office's "thinking [had] moved on".

3.41 After judgment had been given in the *Simpson* case, on 30 March 2012, by Home Office Circular 007/12 the Home Office cancelled (i) in Annex C of Home Office Circular 46/2004, the section entitled 'Review of injury pensions once officers reach age 65'; and (ii) paragraph 20 of section 5 of the Home Office Guidance for PMABs, entitled 'Degree of disablement after age 65'. This circular advised as follows:

"We would advise, in the event that such reviews are being conducted or considered, that police authorities should satisfy themselves that they are acting in accordance with the regulations and the relevant case law in the light of the decision in *Simpson*.

We are currently considering the further implications of the court's decision and will provide further information and advice as appropriate in due course."

[103] See paragraph [36] of the decision of Supperstone J in the *Simpson* case.

3.42 The advice, without more, that individual police authorities should satisfy themselves that they are acting in accordance with the Regulations and relevant case law, including *Simpson*, is hardly very helpful. One of the difficulties identified to me is that this situation – whereby there is a lack of central guidance as to precisely what *Simpson* means and how it should be applied – has broadly pertained since. Moreover, given that, as compared with Northern Ireland, there is a very low number of IOD awards payable to former officers, the lack of guidance is not nearly so problematic in the rest of the United Kingdom as it is here; and, perhaps for that reason, the production of further guidance does not appear to be a high priority for the Home Office.

3.43 As noted above, Home Office Circular 007/12 cancelled a selected portion of Annex C of Circular 46/2004 and a selected portion of the Home Office Guidance to PMABs, each relating to reviews at age 65[104]. As a result of the more recent *Slater* litigation[105] the Home Office withdrew a further part of Circular 46/2004, namely the portion recommending the approach to be followed by medical authorities in conducting reviews where former police officers had reached their compulsory retirement age[106].

The position in Northern Ireland

3.44 As I have noted, there was an NIO Circular in similar terms to Home Office Circular 46/2004. This too has now been withdrawn in material part in light of the Home Office reaction to the decision in *Simpson* and the agreed position in the *Slater* litigation.

3.45 On 21 March 2012 the DOJ[107] wrote to the Chief Constable and the Board in the following terms:

> "The High Court in Leeds gave a decision on 21 February in the judicial review case of Simpson. The judgment concerns guidance on the above [Regulations], principally that contained in Home office Circular 46/2004 concerning reviews of the injury awards of former officers who have reached age 65. The current Department of Justice (DOJ) circular is based on the Home Office Circular.

[104] The withdrawn section of the Circular is that set out at paragraph 3.38 above.

[105] John Slater v Secretary of State for Home Department and The Chief Constable of Derbyshire, case number 16873/2013. Discussed in Chapter 7 at paragraphs 7.58 – 7.66.

[106] The portion set out at paragraph 3.34 above.

[107] Police Human Resources Policy Branch.

The court concluded that the Home Office guidance on this particular issue (over 65s) is inconsistent with the 2006 Regulations and unlawful. Whilst the DoJ is not bound by the decision in Simpson we consider it appropriate that Northern Ireland should adopt the same approach.

Without prejudice, but for the avoidance of any doubt in the circumstances, our current advice is that the following must not be relied upon in the conduct of such reviews:

- Policing Division Circular 6/2007, in Annex A the section entitled "Review of Injury Pensions once Officers reach Age 65";

Under Regulation 35 of the 2006 Regulations the responsibility for such reviews lies with the Policing Board. We would advise, in the event that such reviews are being conducted or considered, that the Policing Board should satisfy themselves that they are acting in accordance with the Regulations and the relevant case law in the light of the decision in Simpson.

The DoJ are awaiting further guidance from the Home Office after they have considered fully the implications of the court's decision. The DoJ will consider the updated guidance from the Home Office when issued and provide further advice and information if considered necessary."

3.46 There is another document on the DOJ's website, which I understand to have been produced at some stage after the decision in *Simpson*, which advises further about the steps the DOJ had taken in response in the following terms:

"RECENT COURT RULINGS

Following the recent English court rulings regarding the Home Office circular 46/2004 the Department issued letters to all the Independent Medical Referees (IMRs) advising them: -

- That the previous guidance to place former officers aged 65 years and over in the lowest band of injury on duty award has now been withdrawn;

- to use age specific ASHE figures for those former officers aged between the age of 60 and 64;

- to provide a percentage disablement calculation using age specific ASHE figures for former officers aged 65 and over.

If you wish to request a reconsideration or review this should be addressed to the Policing Board. The Department has no role to play in the decision making process therefore has no authority to overturn a previous IMR decision."

3.47 More recently, on 1 April 2014, the Department of Justice[108] wrote to the Chief Constable and the Board in the following terms:

"The case of Simpson (2012) found that part of Home Office Circular 46/2004 dealing with reviews of injury benefit at state pension age (SPA) was unlawful. The Home Office withdrew that section of the guidance.

The Department of Justice (DoJ) Circular was based on the Home Office Circular and, whilst the DoJ is not bound by the decision in Simpson, we consider it appropriate that Northern Ireland adopts the same approach.

An application for judicial review has recently been made in the UK which has caused the Home Office to withdraw Annex C of the Home Office Circular 46/2004 dealing with reviews of injury benefit at compulsory retirement age (CRA). The Department considers it appropriate to adopt the same approach. This letter is formal notification of the withdrawal of Annex A of DoJ Circular 6/2007. The DoJ is also withdrawing the paragraphs within Circular 6/2007 which refer to compulsory retirement age."

3.48 Accordingly, the current position in Northern Ireland is similar to that in England and Wales where, as far as central guidance is concerned, there is somewhat of a 'policy vacuum' as to how reviews should be dealt with when a former officer reaches compulsory retirement age or state pension age.

Guidance issued by the Board

3.49 It is also open to local police pension authorities in England and Wales to issue their own guidance or policies on the application of the Regulations and some have done so[109]. However, the

[108] Police Powers and Human Resources Policy Branch.
[109] Detailed consideration of which is beyond the scope of this review.

NIPB is also free to adopt its own policy, or produce its own publications, in relation to the exercise of its functions under the relevant Regulations.

3.50 In this regard, I have been provided with a document produced by the Board entitled 'Guidance Booklet on Medical Pensions and Injury and Duty Awards: Former Police Officers'. This booklet ('the NIPB Guidance Booklet') is dated December 2011. It is also stated to be used as a guidance document by the Board's Selected Medical Practitioner.

3.51 I have also seen a draft revised version of this booklet, prepared in December 2012, but which, in the event, was never published, given some of the developments in case-law and the withdrawal of the central guidance, which had cast some doubt on the best way to deal with some of the issues covered in the booklet.

3.52 The extant version, therefore, remains the 2011 edition – although this was removed from the Board's website because, further to some of the developments in case-law, it was felt that certain portions of the guidance were no longer applicable, particularly those which referred to the withdrawn guidance. This is a concrete illustration of the 'policy vacuum' which some of those consulted in the course of the review drew to my attention. All parties would like clear and readily understood guidance made available – although for the moment it is likely that there would remain contention over exactly what the guidance should say.

3.53 In any event, I also make reference to relevant parts of the NIPB Guidance Booklet in the remaining sections of this report where this is appropriate.

Other guidance

The NAMF Guidance

3.54 I am also aware of a guidance document issued in early 2013 by the National Attendance Management Forum (NAMF) giving 'procedural guidance on assessing and re-assessing the degree of disablement as a result of an injury received in the execution of duty' ('the NAMF Guidance'). NAMF is a forum at which representatives of various police authorities (and the Home Office) cooperate and liaise in relation to issues of attendance management, which includes issues relating

to occupational health, ill-health retirement and injuries on duty. It consists of HR professionals, all from the authorities' side.

3.55 The NAMF Guidance is expressed to consist of "notes" which are "intended as a framework to assist Forces in adopting their own individual policies"[110]. This publication is particularly of interest since it is one of the few guidance documents produced after the *Laws* and *Simpson* litigation[111].

3.56 The NAMF Guidance emphasizes that SMPs are independent and "will reach their decisions independently on an individual basis when undertaking assessments"; and goes on to note that "as such they are entitled to apply their own processes having regard to relevant case law"[112]. This is no doubt correct to some degree, but perhaps understates the reality that many SMPs will feel uncomfortable reaching their own conclusions about how the case law is to be interpreted and applied. This too is recognized in the NAMF Guidance, however, in that it recommends "that Forces instruct SMPs on the legal tests and the necessary procedures to follow", to "include guidance on causation, apportionment and resolving disputes of fact"[113]. I make reference to the NAMF Guidance as apposite throughout the remainder of this report.

The PNB Guidance

3.57 As noted at paragraph 3.28 above, the DOJ Appeals Leaflet refers to IMRs' assessment also being "carried out in line with… the relevant… Police Negotiating Board (PNB) Guidance". The PNB is the body which negotiates agreements between the employers of police officers (police authorities) and police staff, which it recommends to the Home Secretary and devolved Ministers to become part of police regulations. It is responsible for negotiating, *inter alia*, police officers' pay, allowances and pensions; and negotiates with the 'official side' (which includes representatives of the relevant Ministers, police authorities and chief police officers) and the 'staff side' (which has representatives of the police staff associations).

3.58 The PNB has also produced a detailed document entitled 'Revised Guidance on Ill-Health Retirement (Amended)' ('the PNB Ill-Health Retirement Guidance'). This guidance is of interest because it has been agreed between the official and staff sides. It is not related to injury benefits

[110] See paragraph 1.2.
[111] Although in advance of the *Slater* litigation.
[112] See paragraph 1.4.
[113] See paragraph 1.5 of the NAMF Guidance.

directly but, rather, ill-health retirement. However, it touches upon issues which are common to both schemes, including procedural matters such as references to SMPs and further appeals.

3.59 No doubt both the NAMF Guidance and the PNB Guidance are intended to be of assistance to those administering the injury benefits scheme – and will undoubtedly be so to some degree. However, their existence highlights another potential problem in relation to guidance in this area, which is that those operating the scheme may be faced with a range of different guidance documents, not all of which may be entirely consistent with each other or up-to-date. In Northern Ireland, for instance, an SMP or IMR may have access to the NIPB Guidance Booklet, the DOJ Guidance for IMRs, the Home Office Guidance for PMABs, the NAMF Guidance *and* the PNB Guidance. A proliferation of potentially relevant guidance can of course add to, rather than reduce, confusion; and may actively discourage medical practitioners from consulting it.

Departmental review of injury on duty provision

3.60 Before leaving this general discussion of policy, it is appropriate also to mention a review conducted by a Panel appointed by the Department of Justice in Northern Ireland in 2010 to review the operation of the IOD award system. That such a review occurred some 5 years ago illustrates the fact that the system has been the subject of concern and complaint for some time, even before some of the more recent litigation threw the process into further disarray.

3.61 The review is summarized on the DOJ website in the following terms:

> "The Minister initiated a review of the Injury on Duty in May 2010 in response to concerns that were raised about the efficacy and efficiency of the process.
>
> The Review team, jointly chaired by the Department of Justice and the Northern Ireland Policing Board made a number of recommendations to improve the whole injury on duty process. They include:
>
> - A minimum five year period before review in all cases.
> - Reviews to be set aside for those who are suffering from the most severe psychological conditions.
> - Improving time taken for an appeal.
> - Successful appeals against review decisions to be backdated to the date the award was reduced.

- A pool of doctors will be available to act as Selected Medical Practitioners (SMP).
- Individuals will have the option to have their review carried out by a different SMP from initial assessment.
- Further work to be carried out on the possibility of a two person appeal panel, chaired by an Occupational Health Specialist."

3.62 I have had access to the Final Report of the Review Panel, dated 30 September 2010 ('the DOJ Review Report'). Whilst this is not formal Departmental policy, it is plainly a relevant document for me to consider in the course of this review, touching, as it does, on several of the issues I have been asked to look at. Moreover, the Review Panel was an impressive collection of persons with experience and expertise in this field[114]. I return to the recommendations contained in the Review Panel's Report, as appropriate, in various parts of this report.

Conclusion on policy and guidance

3.63 There is a potentially important role for policy publications to play in the administration of the ill-health pension and IOD awards system. As I have made clear, the more simple and clear the legislative scheme is, the less need there ought to be for policy. Ideally, the Regulations should be capable of being applied without there being any need for policy to guide officials and medical authorities on how they ought to approach their task.

3.64 Where the system is complex however, as pension arrangements tend to be, there may be a need for *prescriptive* guidance (indicating how the Regulations are to be operated where there is a lawful choice or judgment as to how this may be done) and/or *descriptive* guidance (simply explaining to the reader in plain terms how the Regulations work).

3.65 In either case, I am strongly of the view that clear and authoritative Northern Ireland specific policy should be produced. At present, I consider it unsatisfactory that SMPs and IMRs have a wide range of guidance documents they might consider[115], produced by different bodies and at different times, not all of which address issues consistently. This is likely to promote confusion rather than clarity.

[114] Mr Jimmy Spratt MLA (Co-Chair), Chairman of the NIPB's Human Resources Committee; Mr Peter May (Co-Chair), Director of Policing and Community Safety in DOJ; Dr Paddy Woods, Deputy Chief Medical Officer; and Mr David McClurg, Chair of the NI Police Fund; assisted by officials from the NIPB and DOJ.
[115] See paragraph 3.59 above.

3.66 Given that appeals are available from SMPs to IMRs, it is also important that they approach issues consistently, rather than there being a different regime applied depending upon whether the medical issue is being addressed at first instance or on appeal. It seems to me plainly desirable, therefore, that SMPs and IMRs work to the same guidance, rather than (as at present) IMRs being referred to the DOJ Guidance for IMRs and SMPs being referred to the NIPB Guidance Booklet[116]. Accordingly, I would strongly recommend the production of a new guidance document in Northern Ireland produced by the Department, in conjunction with the Board. Ideally, given the potential for challenge by officers or their representative organisations, any such guidance should also be agreed on their part, although I recognize that this may be difficult to achieve and that, ultimately, responsibility for the guidance must rest with the relevant public bodies.

3.67 If new guidance is to be issued, it would make sense for this to occur after any forthcoming legislative amendment to the Regulations which might flow from the introduction of new regulations in England and Wales, which are then reflected in amended regulations here[117], or from engagement which occurs as a result of this review. However, there does seem to me to be a more pressing issue, which is the matter of how reviews are dealt with in the meantime, particularly for officers at compulsory retirement or state pension age, the area in which it is said that there is presently a policy vacuum. I would recommend that at least *interim* guidance is provided on this issue as a matter of urgency.

[116] Although recognizing that each may have access to both documents.

[117] Since, otherwise, new guidance issued in the *interim* may become outdated in light of any amendment of the Regulations.

CHAPTER 4

KEY CONCEPTS

Key concepts within the Regulations

4.01 There are a number of key concepts which appear in the Regulations, or important phrases used within the Regulations, which form some of the major building blocks of the statutory scheme. A proper understanding of these is obviously of assistance in addressing the matters set out in my terms of reference, although some of them are by no means straightforward. I have discussed a number of these key concepts below. Several of them are defined, with greater or lesser clarity, within the legislation; others are not. Others still[118] are concepts which do not appear explicitly within the Regulations but arise when the Regulations are sought to be applied in practice. Given the centrality of the concept of the 'degree of disablement' to several of the issues which directly prompted this review, I have addressed this in greater detail than some of the other important concepts.

Injury on duty

4.02 Obviously, where an application for an injury on duty award is being considered, one of the first questions is likely to be whether the injury was "received in the execution of duty by a police officer". This is the foundation concept on which the provision for injury pensions and IOD awards are built.

4.03 Regulation 5(1) of the 2006 Regulations provides that:

> "A reference in these Regulations to an injury received in the execution of duty by a police officer means an injury received in the execution of that person's duty as a constable."

4.04 As is immediately apparent, this definition is somewhat tautological. Further assistance is found in regulation 5(2), which provides:

[118] In particular, the concept of apportionment.

> "For the purposes of these Regulations an injury shall be treated as received by a person in the execution of his duty as a constable if –
>
> (a) the police officer concerned received the injury while on duty or while on a journey necessary to enable him to report for duty or return home after duty, or
>
> (b) he would not have received the injury had he not been known to be a constable, or
>
> (c) the Board is of the opinion that the preceding condition may be satisfied, and that the injury should be treated as one received in the execution of duty…"[119]

4.05 Many of the provisions relating to injuries on duty also apply only to such an injury if it was "received without the default of the officer concerned". That phrase is defined in regulation 5(4), which provides:

> "For the purposes of these Regulations an injury shall be treated as received without the default of the police officer concerned unless the injury is wholly or mainly due to his own serious and culpable negligence or misconduct."

4.06 I am aware that there has been litigation on a number of occasions in Northern Ireland in relation to whether a particular injury was or was not an injury on duty within the meaning of that phrase in the Regulations[120]. There will obviously be difficult or borderline cases, particularly where (as in the case of some stress-related injuries) there is not one index incident which can clearly be seen to have caused the injury. However, the issues giving rise to the present review do not really touch upon the definition of an injury on duty and I do not propose to say anything further in relation to it at this stage, save to note that the determination of whether an injury meets the definition[121] can be an extremely difficult and fact-sensitive judgment. This is relevant when we come to consider who is responsible for reaching the decision on this issue.

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[119] Regulation 5(5) also makes clear that (notwithstanding anything in the 1988 Regulations relating to a period of service in the armed forces) an injury received in the execution of duty as a member of the armed forces shall not be deemed to be an injury received in the execution of duty as a police officer.

[120] See, for instance, *Re Staritt and Cartwright's Application* [2005] NICA 48 (in which I appeared on behalf of the officers).

[121] Including the potentially controversial element of the extent of any default on the part of the officer concerned.

4.07 [redacted]

Police officer

4.08 Plainly, the Regulations are dealing with police officers[122]. Regulation 2(1)(b) of the 2006 Regulations provides that: "In these Regulations, unless the context otherwise requires… any reference to a police officer, however expressed, includes reference to a person who has been a police officer". Accordingly, former police officers (the subject of this review) are included, which opens the way for retrospective IOD award applications.

4.09 Regulation 5(3) provides that:

> "In the case of a person who is not a constable but is within the definition of a "police officer" in the glossary set out in Schedule 1, paragraphs (1) and (2) [of regulation 5] shall have effect as if the references to a constable were references to such a person."

4.10 The glossary in Schedule 1 to the 2006 Regulations (as amended[123]) provides that:

> ""police officer" means a person who is:
>
> (a) a constable of the Police Service of Northern Ireland as defined in section 1(2) of the 2000 Act; or
>
> (b) a Police Service of Northern Ireland trainee as defined in section 36(3) of the 2000 Act."

[122] In the English 2006 Regulations inspectors of constabulary are also treated as police officers for this purpose (see regulation 3); and the draft proposed Regulations also include specified members of SOCA (see draft regulation 4(3)).

[123] There had previously been a number of other categories of persons within the definition of 'police officer' but these were removed by paragraph 74(c) of Schedule 1 to the Crime and Courts Act 2013 (Consequential Amendments and Saving Provision) Order 2013 (SI 2013/2318), subject to the saving provision at article 3(1) of that Order.

4.11 Again, for present purposes, there is nothing particularly controversial in the way in which the Regulations define the concept of a police officer and it is unnecessary to discuss this further at the moment.

Is the officer 'disabled'?

4.12 Whether an officer is disabled is obviously a key issue in relation to a variety of questions which arise under the Regulations. Regulation 6(4) of the 2006 Regulations provides that:

> "Subject to paragraph (5), disablement means inability, occasioned by infirmity of mind or body, to perform the ordinary duties of a police officer, except that, in relation to the child or to the widower or surviving civil partner of a woman police officer, it means inability, occasioned as aforesaid, to earn a living."[124]

4.13 Where one is dealing with an officer or former officer, therefore, the concept of disablement is the "inability, occasioned by infirmity of mind or body, to perform the ordinary duties of a police officer". 'Infirmity' is further defined in regulation 6(8) as "a disease, injury or medical condition, and includes a mental disorder, injury or condition".

4.14 It is important to bear in mind, therefore, that the concept of disablement under the Regulations and for the purposes of ill-health pensions and IOD awards is <u>not</u> the natural and ordinary meaning of the word; and is a legally defined term within the Regulations. A person could be disabled in some way in the sense in which the term is ordinarily understood but still be able to perform the ordinary duties of a police officer[125]. Conversely, someone might not be 'disabled' in the ordinary usage of that term but may have a condition which renders them unable to perform the demanding task of police work.

4.15 It is also relevant to note that the term 'disablement' is distinct from other similar statutory language in different contexts. It is significantly different, for instance, from the term 'disability' as

[124] Regulation A11(2) of the 1988 Regulations is in materially similar terms. (Although the phrase "male or female member" is used instead of the simpler and more modern formulation "police officer" found in the 2006 Regulations, the definition of "member" in Schedule A to the 1988 Regulations makes clear that regulation A11(2) is also dealing with the ordinary duties of a police officer".)

[125] Although, in such a case, the 'disability' is likely to be fairly minor, given the demanding physical nature of the "ordinary duties of a police officer" as that term is understood and applied.

used in the Disability Discrimination Act 1995[126]. What is important to bear in mind is that the issue of disablement in the Regulations focuses on the individual's ability or inability to perform the duties of a police officer.

How disablement is dealt with in guidance

4.16 The "ordinary duties of a police officer" are not defined within the Regulations. It is obviously important to have some idea of what this means, so that the test for disablement can be correctly applied. What the ordinary duties of a police officer are is not dealt with explicitly in the NIPB Guidance Booklet but is touched on in the DOJ Guidance for IMRs which says that "we suggest you should assume that "ordinary duties" means **all** the duties an officer would be expected to perform for his or her age" [bold emphasis in original].

4.17 Guidance on what those duties are is contained in Annex B to the DOJ Guidance for IMRs. It notes that "a police officer can expect to be involved in a wide range of duties in connection with patrols, security (including surveillance), crime investigation, traffic control, communications, community relations work, etc.". As well as attributes required for desk and paperwork, Annex B also identifies "an ability to run, walk reasonable distances and stand for reasonable periods" as necessary in order to carry out activities including the arrest and restraint of suspects and carrying a firearm. Annex B continues:

> "There is a limited number of specialized and administrative posts in the Service but it is the considered view of the Chief Constable that police officers must be capable of undertaking the full range of duties in their rank. This mobility is necessary not only in the interest of the efficiency of the Service but also for the training and career development of the individuals. There are few exceptions to this."

4.18 The NAMF Guidance does not address this issue; nor does the PNB Guidance address it at any length, although it is dealt with in some detail in the Home Office Guidance to SMPs which is annexed to the PNB Guidance. It states[127]:

[126] Section 1(1) of which provides that "a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities".
[127] At paragraphs 4.6 and 4.7.

"It has been held by the Court of Appeal that the reference to "ordinary duties" is a reference to all the ordinary the duties of the office of constable (see its judgment in 2000 in the case of *Stewart*):

> "…the hypothetical member of the force whose ordinary duties the Regulation must have in mind is the holder of the office of constable who may properly be required to discharge any of the essential functions of that office, including operational duty."

The reason behind this is the concern that without a relatively robust test of fitness, a Police Authority would be unable to safeguard the operational effectiveness of its Force, since it might be obliged to retain too many officers who were unfit for operational duties. It has been accepted that a constable cannot perform his or her ordinary duties unless he or she can at least run, walk reasonable distances, stand for reasonable periods, and exercise reasonable physical force in exercising powers of arrest, restraint and retention in custody. Although the core policing tasks go wider than these, it is important that the criteria for ordinary duties are as clear and robust as possible."

4.19 The document goes on to refer to the National Competency Framework as a basis for identifying the ordinary duties of a member of a police force for the purpose of assessing permanent disablement as follows:

- Patrol/supervising public order;
- Arrest and restraint;
- Managing processes and resources and using IT;
- Dealing with procedures, such as prosecution procedures, managing case papers and giving evidence in court.
- Dealing with crime, such as scene of crime work, interviewing, searching and investigating offences;
- Incident management, such as traffic and traffic accident management;

4.20 It then identifies a number of key capabilities which are necessary in order to carry out such duties, as follows:

- the ability to run, walk reasonable distances, and stand for reasonable periods;
  the ability to exercise reasonable physical force in restraint and retention in custody;

- the ability to sit for reasonable periods, to write, read, use the telephone and to use (or learn to use) IT;
- the ability to understand, retain and explain facts and procedures.
- the ability to evaluate information and to record details;
- the ability to make decisions and report situations to others;

4.21 This is consistent with what the DOJ Guidance to IMRs says (which is probably based on an earlier version of the above guidance). The Home Office Guidance for PMABs[128] simply reiterates what is said in the PNB Guidance above.

Is the disablement 'total'?

4.22 Another important concept within the Regulations is that of 'total' disablement. The terminology used is less than clear and might well, in my view, give rise to confusion. This is because, having regard to the definition of disablement discussed at paragraphs 4.12 to 4.15 above, one could conclude that disablement must either be total or non-existent (that is to say, an individual either can or cannot perform the ordinary duties of a police officer). However, 'total' disablement under the Regulations corresponds more readily to the concept of 'degree of disablement' (which relates to earning capacity). That is to say, an individual is totally disabled when they are unable to earn any money at all either as a police officer or in other civilian employment.

4.23 One has a sense of this in the deeming provision contained in regulation 6(5)[129] which provides that "a person shall be deemed to be totally disabled if, as a result of [an injury on duty], he is receiving treatment as an in-patient in hospital". Accordingly, an in-patient is understandably treated as being unable to earn any money whilst in hospital[130].

4.24 However, the point is made explicit in regulation 6(6) which provides that:

> "Notwithstanding paragraph (5), "totally disabled" means <u>incapable</u> by reason of the disablement in question <u>of earning any money in any employment</u> and "total disablement" shall be construed accordingly."

[128] See section 3, paragraphs 9-14.
[129] Set out at paragraph 4.39 below.
[130] Which, leaving aside considerations of sick pay or the limited employment which one might undertake from a hospital bed, seems an entirely reasonable proposition.

4.25 This provision is also interesting as it suggests that when one is considering the degree of disablement (discussed further below) the question relates to the ability of the officer to earn money "in any employment', rather than simply considering the extent to which his capacity to earn a living within the police force is affected.

Is the disablement 'permanent'?

4.26 In considering ill-health retirement and injury awards, a key question is whether the disability is likely to be "permanent". It is permanent disablement which is the gateway to these benefits. A question therefore arises as to how the concept of permanence is to be applied.

4.27 This matter is dealt with in regulation 6(1) of the 2006 Regulations[131]. It provides that:

> "Subject to paragraph (2), a reference in these Regulations to a person being permanently disabled is to be taken as a reference to that person being disabled at the time when the question arises for decision and to that disablement being at that time likely to be permanent."

4.28 Permanent disablement, therefore, seems to relate once again to the notion of disablement (ability to work as a police officer) rather than degree of disablement (earning capacity). In order to be adjudged permanently disabled, the individual must be "disabled at the time when the question arises for decision" – which is an unsurprising requirement – but it must also be the case that the disablement is "at that time likely to be permanent"[132]. The reference to *likelihood* in the Regulations is a pragmatic recognition that such matters cannot be predicted with certainty.

4.29 Regulation 6(1) is of assistance in showing that the judgment is to be made on the balance of probabilities ("*likely* to be permanent")[133]; but it does not assist in defining what the word "permanent" itself means.

4.30 Having completed a consultation process, the Northern Ireland Office issued Circular 04/2009 on 27 April 2009 containing guidance on the definition of the term 'permanent'. This guidance was

[131] Regulation A11(1) of the 1988 Regulations is in materially similar terms; as is regulation 3(1) of the 2009 Regulations.

[132] Assuming that the person receives "normal appropriate medical treatment for his disablement": see regulation 6(3).

[133] As the relevant guidance suggests: see the Home Office Guidance to PMABs, section 3, paragraph 17.

to reflect the Police Negotiating Board guidance on the term and the definition of it which is used in England and Wales. The circular was approved by the Board at its Human Resources Committee meeting on 14 May 2009. Accordingly, with effect from 1 June 2009, the guidance provided to the Board's SMP relating to this question states the following:

> "The Regulations do not define "permanent" since the word arguably speaks for itself, meaning for the rest of one's life. The PNB Guidance states that if, in a case where the officer is still in the early stages of his career, such a long-term view is difficult to determine, the test should be that the officer is likely to remain disabled for the ordinary duties of a member of the force until at least the compulsory retirement for his or her rank, which is age 60 for ranks from constable up to and including chief inspector and age 65 for ranks from superintendent and above."

4.31 This reflects the exact wording contained in the Home Office Guidance for PMABs[134]. The same wording is replicated in the DOJ Guidance for IMRs and, as mentioned, it originates from PNB Guidance.

4.32 Accordingly, the recommended approach appears to be that:

(a) The SMP should first ask whether the disablement will continue for the rest of the officer's life. If the answer to that question is 'yes', the disablement will be permanent. If the answer to that question is 'no', the disablement will not be permanent unless situation (b) pertains.

(b) In cases where the officer is still in the early stages of his career and a long-term view is difficult to determine, the SMP should ask whether the disablement will continue until the officer reaches compulsory retirement age. If the answer to that question is 'yes', the disablement is treated as being permanent (notwithstanding that a recovery might be made before the end of the officer's life but after he or she has reached the age of compulsory retirement).

4.33 This is a pragmatic approach to a question which is likely to be difficult for medical practitioners in some cases. As I discuss further below, however, it may be that – in light of the approach to the injury benefits scheme taken in *Simpson*, minimizing the relevance of compulsory

[134] See section 3, paragraph 15.

or state retirement ages – the focus on whether disablement will continue only until such age is unduly generous to officers.

4.34 The DOJ/NIO guidance also states that:

> "The issue is to be decided more on the balance of probabilities than on the basis of "beyond reasonable doubt" and in the present, taking account of current medical knowledge."

4.35 I am not sure why the guidance states that the issue is to be determined "more" on the balance of probabilities (the civil standard of proof) than on the basis of beyond reasonable doubt (the criminal standard of proof)[135]. It is either one or the other. In my view, the correct standard is plainly the civil standard. A better form of wording for this paragraph may have been simply that:

> "The issue is to be decided on the balance of probabilities rather than on the basis of "beyond reasonable doubt"…"

4.36 However, little is likely to turn on this. It is also the case that there is some flexibility in the application of the civil standard, albeit that the standard remains constant. That is to say, it might take more evidence to show something which is inherently unlikely on the balance of probabilities than it would take to show something which is not inherently unlikely. For a discussion of this issue, one can see authorities such as *Re Doherty's Application*[136].

Degree of disablement

What is the 'degree of disablement'?

4.37 One of the most complex concepts within the Regulations is the notion of 'degree of disablement'. I say this particularly because, in light of the definition of 'disablement' discussed above, one could again be forgiven at first blush from thinking that there should be *no* degrees of disablement but that, rather, an officer is either disabled (*i.e.* unable to perform the ordinary duties of a police officer) or not (*i.e.* able to perform the duties of a police officer). The question of

[135] Although this is probably simply lifted from equivalent guidance in England and Wales (see the Home Office Guidance for PMABs at section 3, paragraph 17).
[136] [2008] UKHL 33.

whether an officer is disabled within the meaning of the Regulations should be capable of a 'yes' or 'no' answer.

4.38 Indeed, I believe this is the correct analysis. The confusion arises because, when one considers the terms of the Regulations carefully, what is termed the 'degree of disablement' does not in fact appear to be a measure of how disabled the officer is (*i.e.* the extent to which they can partially perform the ordinary duties of a police officer) but rather the measure of something different, namely the extent to which their disablement affects their earning capacity.

4.39 This is evident from regulation 6(5) of the 2006 Regulations (and, insofar as it may be relevant, it is of note that regulation 6(4) which defines disablement is expressly "subject to" regulation 6(5)). Regulation 6(5) provides that:

> "Where it is necessary to determine the degree of a person's disablement it shall be determined by reference to the degree to which his earning capacity has been affected as a result of an injury received without his own default in the execution of his duty as a police officer: Provided that a person shall be deemed to be totally disabled if, as a result of such an injury, he is receiving treatment as an in-patient at a hospital."[137] [underlined emphasis added]

4.40 The distinction is described in the DOJ Guidance to IMRs[138] as follows:

> "For the purposes of police injury awards "degree of disablement" is not the extent of physical or mental disability but rather the extent to which a medical authority (i.e. the selected medical practitioner (SMP) or, on appeal, an independent medical referee) assesses to what degree a person's future earning capacity has been affected by the relevant injury. The link with earnings is necessary because injury pensions are based on a system of "minimum income guarantee" designed to bring total income in ill-health retirement up to a certain level." [underlined emphasis in original]

4.41 To my mind, the disconnection between the concept of 'disablement' under the Regulations (which relates to ability/inability to work as a police officer) and 'degree of disablement' under the Regulations (which relates to the effect of the injury on earning capacity) is extremely unfortunate

[137] Regulation A11(3) of the 1988 Regulations is in materially identical terms.
[138] At paragraph 23.

and apt to cause confusion. The latter concept would be better described simply as 'degree of loss of earning capacity' or words to that effect.

4.42 Put shortly, however, the degree of disablement relates to the consequences of the duty injury for the officer's capacity to earn money. It is the calculation of this element which has given rise to many of the difficulties[139] which have led to the need for the present review.

How is the degree of disablement calculated?

4.43 The Regulations provide very little guidance whatsoever as to how the degree of disablement is to be calculated. We know from the table in paragraph 3 of Schedule 3 to the 2006 Regulations that the degree of disablement must be discerned sufficiently to know into which band it falls in any particular case, that is to say 25% or less (slight disablement), more than 25% but not more than 50% (minor disablement), more than 50% but not more than 75% (major disablement), or more than 75% (very severe disablement).

4.44 The Regulations do not, however, indicate whether the correct approach is to make a broad judgment as to the level of the officer's degree of disablement (that is to say, slight, minor, major, or very severe) with the percentages being given merely as an indicator as to how these terms are to be interpreted[140]; or whether, on the other hand, the correct approach is to make a more detailed calculation giving rise to a percentage figure which will then dictate into which band the officer's degree of disablement falls (with the nomenclature 'slight', 'minor', 'major' and 'very severe' simply being labels given to the relevant band). In other words, the Regulations do not make clear whether all an SMP seeking to apply the Regulations must do is choose the applicable band; or whether he must reach a percentage figure, which then dictates the applicable band.

4.45 As it happens, it is the latter, more mathematical approach which has gained favour. It might be said that this is the more natural application of the text of the Regulations, since, considering the layout of the table in paragraph 3 of Schedule 3, the degree of disablement is represented by

[139] Particularly in the context of age 65 reviews.

[140] It might be thought that some support for this approach – although plainly not determinative – may be gleaned from the way Ouseley J expressed the matter in the *Crocker* case at paragraph [4]: "The degrees of disablement are set out in four bands: slight, minor, major and very severe, representing increasing percentages of disablement. So, slight is 25% or less; minor is 26 to 50%; major is 51 to 75% and very severe over 75%. These feed into the calculations of pension and gratuity."

the percentage figures, with the more general labels appearing only in brackets afterwards[141]. However, there is nothing in the Regulations which specifically requires an SMP to give a percentage figure in any individual case. Their obligation under regulation 29(2) is to give a decision on "the degree of the person's disablement", which could just as easily mean a decision as to whether the disablement is slight, minor, major or very severe. Regulation 29 could have been drafted to indicate that the medical authority had to specify a precise percentage disablement; but it is not.

4.46 As I have also noted in Chapter 1, the calculation of a precise percentage figure is also an exercise with which the SMPs are not terribly comfortable, involving, as it does, something of an accountancy exercise. Indeed, the fact that the degree of a person's disablement is a "medical question" under regulation 29 of the 2006 Regulations may also suggest that (what I have referred to as) the mathematical approach is not the correct way of determining degree of disablement under the Regulations; but that, rather, it is a broad judgment to be made by a clinician about the effect of the injury or condition he has examined in contrast to a much more detailed calculation based on earnings data. This approach seems to me to draw support from the *Crocker* judgment[142], particularly at paragraph [56] where Ouseley J noted that the approach he was suggesting (in relation to an issue of apportionment in that case):

> "… reflects the statutory question which has to be answered. It is a straightforward approach which fits with the process for making the assessment, which is comparatively informal, and one in which doctors, and not lawyers or philosophers, make the decisions." [underlined emphasis added][143]

4.47 This view is also supported when one recalls that the important thing, in order to be able to calculate the gratuity or injury pension to which the officer is entitled, is merely the *band* into

[141] This approach might also be said to be supported by the use of wording such as 'more than 25% but not more than 50%', indicating a certain degree of precision as to cases which fall just either side of the line (*e.g.* 26% or 49%).

[142] Discussed in some detail at paragraphs 7.86 to 7.96 below.

[143] See also the comment in paragraph [39] of that judgment to the effect that: "The way in which one might assess someone who is now wholly without earning capacity, but who was likely to regain 50% in two years, and might regain 75% in four years, is a problem for a rather different expertise. The Regulations make no provision for that sort of calculation, which, I believe, they would have done had that been intended." Again, this is consistent with the judgment which the relevant medical practitioner has to make being a broad medical judgment rather than a detailed calculation which is not mandated by the Regulations and which calls for "a rather different expertise" than the exercise of medical judgment.

which his degree of disablement falls. The only relevance of the percentage figure at which the SMP arrives in relation to the degree of disablement is to determine the band – since, thereafter, it is the further percentage figures set out in the table[144] which are operative in the calculation of entitlement.

4.48 I cannot help but wonder, therefore, whether the method presently used to calculate the percentage figure for degree of disablement is much too over-sophisticated and whether a more basic approach – whereby the SMP simply has to make a judgment about the appropriate band – might not radically simplify the process, yet still be in accordance with the Regulations[145]. Viewed in this way, the SMP would simply be asked to determine whether the effect of the officer's injury on his earning capacity is slight, minor, major or very severe (using the percentage brackets as a guide to the interpretation of these terms)[146]. This is an issue to which there is simply no clear answer in the Regulations.

4.49 In any event, whether one uses the sophisticated method which has grown up, which is described in further detail in the next section (involving, for instance, the use of the ASHE survey), or a much more basic approach involving simply on a judgment in the round as to which band the officer's loss of earning capacity falls into, the exercise is obviously one of comparison: comparing the situation with the injury present to a (notional) situation where it has not occurred. This is sometimes referred to as comparing the *injured earning capacity* to the *uninjured earning capacity*; or the injured earning capacity to the 'but for' earning capacity (*i.e.* the earning capacity the officer would have enjoyed *but for* suffering the injury on duty). The degree of disablement – or, in the words of regulation 6(5), the degree to which the officer's earning capacity has been affected as a result of the injury – is essentially the difference between these two situations.

4.50 The injured earning capacity ought to be *relatively* straightforward to assess, since it involves making an assessment of the officer as he actually presents now, in his injured state. The assessment of the uninjured earning capacity is much more difficult to assess, since it plainly relates to a notional state of affairs and involves some element of speculation as to how things

[144] The gratuity expressed as a percentage of average pensionable pay and the various minimum income guarantees expressed as a percentage of average pensionable pay.

[145] Or, indeed, reflect better their purpose and intention.

[146] [redacted]

would have turned out if the injury had not occurred. It is the notional side of the equation (the uninjured earning capacity) which has given rise to much of the difficulty in contentious cases[147].

4.51 One important question is whether the assessment of the uninjured earning capacity should assume that the officer continued to be employed as a police officer. In other words, is assessment of the degree of disablement designed to compare what the former officer can earn now as compared with what he could have earned as a police officer; or designed simply to compare what the former officer can earn now in the civilian employment market as compared with what he could earn in that same market without the injury? This in turn raises an important question about what the relevant awards are designed to do. Are they intended to compensate an officer for the *loss of his job in the police* through injury; or are they, taking the officer's exit from the police through injury as a given, simply designed to compensate him for the *disadvantage he now faces in gaining civilian employment* as compared with his capabilities without the injury?

4.52 This too is a difficult question to which there is no clear answer in the Regulations. The better answer – if the question needs to be answered – is probably that the assessment of the uninjured earning capacity should assume that the police officer continued in police employment. This is certainly the way in which the issue has been approached in the various guidance which has been issued; and I explain below why I think it is the better view *if an answer to this question is necessary*.

4.53 However, I pause to note again that this question gains prominence only when the SMP is urged or required to carry out a detailed calculation which produces a definite percentage disablement figure. In order to do so, a clear idea of an uninjured notional salary is necessary[148] in order to be put into the equation with the injured potential salary which the officer is capable of earning to provide the basis for the percentage difference. This uninjured earnings figure will be his police officer salary for the reasons set out below. But if a much more rudimentary approach was adopted, simply requiring the SMP or IMR to identify a band representing his judgment on the loss of earning capacity occasioned by the duty injury, these issues fade away to a large degree. Indeed, it seems to me that the simplest approach, still consistent with the Regulations, would be

[147] Although that is not to say that the actual side of the equation cannot be difficult also (particularly where the recent medical presentation points to an earlier medical judgment having been erroneous or where additional non-related conditions are present which might be thought to affect earning capacity independently of the duty injury).

[148] Or at least highly desirable.

to ask the SMP/IMR to determine, in the context of the general employment market (including but not limited to employment in the police), into which band the officer's disablement falls, *i.e.* what effect on his earning capacity generally does the duty injury now have (slight, minor, major or very severe).

4.54 This judgment seems to me to be much more in the character of a medical question focused on loss of function than (what the SMPs and the OHW described to me as) the actuarial task they currently have to perform in line with the extant guidance which continues to rely on the ASHE survey. A revision of the approach urged upon SMPs along the lines I have suggested would certainly simplify their task. It is obviously open to the objection that it is less 'scientific' than the present approach, which objection has some force. However, the more detailed the process, and the more steps within it which are required before the SMP reaches his final conclusion on percentage disablement, the more there is to challenge and pick apart on the part of officers who are aggrieved at the ultimate result and the further away from a straight medical assessment the process becomes.

4.55 Moreover, although the present approach produces a definite result (a percentage figure up to two decimal places), there is something highly artificial in my view about suggesting that an injury's effect on a person's earning capacity can be calculated with such precision. In addition, a percentage difference either way can have an important effect on the band into which an officer's case falls if the percentage calculation is at the margin of two bands. In such cases, a broad judgment about whether the higher or lower band is appropriate is probably a fairer way to address the issue.

4.56 Also, I am not suggesting that the present consideration of skill levels and job classifications requires to be entirely jettisoned. These are still tools which the SMP could still use when assessing the officer's capability and earning capacity; but they would be guides and pointers, rather than ultimately dictating a rigid outcome. Certainly, in any reconsideration of policy guidance to SMPs and IMRs which may now be undertaken, I would urge that serious consideration be given to simplifying the SMPs' task along the lines outlined above.

Issues with the assessment of the uninjured earning capacity

4.57 Returning to the present method of calculation though, there are at least two reasons why I have said in paragraph 4.52 that the better approach, insofar as the issue arises, is for the former officer's uninjured earning capacity to assume that he continued in police employment[149]. Firstly, one must not lose sight of the fact that an officer becomes entitled to an injury pension only if he is disabled from acting as a police officer by the duty injury. In assessing a situation where the injury has not occurred, it is natural to assume that he would not be so disabled and would have continued to serve in the police. Given that the degree of disablement under regulation 6(5) is the degree to which the officer's earning capacity has been affected "*as a result* of" an injury on duty, and that an injury award under regulation 10 is payable where the officer "ceases or ceased to be a police officer and is permanently disabled *as a result* of" such an injury, it is natural to consider that, without the injury on duty occurring, the officer would have continued to serve.

4.58 Secondly, it is plainly at least *part* of the purpose of the injury benefit scheme established by the Regulations to compensate an officer for loss of employment as a police officer (although there is argument about whether this is the full or exclusive purpose of these provisions, discussed later in the context of the *Simpson* judgment). In light of this, in assessing the degree of disablement under the current approach, it seems fair to compare the injured earning capacity against a notional uninjured earning capacity where the officer is capable of, and does, continue to serve as a police officer.

4.59 That said, if the focus is purely on earning capacity, simply assuming that the officer would have remained a police officer without the injury – or, more accurately, that employment within the police best reflects what he was capable of earning – is not without its shortcomings. For example, the officer might well have been over-qualified for the police (or, at least, for the rank he was in at the time of the injury); or may have chosen to work as a police officer, when a much more lucrative career was open to him, out of a sense of calling or public duty. In such circumstances, simply assuming that, without the duty injury, the officer's police salary represents a proper reflection of his true earning capacity may be wide of the mark.

[149] And, indeed, this appears to be assumed in the case-law which has dealt with assessment of degree of disablement.

4.60 Let us assume, however, that 'but for' earning capacity is to be assessed on the basis that he would have continued in his police employment. Beyond this, seeking to evaluate the officer's uninjured earning capacity becomes much more difficult, particularly as the years roll on and the ability to speculate further on how the officer's career would have progressed but for the duty injury increases. For instance, if an officer has to retire through a duty injury early in his career whilst still a constable, but is still receiving an injury on duty award some 20 or 30 years later, to what extent (in the event that the IOD award is being reviewed at that stage) should the SMP speculate as to how the officer would have advanced? Should it be assumed that he was promoted through the ranks or not? Put another way, does the assessment of uninjured earning capacity seek to track the notional development of the police career which the officer would have had but for the injury?

4.61 The answer which seems to be given to this question appears to be 'no'; although if a *true* comparison is to be made at any point in time between the officer's earning capacity but for the duty injury and what his earning capacity actually is at that point, it seems to me that logic demands that an assessment should be made of where the officer would have been in his police career if the duty injury had not occurred. If he would have been capable of commanding the salary of a senior officer at that stage, but his employment prospects have plateaued as a result of the duty injury, this would suggest that the effect of the injury on his earning capacity may actually increase with time.

4.62 Nonetheless, I understand that what is used for the calculation of the officer's uninjured earning capacity is his <u>basic</u> earnings as a police officer (at the time of ceasing to be such). As such, his notional uninjured career is treated as stagnant, rather than dynamic.

4.63 Obviously, this issue too is not dealt with in the Regulations, since the means of assessing impact on earning capacity, though referred to in regulation 6(5), is not set out in the Regulations in any detail. All we have to guide us is the banding which must be the result of the exercise and the purpose and effect of the legislative scheme as a whole. Moreover, the more complex the assessment of impact on earning capacity becomes, the further from the text of the Regulations one travels and the less certain one can be that they are being applied correctly. Notwithstanding this, I set out below how the assessment of impact on earning capacity is dealt with in some of the various guidance documents to which I have referred in Chapter 3.

How 'percentage disablement' (banding) is dealt with in the NIPB Guidance Booklet

4.64 The NIPB Guidance Booklet describes the issue[150] in this way:

> "Once permanent disablement has been established and an Injury on Duty has been determined by the SMP, the next step is to calculate an estimate of the percentage disablement. It is important to remember that the percentage disablement awarded by the SMP is based on the degree to which your earning capacity has been affected by a condition which has resulted from an injury on duty.
>
> The SMP is required to make a comparison between your basic gross earnings (including CRTP if in payment at the date of retirement) as a police officer against your potential earnings outside the police service. Although the medical condition, or conditions, may have disabled you from continuing to work as a police officer, where fitness standards are high, you may potentially be capable of undertaking other civilian employment.
>
> The percentage disablement calculation method cannot, therefore be compared directly with other sources of benefit, such as the Industrial Injuries Benefit Scheme. **The calculation is based on the loss and/or impact of the condition or conditions on your earning capacity, not the actual physical/mental injury(s) or condition(s) you may have sustained whilst on duty as a police officer.**" [bold emphasis in original]

4.65 As discussed above, the guidance is clear that the comparison is to be made between the former officer's earnings <u>as a police officer</u> against his potential earnings outside the police service.

4.66 The Guidance Booklet goes on[151] in the following terms:

> "The impact of the disablement is determined by the degree to which your earning capacity has been affected as a result of the injury or injuries sustained whilst on duty. The SMP is provided with information in respect of the assessed potential basic gross pay (plus CRTP) you would be receiving if you were still a serving officer.
>
> The SMP will make a professional and informed assessment of the loss of functional ability, which is considered to be directly attributable to the Injury on Duty. An assessment is also

[150] At pages 9-10.
[151] At page 10.

made of your capabilities and the potential basic earnings you may receive in other occupations.

In the calculation of an Injury on Duty award, the SMP will use the Northern Ireland ASHE (Annual Survey of Hours and Earnings), not inclusive of income tax. ASHE is an annual pounds figure calculated by using National Insurance contributions. It is validated and produced each year by Government.

The percentage calculation may be reduced if the SMP considers that conditions and factors, not work related, also contributed to your condition and functionality. The percentage disablement calculation made by the SMP determines into which of the four percentage disablement bands you are placed, in order that PSNI's Pension Branch may calculate the pension payable to you."

4.67 A number of worked examples are then provided[152]. Essentially, the officer's pay as a police officer as it would have been without the disablement is compared against what the officer could now be expected to be paid in civilian employment with the disablement (taking into account their appropriate 'skill level' under ASHE) and the difference in these figures gives rise to a percentage difference. That percentage level (subject to further reduction for other unrelated factors which have contributed to the disablement) then finds its place within one of 4 bands, namely Band 1 (0% to 25%), Band 2 (over 25% but not more than 50%), Band 3 (over 50% but not more than 75%), and Band 4 (over 75%)[153].

4.68 As I have said, it is the band into which the disablement falls which is important in terms of the calculation of the IOD award. An increase or decrease within the band (for instance, on review) will not result in any change to the award payable. It is only where an officer moves from one band to another that there will be an effect on the amount of any award.

4.69 The assessment of what civilian employment a former officer can undertake is obviously complex and involves some degree of judgment. The process is described in the NIPB Guidance Booklet[154] in this way:

[152] See page 11 of the NIPB Guidance Booklet.
[153] These are set out at section 18 (page 13) of the NIPB Guidance Booklet.
[154] At page 12.

"The SMP, as a result of all the medical, non medical documentation available at the time of the assessment/review, plus the information obtained from the discussion/assessment meeting, makes a professional judgement as to the range of work and skill level you may be able to perform. This then indicates which one of the 4 skill levels you may be capable of performing. The ASHE survey then indicates a potential level of earnings. The SMP may, on occasions, consider that a person may only be capable of part time work and the ASHE survey figure is adjusted accordingly.

Job classification can be undertaken by the SMP in two ways. Both methods make use of the Standard Occupation Classification SOC.

Firstly, if no specific occupation can be clearly identified, an estimate based on Skill Level can be used and definitions are provided below. Secondly, if a specific occupation or set of occupations are identifiable; these can be listed as appropriate to the individual. Once again reference to SOC should be made if there is any doubt as to the 'general tasks' inherent to the job or experience/qualifications required for these occupations."

4.70 The skill levels and definitions are also set out in the NIPB Guidance Booklet. They range from skill level 1 (occupations equating with the competence associated with a general education at compulsory level) to skill level 4 (professional occupations and managerial positions).

The DOJ Guidance to IMRs discussion of percentage disablement calculation

4.71 The DOJ Guidance to IMRs also contains guidance, at some length[155], on how a percentage disablement figure should be calculated. Extracts are set out below:

"The 2006 Regulations do not set out a specified procedure for assessing the degree of a person's disablement. You are required to make a comparison between the appellant's basic earnings as a police officer against his/her potential earnings outside the Police Service.

The calculation is based on the loss and/or impact of the condition or conditions on the appellant's future earning capacity, **not** the extent of the actual physical/mental injury or condition(s). Your assessment should be aimed at assessing what the person is capable of doing and therefore capable of earning. What follows here is the procedure suggested by

[155] See paragraphs 24-32, which does not take into account the additional sections dealing with compulsory retirement age.

the Department of Justice. This has no binding authority but is consistent with the procedure which is followed by the SMP.

In order to assess the degree of percentage disablement based on loss of future earnings capacity, you will need to make an assessment of the appellant's skill level by reference to the person's background, skills and qualifications, what kind of employment he or she could undertake, allowing for the particular effects of the qualifying injury. You may seek information from the appellant to help with this assessment. A relevant consideration is whether the person could manage a job full-time or would have to work part- time.

If the person has actually found another job at the time of the assessment, there would then need to be a direct comparison between the person's earnings when employed as a police officer and the potential earnings in an outside job. If the person has actually found another job at the time of the assessment, there is an expectation that you would take this factor into account. **NB** – The appellant should provide evidence of his current salary if this is the case. It is not necessary for the person to have found work for an assessment to be made of degree of future earning capacity. Nor do earnings in a current job necessarily accurately reflect potential earnings, if the present job is not commensurate with the person's experience, skills and educational qualifications. Although the relevant injury may have prevented the person from continuing to work as a police officer, where fitness standards are exceptionally high, the person may be fully capable of taking up other employment.

…

How is the comparison between outside earnings and police earnings made?

Once you have assessed the appellant's skill level in relation to his capabilities after the injury, you then need to make a direct comparison between the person's earnings <u>when employed as a police officer</u> (this will be provided for you) and the potential earnings in an outside job based on the skill level. **Annex D** attached provides information on the latest outside earnings in the Annual Survey of Hours and Earnings (ASHE) relevant to the skill levels under consideration so that the person's earning capacity can be established in the light of your assessment of the person's capabilities for employment after the injury. If the appellant is already in employment, you may wish to consider his current salary.

Where an application is made for an injury award at the same time or immediately after medical retirement, the likely outside pensionable (or basic) earnings should be compared <u>with the pensionable police salary earned when last serving</u> (this will be provided to you) and will not need to be adjusted for inflation. The police salary should include any

competence related threshold payment given to the officer, since that is also pensionable (again, details of this will be provided, if applicable). If the officer was not in receipt of a competence related threshold payment at the point of retirement no further account should be taken of it in his or her case.

…

In the case of an after-appearing injury, or in the case of a review of degree of disablement, the medical retirement may have occurred a considerable time ago. In such cases the former police pensionable salary should be re-valued to current police pay levels to the equivalent point on the salary scale for the rank concerned. This will allow full account to be taken of the effect of inflation during the intervening period. **No account should be taken of the amount of any police pension received by the person when considering a retired officer's current earnings.**

If the person's employment prospects are such that he or she could expect to earn, in an outside occupation, as much if not more than he or she <u>was earning</u> as a police officer, then the degree of disablement would be virtually nothing. At the other extreme, if the person is incapable of earning any money because of the relevant injury, the degree of disablement would be close on 100%..." [bold emphasis in original; underlined emphasis added]

4.72 The majority of this guidance relates to assessing the current injured earning capacity and how the relevant point on the ASHE scale should be identified. Very little is said about assessing the uninjured earning capacity, since that is based on figures for basic pay, at the rank the officer was at when he left the police service, which are simply given to the SMP or IMR (although adjusted for inflation). This is consistent with what is said above about the uninjured earning capacity being approached on the basis that the officer's police career was stagnant, rather than dynamic.

Other guidance relating to percentage disablement

4.73 Some of the other guidance referred to in Chapter 3 above also deals with calculation of percentage disablement at some length. Section 5 of the Home Office Guidance for PMABs, on which the DOJ Guidance for IMRs appears to be based, contains the following extracts[156]:

[156] See section 5, paragraphs 6-9.

"For the purposes of police injury awards "degree of disablement" means the extent to which the SMP assesses a person's earning capacity has been affected by the relevant injury. The link with earnings is necessary because injury pensions are based on a system of "minimum income guarantee" designed to bring total income in retirement up to a certain level…

Note that degree of disablement is always related to loss of earning capacity…

In almost all cases it will be a matter for the SMP to judge the degree of disablement in terms of bands. However where specific conditions are met the Regulations law down that the degree of disablement should be 100%...

An SMP may have difficulty in putting an exact figure on the extent to which earning capacity has been affected by the relevant injury. The task is made easier by the fact that the degree of disablement column is divided into bands – slight, minor, major and severe. Percentage differences within these bands do not affect the award.

The Regulations do not set out a specified procedure for assessing the degree of a person's disablement. The Administrative Court has, however, commented that the task in assessing earning capacity is to assess what the person is capable of doing and thus capable of earning. It is not a labour market assessment of whether somebody would actually pay that person to do what he or she is capable of doing, whether or not in competition with other workers. What follows here is the procedure suggested by the Home Office. This has no binding authority but is the procedure which has been followed in most forces and by boards over recent years."

4.74 The following portions of the Home Office Guidance to PMABs[157] are in materially similar (if slightly more detailed) terms to the extracts of the DOJ Guidance to IMRs which I have set out above.

4.75 The PNB Guidance, because it relates to ill-health pensions which do not require the same assessment of 'degree of disablement', does not address this issue; but the NAMF Guidance is directed predominantly towards assessing and re-assessing the degree of disablement. It contains the following extracts[158]:

[157] Section 5, paragraphs 10-16.
[158] See paragraphs 3.4.2 to 3.4.7.

"It will be for the SMP to assess the degree of disablement in terms of a percentage. However, where specific conditions are met the Regulations lay down that the degree of disablement could be assessed as 100% receiving treatment as a hospital inpatient [*sic*]…

The degree of disablement relates to the loss of earning **capacity**. It is therefore a quantum assessment reached by considering the disabling effects of the injury and how this impacts on the individuals' loss of earnings potential. It is not a test, however, of whether the individual is actually earning a wage, whether he or she wants to work, or whether or not they would be offered a job in competition with others. In most cases the degree decided upon will be a theoretical estimate based on the information available.

In order to assess the degree to which earning capacity has been affected the SMP may decide to determine two values, namely

a) the former officer's uninjured earning capacity but for the relevant injury and
b) the former officer's injured earning potential with the relevant injury.

The injured earning capacity will be calculated through consideration of what the person concerned could earn at the time the consideration takes place. The individuals' uninjured earning capacity '*but for the relevant injury*' will be determined through assessment of what the person concerned would have been able to earn if the relevant IOD injury was not present. Both will involve consideration of their skills, knowledge, experience (either gained within or without of the police service) qualifications and any actual earnings, if currently working. The impact of other medical conditions or circumstances may also potentially be relevant and may be determinative of the issue, for example, if another medical condition means the former officer has no earnings capacity whatsoever.

When determining earning capacity, the SMP may consider specifying the type of work activities (eg manual/sedentary/indoor/outdoor etc) or kind of job, full or part time, that the person concerned potentially could or would be able to do. These details could then be passed to the Force to identify jobs to match the kind of work described by the SMP and the earnings that these would attract. The SMP will thereafter consider the research and decide which job or jobs (and the connected earnings potential) the person concerned could or would be able to do. This will enable the degree of disablement to be determined." [underlined emphasis added]

4.76 As will be seen from the underlined portions above, the NAMF Guidance is not really guidance at all. It simply suggests an approach which an SMP "may" adopt, recognizing that the

SMP may choose to do something entirely different. It seems to me to seek to perpetuate the type of analysis set out in Home Office Circular 46/2004 but without applying it specifically to cases where the officer has reached age 65.

4.77 The NAMF Guidance continues to give more detailed advice in relation to how the comparison between outside earnings is made in the following terms[159]:

> "In assessing the degree of disablement many assessments will be subjective, as the individual may not be earning an actual income or working to their full capacity – eg. part time or temporary work instead of full time. It is however necessary to assess what the pensioner could potentially earn but for the disabling condition received in the execution of police duties and then to assess what he could potentially earn with the disabling condition. The difference between the uninjured earnings assessment (taking account of all conditions affecting earnings loss apart from index condition) and the injured potential earnings with all current conditions (ie all conditions including index condition) is the degree of disablement…
>
> In determining what the former officer would have been capable of earning but for the injury it is essential that the pensioner's individual circumstances are considered, such as their past and current knowledge and experience and how this would enable them to earn an income in the wider world of work.
>
> The SMP will normally require information from the Force HR Department regarding the service history of the retired officer to enable an assessment to be made of his/her competencies. The SMP, following the assessment may also require follow-up information on a range of jobs suitable to the officer's disabilities. Jobs in any sector or industry appropriate to the individual's skills, knowledge or experience may be considered as the process is aimed at deciding what the individual could, in theory, earn rather than finding them an actual job. Similarly jobs in any UK location may be appropriate as actual travel is not an issue in the assessment process. The SMP may also discuss current work and suitable jobs with the retired officer and may include that work within the assessment, if felt appropriate.
>
> If a subsequent deterioration in the officer's general health or fitness means that his uninjured earning capacity but for the injury would have been reduced in any event, then applying ordinary principles, and in particular the cases of Jobling v Associated Dairies Ltd

[159] See paragraphs 3.7.1 to 3.7.5.

> [1982] and Heil v Ranking [2001], that should be taken into account in assessing his uninjured earning capacity for the purpose of determining the degree of disablement…
>
> *e.g. if an individual were to have developed advanced Parkinson's disease since the last review, such that he was unable to work by reason of the symptoms of that disease alone, then the uninjured earning capacity should be nil. Alternatively, if an officer were to have become generally less fit by reason of advancing age, such that he was no longer able to undertake a physically demanding job, or no longer able to work full time, then the uninjured earning capacity would be reduced accordingly.*
>
> To do otherwise would be to fail to have regard to the wording of Regulation 7(5)… which sets out a test of causation clearly designed to put the injured officer in the position he would have been in hand it not been for the duty injury…" [italics in original]

What is 'zero-rating'?

4.78 Some of the consultees spoke of a policy of 'zero-rating'. What this refers to technically, as I understand the position, is an assessment that the degree of disablement is 0% (that is to say that the officer's earning capacity is not affected at all by the injury sustained whilst on duty). There may be cases where this is in fact the assessment which has been made.

4.79 However, there will also be cases where the officer is not 'zero-rated' but where the percentage disablement falls within Band 1, that is to say, between 0% and 25%. But the point was made to me (particularly by the Police Federation) that whether an officer was rated at 0% disablement or 24.9% disablement, the net result would be the same. Practically speaking, the outcome would be no different[160].

4.80 It is important, however, to try to be accurate about what is occurring. In some cases officers who are assessed at, or have been reduced into, Band 1 may say they have been 'zero-rated', when this is not technically the case. One reason this is important is because it explains, to some degree, the confusion over precisely what the Board's policy was in relation to the conduct of reviews for those over compulsory retirement age. This is an issue discussed further in Chapter 9 below.

[160] For this reason, in the course of consultation with the Police Federation, it was said that reducing someone into Band 1 but without full zero-rating them was simply a "sleight of hand".

The implementation date

4.81 The 'implementation date' in relation to an award is not a phrase which will be found within the Regulations. However, as a matter of practicality, it is clear that a date will need to be identified as and from which a relevant injury benefit is payable. This date has come to be referred to as the implementation date. The issue can be particularly difficult to address in cases where a retrospective IOD application is made and an assessment has to be made as to when the officer became permanently disabled and entitled to an award.

4.82 Not only does the phrase 'implementation date' not appear in the Regulations but they say very little about the identification of relevant dates at all. In regulation 29(3), where the Board is considering eligibility for a disablement gratuity, a medical authority will have referred to it a question to determine "the date on which the person became totally disabled". However where, as is more commonly the case, the Board is considering an injury award under regulation 10, the medical questions for reference under regulation 29(2) do *not* include a question directed to when the officer became disabled or permanently disabled[161].

4.83 Accordingly, there is an issue as to how this date should be identified and by whom. I discuss this issue further in Chapter 6.

Apportionment and revisiting causation

4.84 Apportionment is another phrase which will not be found within the Regulations but is referred to in all of the relevant guidance relating to assessment of injury awards. It arises principally from the reference in regulation 6(5) to "the degree to which [the officer's] earning capacity has been affected as a result of an injury" on duty. The underlined phrase has been understood to give rise to a test of causation, namely whether any loss of earning capacity has been caused by the duty injury or by some other independent injury or factor.

[161] The questions are simply (a) whether the officer *is* disabled, (b) whether the disablement is likely to be permanent, (c) whether the disablement is the result of an injury received in the execution of duty, and (d) the degree of the person's disablement.

4.85 The NIPB Guidance Booklet refers to apportionment only in passing[162]. The DOJ Guidance for IMRs addresses it in more detail. Paragraphs 36-37, under the heading 'Apportionment of percentage disablement figure', are in the following terms:

> "When a person is disabled partly on account of a medical condition occasioned by an injury on duty and partly by **another** medical condition which has not been occasioned by a relevant injury, the degree of disablement must be assessed on the basis of an apportionment of the disablement to take account of the condition occasioned by the relevant injury.
>
> The simplest case of apportionment is where there are two separate causes of loss of earning capacity, each making a contribution to the loss. Where, for instance, a person is disabled partly on account of a medical condition occasioned by a qualifying injury and partly by another medical condition, the degree of disablement must be assessed on the basis of an apportionment of disablement to take account only of the condition occasioned by the relevant injury."

4.86 A worked example is then shown. The DOJ Guidance then goes on to discuss a situation where the other factor contributing to a loss of earning capacity is also an injury contributing to the one medical condition, but not an injury sustained in the execution of duty. Paragraphs 38-39 are in the following terms:

> "Apportionment may also be appropriate where there is no other medical condition, as described above, but where it is found that there has been more than one injury involved which causes loss of earning capacity and where not all the injuries were received in the execution of duty. In such a case the percentage of degree of disablement should be apportioned, applying the same proportion that the injury or injuries in the execution of duty have contributed to the loss of earning capacity as a result of the disablement.
>
> There is also the situation where loss of earning capacity is attributable to a qualifying injury exacerbating a pre-existing condition. Apportionment is appropriate here only where the underlying condition, on its own, had also caused a loss of earning capacity."

[162] In the sections detailing how percentage disablement is calculated and dealing with reviews at CRA – referring, in the course of worked examples, to a reduction for "apportionment for pre-existing and/or non-injury on duty related conditions/factors".

4.87 The notion of apportionment might be thought to sit rather uneasily with regulation 7 of the 2006 Regulations which provides that:

> "For the purposes of these Regulations disablement… shall be deemed to be the result of an injury if the injury has caused or substantially contributed to the disablement…" [underlined emphasis added]

4.88 The purpose of regulation 7 seems to me clearly to be to set the causation test for use "for the purposes of these Regulations" as to when an injury will be considered to have caused disablement. Where the injury "has caused or substantially contributed" to the officer being unable to perform the ordinary duties of a member, that is sufficient for it to be a qualifying injury. This is faithfully recognized in the DOJ Guidance for IMRs[163]:

> "In question (c) [relating to whether the disablement is the result of an injury received in the execution of duty] where injury on duty is also being considered, please note the following:
>
> - the Police Service of Northern Ireland and Police Service of Northern Ireland Reserve (Injury Award) Regulations 2006 [Reg 7] specify that disablement is deemed to be *the result of an injury* if the injury has caused or ***substantially contributed*** to the disablement. This has been interpreted by the courts in a number of cases, which the parties may draw to you attention, but in brief we suggest the following should be noted:
>
> 1) an injury does **not** have to be received though a single, significant incident;
>
> 2) causation includes the "straw that broke the camel's back" provided the condition would not have become permanently disabling but for the injury;
>
> 3) substantial means more than marginal but does not have to mean predominant;" [bold and italicized emphasis in original; underlined emphasis added]

4.89 In light of this, whereby a duty injury which is merely a substantial cause of the disablement is deemed to be *the* cause (the disablement being deemed to be *the result* of the duty injury), on what basis is a more sophisticated approach taken to the causative effect of the duty injury when

[163] At paragraph 22, bullet point 3.

one comes to consider the degree of disablement? The answer must be that regulation 6(5) imposes a separate test of causation when considering what has caused the officer's loss of earning capacity[164], which may to a greater or lesser extent be due to the duty injury. In other words, although the duty injury must only be a substantial cause of disablement for the purposes of *qualifying* for an IOD award, when it comes to calculating the sums due, the actual effect of the injury on earning capacity must be looked at more closely[165].

4.90 Given that non-related factors such as pre-existing or subsequent injuries or conditions can develop and change over time, the possibility is opened up of the level of apportionment changing, that is to say, the cause of an officer's loss of earning capacity altering as one factor becomes more or less dominant. This is another extremely difficult area. This is partly because of the medical complexity of apportioning causative effect between a variety of, and perhaps several, injuries or conditions, especially with the precision required to produce a percentage figure as a result. It is also partly because an alteration in apportionment at review may sometimes be thought to be 'revisiting causation', that is to say, changing the initial determination that the duty injury caused the officer's disablement. In fact, this is not truly revisiting causation if one accepts, as discussed above, that the cause of the initial disablement and the cause of subsequent loss of earning capacity are two different things.

4.91 The prospect of 'revisiting causation' in a more literal sense arises where the SMP or IMR feels it has become clear on review that the injury giving rise to the disablement did *not* occur as a result of the execution of the officer's duty or where he feels that, although it did so occur, it is now clear that it did not in fact cause, or even substantially contribute to, the officer's disablement. Where this arises, the question is whether (and, if so, how) such a new conclusion can be accommodated within the legislative scheme which, by providing that various medical determinations are 'final', places a high degree of value on the principle of certainty for officers in the administration of the injury benefits system. This is an issue which is discussed in further detail in Chapter 7, since it is dealt with in a number of cases; in Chapter 8 in the context of review; and also in Chapter 11 dealing with the Pensions Ombudsman and some of their recent decisions.

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[164] Another result of the disconnection I referred to at paragraph 4.41 above between the concept of 'disablement' in the Regulations (incapacity to fulfil the duties of a police officer) and the concept of 'degree of disablement' (effect on earning capacity).

[165] This is the way in which the Regulations have been approached but, again, it is apparent that there is at least some degree of tension between regulation 6(5) and regulation 7 (particularly given that regulation 7 is expressed to apply for the purposes of the Regulations generally – which would include assessment of degree of disablement under regulation 6(5) – rather than only for more limited purposes).

What does 'substantial' mean?

4.92 Another question which has been posed to me is exactly how the term 'substantial' should be interpreted when it is used in the Regulations. There are three uses of this phrase, in different contexts, which are relevant. First, regulation 7 (which we have just considered above) indicates that disablement is to be deemed to be the result of an injury if the injury has caused or "substantially" contributed to the disablement. Second, regulation 35(1), dealing with reviews, indicates that an injury pension shall be revised where the Board finds that the pensioner's degree of disablement has "substantially" altered. Third, regulation 36 permits reduction of an injury award in circumstances where the officer "has brought about or substantially contributed to the disablement by his own default"[166].

4.93 It is impossible to give a definitive answer to what this term means. Indeed, case law which considers the meaning of the word (in contexts far removed from the present) suggests that "the word "substantial" is not only susceptible of ambiguity: it is a word calculated to conceal a lack of precision"[167]. Broadly speaking, there appears to be two approaches to the interpretation of this word in case-law dealing with it in other contexts: that is to say, *either* that it means not insubstantial or other than *de minimis*; *or* that it means significant or large.

4.94 The use of the word in the 2006 Regulations requires the exercise of judgment in any given case as to whether (in the case of the cause of disablement) the contribution is substantial or (in the case of an alteration of the pensioner's degree of disablement) the alteration is substantial. I address the second of these issues in more detail in Chapter 8 dealing with reviews.

4.95 As to the first issue, my instinct would be that 'substantial' in that context means a contribution to the disablement which is significant, or a cause which is significant. It is likely to mean more than simply 'not minimal'. It is very difficult to put a percentage figure on this but it seems to me to be a question to which a medical professional should be able to give a fairly clear answer. Since the same phrase is used in regulation 7 and regulation 36, I think the same approach to its meaning must be taken in each (albeit officers would no doubt prefer a higher threshold in relation to regulation 36 than regulation 7).

[166] The term is also used in this context in regulation 29(4).

[167] *Per* Deane J in the Australian case of *Tillmans Butcheries Pty Ltd v Australasian Meat Industry Employees Union* (1979) 42 FLR 331 at 348; quoted in *Words and Phrases Legally Defined* (4th edn, 2013, LexisNexis).

4.96 The use of the phrase in regulation 36 may also provide a clue that it is something short of a *main* cause, since regulation 36 envisages a reduction in an injury award where the officer's default substantially contributed to his disablement. However, the officer would not be in receipt of the award at all if his default[168] had been the main cause of his injury: see regulations 10(1) and 5(4). Although there is not perfect symmetry between these provisions, it seems to me that a substantial contribution is a significant or material cause, but not necessarily a main cause, of the disablement.

[168] As defined in regulation 5(4).

CHAPTER 5

THE ADMINISTRATION PROCESS

Bodies involved

5.01 The process set out by the relevant Regulations for determination of whether an officer is entitled to an IOD award, or indeed to ill-health retirement, is complex and must necessarily involve a number of different bodies.

5.02 Within the Policing Board, the Police Administration Branch (PAB) is responsible for the management of retrospective ill-health retirement applications and injury on duty award applications (including IOD reviews) for former police officers. It is this branch which oversees applications and generally manages them through to determination.

5.03 The description of PAB's functions on the NIPB's website is as follows:

> "The main areas of the work of Police Administration Branch are to:
>
> - Consult and liaise with the Department of Justice in respect of police service regulations and their impact on the PSNI.
> - Represent the interests of the Policing Board and PSNI in respect of amendments to police officers pay, conditions and pensions negotiated nationally by the Police Negotiating Board.
> - Manage and administer the ill-health pension retirements of serving police officers, including injury on duty award applications. This includes retrospective claims submitted by ex-police officers.
> - Consideration of dependents pension awards and child allowances.
> - Consideration of applications for extension of service by police officers.
> - Processing of applications for licences, including occasional licences in respect of PSNI premises."

5.04 Where consideration is being given to whether an officer (or former officer) is permanently disabled, or certain other medical questions are being considered, the Regulations require a duly

qualified medical practitioner selected by the Board to be involved. As a result of a procurement process managed by the Central Procurement Directorate (a directorate of the Department of Finance and Personnel), the Board appointed Blackwell Associates Belfast to act as its Selected Medical Practitioner. The contract commenced on 1 April 2011 for a three year period and is subject to a further possible two one-year extensions.

5.05 Where medical notes and records are required (for instance from the officer's GP), or where specialist advice, assessment or treatment is required or has been given, additional medical professionals may also require to be involved in the process of providing information to the SMP.

5.06 Obviously, a considerable amount of information about the applicant's service within the police is likely to be held by the PSNI itself; and for this reason there is a requirement to liaise with the PSNI Human Resources Department and, often, the PSNI Occupational Health and Welfare Unit (OHW). The former will be able to provide details about the officer's police career and information which may relate to the incident or incidents which are said to have given rise to the injury sustained in the execution of the officer's duty. The latter may also be able to provide information about the officer's occupational health whilst he remained a member of the PSNI, including about the duty injury, and the officer's capability to perform the duties of a member.

5.07 In addition, actual payments to officers in receipt of pensions or IOD awards are made by the PSNI Pensions Branch, which deals with issues such as the inter-relationship between state benefits payable to the officer and an injury award also payable.

5.08 It is apparent, therefore, that there are a range of actors with relevant functions who are involved in the process leading up to the determination of eligibility for, and assessment and payment of, injury awards or ill-health pensions. This is so even before one considers the possibility of appeal on a medical or non-medical question.

The application procedure

Initial contact to request an application form

5.09 The NIPB Guidance Booklet indicates[169] that if an officer wishes to be considered for a retrospective ill-health pension and/or injury on duty award, "the first step in the process is to write to the Police Administration Branch of the Northern Ireland Policing Board, indicating that you wish to make an application". It seems that such an enquiry may also be made by email, although this is not clearly stated in the Guidance Booklet. Such a letter should include the officer's name, service number and contact address. This leads to an application form being posted to the officer. In addition information and application forms and consent forms are available to be downloaded from the Board's website.

5.10 At this stage a member of PAB "will be appointed to be responsible for all aspects of the administration of [the] application"[170]. This staff member acts as the officer's 'case co-ordinator' who is there to provide information and guidance throughout the process. The applicant should be provided with a direct line telephone number for the case coordinator. This seems to me to represent good practice.

Application and consent forms

5.11 An information pack is available which explains the procedures to those making an application. In addition, the applicant is provided with an application pack, containing the relevant application and consent forms to be completed and returned to the Board.

5.12 Completed application and consent forms should then be forwarded to the PAB. Advice is given that forms should not be faxed or emailed as it is not possible to provide a secure facility for this. In addition, the Guidance Booklet indicates that an (original) signature is required and therefore forms should be posted or hand delivered to the PAB.

5.13 Ideally, it would be helpful if forms could be faxed or, particularly in this day and age, emailed; or even if it were possible for applications to be made online. I appreciate that it may be

[169] At page 3.
[170] See NIPB Guidance Booklet, page 4.

difficult to provide a secure facility for this and that many applicants, even if retired, will be concerned about the possibility of their police service being disclosed more widely than strictly necessary. However, this is something the Board may wish to explore further as being a more efficient system than requiring hard copy documents to be submitted by post, which carries its own security risks and may give rise to additional delays. Electronic copies or electronic applications may also assist with record-keeping.

Confidentiality

5.14 NIPB has procedures to seek to ensure the confidentiality of information submitted. In particular, it has a Data Protection Policy and PAB also has approved guidance and procedures to ensure that the identity of any former officer is established before an application is processed. There are also procedures to ensure that this information is only supplied to the former officer, his or her solicitor, or their nominated representative. PAB will not discuss or correspond with third parties regarding an application unless that person has been nominated in writing to act on behalf of the former officer and a copy of the written nomination is held by PAB. Although this may seem cumbersome, these procedures are plainly appropriate in order to ensure the safety of the information submitted, particularly where officers or former officers may have security concerns.

5.15 In addition, as appears below, Board officials should not have access to medical information submitted in relation to applications. The Board's SMP will receive and have access to such information; as well as any IMR appointed by the Department. However, the Board's SMP is not provided with the applicant's contact details.

5.16 I can see the rationale for these further restrictions but consider they might well give rise to inefficiency within the system. As for medical information, this is plainly sensitive personal data within the meaning of that term in the Data Protection Act 2000[171]. It is right that Board officials should not, as a matter of course, have access to this information. However, there will be circumstances where the Board does itself need access to some medical information in relation to an applicant[172]. The Board should perhaps reflect on whether it may be of assistance to seek consent from applicants in appropriate terms to enable medical information to be made available to it (only) as and when necessary.

[171] Discussion of the full terms and effect of which is beyond the scope of this report.

[172] One example will be where the Board itself has to make a decision on an implementation date (discussed in further detail below); or where a pensioner seeks the postponement of a review on medical grounds.

5.17 The withholding of an applicant's contact details from an SMP also seems to me to be a sensible precaution, given the sensitivity which many officers or former officers may feel about their contact details being disseminated. That corollary of this, however, is that if an SMP is not able to contact an applicant directly to arrange appointments, etc., the Board will have to ensure that its own processes for coordinating this are efficient and run smoothly.

Liaison with the PSNI

5.18 The PSNI Human Resources Manager who is responsible for the District Command Unit or Department in which the applicant last served is then required to supply the Board with information in respect of the applicant's service. In addition, any relevant medical information held by the PSNI will be supplied by the PSNI Occupational Health and Welfare Unit (OHW). This is provided in a sealed, secure envelope (referred to as the 'red envelope'), to which Board officials also do not have access. Plainly, the more quickly these records can be collated and furnished to the Board, the better.

Progress of the application to SMP stage

5.19 The NIPB Guidance Booklet goes on to state[173] that "the Board will consider whether your application should move forward for formal assessment to the SMP". As the Booklet also notes, "the vast majority of applications will be dealt with under delegated authority which has been granted by the Board to officials". However, "in some situations, applications may be required to be referred to the Policing Board's Human Resources Committee for consideration at its monthly meeting as to whether or not the case should be referred to the SMP"[174].

5.20 The test for referral to an SMP, and the extent to which (if at all) the Board can determine not to refer a case to an SMP, is discussed in further detail in Chapter 6.

5.21 It is convenient to mention here the delegation of consideration of applications and reviews to Board officials. This seems to me to be a sensible and practical way of proceeding and mirrors, for instance, the extensive delegation of day-to-day functions and administration by elected members of district councils to their officers. The Board staff within PAB are employed on a full-

[173] At page 5.
[174] Again, NIPB Guidance Booklet, at page 6.

time basis and will have a greater practical knowledge of the Regulations than most, if not all, of the Policing Board's members. They will have built up an expertise in the administration of the scheme and, frankly, that is what they are employed to do. It would be time-consuming and difficult for members of the Board, with all of the other responsibilities they have, to deal with individual IOD cases and appraise themselves of the details of each case[175]. Perhaps more importantly, it seems to me[176] that the administration of the statutory scheme should be de-politicized as much as possible, since it was never intended to be a political issue but merely a compensation mechanism for officers who came to be injured in the execution of their duty. In short, the administration of the injury benefits scheme ought not to be the type of issue which requires the full involvement of the Policing Board.

5.22 For these various reasons, it is natural and unobjectionable that the day-to-day work of the Board in relation to ill-health pensions and injury benefits and awards should be carried out by the Board's officials. Having said that, the Regulations specifically provide the relevant functions to the Board and it is also proper that the Board itself (principally through its Human Resources Committee) exercises an oversight role and, where appropriate, sets Board policy in relation to the administration of the scheme. I would have thought it should be extremely rare that Board members should become involved in adjudication on an individual case[177] but the facility ought to be available, as I understand it will be in the usual way, for Board members to 'call in' consideration of a case from the officials to whom they have delegated this. Plainly, it is also sensible, where there is some need for the involvement of Board members, for the issue to be considered at least in the first instance by the Human Resources Committee, which is the Board Committee with responsibility for this sphere of its functions.

[175] Which would necessarily lead to much wider dissemination of personal information about the officer concerned also.

[176] And this is an issue to which I return in Chapter 12 below: see, in particular, paragraph 12.20.

[177] Particularly since the Board's own decision-making functions ought, under the present Regulations, to be fairly limited, with most of the more important issues being determined by the SMP or IMR as the case may be. However where, in limited circumstances, the Board has to consider an issue itself (such as a particular implementation date), it seems to me that this should, again, be dealt with by the officials who administer the scheme on a regular basis – unless a particular case raises an important issue of policy which will set a precedent for many other cases and which, therefore, it is appropriate, exceptionally, for the Board members themselves to consider.

The SMP assessment

5.23 When a case is referred to the SMP, he will complete an assessment which includes a face-to-face meeting with the applicant and also a consideration of both medical and non-medical evidence which he has received from the Board. PAB does not release the applicant's contact details to the SMP, so the letter inviting the applicant to attend for assessment is sent to him or her by their case coordinator within PAB. Arrangements can be made to move assessment times if the date or time provided is not suitable, and applicants are asked to give at least 48 hours notice of this. Special arrangements can also be made for those with disabilities or special needs. In exceptional circumstances home visits can be arranged. All of this seems to me to be appropriate.

5.24 Applicants are advised to bring photographic identification to the SMP appointment so that their identity can be established. I understand this is designed to ensure that the SMP is examining the correct applicant, which at one and the same time reduces the prospect of sensitive information being released to a third party and reduces the chance of dishonest claims. Applicants attending a medical assessment may be accompanied by a relative or friend if they wish. No prior approval is required for this but it is subject to the agreement of the SMP that the companion may be present during the assessment process.

5.25 SMPs are qualified medical practitioners. The present arrangements (on foot of a competitive procurement process) are that Blackwell Associates Belfast have been appointed as the Board's SMP. Each of the doctors involved are experienced in occupational medicine.

5.26 The precise nature of the assessment itself will depend on the nature of the injury which the officer has sustained and its presentation at that time. There is, of course, a wide variety of possible circumstances. Nonetheless, the substance of the assessment, in the vast majority of cases, will contain a number of features common to any medical assessment of this type. First, the SMP will review, or will have reviewed, the medical history of the applicant (including relevant notes and records) and the background information about the case which has been provided to him or her by the Board. Second, the SMP will ask questions of the applicant in order to ascertain, confirm or obtain further information about the history and the relevant injury or condition. Third, as appropriate, the SMP will conduct a medical examination. The SMP will also consider any other relevant reports already prepared by clinicians who may have treated the applicant (if their consent to this is obtained).

5.27 The NIPB Guidance Booklet has a section entitled 'How does the SMP assess an Injury on Duty'[178], which includes the following guidance:

> "The SMP, when undertaking an assessment for Injury on Duty (IOD), will be required to provide an opinion as to whether the condition or conditions occurred as a direct result of an injury received in the execution of duty. The injury/s and/or conditions should be deemed to have caused or substantially contributed to the permanent disablement."

5.28 The role of the SMP is curious since, as discussed further below[179], the assessment the SMP is required to make often extends beyond questions which are purely medical in nature. For this reason, the SMP will be provided with a range of both medical and non-medical information. So, for instance, the SMP will often also have access to other information from the PSNI – such as the officer's notebooks, copies of IOD reports, sickness and absence records, station records, incident logs, *etc.* – which is not strictly medical information[180]. It is also open to the applicant himself to submit whatever additional supporting information they wish and they are encouraged to do so.

5.29 Before leaving the premises of the SMP, every officer assessed or reviewed is asked to complete a patient satisfaction form. A summary of the completed forms is made available to the Board's Human Resources Committee.

5.30 The SMP is also entitled, should they feel it necessary, to request further reports. This might be from the applicant's General Practitioner (who is likely to have much more experience of managing the applicant's injury or condition, at least in some cases) or it may be from a medical specialist, depending on the type of injury involved. This may result in the applicant being asked to attend with an independent specialist in order that they can prepare a report. Again, it is perfectly natural and unobjectionable that access to specialist medical assessment and advice should be available.

5.31 The NIPB Guidance Booklet notes that, in order not to delay a decision indefinitely on an application, the SMP will allow a maximum period of 12 weeks for a report to be returned from a GP or a specialist from the date on which it is requested. The applicant will receive copies from the Board of reminders forwarded by the SMP to the GP or specialist. At the end of this 12 week

[178] At page 9.
[179] In Chapter 6.
[180] See page 9 of the NIPB Guidance Booklet.

period, if the GP or specialist has not supplied a report to the SMP, the SMP will make a decision on the application based on the information available. I also consider it to be sensible to put a time limit on the period during which further information can be supplied. This should hopefully provide some momentum to the process and minimize delay. An SMP should not be expected to delay a decision on a case indefinitely because of the non-provision by a third party of additional information. However, in my view there ought to be a facility for this period of time to be extended, where there is some truly exceptional or compelling reason why important information could not be, or was not, provided within time.

5.32 Once the SMP's consideration of the case has been completed he will provide a certificate and report on the referred questions to the Board. In the majority of cases, the contents of the certificate and report should (subject to appeal or a request for reconsideration) be determinative of the application.

Complaints about the administration process

5.33 A number of complaints about the administration process were raised with me in the course of consultation meetings undertaken during this review. I discuss a number of these below.

Time taken to reach decisions

5.34 The most common complaint was that the time taken from the making of an application to a final determination was unreasonable. For instance, NIRPOA suggested that the application process for a retrospective IOD award is "unduly bureaucratic and takes over a year currently to process" and can often take much longer. It was recognized that the blame for this was not solely to be laid at the door of the administrators, "as the functions of the Board and limited meetings of the committees will inevitably take time". However, NIRPOA also said that it was "aware of widows waiting 6 years for decisions" which was thought to be totally unacceptable[181].

5.35 I have little doubt that the system, as it operates at present, suffers from chronic delay. There are a number of reasons for this. As I have discussed elsewhere in this report, the decision-making

[181] I am also unsure whether this comment relates to the time taken for an initial decision or whether, as I suspect, it relates to a decision which was subject to appeal or reconsideration in some respects.

process established by the Regulations is unduly cumbersome and requires reconsideration and amendment.

5.36 Moreover, the range of bodies involved obviously gives rise to some inevitable delay in the process, whilst each liaises with others as appropriate to the circumstances of the case. I have recommended some streamlining of the decision-making process; but it is difficult to see how one can administer the system[182] without at least the involvement of the Board[183], someone with sufficient medical expertise to make appropriate determinations about the officer's condition, some branches of the PSNI which will hold relevant records and other clinicians who may also have relevant records or input to provide. Certainly, as between the public bodies involved (and I include within this the SMPs and IMRs), protocols and procedures should be adopted to ensure that cooperation and information sharing is as efficient and effective as possible.

5.37 In addition, target times for completion of various stages of the consideration by each of the relevant bodies ought to be set and adhered to, with compliance the subject of ongoing monitoring. Where reports have to be obtained from external experts, however, there is a certain uncontrollable element of delay which can be introduced into the system.

5.38 Three further factors which have given rise to chronic delay in the administration of the system at present are as follows. First, as mentioned in Chapter 1, the present system of regularly set reviews, in conjunction with the various strands of challenge available to an officer who is dissatisfied with a decision on his application, means that a case is seldom 'cleared' from the system, whether it is determined favourably or unfavourably. This results in a continual build-up of casework for the Board. Hopefully, some of the recommendations made in this report, if implemented, will alleviate at least a measure of that pressure.

5.39 Second, it must be acknowledged that the litigation in England and Wales in recent times (particularly the *Simpson* case but others also) has thrown the previous running of the scheme into some element of disarray, as officers and those administering the scheme have sought to understand the implications of the recent case-law and to apply it: a process which has also resulted in challenge and contention, which has led to further uncertainty and resultant hesitancy as to how to proceed, giving rise to further delay.

[182] At least without major changes to the process by amendment of the Regulations.

[183] Unless, as is discussed further below, this entire area of administration is delegated to the Chief Constable.

5.40 Third, the issue of the limited resources available to the Board[184] also has an important role to play in the delay evident in the system at the moment. I have described in Chapter 1 of this report[185] the critical position in which the Board finds itself. The number of cases being dealt with (applications and reviews) simply cannot be accommodated without significant delay with the present staff complement. The letter from the Chief Executive of the Board referred to in paragraph 1.18 accepted that an applicant may presently have to wait a number of years to have an application processed. As I have already commented, this is obviously not acceptable. If the administration of the system is to remain with the Board, I would recommend that more resources be made available to the PAB, at least in the medium term, to enable it to get to grips with the current backlog of cases[186].

5.41 In summary, I consider that the complaint about applications taking too long to be determined is substantiated (and do not, in fact, think the Board would demur from this conclusion). Something must be done urgently to try to come to grips with the caseload. As I have said elsewhere, I hope that the production of this report and some of the recommendations within it may contribute, in some measure, to that process.

Application and/or consent forms excessive

5.42 NIRPOA also expressed the following concerns:

> "The application form could be significantly reduced; the five consent forms could also be reduced, particularly as they expire after six months and require re-issue. Additionally the SMP never (to our knowledge) obtains GP notes and records prior to the medical assessment. Indeed one of our clients was advised at his recent assessment that it was for the ex-officer to provide the medical evidence. If this is the case, why complete the forms?"

5.43 Several consultees, in particular the PFNI, also complained that the Board continued to require separate application forms for applicants over 65 and applicants under the age of 65.

5.44 I have considered the application and consent forms which the Board uses and which are

[184] And, it must also be said, the limited number of SMPs available.

[185] See paragraphs 1.15 to 1.18.

[186] Although this recommendation is made, I also recognize that the allocation of currently scarce public funds to the Board and, in turn, within the Board, is ultimately a matter of judgment in relation to priorities, which is not for me.

published on its website. In relation to retrospective ill-health pension awards or injury on duty awards, the following forms are used:

(i) Application for Retrospective Injury Award (Form RA1);
(ii) Application for Retrospective Injury Award (Over 65 Years) (Form RA5);
(iii) Blackwell Associates – Information Sheet (BWELL1);
(iv) Consent to Release of Medical Information to the Medical Adviser (Blackwell Associates) – Occupational Health and Welfare Unit (BWELL2);
(v) Consent to Release of Medical Information to the Medical Adviser (Blackwell Associates) – Family Doctor and/or Specialist(s) (BWELL3);
(vi) Blackwell Associates – Patient Information Sheet (BWELL4);
(vii) Consent to Release Medical Information to the Policing Board's Selected Medical Practitioners (Form 100);
(viii) Retrospective Consent to Release Non-Medical Information to Blackwell Associates (Form RA3); and
(ix) Consent to Release Medical / Non Medical Information to PSNI Legal Services (e.g. Hearing Loss) (Form RA4).

5.55 Several of these forms are also used where an award is being reviewed and, in addition, there is a further form: Percentage Disablement Review Consent to Release Non-Medical Information to Blackwell Associates (Form PDR 3).

5.56 The content of the application form (RA1) seems to me to be appropriate. Although it is a lengthy enough form, I would not be inclined to agree that the completion of it is excessive, particularly when (as is often the case) a former officer may be able to receive assistance completing the form from a solicitor or representative organization. In general, it is best to ensure that all of the information which may be required in order to process the application is set out in writing from the applicant from as early as possible in the process. The form is designed to elicit relevant information about the officer's police service, the medical conditions upon which he relies, the incident(s) said to have caused the injury and his employment capabilities. It is laid out simply and clearly.

5.57 I agree that there is no need for separate application forms for those aged over and under 65, particularly in light of the approach taken in the *Simpson* case and the conclusions in relation to

that contained in this report. More basically, however, provided an application form requires an applicant to provide his date of birth, it is a matter of simple calculation to determine what age the applicant is. The specific form for use of those over age 65 (RA5) largely replicates the content of Form RA1. In my view, the use of separate forms for those aged over 65 is unnecessary. It has also transpired to be antagonistic in effect, even if not in intent. I would recommend that the use of separate forms cease.

5.58 I also consider that the obtaining of consents to disclose information to the Board and SMP could be simplified. That is not to say that I consider the present procedures to be wrong in any way or particularly cumbersome, and there is an understandable desire when dealing with sensitive information such as medical details to ensure that consent to disclosure is clearly given and recorded, but there may be some scope for streamlining the forms.

5.59 In particular, there are separate forms for consent to be given to Blackwell Associates receiving records from the PSNI OHW Unit (BWELL1) and medical information from doctors who have previously treated or assessed the applicant (BWELL2). Consideration should be given to including these consents on one form. In addition, there is a form (Form 100) providing consent to the PSNI OHW Unit to forward information to the SMP; a separate form (RA3) providing consent to the PSNI more generally to forward non-medical information to the SMP; and a further form (RA4) providing consent to PSNI Legal Services to release information to the Board about an applicant's hearing loss claim[187]. An additional form used in the course of reviews (PDR3) is in very similar terms to Form RA3. Again, consideration should be given to including all of these consents on one form.

5.60 Alternatively, a composite form could be compiled giving both consent to the SMP to seek and receive information from various parties and consent to the PSNI to provide such information. Although some of this information (particularly medical records) will be governed by specific statutory provisions[188] whilst other parts may not, it should not be impossible to include the various necessary consents on one form, or certainly fewer forms than presently. These could also be compiled in such a way so that, as necessary, completed parts of the form could be redacted insofar as they were irrelevant to the recipient. In addition, it may be possible to incorporate the

[187] Such a form should also, in my view, cover any other relevant claim brought against the police rather than merely those relating to hearing loss.

[188] The Access to Personal Files and Medical Reports (Northern Ireland) Order 1991.

provision of consent to disclosure within the application form itself[189]. This is a matter which could usefully be considered further by the Board in consultation with its appointed SMPs and the PSNI.

5.61 Consideration should also be given to extending the life of a consent form which, at least in the case of the Blackwell forms, is expressed to last only for 6 months. Given that applications are taking longer than this to process at present, there would be merit, if possible, in a consent form providing the necessary consent for disclosure until the time when the application is determined. The requirement to obtain further consents in the meantime gives rise to further administration and delay and may antagonize an already frustrated applicant. It is probably appropriate, however, to re-seek consent for any appeal stages where further disclosure of sensitive information is necessary.

Requirement to pay for records

5.62 The Police Federation complained that an applicant had to pay for their records. Where this is necessary, I do not feel it unreasonable that the applicant for an award ought to bear the cost, which ought to be relatively modest, of obtaining the disclosure of records which are necessary for consideration of his application.

Failure to consider, or pre-read, GP records

5.63 As appears from the quotation from the NIRPOA submission set out at paragraph 5.42 above, it complained that SMPs never obtain GP notes and records prior to the medical assessment. PFNI also complained that in some cases the officer's GP notes and records were not considered at all; and its written submission stated that "initial IOD applications and review applications seek the applicant to sign medical consent forms, yet rarely does the Board/SMP actually seek these medical records before assessment".

5.64 It would not be appropriate for me to seek to ascertain what an SMP had or had not considered in the particular circumstances of any individual case. I can say, however, that, as a matter of general practice, it seems to me that an SMP *should* have received and read the relevant medical records relating to an applicant (or recipient of an injury pension if the issue arises on

[189] I note that the form for appeal, for instance, (Form Appeal 1), provides consent for the SMP to consider information submitted during the appeal; although there also seems to be a separate consent form (Form Appeal 1) which overlaps with this, which is less than ideal.

review) in advance of the interview with that person. The assessment is likely to be more focused and better informed if the relevant medical history has been considered in advance. In addition, I can understand that officers may be frustrated if the SMP (or IMR) considering their case appears to be unaware of salient medical interventions or findings which ought to be clearly documented in their medial records. Insofar as there is a failure presently to consider these records in advance in some cases, I recommend that this should be remedied.

Lack of computerized records

5.65 NIRPOA also complained about the use by PAB of paper case files. This was said to have led to a request for information from an MLA under the Freedom of Information Act being declined on the basis that to provide the information would involve reviewing thousands of individual IOD award case files.

5.66 In my view, it would obviously be better if there were information technology systems in place which enabled information in relation to ill-health pensions and IOD awards to be recorded, processed, accessed and analysed in an efficient way. However, I recognize that the introduction of such systems is likely to be costly and complex and, perhaps in the short term, cause additional disruption to the work of PAB. It is beyond the scope of this review to make any concrete recommendation on such an issue. I have no doubt that it will have been under consideration by the Board staff periodically, within the constraints of funding limitations.

5.67 I would support the introduction of IT systems if it could be shown that this would result in an increase in efficiency, would be of assistance to the staff administering the scheme and would represent value for money. In the longer term I suspect this may well be the case. However, whilst the lack of easily accessible information in response to certain information requests is obviously regrettable, in my view the introduction of new IT systems purely for the purpose of facilitating FOI responses would not be warranted.

The importance of proper communication

5.68 I would say one final thing about the frustrations with the administration of the injury benefits scheme which were expressed to me in consultation meetings. This is that much of the frustration felt on the part of officers and those who represented them related to a lack of

knowledge as to what was happening with their application (and a resulting assumption that nothing was happening with it) and/or an inability, or perceived inability, to be able to access information as to how their application or appeal was being progressed.

5.69 Some of this is obviously due to the complex nature of the decision-making process, which involves various parties, as discussed above. Sometimes, it seems to me to be the result of an unwillingness to accept what has been explained or determined, rather than an inability to access information. On other occasions, there is a genuine lack of information as to how an officer's case is being progressed.

5.70 The NIPB Guidance Booklet notes[190] that:

> "In order to ensure that staff can devote as much time as possible to the processing of cases we request that, with effect from 11 April 2013, telephone calls are only made to the Police Administration Branch on a Thursday afternoon from 12 Noon to 5.00 pm."

5.71 This is a highly regrettable situation, whereby officers who wish to speak to PAB staff are limited to doing so by telephone on only one afternoon *per* week. I do not criticize PAB for adopting this policy, since it is clear (as I have already mentioned on a number of occasions) that they are under-resourced for the size of the task they presently face and that they need to focus on the actual processing of applications, as well as dealing with officers who call with queries or complaints[191]. Nevertheless, it is plainly a situation which falls far short of the optimal.

5.72 In my view, this has probably also contributed to some degree to the sense of frustration and disenfranchisement felt by many applicants whose cases are currently in the system. Applicants should be entitled to a reasonable degree of information about what is happening with their case and updates at reasonable intervals. They should have a reasonable level of access to PAB for these purposes. The more clear the communication between PAB and the officers concerned and the more information an officer is given about how his case is progressing[192], I would hope, the less antagonism there will be on the part officers who are concerned about what is happening with their case.

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[190] At page 3.

[191] And it should also be recognized that, human nature being what it is, there will be those who contact PAB who take up a disproportionate amount of time in the context of the limited resources available.

[192] Or perhaps why it is not progressing.

5.73 In the absence of significant additional resources, it may be that PAB is required to continue with its present policy in relation to telephone communications in the meantime. However, it could usefully consider other ways of keeping officers informed of what is happening, certainly at a general level[193], perhaps through better use of its website or through cooperation with some of the officers' representative bodies, such as those who have participated in this review process.

5.74 The other side of this coin is that officers should be encouraged to communicate more effectively with Board officials. In the course of the review process I have seen, or been advised of, a number of communications from applicants or those in receipt of injury pensions to Board staff (or indeed SMPs) which clearly fall below the level of professionalism and courtesy one could expect from former police officers towards those charged with administering the injury benefits scheme. As I have already acknowledged, former officers may face a range of pressures which are connected to their injury benefit applications or payments – including financial pressures, health concerns or mental health problems – but these do not justify Board staff being subjected to correspondence in rude, offensive, aggressive or threatening terms. Insofar as it is within their power, I would therefore urge the representative bodies who have engaged with this review to encourage officers, even those who are highly frustrated with the operation of the injury benefits system or a particular decision in their case, to understand the pressures the staff administering the system also face and to deal with them with appropriate courtesy and restraint.

[193] I am thinking in particular about issues such as the general suspension of reviews.

CHAPTER 6

WHO IS THE DECISION-MAKER?

The relevant statutory provisions

6.01 Part 4 of the 2006 Regulations deals with appeals and medical questions. One of the difficult issues which has emerged in the course of administering the scheme provided for by the Regulations is a rather basic question: namely, who has responsibility for deciding what issues in the course of consideration of an application for an award? Much of this turns, in my view, on a proper understanding of the distinction made in the Regulations between medical and non-medical questions.

Primary decision-making function is the Board's

6.02 Regulation 29(1) of the 2006 Regulations contains a provision which seems to me to be foundational to an understanding of who the decision-maker is. It provides that:

> "Subject to the provisions of this Part, the question whether a person is entitled to any, and if so what, awards under these Regulations shall be determined in the first instance by the Board."

6.03 A similar provision – conferring primary decision-making responsibility upon the Board (subject to the following provisions and the possibility of appeal) is contained in the 1988 Regulations[194] and the 2009 Regulations[195].

6.04 The clear import of this provision, which precedes the remainder of what the Regulations have to say about determination of questions relevant to the grant of any award, is that Board is the key decision-making authority as to whether an officer is entitled to any award. Although regulation 29(1) does not say that the Board also has the function of determining what level of

[194] See regulation H1(1). This provision is in very slightly different terms to regulation 29(1) of the 2006 Regulations – but not in any material respect.
[195] See regulation 62.

award is payable (if any) it seems to me that this is also the obvious meaning and intention of the provision (subject to the further provisions discussed below).

6.05 This interpretation is supported by the reference in regulation 33, in the context of appeals to the Minister for Justice, to "a refusal of the Board to admit a claim to receive as of right an award *or a larger award than that granted*".

6.06 One might ask what is meant by an 'award' in the context of regulation 29(1) or regulation 33(1). Is this referring only to some of the benefits available under the 2006 Regulations but not others? Regulation 2(1)(c) purports to give some assistance as to how the phrase 'award' is to be interpreted; but it does not provide a great deal of clarity. It says simply that: "In these Regulations, unless the context otherwise requires… any reference to an award, however expressed, is a reference to an award under these Regulations". Certainly, the phrase 'award' would cover those benefits which are expressly called an 'award'[196]; but in my view the intention of the Regulations is to use 'award' as a general word covering any benefit payable under the Regulations. This is consistent with the repeated use of the word in general provisions[197]; with the reference in regulation 2(1)(c) to an award being 'an award' "however expressed"; with the reference to "any" award under the Regulations in regulation 29(1); and with, for instance, the reference in regulation 29(3) to "*an award* under regulation 11", when regulation 11 itself only refers to a 'gratuity'. In short, the decision-making function in relation to any benefit under the Regulations is conferred in the first instance on the Board by regulation 29(1).

6.07 That it is *prima facie* the Board's responsibility to determine issues which arise in the course of consideration of applications for awards (and any review of such awards) is borne out by a number of further statutory references within Part 4 of the 2006 Regulations. For instance, in regulation 29(2) there is a reference to circumstances "where *the Board* is considering whether a person is permanently disabled"; and in regulation 29(3) there is a reference to circumstances "where *the Board* is considering eligibility for an award under regulation 11", which would of course include the issues of whether the relevant officer was totally and permanently disabled.

6.08 The scheme of the Regulations is that *all* of these matters are *prima facie* to be determined to the Board – but subject to two caveats. The first caveat (indicated by the phrase "subject to the

[196] Including, perhaps most importantly, a police officer's injury *award* under regulation 10.

[197] Such as regulation 3(1), which relates to various benefits where pensionable pay is used as part of the calculation

provisions of this Part" in regulation 29(1)) is that there are certain questions which are required to be referred for a medical assessment. These are discussed in further detail below. The second caveat (indicated not only by the phrase "subject to the provisions of this Part" in regulation 29(1) but also by the phrase "in the first instance") is that the Board's decision is subject to appeal. Again, this is considered in further detail below.

6.09 However, setting aside for the moment the question of appeal and the instances where the Board is statutorily required to refer questions for a medical view, the starting point is that the Board has full decision-making authority to determine eligibility and, it seems, quantum.

6.10 I believe this analysis to be entirely consistent with what the Northern Irish High Court held in the *DB's Application* judgment, discussed at paragraphs 7.159 – 7.162 below. Having referred to regulation 29, the judge's core conclusion was that the Board, by virtue of this provision, "is the arbiter of what if any award is due under the Regulations". In that case, the point was that it was for the Board to determine the implementation date for the award (albeit on medical advice), this not being one of the questions which was to be referred for determination by the medical authority under regulation 29(2).

6.11 This gives rise to a particular query on the part of the Board, which is as follows. Given the Board's responsibility to make decisions as to entitlement, are there circumstances where the Board can determine an application at the earliest stage (without medical advice) if it appears to the Board to be a hopeless application? The present position is that, following receipt of an application and collation of all required papers and evidence, a case is essentially automatically referred by the PAB to the SMP under delegated authority from the Board's Resources Committee.

6.12 The answer to this query is to be found largely in the discussion (immediately following) of circumstances in which the Regulations *require* a referral of medical questions to the SMP. Where such an obligation arises, it is not open to the Board to determine the application without making the mandatory referral (even if the Board considers the answers to the medical questions to be entirely clear-cut). A decision on the application could only lawfully be reached without referral to an SMP if the decision could be reached without any of the triggers for referral[198] applying. I am bound to say that the scope for this appears to me to be extremely limited.

[198] Set out in regulation 29(2), (3) and (4).

6.13 This is because the obligation to refer questions to the SMP arises where the Board is "considering" certain matters[199]. If one of those matters arises in the application, it seems to me to be contrary to the scheme of the Regulations for a decision to be taken by the Board without referring the mandatory questions to the SMP. Indeed, refusal of the application would tend to suggest that the eligibility criteria must have been 'considered' by the Board. It *might* be that a clear conclusion can be drawn on a case without having to consider one of the matters which triggers a mandatory referral, or any of the issues on which the SMP is to give a final decision, but this is likely to be a very rare case indeed (perhaps, for instance, if it is clear that the applicant was never a police officer within the meaning of the Regulations). In the normal course of applications, however, it is (on the present wording of the Regulations) virtually inevitable that every case will have to be referred to an SMP. This conclusion is also consistent with the approach of the English High Court in the *ex parte *Y* case which considered just this issue, and which is discussed below in Chapter 7.

Reference of medical questions

6.14 The Regulations recognize that there will be some questions which the Board is required to address in the context of its decision-making on eligibility for awards under the Regulations which it is not well-equipped or indeed qualified to determine for itself. These are what are referred to in the title of Part 4 and the heading of regulation 29 as "medical questions". As appears further below, where the Board's consideration of eligibility for an award includes a requirement to address a medical question, this issue has to be 'referred' by the Board to a duly qualified medical practitioner for determination.

6.15 The statutory process envisages that the medical practitioner (subject to a separate appeal on the medical questions) will determine the medical questions, before sending a decision on these back to the Board by which it is bound in its final decision on eligibility for any particular award. This curious dichotomy in the decision-making is encapsulated in the statutory phrase in regulation 29(2) to the effect that the primary decision-maker, the Board, must "refer *for decision*" to the SMP certain important questions which will affect its ultimate decision on eligibility. Essentially, this element of the Board's decision is delegated, or sub-contracted, to the SMP – but on a basis which forbids the Board from departing from the SMP's conclusions on the specified questions.

[199] Including whether a person is permanently disabled, whether to grant an injury pension and/or eligibility for a disablement gratuity.

6.16 In paragraph [14] of the *Crudace* decision, Judge Behrens put the matter this way:

> "Thus, it will be seen that the Police Authority are required to refer questions (a) – (d) to the SMP and it is the SMP who makes the decisions in relation to them. It will also be seen that question (d) must also be referred to the SMP when they are considering revision to the injury pension." [underlined emphasis added]

6.17 The obligation on the Board to refer medical questions to a duly qualified medical practitioner arises in any one of four circumstances set out in regulation 29, namely:

(1) Where the Board is considering whether a person is *permanently disabled*[200]. This will arise in relation to applications both for police officers' injury awards under regulation 10 and disability gratuities under regulation 11.

(2) Where the Board is further considering whether to grant an *injury pension*[201]. Again, this will involve determination of whether the officer is permanently disabled.

(3) Where the Board is considering eligibility for an award under regulation 11 (that is to say, a *disability gratuity*)[202]. This will involve consideration of whether the officer is totally and permanently disabled.

(4) Where the Board is considering exercising its powers to reduce any injury award payable under regulation 36 on the basis that the officer brought about or substantially *contributed to the disablement by his own default*[203].

6.18 In the first instance in which referral is required, where the question is whether the officer is permanently disabled, the medical questions to be referred are: "(a) whether the person concerned is disabled"; and "(b) whether the disablement is likely to be permanent"[204]. It seems to me that, whilst these questions may be complicated, there is little difficulty in principle with them

[200] See regulation 29(2); except that, where the relevant questions have been referred for decision to a medical practitioner under the Pensions Regulations, a final decision of a medical authority on the questions under those regulations will also be binding for the purposes of the 2006 Regulations.
[201] See regulation 29(2).
[202] See regulation 29(3).
[203] See regulation 29(4).
[204] See regulation 29(2).

being referred to a medical practitioner, since they are clearly questions which deserve medical assessment and which are ultimately matters of medical judgment.

6.19 In the second instance in which referral is required, where the question is eligibility for an injury pension, the medical questions to be referred include also: "(c) whether the disablement is the result of an injury received in the execution of duty"; and "(d) the degree of the person's disablement"[205].

6.20 Initially, the requirement for a medical view on the fourth of these questions may be thought to be uncontroversial, since the degree of a person's disablement, whilst again difficult to assess, is classically a matter on which a medical professional would perhaps be best placed to give a view. This remains so – although probably less so – even having regard to the technical meaning of 'degree of disablement' as defined in regulation 6(5) of the Regulations; that is to say relating to an assessment of the effect of the injury on the officer's *earning capacity* rather than an assessment of pure disability[206].

6.21 In short, a doctor (particularly one with a background in occupational health) is better placed to discern the extent to which an injury affects a person's ability to work and earn a living than the Board. I have already expressed the view that the character of this question as a *medical* question is severely diluted the more arithmetical the process becomes, as it has in recent years by virtue of the guidance to SMPs and IMRs about the methodology to be used in calculating a precise percentage disablement figure: see the discussion at paragraphs 4.44 – 4.48 and 4.53 – 4.55 above.

6.22 Further difficulties begin to creep in, however, when one has regard to the third medical question which has to be referred to the SMP under regulation 29(2) in an injury pension case. It requires him to decide "whether the disablement is the result of an injury received in the execution of duty". The reason why I say that this potentially poses a difficulty is because this question seems to me to go far beyond a question of simple medical assessment. Although this question may undoubtedly involve some medical aspects when considering how a particular injury was caused[207], it seems to me that it also (at least in some cases) will incorporate issues of fact and law. (I note

[205] See again regulation 29(2).

[206] See the discussion of this issue at paragraphs 4.37 to 4.41 above.

[207] This will be particularly acute where there are a range of possible causes and it falls for medical determination as to what was the operative cause or to what extent various factors contributed to the development of an injury.

that the Board has also previously received advice to this effect[208]). Issues of fact may arise where there is a dispute as to precisely how the officer sustained the injury, for instance, if there are varying versions of events in relation to the incident in which the injury occurred which would alter the question of whether the officer was acting within the scope of his duty or whether he was or was not guilty of default within the meaning of regulation 5(4). Some particularly difficult cases can arise, for example, where the injury on duty is said to be management-induced stress.

6.23 In light of this, my concern is that regulation 29(c) treats this issue as a "medical question", whereas in fact it probably involves determination of a number of matters, or will do so in at least some cases, which are not, properly understood, pure medical issues. For the moment, however, SMPs are required to determine this question, even if they are ill-equipped to do so in terms of fact-finding facilities to resolve disputed issues. The SMP will see whatever documentation is made available to him by the Board (including PSNI records) but will in all likelihood only interview the applicant officer and has no power to compel the production of documents, to examine witnesses, etc.. From consultation with the SMPs I am also aware that they feel that dealing with cases where there are several sides to the story puts them in a difficult position.

6.24 This is an issue which I consider requires to be reassessed. [redacted]

6.25 Finally in relation to regulation 29(2)(c), there is an odd relationship between this provision and regulation 5(2)(c), which may well be thought to be contradictory. Regulation 29(2)(c) provides that where the Board is considering whether to grant an injury pension, it "shall so refer" to the SMP (*i.e.* refer to him "for decision") the question whether the disablement is the result of an injury

[208] In particular, I have been provided with a copy of an opinion from Declan Morgan BL (now the Lord Chief Justice) from January 2003, in which he observed that determination of whether disablement is the result of an injury received in the execution of duty "may often involve consideration of questions of law and fact but there is no doubt on the basis of the authorities that Parliament has determined that the determination properly lies with the medical experts".

received in the execution of duty. On the basis of this provision, it seems clear that this is a determination for the SMP. However, in defining what is to be treated as an injury received by a person in the execution of his duty as a constable, regulation 5(2)(c) includes a case where "*the Board is of the opinion* that the preceding condition may be satisfied [namely that the applicant would not have received the injury had he not been known to be a constable] and that the injury should be treated as one received in the execution of duty". This provision seems to suggest that there is at least one circumstance where the Board is to have the final say on whether the injury should be treated as an injury on duty for the purpose of the Regulations.

6.26 I confess that I am not at all sure how these two provisions should be read together; although the best interpretation is probably that regulation 5(2)(c) is a deeming provision whereby the Board is entitled to treat an injury so sustained as an injury on duty, even though the SMP has not been persuaded on the balance of probabilities that it is such.

6.27 In the third instance in which referral is required, the medical questions to be referred are as follows: "(a) whether the person concerned is totally disabled; (b) whether the total disablement is likely to be permanent; (c) whether the disablement is the result of an injury received in the execution of duty; and (d) the date on which the person became totally disabled"[209].

6.28 As before, I see little difficulty with questions (a) and (b), and indeed (d)[210], but the determination of the various issues required to give a decision on issue (c) may well go beyond pure medical questions. Interestingly, regulation 29(3)(d) is the only indication of an instance where the SMP has a role in specifying a date.

6.29 In the fourth instance in which referral is required, the sole issue for the SMP is "the question whether the person concerned has brought about or substantially contributed to the disablement by his own default". Again, this appears to me to be an area where, at least in some cases, it is inevitable that the SMP will have some role in fact-finding over and above a pure exercise of medical judgment. The concerns I have expressed in paragraphs 6.22 and 6.23 therefore apply equally in this instance.

[209] See regulation 29(3).

[210] Although, as the SMPs made clear in their meeting with me, the calculation of a precise date, particularly in relation to retrospective applications sometime after the event, can be very difficult (although perhaps less so where the question is when the officer became totally disabled rather than merely unable to perform the ordinary duties of a constable).

The 'finality' of the SMP certificate

6.30 Regulation 29(5) provides that:

> "The decision of the selected medical practitioner on the question or questions referred to him under this regulation shall be expressed in the form of a report and a certificate and shall, subject to regulations 30 and 31, be final."

6.31 Regulations 30 and 31 deal respectively with an appeal of the medical questions from the SMP to an IMR and a reference back to the medical authority by a tribunal hearing an appeal against a decision of the Board under regulation 33. These procedures are discussed in further detail in Chapter 10; but it is obvious that a 'final' certificate is not intended to be immune from proper appeal or reconsideration.

6.32 Assuming there is no such appeal or reference back, however, what is the purpose and effect of the provision that the decision of the SMP shall be final[211]? It seems to me that this plainly does not mean that there can be no review of the award; but the courts have interpreted the 'finality' provision as being very significant and, importantly, severely limiting the extent to which certain issues can be reconsidered at a later stage on review, even where there is evidence pointing to a wrong conclusion in the earlier 'final' certificate. This is discussed further below[212]. More fundamentally, this is a further means of emphasizing that, although the Board remains the ultimate decision-maker, it is not at liberty to go behind SMP or IMR decisions on the medical questions which are required to be referred to them.

Refusal to be medically examined

6.33 What then if the SMP cannot do his job because of a refusal on the part of the applicant to cooperate with him? The Regulations also make provision for a case where questions have been referred to a medical authority[213] but the person concerned "willfully or negligently fails to submit himself to such medical examination or to attend such interviews as the medical authority may

[211] It seems to me that the proper reading of regulation 29(5) is that the *decision* of the SMP on the question or questions referred is final, rather than the certificate or report being final. Little is likely to turn on this distinction but the important issue is what the decision of the SMP is on the question or questions referred, albeit there is an ancillary obligation to express that both in the form of a report and a certificate.

[212] See, in particular, the cases concerning 're-visiting causation', discussed in Chapter 7.

[213] Whether under regulation 29, 30 or 31.

consider necessary in order to enable him to make his decision". This is an important provision, since it provides for what should happen when an officer fails to cooperate with the SMP (or the IMR) or any further medical examination which he considers necessary.

6.34 In such circumstances, regulation 32 provides that, if the question arises otherwise than on an appeal to an IMR[214], "the Board may make its determination on such evidence and medical advice as it in its discretion thinks necessary". That is to say, if there is non-cooperation with the SMP, the Board can obtain its own medical advice and simply make its decision (on *all* issues, it appears, even those which would usually be the subject of an SMP report and certificate if there was cooperation in the normal course). This is a further illustration of the general theme of the Regulations that the Board remains the ultimate decision-maker on all issues, subject to the referral of medical questions under regulation 29, such that, where the regulation 29 procedure is frustrated, the decision-making function even on medical questions reverts back to the Board (taking such medical advice as it considers necessary)[215].

6.35 If the issue of non-cooperation arises on an appeal to the IMR, then the appeal is simply deemed to be withdrawn and the initial SMP report and certificate will stand.

Even medical decisions are ultimately those of the Board?

6.36 In the *Crudace* case, it was also suggested that in law the Board (or, in England, the authority) is ultimately responsible for decisions of the SMP, even though they are made independently of it. This arose in the course of a debate as to who the correct defendant to the proceedings should be, the authority or the SMP.

6.37 The claimant submitted that the police authority was the correct defendant, since the Regulations expressly said that the decision was to be that of the authority (and, in particular, in the case of reviews, the pension is to be revised if the *authority* finds that the degree of disablement has substantially altered). He accepted that the actual decision was made, in the first

[214] Generally where the application is at the initial SMP stage; although this could also incorporate a reference back to the SMP by agreement or order of the tribunal under regulation 31. An appeal to the IMR is dealt with separately. It is unclear whether a reference back to the IMR under regulation 31 would be treated as the question arising "on an appeal to an independent medical referee" but it is likely in my view that it would.

[215] This has resonance with the issue of determining implementation dates, discussed at paragraphs 4.80 – 4.82 above and paragraphs 6.58 – 6.65 below.

instance, by the SMP or on appeal by the PMAB, each of which is independent. However, he submitted that their decision was still a decision of the police authority, albeit a decision that had been delegated to the SMP or PMAB by the Regulations. The defendant did not accept this analysis and submitted that the decision of an SMP was not to be treated as a decision of the authority, since the SMP "is not a true delegate of the authority", evidenced by the fact that the Authority is required to accept his decisions on the questions referred to him.

6.38 The judge expressed his conclusions on this issue in paragraph [68] of his judgment in this way:

> "My mind has wavered on this point during the course of the submissions. In the end, however I prefer the submissions of [counsel for the claimant]. It seems to me that the wording of reg 37 makes it clear that the decision to revise the pension is the decision of the police authority. It follows, in my view that the decision of the SMP and/or the PMAB on appeal can only be as the delegate of the Police Authority. This is so even though they are independent and the Police Authority is bound to accept their decision as final (subject to reconsideration under reg 32(2) and/or judicial review)."

6.39 Thus, it appears that, even though the SMP (and indeed the IMR) is independent of the Board and it is bound to accept as final their determination of the medical questions referred to them, they are still acting as the 'delegate' of the Board within the statutory scheme, acting to assist the Board in making the ultimate decision on eligibility for an award, so that the Board is in law responsible for their decision.

The role of the SMP

6.40 We have considered the issues which the Board is required to refer to the SMP for determination. It is convenient, therefore, to look for a moment at how the SMP approaches his task. Little guidance is contained within the Regulations in relation to this. This is one reason why SMPs have traditionally looked to policy guidance to assist.

6.41 The obvious point to make is that the Regulations require the involvement of a "duly qualified medical practitioner" because the questions he is asked to address are medical issues and questions of clinical judgment. The SMP should bring a further element of independence to the decision-making and should assess the questions referred to him as best he can, on the balance of

probabilities and using his clinical judgment. As discussed elsewhere in this report, to my mind the system will operate more effectively if the questions which the SMP has to determine are focused as much as possible on issues which are truly medical in nature.

6.42 The Regulations also give no guidance as to what is meant by a "duly qualified" medical practitioner. It could be argued that this is unlikely to mean simply someone who is qualified as a medical practitioner since, if that were the case, the words "duly qualified" would really be otiose. On the contrary, it might well be the case that this is what the Regulations mean and that is simply how they happen to be expressed.

6.43 Insofar as the requirement of being "duly qualified" adds anything, it seems to me to simply connote competence to assess the questions referred in the particular circumstances of the case. I do not believe this means that the SMP has to be a specialist in the particular injury which is the subject of the application (if this were so, there would be a problem in cases where more than one type of injury was involved requiring expert input from different specialties). Moreover, regulation 32 suggests that the SMP has the ability to require the applicant to attend interviews with other clinicians if he considers that necessary in order to enable him (the SMP) to make his decision. If the phrase "duly qualified" is to be given any further meaning, it seems to me that it ought to relate to a medical practitioner with experience or qualifications in the field of occupational health, given the character of the questions which he will be required to decide under regulation 29.

6.44 It is a particular feature of the statutory scheme that the SMP is not merely required to provide an opinion or advice, but is required to express a "decision" on the questions referred (see regulation 29(5)). This is to be "expressed in the form of a report and a certificate". Again, little guidance is provided as to how these documents are to be formulated; but it seems to me to be a reasonable interpretation that the certificate should simply answer the questions referred in as straightforward a manner as possible and the accompanying report should express the reasoning behind the decisions.

6.45 The Guidance Booklet gives the following advice[216] as to what happens after the assessment is completed by the SMP:

[216] At section 20 (page 13).

> "When the assessment is completed and the SMP has all the information available to make a decision, the decision is forwarded to the Policing Board for consideration in the form of a Certificate, together with a report, explaining the background to the medical determination. Should the SMP have awarded an injury on duty percentage disablement, the SMP report will illustrate how the percentage disablement award has been calculated, as illustrated at Section 16. It will also contain a list of all the doctors and specialists reports the SMP had sight of before arriving at a decision. The decision of the SMP, as specified in a certificate is final, subject to any appeal.
>
> You will be advised of the SMP's decision by letter from the Board and you will also receive a copy of the Certificate and report issued by the SMP."

6.46 This commentary clearly suggests that the SMP is the decision-maker in all relevant respects. Although it is noted that the SMP's decision is forwarded to the Board "for consideration", no explanation is given as to what precisely is meant by that, nor what options (if any) are open to the Board if it thinks there is some difficulty with the SMP's decision. As appears from the discussion above, the Board is clearly bound by the decision of the SMP on the referred questions but may have a residual decision-making function in relation to issues which are not the subject of a referral under regulation 29 (the most obvious example arising from practice being that of an implementation date).

6.47 In its submission to me, NIRPOA suggested that problems relating to the issue of IOD awards "began with the establishment of NIPB and the decision to outsource the Selected Medical Practitioner". NIRPOA pointed out that, prior to this, the decision was taken by one of the Force Medical Officers based at the PSNI OHW Unit. It was felt that these doctors had "a first hand understanding of the difficulties and problems facing Police Officers being medically discharged or reviewed". This appears to be linked with the fact that, on occasions, these doctors would have designated an award as being for "no review" or "for life", an approach of which the NIRPOA was strongly supportive, at least in obvious cases[217]. NIRPOA was concerned that today, even when OHW consider that an officer is incapable of performing the duties of a police officer, that decision is "often overruled by the SMP".

6.48 NIRPOA further suggested to me that "if… the SMP is a decision maker there should be greater scrutiny of their role and the directions issued to them". A particular criticism was that

[217] That of multiple limb loss being an example given.

SMPs were said not to be aware of various decisions of the English courts in relation to their equivalent Regulations; and that their decision-making had been 'fettered' by the Board.

6.49 The Board's position is that the SMPs are qualified and experienced occupational consultants. They are provided with training on the legislation and there are also monthly meetings to, *inter alia*, exchange information on case law. The SMPs also attend training sessions annually in England[218].

6.50 I was not provided with any evidence to substantiate NIRPOA's claim that problems with the IOD system commenced with the outsourcing of the SMP function, other than broad assertion. As I have noted, I found the SMPs who attended a consultation meeting with me to be conscientious and highly credible. Part of the difficulty in my view is likely to be that, when a decision is given with which an applicant is unhappy, the natural tendency will be to blame and disagree with the SMP who is the decision-maker in relation to the key questions.

6.51 I also consider that there was some inconsistency in the complaints made to me by NIRPOA about the SMPs – on the one hand that they should be given more guidance and direction; and on the other that they should not be 'dictated to' by the Board in a way which fettered their discretion. It seems to me that this is largely as a result of the uncertainty which has surrounded the guidance issued by the Home Office and DOJ in recent years and the contention which there has been about the contents of this guidance. Officers understandably wish SMPs to follow guidance if it will be favourable to their case; but not to do so if it will not.

6.52 I do consider that there is likely to have been a failure to keep SMPs as fully appraised as they ought to have been about important developments in case-law in recent years which affected the way in which the statutory scheme is understood and applied. Indeed, this is an area in which the SMPs themselves indicated that they would appreciate further support. However, I would not be overly critical about any such failing since, as appears from the discussion in Chapters 7 and 9, the case-law in this field is not always easy to understand, interpret or apply (even for lawyers, never mind non-lawyers) and there have been differing views as to precisely what cases such as *Simpson* meant.

[218] This summary is taken from the summary of the Board's response to the Pensions Ombudsman in the *Black* case.

6.53 There is an issue about possible conflict between decisions of the OHW (for instance, that an officer should be medically retired) and a contrary decision of an SMP (that the officer is not permanently disabled). However, the Regulations make clear that it is the SMP's decision which is legally effective (including in a situation of compulsory retirement on the ground of disablement under regulation 18 of the 2009 Regulations: see regulation 67 of those Regulations, which is in similar terms to regulation 29 of the 2006 Regulations).

6.54 I also consider that, at least with the present system of appointing a firm of SMPs for a period of time – which is likely to continue due to the constraints of public procurement law – the SMPs who make these decisions will build up, or in the present case have built up, considerable experience of occupational health assessment in this field, so that the advantage enjoyed by OHW staff is diluted to a considerable degree. The PSNI also told me that the independence of the SMP was useful and that they favoured keeping pension decisions separate from the work of the OHW. Whether this should be maintained, both in relation to medical assessment or administration, is discussed in more detail in Chapter 12.

The role of the Board

The role of the Board generally

6.55 As already discussed, the Board is the ultimate decision-maker in relation to eligibility and quantum of awards, subject to being bound by the determination of a medical authority on a question referred to him under regulation 29 (which will often be determinative, or largely determinative, of the issues for which the Board has responsibility to decide).

6.56 The Board also has *de facto* responsibility for administering the scheme generally and attending to the practical running of the administrative process discussed in some detail in Chapter 5.

6.57 There will be some rare occasions where a substantive issue requires to be determined which, for one reason or another, the mechanism of referral of medical questions under regulation 29(2) (and following) fails to provide the answer. In such circumstances, the Board's residual decision-making function under regulation 29(1) comes again to the fore. One express instance of this in the Regulations which has already been referred to is the power of the Board to make its own

determination on any of the medical questions, on such evidence and medical advice as it considers necessary, in circumstances where the person concerned willfully or negligently fails to submit himself to medical examination or to attend such interviews as the medical authority considers necessary[219]. The other key instance is the thorny issue of implementation dates.

The determination of implementation dates

6.58 The NIPB Guidance Booklet says this[220] in relation to the setting of implementation dates:

> "When a serving officer is awarded an IOD, the actual date of implementation is set by Police Administration Branch following an established procedure. This is 6 weeks from the date of letter and will be the day after the officer leaves the service.
>
> For a former police officer awarded a retro IOD, the actual date of implementation will be the date specified on the SMP certificate. On any subsequent reviews the date the new SMP certificate decision is implemented will depend on when Pension Branch are advised of the new certificate issued. If the notification is received by Pension Branch before the 15th of the month any change will be made to that month's payment calculation. If received after 15th of the month any change will be made to the next month's payment calculation. This seeks to avoid the possibility of an overpayment of award and former officers being required to pay back to Pensions Branch overpayments." [underlined emphasis added]

6.59 However, consideration of regulation 29(2) confirms that the date on which an applicant became permanently disabled is not a matter which is referred to the SMP for determination[221]. There is strong support for the view, therefore, that the SMP is not required to provide such a date and that it should not form part of the certificate he is required to furnish.

6.60 I should say immediately, however, that I suspect this is an error in the drafting of the Regulations (or some earlier version of the Regulations which has been carried through into the present provisions). I say this for a number of reasons. Firstly, it seems to me that the question of the date when the officer became permanently disabled is classically a matter on which the medical authority is better placed to give a view than the Board, so that it ought to be a question

[219] See regulation 32(a) of the 2006 Regulations.
[220] At section 29, page 21.
[221] In contrast, for instance, to the referral under regulation 29(3)(d), in an application for disability gratuity, of the question of "the date on which the person became permanently disabled".

referred to him under regulation 29(2). Secondly, the referral of a similar question to the SMP under regulation 29(3) (the date on which the person became totally disabled) supports this first point. It makes clear that there is no objection to this type of issue being determined by the SMP; indeed, it is appropriate; and suggests that the omission of an equivalent provision in regulation 29(2) was a mistake[222].

6.61 The question of who bore responsibility for determining the implementation date in the state of the current Regulations was addressed in the *DB's Application* case, which is discussed in further detail in Chapter 7. The High Court endorsed the view that the SMP or IMR "is not required to specify the date when the applicant first became permanently disabled"[223]. This flowed from the fact that the questions to be referred where the issue of permanent disablement is under consideration do *not* include the date when the disablement arose. The Board was entitled (indeed, required) to determine this issue for itself; but could obviously do so on the basis of medical advice which it received.

6.62 In my view, the proper approach to the Regulations is therefore as follows. There is no *requirement* under regulation 29 to refer to the SMP the question of when the officer became disabled. Moreover, since this is not one of the medical questions to be referred to him for decision, he cannot determine that in a way which is binding on the Board. However, there is nothing wrong with the Board asking the SMP to give a view on this issue; and, indeed, it is perfectly natural for it to do so, given that he will be examining the case in detail in any event in order to answer the questions which are statutorily referred to him under regulation 29(2). In considering whether the officer is permanently disabled and how this was caused, the SMP is likely to also consider when this occurred.

6.63 Although the implementation date ought not to be included in the certificate in my view (which ought only to give clear answers to the statutorily required medical questions), it could and should certainly be dealt with in the SMP's report, which will of course be considered by the Board in reaching a view on the correct implementation date. In the absence of medical evidence to the contrary or some other compelling reason, it will be virtually inevitable that the Board will accept the advice of the SMP as to what the implementation date should be.

[222] The other questions in regulation 29(3) broadly mirroring those referred under regulation 29(2).
[223] See paragraph [20] of the judgment.

6.64 It is also relevant to note that regulation 6(7) provides that:

> "Where a person has retired before becoming disabled and the date on which he becomes disabled cannot be ascertained, it shall be taken to be the date on which the claim that he is disabled is first made known to the Board."

6.65 This may arise in a range of cases where a retrospective application is made by a retired officer who, it is accepted, was not disabled at the time of retirement (although this may itself be a contentious issue) but is disabled at the time of application. Where, as may often be the case, it is not possible to ascertain the date on which he became disabled, this is treated as the date on which his claim is first made known to the Board[224].

Appealing an implementation date

6.66 The Police Federation raised with me the issue of whether it is possible to appeal against an implementation date (and said that the Board maintained that there was no way to challenge such a date). It seems to me that there must be a means of appealing an implementation date which is given effect by the Board. However, given that the determination of the implementation date is not a medical issue referred to the SMP for decision under regulation 29(2)[225], this cannot, at least as the Regulations stand at present, be the subject of an appeal to an IMR under regulation 30. Rather, if there is to be an appeal against an implementation date fixed by the Board (albeit on the advice of the SMP), this would be an appeal directly from the Board to an appeal tribunal under regulation 33(1).

6.67 I assume that such an appeal would only arise where the officer either contended that the implementation date should be earlier than that fixed by the Board, or where he disputed a decision of the Board under regulation 6(7) that a date could not be ascertained, so that the relevant date was the date of the IOD application. In either instance, this could fall within the situation described in regulation 33(1) whereby the officer was "aggrieved by the refusal of the Board to admit a claim to receive… a larger award than that granted…".

[224] This is likely to be when he makes his application for an IOD award but might conceivably be at a different time if there is some other contact with the Board in which the officer claims to be disabled.
[225] See the discussion at paragraphs 6.59 to 6.61 above.

6.68 The nature of the appeal tribunal[226], however, which does not include a medic, only serves to underline the difficulties presented by the Regulations presently treating this question as a non-medical question for determination by the Board, rather than as a medical question for determination by the SMP, with a further appeal to the IMR. Although in theory an aggrieved officer could appeal against an implementation date with which he was unhappy to the appeal tribunal, it is difficult to see how he would be in any better position before the tribunal, which is likely to rely upon the same medical advice on which the Board itself relied when reaching its initial determination about the implementation date.

Fixing the implementation date where there has been an appeal to the IMR

6.69 That said, where there is an appeal to the IMR on one or more of the prescribed medical issues, one would have thought that the officer might also be able to effectively have the question of the implementation date revisited in the course of the IMR's consideration of his case. However, the question of what guidance IMRs will provide in relation to implementation dates has proven to be a fairly contentious issue between the Board and the Department.

6.70 The Board has complained that, where there is a successful appeal from an SMP to an IMR, the IMR does not provide an implementation date. The Board then has to make a judgment as to what the implementation date should be. Since the appeal from the SMP has been successful, it will often be the case that it is not possible to rely on the date (if any) suggested by the SMP. In the absence of clear advice on the issue from the IMR, the Board will need to seek further medical assistance on the issue. One way of doing so may be to refer the case back to the SMP who had initially considered it. However, the officer concerned may not be content with this, since this will be asking the SMP for advice on his case when that SMP has already made a decision with which he was aggrieved and which has been successfully appealed to the IMR. On the other hand, if the Board approaches a different SMP, this will require that SMP to fully consider the papers from scratch, rather than looking again at a case with which he is familiar, which is likely to be much less cost effective. There are also potential difficulties with the Board seeking advice from someone other than its appointed SMPs, given the lack of any contracted services on the part of other doctors.

[226] Discussed in further detail in Chapter 10.

6.71 The Board's point is that, consistent with the *DB's Application* judgment, it is entitled to seek medical advice about the implementation date, and that there is nothing prohibiting this being provided by the SMP in the first instance or, additionally, by the IMR on appeal. Where the IMR does not provide advice on this issue, there are significant additional costs incurred by the Board in seeking such advice from another medical practitioner, as well as additional delay built into the process, which the Board feels are not justifiable.

6.72 The Department has recently responded to these concerns as follows[227]:

> "As was previously agreed, decisions in respect of the implementation dates of awards are a matter for the Board. There is no obligation on the IMR to provide a view on an implementation date and no provision in legislation requiring the Department to direct the IMR to do so. However, you will recall that, in order to support the Board, the Department incorporated a section into the IMR certificate in or around 2011, offering the IMR the opportunity to provide their opinion on an implementation date, if evidence is available to them…
>
> Where an IMR does provide their opinion in respect of a date of disablement in their report and/or certificate, it should be noted that any appeal against the implementation date will remain an appeal against the decision of the Policing Board under regulation 33(1).
>
> The Department will continue to encourage IMRs to provide opinion on implementation dates, where they are able and wish to do so, to inform the Board's decision making in these cases."

6.73 The Department's summary of the legal position is, of course, correct[228]; nor do I think the Board would take issue with this. The Board's complaint, from what I understand, is that the Department really has not been sufficiently cooperative in encouraging IMRs to provide advice on the implementation date to meet the concerns it has raised about the additional costs and delay to which the absence of such advice gives rise.

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[227] See the letter from Ms Montgomery of the Department to Mr Gilleece of the Board dated 21 August 2014 on this issue.

[228] Although I have already noted my suspicion (see paragraph 6.60 above) that the absence of a reference to the date of permanent disablement in the medical questions to be referred to an SMP (and capable of appeal to the IMR) was probably a mistake in the Regulations.

6.74 On the basis of the most recent correspondence, it seems that there is now little between the Board and the Department on this issue. For my part, I agree entirely that it makes obvious sense for the IMR, when considering the case and providing a certificate and report, to also address the issue of the implementation date in cases where they disagree with the initial SMP's determination and allow the appeal. If he does not do so, this presents considerable issues for the Board in seeking to determine the date for itself either on the basis of no medical evidence or, more likely, on the basis of further medical evidence which it then has to go off and obtain.

6.75 As with the SMP, I do not believe it is strictly appropriate for the IMR certificate itself to contain a section requiring specification of the implementation date (since what is said about the implementation date is, legally, on the Regulations at present, expert advice to the Board to assist it to inform its decision, rather than the determination of a referred medical question under regulation 29). However, for the reasons given by the Board in its correspondence to the Department on this issue, I believe the IMRs should be strongly encouraged as a matter of course to provide clear commentary in their report as to what the appropriate implementation date is *or*, if they are unable to ascertain the date[229], to state that. Such encouragement could usefully be provided in any comprehensive further guidance which is provided to them, such as I recommend elsewhere in this report, but should in my view, in any event, be given by the Department now.

Is the present distinction between medical and non-medical questions sound?

6.76 It will be clear from the discussion above that I have grave reservations about the present scheme of the Regulations – and the similar provision made in the 1988 Regulations and 2009 Regulations in relation to the referral of medical questions to a medical practitioner – on two grounds.

6.77 The first is that I consider the present decision-making arrangements to be extremely unwieldy, whereby important component parts of the decision-making are carried out by an independent medical practitioner and other important parts are left to the Board. In my view this is surely less effective than having one decision-making body which addresses all of the issues required to reach a determination on eligibility and quantum in a holistic way.

[229] So that the default provision contained in regulation 6(7) comes into play.

6.78 The second reservation relates to the fact that a firm dichotomy is drawn between medical questions to be referred and, by implication, non-medical questions which are not. However, several of the issues which require to be considered and determined in the course of an application do not lend themselves to ready categorization in this way. The question of whether the disablement is the result of an injury received in the execution of duty is a paradigm example of this; another is the question of whether the officer brought about or substantially contributed to the disablement by his own default[230]. Although some aspects of these assessments will be medical in nature, others will involve questions of factual determination and perhaps also legal analysis. In short, these are not purely medical questions. Indeed, in some instances, where the nature and cause of the injury is fairly obvious but the key area of dispute is whether the officer was acting within the scope of his duty or whether he was guilty of default, the issue may not really be medical in nature at all.

6.79 Accordingly, some of the issues which are referred as medical questions will be much more complex than a medical practitioner should really be expected to deal with in the course of providing clinical expertise; or will be such as to not really engage that expertise at all. The distinction between medical and non-medical issues is not always black and white but involves several shades of grey. Although in some instances it will be clear that an issue has been referred to the medical practitioner which is not really for him; and, conversely, the Board is left to determine implementation dates when this is much more obviously a medical issue than a non-medical one.

6.80 This is a point made by a High Court judge in England as long ago as 1999, in relation to the equivalent provisions in Part H of the 1988 Regulations[231]. He commented that there was "no doubt" that those provisions appeared "to abdicate to the medical practitioner responsibility for deciding issues *in relation to which he is not necessarily appropriately qualified*", including the question of whether disablement is the result of an injury received in the execution of duty, which the judge felt was "a question of mixed fact and law" which "may well involve disputed issues of fact". He concluded pointedly that, "It is not clear why the medical practitioner is considered the appropriate person to deal with these issues". For the reasons set out above, I agree. Indeed, these observations having been made by the High Court in England over 15 years ago, I find it strange that precisely the same decision-making mechanisms were replicated in the English

[230] See regulation 29(4).

[231] In the *ex parte Yates* case, discussed at paragraphs 7.74 – 7.78 below.

Regulations, our 2006 Regulations and the relevant Pensions Regulations both here and in England and Wales made since.

6.81 For the reasons highlighted above, I would recommend a wholesale reconsideration of the decision-making process mandated by the relevant Regulations for considering these issues. I return to this issue in Chapters 13 and 14.

CHAPTER 7

DISCUSSION OF RELEVANT CASE LAW

7.01 In this chapter I have set out a brief discussion of some of the most relevant decided cases which were drawn to my attention. The summary of each case is intended as just that – a summary. Where relevant to a particular topic under consideration, the salient findings in a number of these cases are discussed elsewhere in this report.

7.02 A full discussion of *every* decided case dealing with the ill-health pension or injury benefits scheme is beyond the scope of this review. I have sought to concentrate on some of the more important cases in recent times, or cases which were specifically drawn to my attention.

7.03 Given the prominence of the *Simpson* case in both my terms of reference and the various submissions which were made to me, and its importance to a number of the key issues which have given rise to this review, I have considered this case (and the follow-up litigation in the *Slater* case) in some detail in its own section within this Chapter.

The relevance of decided legal cases

7.04 It is worth reflecting for a moment, however, on the reason why it is necessary to consider decided legal cases. Essentially this is because the courts are the ultimate arbiter of the meaning and effect of the Regulations[232]. If guidance is produced which fails to reflect the true legal meaning and application of the Regulations, or if a decision-making authority applies the Regulations in a way which is otherwise than in accordance with its statutory obligations, as correctly construed, then the High Court is competent to correct these errors by quashing the guidance or decision as the case may be.

7.05 The difficulty, of course, is that where there are competing interpretations of the Regulations, or where their precise meaning and effect is not clear, it can be difficult to predict with certainty precisely how a judge faced with a determination to make on these issues will do so. This difficulty ought to reduce with the more decisions there are dealing with the Regulations, or with decisions

[232] Subject to any legislative amendment changing the law.

being given by superior courts such as the Court of Appeal, particularly by reason of the doctrine of precedent, since the courts ought to build on earlier judgments explaining the Regulations and be consistent with them. Where there are legal rulings providing guidance on the objectively correct legal meaning and effect of the Regulations, however, it is obviously prudent to guide one's approach to the legislative scheme on the basis of these.

7.06 Indeed, the new draft NIPB Guidance Booklet compiled in 2012 (although not, in the event, published) noted[233] that:

> "There has also been a number of Judicial Review decisions particularly in England which have resulted in changes to how particularly injury on duty reviews are conducted. All such decisions are considered as the Board reviews its policies and procedures on an on-going basis."

7.07 This reflects an approach which is perfectly sensible, and indeed required, namely to seek to act in accordance with the legislation as it has been explained by the courts.

7.08 One issue which was raised on a number of occasions in the course of the present review, however, was the extent to which decisions of the English courts, or decisions relating to the English Regulations, were binding on the authorities in Northern Ireland. I can deal with this issue relatively briefly. In theory, such decisions are of persuasive value only in Northern Ireland; but in practice it is extremely likely that they will be followed.

7.09 Dickson puts the matter succinctly in this way[234]:

> "Courts in Northern Ireland, strictly speaking, are not bound to apply the law laid down by courts in England and Wales (except for the UK Supreme Court), but they very frequently do so."

7.10 In fact, there is more specific authority to the effect that it is desirable that legislation which applies on a UK-wide basis is given the same meaning by courts within the various jurisdictions of the United Kingdom. Obviously, the 2006 Regulations in Northern Ireland and the equivalent English Regulations are not contained within the one UK-wide statutory instrument. Nonetheless,

[233] At page 1.
[234] Dickson, *Law in Northern Ireland* (2nd edn, 2013, Hart) at paragraph 4.41(4).

they are in materially identical terms in the important respects dealt with in the cases discussed below. Accordingly, the courts in Northern Ireland are highly unlikely to consider that the *same* wording of the 2006 Regulations here has a different meaning or effect to materially identical wording in England, the correct construction being a matter to be objectively determined from the meaning of the statutory text.

7.11 Indeed, in her determination in the *Black* case, the Deputy Pensions Ombudsman referred to some English case law and then said that:

> "Those cases have been concerned with the Police Injury Benefit Regulations for England and Wales, but the Northern Ireland Regulations mirror these and, therefore, the same principles can be expected to apply."

7.12 This is a fair summary of the way in which Northern Irish courts are likely to approach the issue. Unless a court here was to be persuaded that a decided English case was plainly wrong, it is highly likely to follow it. This is particularly so if the English authority in question is, or appears to be supported by, a decision of the English Court of Appeal.

The *Simpson* and *Slater* litigation

Simpson (English High Court, February 2012)

7.13 The *Simpson* case – *R (Simpson) v Police Medical Appeal Board and Others*[235] – is an important case in relation to the issue of reviews, and particularly age 65 reviews. The specific mention of this case in the introduction to my terms of reference underscores the fact that it deals with a central issue of controversy on which I am asked to comment. It followed on from a number of earlier, related cases, which are discussed in further detail below; but it is really the judgment in *Simpson* which represents the most recent, authoritative statement from the English courts as to how age 65 reviews should be approached under the Regulations.

7.14 In *Simpson*, the central question was whether the part of Home Office Guidance 46/2004 entitled 'Review of Injury Pensions once Officers reach 65'[236] (and guidance to similar effect in relation to medical appeals) were inconsistent with the Police (Injury Benefits) Regulations 2006

[235] [2012] EWHC 808 (Admin).
[236] Discussed in Chapter 3 above.

and therefore unlawful. Mr Simpson, who had previously been within Band 2, had his injury pension reassessed by an SMP, as a paper exercise and in accordance with a recommendation from the relevant police force, to 0% degree of disablement. This was on the basis that, having reached state pension age, Mr Simpson no longer had an earnings capacity for the purpose of the Police (Injury Benefit) Regulations; and that there was no cogent reason in his case why he should not be considered to have 0% loss of earnings capacity.

7.15 Mr Simpson's case against both the Medical Appeal Board and the relevant police force, Northumbria, was settled; and his previous pension was restored[237]. However, the case continued against the Home Secretary in order to determine the legality of the Home Office guidance which was consistent with the approach adopted by the SMP and the force. The key part of the relevant guidance which was under challenge was in the following terms:

> "Once a former officer receiving an injury pension reaches the age of 65 they will have reached their State Pension Age irrespective of whether they are male or female. The force then has the discretion, in the absence of a cogent reason otherwise, to advise the SMP to place the former officer in the lowest band of Degree of Disablement. At such a point the former officer would normally no longer be expected to be earning a salary in the employment market.
>
> A review at age 65 will normally be the last unless there are exceptional circumstances which require there to be a further review."

7.16 The provisions of the English Regulations in the *Simpson* case were materially identical to our own, including the table within Schedule 3 setting out the bands of 'degree of disablement' and the methodology for calculating an injury pension.

7.17 The claimant's argument that the approach adopted by the guidance was unlawful focused on two contentions[238]: first, that, properly construed, the English equivalent of our regulation 6(5) requires an assessment of loss of earning capacity *regardless of age* (there being no presumption provided for within the Regulations that a person who reaches a particular age is thereby unable to work or has either no, or a reduced earning, capacity); and, second, that the test is one of loss of earning *capacity*, not *actual* loss of earnings. This latter argument was said to be supported by a

[237] See paragraph [6] of the judgment of Supperstone J.
[238] See paragraphs [12]-[13] of the judgment.

portion of the judgment of Ouseley J in *R (South Wales Police Authority) v The Medical Referee*[239], where he had said that:

> "The task, in my judgment, in assessing earning capacity is to assess what the interested party is capable of doing and thus capable of earning. *It is not a labour market assessment, or an assessment of whether somebody would actually pay him to do what he is capable of doing*, whether or not in competition with other workers." [italicized emphasis added]

7.18 In response, the Home Office argued that it was common sense, and consistent with both the purpose and practical focus of the IOD award scheme, that an injury pension review should be considered compulsory at occupational retirement age, since it is no longer appropriate to use the former officer's police pay scale as the basis for his pre-injury earning capacity[240]. The assessment must be directed to what the individual would have been earning *in reality* if he had not been injured, and not what he would have been earning in theory. The fact that someone has reached an age at which they would no longer be working as a member of a police force (nor, probably, in any other capacity) could not be disregarded. The Home Office contended that the guidance simply suggested that, in such circumstances, reference be made to national average earning figures as a guide, in the absence of a cogent reason for a higher or lower outside earnings level.

7.19 The Home Office relied upon several "working assumptions" which it said could reasonably be made when an SMP or (the English equivalent of) an IMR was assessing the degree of an officer's disablement by reference to the degree to which their earning capacity had been affected, namely:

> "(1) until the age when the individual would have been compulsory retired from the police service ("CRA") it can be assumed that he or she would have remained in the service 'but for' the duty injury, and his or her earning capacity can therefore be assessed by reference to his or her police pay;
>
> (2) from CRA onwards it can be assumed that the individual would no longer have been in the police service 'but for' the duty injury, and his or her earning capacity can therefore be assessed by reference to the average earnings of a person in his or her age group;
>
> (3) From state pension age ("SPA") it can be assumed that the individual would no

[239] 'The *Crocker* case': [2003] EWHC 3115 (Admin).
[240] See paragraphs [17]-[18] of the judgment.

> longer be in gainful employment 'but for' the duty injury, and his or her earning capacity can therefore be assessed as nil."

7.20 The Home Office accepted that an SMP could not revisit questions (a) and (c) in (the English equivalent of our) regulation 29(2) when conducting a review, that is to say whether the officer is disabled and whether the disablement was the result of an injury received in the execution of duty. However, he had to consider again the degree of the person's disablement.

7.21 Although the assumptions set out at paragraph 7.19 above may seem relatively unexceptional[241], Supperstone J held that there was a problem with them, namely that they find no basis in regulation 37[242] and that that regulation "requires a very different approach". That approach is encapsulated in the following holding in paragraph [28] of the judgment:

> "I accept [counsel for Mr Simpson's] submission that the SMP and the [IMR] cannot conduct a fresh review of the uninjured earning capacity and the actual earning capacity of the former officer and then, comparing the outcome of that assessment with the previously determined degree of disablement, conclude that there has been an alteration in the former officer's degree of disablement. That approach is contrary to the analysis approved in *Turner* and confirmed in *Laws* and reverses the approach required to be taken by Regulation 37(1). The statutory scheme requires an assessment as to whether there has been an alteration in the degree of disablement first. A further quantum decision on the present degree of disablement is only permissible if the police authority, acting by the SMP, have first decided that there is a substantial alteration in the former officer's degree of disablement." [underlined emphasis added]

7.22 It seems clear from the following paragraphs of the judgment that, when Supperstone J says that a further quantum decision is only permissible after the SMP has first decided that "there is a substantial alteration in the former officer's degree of disablement", he is referring to a substantial alteration in the former officer's *physical condition* (or, perhaps, his *actual present job opportunities*)[243].

7.23 The conclusion in *Simpson* seems to me to be clear. There can be no reconsideration of

[241] And, indeed, I think they are propositions with which the Police Administration Branch of the Board might have some sympathy.

[242] The English equivalent of our regulation 35. See paragraph [28] of the judgment.

[243] The usual example being given being that of a new job suddenly becoming available in fact.

notional earning capacity (*i.e.* what the officer would have been capable of earning but for his injury, including after having reached state pension age) unless and until there has been a substantial alteration in his physical condition or his present job opportunities, that is to say that something has *actually changed* since the last review, other than the mere passage of time and the attainment of a greater age[244]. Only once this trigger has been activated can there be a further exercise to consider the uninjured (or 'but for') earning capacity. It follows that, where there has *not* been such a change in the officer's physical condition or present job opportunities, the entire exercise of comparing notional earning capacity but for the injury against actual earning capacity post-injury should not be undertaken. Reaching a particular age is not, of itself, sufficient to warrant a conclusion that there has been a substantial alteration in the degree of the officer's disablement.

7.24 The position is made particularly clear in paragraphs [32] and [42] of Supperstone J's judgment in which he says pithily that:

> "There is in my view no statutory basis in the Regulations to support a different approach to a regulation 37 review at different ages."

And, to like effect:

> "There is no justification for adopting a different approach to regulation 37(1) in respect of a former officer who reaches the age of 65 than in the case of a review for former officers of a younger age."

7.25 In other words, age should not make a difference to how the review is approached. A more detailed expression of this concept is found in paragraph [33] of the judgment:

> "The [Home Office Guidance] is based on the premise that, having reached the age of 65, a former officer would normally no longer be expected to be earning a salary in the employment market. The third of [the Home Office's] working assumptions is that the individual would no longer be in gainful employment… <u>This is not in my view an approach permitted by regulation 37(1)</u>. It is no answer to say that the working assumptions can be

[244] See also the reference to the judgment of Burton J in the *Turner* case at paragraph [23] – quoted with approval by Supperstone J in paragraph [29] of *Simpson* – that "it would all hang on the issue of alteration or change *after* 'such intervals as may be suitable'", that is to say, a change in the present, rather than merely the assumed or 'but for' state of affairs.

rebutted by way of a cogent reason. Regulation 37(1) contains no such presumption or "cogent reason" test. The Guidance fails to address the question as to whether there has been an alteration. Instead of advising that the question as to whether there has been an alteration should be approached neutrally by the decision maker on the facts of the individual case, it wrongly advises that certain working assumptions can be made."

7.26 Supperstone J appears to me to be saying, in clear terms, that age is not a relevant factor in considering whether or not there has been a substantial alteration in the degree of disablement (which is the necessary first step before conducting a fresh review of the uninjured earning capacity); and that, even where an officer is aged 65 (or has reached some other relevant compulsory retirement age), the same approach to the review should be undertaken as would apply to an officer who had not reached that age, namely that there should be no recalculation of his earning capacity unless something else had actually changed since the date of the last review. Moreover, *Simpson* suggests that it is also inappropriate to have regard to "working assumptions" or an assessment of what a former officer would "normally" be earning at a particular age.

7.27 Not only does this conclusion on the part of Supperstone J flow from a strict application of regulation 37; it also flows from a particular conclusion about the nature and purpose of the statutory scheme as a whole in *Simpson*. Indeed, it is this conclusion which seems to me to be perhaps the most important part of the reasoning of the judge in *Simpson.* So, in paragraph [32] of his judgment, Supperstone J continued:

"I also reject [counsel for the Home Secretary's] submission that the purpose of an injury pension is to make up for the financial consequences of an enforced inability to continue operating as a member of a police force. Regulation 7(4) is the gateway into the benefit, defining disablement. Regulation 7(5) is concerned with the assessment of loss of earning capacity. The degree of a person's disablement should be determined by reference to the degree to which *his* (emphasis added) earning capacity has been affected as a result of the injury. The focus is on the individual's earning capacity which, in the case of a former officer, may or may not involve the police officer's salary. As Ouseley J noted in *Crocker*, the task in assessing earning capacity is to assess what the interested party is capable of doing and thus capable of earning. It is not an assessment of whether somebody would actually pay him to do what he is capable of doing. There is nothing in the language of section 1(2)(c) or regulation 7(5) to suggest that the life entitlement provided by regulation 43 is affected by reference to the age when the individual would have been compulsorily retired from the police service or from state pension age on the basis of an assumption that the

individual would no longer be in gainful employment "but for" the duty injury and his earning capacity can therefore be assessed as nil."

7.28 This seems to me to represent a fundamental and deep-rooted finding about the nature and purpose of the statutory scheme, including that disability is a 'gateway' to the benefit; that once that gateway has been passed through, the officer is compensated for the impact of the injury on what he is capable of doing (irrespective of whether, realistically, he would have been employed to do what he is now incapable of doing); and that such an entitlement is designed to be a life entitlement.

7.29 Indeed, the first sentence of the quotation set out at paragraph 7.27 above is a clear rejection of the argument that police injury awards under the Regulations are simply about compensating a former officer for a loss of earning capacity arising from his no longer being able to work as a police officer. This is the view that many may previously have taken (and understandably have taken on the basis of the terms of regulation 6(5) of the 2006 Regulations).

7.30 The statement that "the focus is on the individual's earning capacity which, in the case of a former officer, may or may not involve the police officer's salary", and the focus on the officer's own particular loss of capacity, approaches the issue of an individual's earning capacity as one which is closely associated with their actual disability and detached from assumptions about what salary would be, or is, actually payable to them in the employment market. Viewed in this way, it is not surprising that Supperstone J reached the view that the life entitlement to a benefit conferred by the Regulations is not to be considered as "affected by reference to the age when the individual would have been compulsorily retired from the police service or from state pension age on the basis of an assumption that the individual would no longer be in gainful employment". It seems tolerably clear to me that this represents a finding that age[245] is to be viewed as an irrelevant consideration for the purpose of the Regulations.

7.31 In particular, *Simpson* represents a finding that there should not be any different approach adopted for those 65 and over in the review process undertaken under the Regulations: this was described by Supperstone J (in the course of exchanges on the question of the costs of the proceedings) as "the fundamental issue to be determined" in the case. Much of the debate since then has really focused on what this means and what its implications should be. I address this

[245] And the consequent assumptions flowing from attainment of a certain age, such as the working assumptions referred to in the Home Office's evidence in the *Simpson* case (see paragraph 7.19 above).

further below.

Was Simpson *correctly decided?*

7.32 The *Simpson* judgment does provide the benefit of some additional clarity and, understandably, it is relied upon strongly by former officers and those representing them. If it is applied in this jurisdiction, the result should be precisely the same as that envisaged by Supperstone J as appropriate in England, namely that there should be no change to the banding of a former officer merely because he has reached age 65 (or beyond) unless and until his physical condition has substantially altered or there has been some actual change, in the present, to his employment prospects (unrelated merely to his attainment of a particular age).

7.33 There is, unsurprisingly, a case to be made that *Simpson* was not correctly decided. The case made by the Home Office was far from fanciful. In summary, it relied upon the definition of degree of disablement (the relevant concept for the purpose of consideration on review) and the emphasis in the Regulations of this concept being tied to a loss of earning capacity flowing from the duty injury. As a matter of common sense, so the argument runs, a police officer's uninjured earning capacity *must* alter when he reaches the age when he would have to retire from the police or take up his state pension. It is foolish to ignore this, since it will (or at least may) result in a police officer receiving much more by way of injury pension than he could have expected to receive at that age had he not been injured, when he, like all his colleagues of a similar age, would have retired. This, the Home Office argued, reflects the fact that the scheme as a whole is designed to compensate officers who are *unfit for police service* through injury – but who would no longer be serving as police officers at that age even if they had not been injured. In essence, the injury pension is simply, and more accurately, a loss of police earnings award.

7.34 The judge in *Simpson* could, perfectly rationally, have accepted this analysis. However, he did not. This was partly based on the conclusions in earlier authorities (discussed below) that something must have changed in the present in order for substantial alteration of the pensioner's degree of disablement to have arisen since the last review, in order to warrant a further reassessment of his uninjured earning capacity. But it would have been equally rational for the judge to have said that the attainment by the officer now, in the present, of the relevant CRA or SPA was that real change of circumstance. The real nub of the case is why the judge concluded that this was not relevant.

7.35 It seems to me that there are two broad answers to why the judge reached that important conclusion, namely that the Regulations do not appear to concern themselves with age at all and, secondly, more broadly, that the Regulations go beyond mere compensation for loss of earnings from police employment.

7.36 As to the first of these points, as the judge repeatedly emphasized, the Regulations themselves say nothing about the officer's age. If age was to be a key consideration in the way in which the awards for which they provide were to be administered, one would have expected that to be expressed. There is obviously some commonsense force to this point.

7.37 As to the second point, and more importantly in my view, Supperstone J felt that the Home Office's analysis of the nature of police injury awards, as being entirely directed to loss of earning capacity[246], was not supported by the Regulations. On balance, I think he was correct in this conclusion for a variety of reasons, only one of which is clearly expressed in the *Simpson* judgment itself. That is that the Regulations expressly provide for entitlement to the various awards for life. If the real purpose of the Regulations was to focus on compensating an officer only until his police career would have ended in any event, one might have expected that to have been spelt out more clearly in the Regulations. The provision for life entitlement[247] certainly gives a contrary impression.

7.38 Relatedly, it is not without significance in my view that the police officer's injury award[248] contains a component referred to as an injury <u>pension</u>. One could obviously object that this is simply a misnomer, and that a better reflection of what the Regulations actually provide for in substance[249] would be a regular payment called a 'loss of earning award' [redacted]. But that is not how the Regulations are currently expressed. For the moment, they provide for a "pension" which arises on permanent disablement, which suggests a payment which continues in the usual way beyond retirement age.

7.39 This analysis is also supported when one has regard to the other pensions and awards which are payable under the Regulations, such as those payable to adult survivors, children or adult

[246] Which in turn was directed to loss of one's job as a police officer through injury.

[247] Found in regulation 40(3) of the 2006 Regulations.

[248] Payable under regulation 10 of the 2006 Regulations.

[249] Having regard to regulation 6(5) and the importance of degree of disablement in the calculation of the amount of the injury pension to which the officer is entitled.

[250] [redacted]

dependent relatives. There is no suggestion that these should either stop or be reduced at the time when the deceased officer would have reached CRA or SPA, so that he would no longer have been supporting the recipients to the same degree had the injury not occurred and had he continued in police service. Why then should a different approach be taken to the award which is payable to the officer himself in the event that he does not die as a result of the duty injury?

7.40 There are also two further important clues within the Regulations which suggest that an injury pension is not directed solely towards compensation for loss of earning capacity as a police officer. The first is that the officer's degree of disablement is only one of the components which goes to determine the amounts which will be payable to him, the others being his average pensionable pay and the period in years of his pensionable service. One must be careful not to elevate the degree of disablement to a position of relative importance which is not accorded to it in the Regulations themselves[251]. I believe Supperstone J considered, or would consider, that the concept and definition of degree of disablement or loss of earning capacity was being given undue prominence in the Home Office's understanding of the entire purpose of the Regulations, when it is but one cog in a much larger wheel.

7.41 The second is that Band 1 encompasses a degree of disablement from 0% to 25%. What this means, as a matter of logic, is that an officer with 0% degree of disablement – that is to say, with no loss of earning capacity at all – is still entitled to an injury pension under regulation 10. Although this will be lower than the amount which would be payable if he had a higher degree of disablement, he will still be eligible for an injury pension. Viewed in this way, it is impossible to say that the regulation 10 award is designed solely (or perhaps even principally) to compensate for loss of earning capacity.

7.42 There are also a further two factors which point to age not being a necessary, or relevant, consideration in relation to the determination of degree of disablement under the present statutory regime. First, as I have discussed at some length in Chapter 4, it would be quite possible for the SMP to determine the officer's degree of disablement without reference to the detailed calculations they are presently asked to consider (including use of ASHE, which introduces an element of age-related consideration). In other words, the assignment of an appropriate band to

[251] And, particularly, in the table in paragraph 3 of Schedule 3 to the Regulations.

the officer could be undertaken by the SMP without reference to his age[252] or, more particularly, the average earnings for his age; and, as I have indicated, it seems to me that this may well be a better way of approaching the issue.

7.43 Second, the proviso in regulation 6(5) makes plain that, where a former officer is receiving treatment as an in-patient at a hospital as a result of an injury on duty, he is to be deemed to be totally disabled. The result of this is that an officer could[253] be well over 90 years of age and, provided he was hospitalized as a result of his injury on duty, would be considered to have a degree of disablement of 100% and eligible to a significant injury pension as a result. This is the case even though, on the Home Office or ASHE approach, the officer would in reality have little or no loss of earning capacity, since in real terms he would not have been working at age 90 even had the duty injury not occurred.

7.44 As I have said, a judge could rationally have reached a different conclusion in *Simpson*, simply on the basis that all of the matters I have just referred to had to be read subject to the definition of 'degree of disablement' as being a measure of loss of earning capacity, which most accurately expressed the true purpose and intention of the Regulations and which, in practical terms, is obviously related to the former officer's age. Nonetheless, on balance, I consider that the better construction of the Regulations, looking at them in the round, is that adopted by Supperstone J in *Simpson*, namely that the purpose of an injury pension under regulation 10 of the 2006 Regulations is about more than simply making up "for the financial consequences of an enforced inability to continue operating as a member of a police force".

7.45 It is also significant in my view that the Home Office did not choose to appeal the judgment in *Simpson*, as it could well have done, but rather simply withdrew the guidance it had issued in accordance with the judgment given by the Court.

7.46 Moreover, the opportunity would have been available to the Home Office in the later *Slater* case (either at first instance or on appeal) to argue that *Simpson* had been wrongly decided or that its effects should be limited. Again, it did not choose to do so. This suggests to me that the Home

[252] Or, at least, without direct reference to his age in the way in which the guidance impugned in *Simpson* required. For instance, in assessing what degree of loss of earning capacity resulted from the duty injury, as opposed to other independent factors, the SMP could consider (as he would in any event under the current approach to apportionment) whether the officer's loss of function giving rise to reduced earning capacity was as a result of conditions related to old age.

[253] For instance.

Office's own legal advisers may have felt there were limited prospects of persuading another court that *Simpson* should not be followed or should be overturned[254].

7.47 Given that the reasoning in *Simpson* also hangs together with some earlier English authorities, including at Court of Appeal level, this is a further reason why I consider it unlikely that a court would be persuaded now that it should be treated as wrongly decided.

7.48 In summary, I consider that there are extremely limited prospects of a court in Northern Ireland – and certainly a court at first instance – determining that the *Simpson* case was wrongly decided. Although the Court of Appeal in Northern Ireland could conceivably be persuaded that this was the case, for the reasons given above I also consider that this is unlikely. Furthermore, it would likely take a period of 1-2 years to reach a position where the Court of Appeal was giving judgment on the issue in this jurisdiction, which is an additional time period for which the current pressures on the system[255] simply will not allow.

7.49 Accordingly, my advice to the Board is that it ought to proceed on the basis that the judgment in *Simpson* represents an authoritative statement on the purpose and effect of the English Regulations and, by necessary implication, the 2006 Regulations which are in materially identical terms.

What Simpson *didn't decide*

7.50 The main difficulty with this is discerning not only precisely what the judgment in *Simpson* means, but exactly how it should be applied. The judge in *Simpson* had the luxury of being able to quash the relevant Home Office guidance as not reflecting the terms of the Regulations – but without having to explain clearly with what that guidance should be replaced. A large part of the problem flowing from the *Simpson* litigation is that there remains a policy vacuum in which there is no clear guidance as to how reviews should be approached, particularly for those officers at CRA or SPA, in light of the judgment of the Court.

[254] Although, as I have also made clear elsewhere in this report, the relatively low numbers of IOD awards in England and Wales are likely to mean that any increased expenditure arising out of the implications of the *Simpson* judgment there are limited; and this is accordingly not necessarily an issue of high priority for the Home Office.

[255] Described in Chapter 1: see, for instance, paragraphs 1.15 to 1.19.

7.51 In particular, this has led to a difference of expectations between officers and the Policing Board as to what *Simpson* really means and what it required by way of alteration of the Board's approach to age 65 reviews. The result, as I have discussed in some detail in Chapter 9, is that the Board considered itself to have been acting in compliance with the *Simpson* judgment and not to have been applying the unlawful elements of Home Office Circular 46/2004, whereas the officers' representative organisations took precisely the contrary view.

7.52 There remains an important issue of controversy over how reviews should be approached for those officers over 65 in cases where it is accepted that there *has* been a substantial alteration of their degree of disablement (unrelated to their age) and, specifically, whether in these circumstances it is still appropriate to use ASHE figures for the purpose of calculating the percentage disablement figure.

7.53 For instance, what if the condition of an officer aged 75 has substantially worsened so that, even on the *Simpson* approach, it is appropriate to determine that there has been a substantial alteration in his degree of disablement so triggering the ability to make "a further quantum decision on the present degree of disablement"[256]? In such circumstances, can the ASHE approach be used? If so, although the officer's condition has worsened, and one would therefore expect that his award might increase, the contrary might in fact be the case. Indeed, he may be worse off following such a review than a former officer in otherwise similar circumstances whose condition has *not* worsened. This is because, even though the officer whose condition has worsened could perform less in the workplace, the difference between his injured earning capacity and his uninjured earning capacity (based on ASHE average figures for his age bracket) might have lessened since the last review. Put simply, if there is a *Simpson*-compliant reason to undertake a further calculation, can the ASHE age-related figures be used?

7.54 There is no clear answer provided to this question in the *Simpson* judgment; but it seems to me that the approach which is most consistent with the reasoning in the *Simpson* judgment is that ASHE figures cannot be used in such circumstances. This is because the use of ASHE for an officer who is aged over 65 is to import age-related considerations back into the calculation in circumstances where (as discussed above[257]) *Simpson* appears to set its face against this.

[256] See paragraph [28] of the *Simpson* judgment, quoted at paragraph 7.21 above.
[257] See paragraphs 7.24 to 7.30.

7.55 Although the ASHE figures reflect the reality of the employment market for those over 65, they still clearly reflect some of the "working assumptions" which Supperstone J felt had no place within the scheme of the Regulations; and return to the approach of asking what an officer would "normally" be earning at a particular age[258], rather than simply focusing on the individual officer's own lack of capacity. Put another way, use of ASHE in calculations for officers aged over 65 will result in their entitlement being "affected by reference to the age when the individual would have been compulsorily retired from the police service or from state pension age"[259], when Supperstone J felt that there was no support for this in the Regulations. Although procedurally, the Policing Board would be able to assert that officers aged over 65 were being treated in precisely the same way as those under 65 – insofar as a calculation using ASHE figures may be common to each (in relation to either injured earning capacity and/or, particularly in the case of post-CRA reviews, uninjured earning capacity) – substantively there would be a difference in outcome because of the in-built assumptions about post-SPA earnings which are contained within the ASHE figures.

7.56 Accordingly, taking the reasoning in *Simpson* to its logical conclusion, it seems to me that a challenge to the continued use of ASHE figures for those officers who have reached age 65 might well be successful. If such figures continue to be used for officers over age 65, this will virtually inevitably be the next line of challenge by an aggrieved officer.

7.57 The same concerns about the legality of using ASHE figures in a detailed calculation to quantify percentage disablement do not arise in relation to officers aged under 65 since the in-built assumptions about reduction in earning capacity flowing from attainment of a particular age do not arise (or, at least, do not arise in such an acute way as they do when SPA comes into play). I do not consider there is anything unlawful about using ASHE up to age 65[260] but, as I have set out above, I would recommend a move away from this approach for a variety of reasons. Moreover, if, as I have also concluded, there is a considerable risk of successful challenge to the continued use of ASHE for officers aged over 65[261], this would be a further reason for abandoning its use for those aged under 65. This is because there must be some value in a consistent methodology being applied to those aged under and over 65 generally, and particularly so in light of the decision in *Simpson*.

[258] The 'normal' position being expressed through the ASHE figures.

[259] See paragraph [32] of the *Simpson* judgment, set out at paragraph 7.27 above.

[260] And am aware of no authority where it was considered that the use of ASHE in such circumstances was unlawful.

[261] Even where a *Simpson*-compliant reason for conducting a further calculation has arisen.

Slater (English High Court, February 2014)

7.58 *Slater* was the follow-up case to *Simpson.* [redacted]

7.59 [redacted] Accordingly, not only that portion of the Home Office Circular referring to state pension age has been found to be unlawful – but also the portion applying a similar approach to former officers who have not yet reached state pension age but have reached a relevant compulsory retirement age. Again, the Circular had advised an approach which assumed that those officers would no longer be employed as police officers in an assessment of their uninjured earning capacity and that it would be appropriate therefore for their awards to be reviewed.

7.60 The result in *Slater* has been viewed as a further success by officers' representative organisations. It is difficult to give a clear view, however, on what the implications of the decision in *Slater* are, given that the relevant authorities compromised the case and there is therefore no written judgment from the court.

7.61 The Board has asked the Department for some assistance as to the implications of the *Slater* litigation[262]. This arose particularly because NIRPOA were suggesting that the Government's

[262] See, in particular, Mr Gilleece's letter to Ms Montgomery of the Department dated 13 June 2014.

concession in the *Slater* case "means the blanket National Average Earnings figures cannot be used to cut pensions". The Department's response[263] indicated as follows:

> "Following the judicial review by John Slater, the Home Office agreed that the Simpson judgment would apply to reviews at compulsory retirement age (CRA) as well as reviews at state pension age (SPA). The Home Office withdrew the section of its Guidance dealing with reviews at CRA as the court had decided that there should not be an automatic review of pension at CRA. The Home Office did not comment on the use of ASHE figures as the basis for assessing a person's earning capacity. On 2 April the Home Office clarified in its email to the National Attendance Management Forum that the withdrawal of Annex C did not cast any doubt "*on the use of ASHE as a relevant comparator for use in reviews and calculating awards where the force considers it justifiable and appropriate*."
>
> The Department issued similar guidance to that of the Home Office withdrawing the guidance provided in circular 6/2007. The Department considers it appropriate to use ASHE figures where it enables the Board to assess a person's earning capacity."

7.62 I have also been provided with a copy of the email of 2 April 2014, to which the Department refers, which is from a Home Office official. It states:

> "Clarification on withdrawal of Annex C of Home Office Circular 46/2004:
>
> In February the Home Office announced… that it was withdrawing Annex C of the Home Office Circular 46/2004 which related to conducting reviews at compulsory retirement age. This followed a legal challenge in which the court decided that there should not be an automatic review of pension entitlements at the compulsory retirement age. The Home Office conceded that the Annex should be withdrawn but did not comment on the use of the National Average Earnings (or what is now known as Annual Survey of Hours and Earnings – ASHE) as the basis for assessing an individual's earning capacity.
>
> We have become aware that forces are being asked to reconsider cases where ASHE has been used in light of the withdrawal of Annex C of Home Office Circular 46/2004. It is of course for forces to consider how and when to conduct reviews. However, the Home Office do not consider withdrawal of Annex C casts any doubt on the use of ASHE as a relevant comparator for use in reviews and calculating awards, where the force considers it justifiable and appropriate."

[263] See the letter from Ms Montgomery to Mr Gilleece of 21 August 2014.

7.63 This 'clarification' seems to me to be fairly unhelpful. Firstly, because it contains the important qualification "where the force considers it justifiable and appropriate" without giving guidance as to when it will be justifiable and appropriate to continue to use the ASHE figures; and, secondly, because it fails to explain precisely what is meant by "the use of ASHE as a relevant comparator for use in reviews…". Does this mean that ASHE will be used only for calculation of the officer's injured earning capacity? Or does it also mean that, rather than using the officer's police salary in order to calculate his uninjured earning capacity, an ASHE figure will now be used instead? If the latter, does this not amount to continuing to work on the assumption that the officer would have retired from the police at CRA which the Court found in *Simpson* was one of the 'working assumptions' which had no expression in the Regulations?

7.64 The approach of the Home Office in the *Slater* case, and the 'clarification' issued subsequently, has only served to confuse the issues more in my view. It is disappointing that the representative organisations and the authorities appear to have completely different takes on the reasons for, and significance of, the outcome in *Slater*. This is the type of confusion to which the current policy vacuum to which I have referred merely adds, although it also seems clear that the approach of the Home Office in continuing to use ASHE, if confirmed in guidance, may well still be the subject of further challenge[264].

7.65 I have been provided with the papers in the *Slater* case and they certainly contained a challenge to the use of the national average earnings survey figures, which the claimant contended "fails to follow the wording of the statutory test in directing the decision maker away from the individual circumstances of the former police officer whose case is being reviewed". It is unfortunate that there is no clear way of determining, at this remove, the precise basis of the agreement that the consent order referred to above should be granted.

7.66 The Home Office appears to take the position that all that the Court in *Slater* was disapproving of was the holding of automatic reviews at CRA. Given the approach in *Simpson*, it is virtually inevitable that the Court would have held that the automatic holding of reviews at CRA (as at SPA) was unlawful; and this is no doubt (at least part of) the reason why the Home Office did not oppose the grant of relief by the Court. However, the Home Office also appears to consider that the withdrawal of the further portions of Annex C to the Circular has no further effect. I am sceptical of this but, in the absence of a written judgment from the Court or an agreed statement

[264] See paragraph 7.56 above.

of the basis for the consent order, the outcome in *Slater* is of little assistance. One is left, instead, to try to discern the implications of the reasoning in *Simpson*, which I have discussed in some detail above.

Other relevant case-law

W (Northern Irish Court of Appeal, 1997)

7.67 One of the earlier Northern Ireland cases in this field is the case of *W*[265]. This was a statutory appeal from an appeal tribunal constituted under the 1988 Regulations. The appellant was a serving police officer, who claimed to be entitled to a gratuity and an injury pension under Regulation B4 of the Regulations. The Police Authority for Northern Ireland refused to accept claim, notwithstanding the issue of a certificate in favour by the Chief Medical Officer to the RUC, and appealed to the tribunal. The tribunal dismissed appeal and appealed to the High Court on the ground that the tribunal was wrong in law in its findings and the course which it took in dismissing appeal.

7.68 It was not in dispute that the appellant was entitled to receive an ill-health award under Regulation B3, as it was accepted that retired on the ground that was permanently disabled. The question was whether was entitled to an injury award under Regulation B4, *i.e.* whether was permanently disabled as a result of an injury received without own default in the execution of duty as a member of the RUC.

7.69

[265] Unreported, Northern Ireland High Court (Carswell LCJ), (ref).

7.70 [redacted] The question for the judge was the extent to which the Authority, and later the Tribunal, could reach a view on this medical question (which was referred to the SMP under regulation H1(2)) which was contrary to what was stated in the SMP's certificate.

7.71 Carwsell LCJ held on this issue as follows:

> "The Police Authority is bound to accept the medical authority's certificate as final on the issue whether the disablement is the result of an injury received in the execution of duty. The Authority has not been given any power to refer a certifier's finding on such an issue back to him for reconsideration, in the absence of agreement by the claimant (see Regulation H3(2)). Subject to the procedural question, which I shall consider in a moment, it ought to have accepted the certificate as final, unless the parties had agreed to invoke Regulation H3(2). It was accordingly wrong in my view to reject the appellant's claim for an injury award."

7.72 This is one of a line of authority which emphasizes the finality of the medical authority's certificate and the inability of the decision-maker (then the Police Authority, now the Board) to go behind it in the absence of an appeal against it or a proper referral back. The same reasoning applied also to the tribunal considering an appeal against the (non-medical) decision of the Police Authority. In this instance, the tribunal had heard medical evidence for itself and taken its own view on the medical question. As to that, Carswell LCJ held as follows:

> "When the matter came before the tribunal -- which it would ordinarily do only if the medical decision had gone against the claimant, for otherwise the Police Authority is bound to accept it -- it misconstrued its powers when it decided to hear evidence from the medical examiners and determine the medical issue for itself. In my opinion [redacted] submission was correct, and it should have declined to hear medical evidence, except in so far as it might have been directed to showing that the evidence which had been before the certifier was inaccurate or inadequate. Even then, if it had been so satisfied, its proper course was then to refer the certifier's decision back to him for reconsideration in the light of such facts as the tribunal might direct. This conclusion is supported by the decision in Ead v Home Secretary [1954] 1 All ER 386, in which the Divisional Court held on similarly worded regulations that the appeal committee of quarter sessions (the analogue of the tribunal under the Regulations) was right to decline to review the conclusion of the medical referee. The court took the view that the committee was correct in holding that its jurisdiction was limited to deciding whether or not

the evidence before the referee was inaccurate or inadequate, so that it could determine whether or not it should refer the matter to him for reconsideration.

The tribunal plainly thought that the evidence before the medical examiners was insufficient to ground their conclusion, but it misconstrued its powers when it held at page 14 of its judgment that it was empowered to hear the evidence which had been before the medical authority and to adjudicate thereon. In my opinion in reaching this conclusion the tribunal failed to give proper weight to Regulation H6(2). It could, if it thought fit, have taken evidence adduced on behalf of the Police Authority tending to show that the medical examiners did not have before them certain material facts -- on the lines of the matters put to the doctors in cross-examination -- and then referred the decision back to the Chief Medical Officer. I consider that the tribunal took a mistaken view of its powers when it decided that the doctors could be called and then held that the Chief Medical Officer could not properly have answered question (c) in the affirmative."

7.73 The reasoning here is clear, namely that the referred medical questions are a matter for the medical authority alone, in the absence of a proper appeal or a referral back; and that the medical evidence which the Board or a tribunal on appeal from the Board may consider otherwise, at least in relation to a mandatorily referred question, relates only to the question of whether there should be referral back.

Ex parte Y (English High Court, 1999)

7.74 *R v* *ex parte Y*[266] was an early case of an applicant claiming an IOD award on the basis of stress arising out of disciplinary proceedings against him[267]. The applicant was a serving with the until he was retired on medical grounds on . This was as a result of a medical examination carried out by a doctor who diagnosed the applicant as suffering from and and certified that he was disabled from performing the ordinary duties of a member of the police force and that the disablement was likely to be permanent.

[266] Unreported, English High Court (Latham J), .

[267] There has been a range of further authorities since in relation to this issue, including *R v Kellam, ex p South Wales Police Authority* [2000] ICR 632; *R* (*Stunt) v Mallett* [2001] EWCA Civ 265, [2001] ICR 989; *South Wales Police Authority v Morgan* [2003] EWHC 2274 (Admin) (discussed below); in this jurisdiction, *Re Starritt & Cartwright's Application* [2005] NICA 48; and, more recently, *Merseyside Police Authority v Police Medical Appeal Board* [2009] EWHC 88 (Admin). However, this is not an issue which has arisen for detailed consideration in the course of the present review.

7.75 His illness, the applicant said, was occasioned by the stress which he suffered arising out of protracted disciplinary proceedings which had been taken against him. [redacted]

7.76 The authority refused to pay an injury award and, indeed, refused to even refer the case to the force medical officer (the selected medical practitioner) on the basis that it thought that the applicant's "medical condition is not consistent with a properly conducted discipline inquiry". Although the applicant's claim was dismissed on the basis of the appeal mechanism within the 1988 Regulations providing an adequate alternative remedy, the judge nonetheless went on to consider the legality of the authority having refused to refer the case to the SMP on the basis that the argument was of importance not only in this case but more generally.

7.77 Latham J began by concluding, in fairly stark terms, that the decision-making mechanisms established by the 1988 Regulations, involving the reference of certain medical questions for determination by the SMP, was unsatisfactory. He said:

> "There is no doubt that the scheme of part H of the Regulations[268], read literally, appears to abdicate to the medical practitioner responsibility for deciding issues in relation to which he is not necessarily appropriately qualified. In the present case, an answer to the question of whether the disablement is the result of an injury received in the execution of duty is a question of mixed fact and law. On other occasions, the question may well involve disputed issues of fact. It is not clear why the medical practitioner is considered the appropriate person to deal with these issues. There is merit in the contention that these are issues best determined by the Police Authority, subject to appeal to the Crown Court, which would provide a perfectly workable scheme.
>
> I do not, however, consider that the Regulations permit anything other than a literal reading. The questions which are to be referred to the medical practitioner under reg H1(2) are unambiguous, and the answers given by the medical practitioner are, pursuant to reg

[268] The equivalent of Part 4 of the 2006 Regulations.

H1(4) to be final. The answers will determine the claim, subject to the rights of appeal. This produces an unsatisfactory result. If the claimant is dissatisfied with the answers of the medical practitioner as to the facts upon which his opinion is based, he has an appeal to the Crown Court; if he is aggrieved by reason of the medical practitioner's medical opinion, then he has an appeal to the medical referee; if he is aggrieved by the medical practitioner's conclusions as to law as to whether or not an injury was received in the execution of duty, it would appear that he can only challenge the matter by way of judicial review. That would be one of the special circumstances in which this Court would intervene because the statutory scheme provides no effective remedy. As for the Police Authority, there is no mechanism which would enable it to correct any errors of fact upon which a medical practitioner may have based his opinion, unless they could be dressed up as issues of law, which again could be the subject matter of judicial review.

Despite the unsatisfactory consequences of the literal interpretation, I can see no way in which better sense can be made of the provisions without rewriting them." [underlined emphasis added]

7.78 As to whether the authority was entitled to reach a view that the relevant injury was not an injury sustained in the execution of duty, without referring that issue to the SMP, the Court held as follows:

"It follows that once a Police Authority applies its mind to a claim by someone such as the applicant that he is entitled to an injury pension, it is required pursuant to reg H1(2) to refer the relevant questions to a duly qualified medical practitioner. In any ordinary use of the word, the authority is "considering" the matter even if it decides to refuse the claim. It will then have refused to "admit a claim" so as to engage a right of appeal under reg H5. A claim to an injury pension is a claim to receive "as of right" an award: this, it seems to me, is simply a phrase used to differentiate between awards which are discretionary and awards which are mandatory…

It follows that a Police Authority is not entitled to pre-empt the answers of the medical practitioner by coming to adverse conclusions as to fact, or law, in relation to the claim in order to avoid reference to the medical practitioner…"

Morgan (English High Court, October 2003)

7.79 The *Morgan* case – *R (on the application of South Wales Police Authority) v Morgan and Lewis-Davidson*[269] – was a case concerning a police officer[270] suffering from permanently disabling depression which had three causes, only one of which, overwork, was a duty injury. Stanley Burnton J concluded that the Medical Referee had wrongly failed to distinguish between a duty injury and non-duty injuries in his assessment of the degree of disablement attributable to the duty injury. This is a case describing in stark terms what has become known as the approach of 'apportionment'.

7.80 The judge drew the distinction between, on the one hand, whether under regulation A13 a duty injury caused or substantially contributed to permanent disablement – which was the causal, or entitlement question arising under regulation H2(2)(c) – and, on the other hand, the degree of disablement which was relevant to the calculation of the quantum of gratuity and pension to be paid to those entitled to an injury award, which was the question under H2(2)(d).

7.81 The relevant degree of disablement for the latter question was not determined by the fact that the duty injury had been found to have caused, or substantially contributed to, permanent disablement *at the entitlement stage*. This is the distinction I have drawn at paragraphs 4.89 and 4.90 above as to the different assessments of causation which have to be undertaken in relation to initial entitlement (did the duty injury cause or substantially contribute to permanent disablement?)[271] and quantification of the award to which the officer is entitled, whether initially or on review (to what degree has his earning capacity been affected as a result of the duty injury?)[272].

7.82 At paragraphs [20]-[21] the judge commented as follows:

> "Regulation A13 requires disablement to be deemed to be the result of an injury if that injury substantially contributed to the disablement. It follows that provided [the second defendant's] depression caused by overwork was a substantial cause of his disablement, his disablement was the result of an injury received in the execution of his duty. It is understandable, therefore, that the Police Authority conceded that the answer to the

[269] [2003] EWHC 2274 Admin.

[270] The second defendant; the first defendant, from which the case generally receives the short name by which it is referred to, being the relevant medical practitioner.

[271] Now encapsulated in regulations 7 and 29(2)(c) of the 2006 Regulations.

[272] Now encapsulated in regulations 6(5) and 29(2)(d) of the 2006 Regulations.

question posed in regulation H1(2)(c) was affirmative. However, this case concerns not the question required to be answered by regulation H1(2)(c), but that posed by regulation H1(2)(d).

… If there are separate injuries, of which one is a duty injury and one is not, the degree of disablement falls to be assessed in relation only by reference to the affect of the former on the earning capacity of the person in question. Regulation A12(3) refers to the result of the duty injury only. Regulation A13 does not require a different result: it applies to the question whether disablement is the result of an injury, not the degree to which earning capacity has been affected as a result of a duty injury."

7.83 The judge went on to consider that the ability, under (the equivalent of) our regulation 6(5) to apportion the effect of different injuries on an officer's earning capacity was sensible, giving the following examples in paragraph [22] of his judgment:

"To take an extreme example, if a person lost the use of his left hand as a result of a duty injury, he would suffer from a disablement as defined in reg A12(2). If, while on leave subsequently he lost the use of his right hand as a result of a non-duty injury, it would not be rational to determine an injury award on the basis of the loss of earning capacity resulting from the combined injuries. Less obvious examples may be given, as where a loss of mobility caused by a broken leg, suffered in the execution of duty, and sufficient to cause disablement, is exacerbated by a subsequent non-duty injury to the same leg. In one sense, the disablement is the same before and after the second injury, ie an inability to run or to walk normally; but in my judgment only the first injury is relevant to the assessment of the degree of disablement."

7.84 These were straightforward examples of several different injuries. In paragraph [25] of his judgment, however, Stanley Burnton J turned to the more complex question of a case where there was merely one injury but several causes:

"… it does not follow that, where the disability is the result of a single injury, received partly in the execution of duty and partly not, the same applies… The Regulations distinguish between injury and disability. It does not follow from the proposition that only the degree of disability resulting from the relevant injury is to be assessed that a similar approach is required where there is only a single injury, but it has multiple causes, or it has been exacerbated by non-duty matters, as where a disabling depression is the result of a predisposition to depressive illness or concurrent causes of stress… In such a case, there is

> no real distinction between injury (depression) and disablement, and in accordance with normal principles of causation it is sufficient if the duty cause is a substantial cause of the injury."

7.85 The judgment of Stanley Burnton J in *Morgan* was discussed and applied in the soon following case of *Crocker*, to which I now turn.

Crocker (English High Court, December 2003)

7.86 The *Crocker* case – *R (South Wales Police Authority) v The Medical Referee*[273] – also dealt with the issue of apportionment; and is a very important authority in terms of how some of the more difficult apportionment questions should be approached. The claimant, the South Wales Police Authority, sought to quash a decision of the defendant Medical Referee that Mr Crocker, a police officer who was retired on 3 March 2002, had lost *all* earning capacity as a result of an injury received in the execution of his duty. The authority contended that only 40% of Mr Crocker's earning capacity had been lost because of the duty injury, which the SMP accepted. Mr Crocker appealed against that decision to Dr Anton, the defendant IMR.

7.87 The Police Authority claimed that on the medical evidence accepted by the IMR, Mr Crocker had some, or some potential, earning capacity, and that the IMR's decision had been wrongly affected by his assessment of how employers would react to the officer's medical history, a factor irrelevant to the assessment of earning capacity. Importantly, the Police Authority also claimed that the IMR had failed to apportion Mr Crocker's loss of earning capacity between the injury sustained in the execution of his duty (stress at work) and an earlier injury which had not been sustained in the execution of his duty (a chemical imbalance in the brain). It was this latter injury, in combination with his stress at work, which, the claimant said, had led to Mr Crocker's schizoaffective psychosis.

7.88 One of the key issues in the case was the extent to which an SMP or IMR conducting a review had to look to the future, an issue which arose on the facts of the *Crocker* case because, although a view was taken that Mr Crocker was at that time "effectively unemployable", there were a number of comments in the medical evidence about the possibility of his condition improving over the next number of years to the extent that he could work again. Part of the authority's case seems to have

[273] [2003] EWHC 3115 Admin. (Mr Crocker, the officer concerned, was represented as an interested party in the case).

been that these future possible improvements had not been adequately taken into account and that there was an undue focus purely on the Mr Crocker's current presentation.

7.89 In paragraphs [32]-[33] of his judgment, Ouseley J said this:

> "The starting point is Regulation A12(3). It requires an assessment of how earning capacity "has been affected", not of how it is likely to be affected. There is a degree of contrast with the language of the assessment of permanent disablement which does look forward. It requires someone disabled to be, or to be "likely to be", permanently disabled as at the time when the assessment is made. The same review provision applies to both, but it shows that the assessment of how earning capacity has been affected is not to be answered by reference even to what is likely to eventuate, let alone by reference to any more remote possibilities. This makes sense in the context of legislation which provides for reviews of both the degree of disablement and of the effect of that disablement on earning capacity. These are reviews which can be undertaken as occasion requires rather than at mandatory but necessarily arbitrary intervals.
>
> The concept of earning capacity might be thought itself to contain an element of future potential, but the more normal connotations of capacity are of what is now achievable, to be contrasted with actual achievement, rather than with what in the future might become achievable." [underlined emphasis added]

7.90 Accordingly, on the basis of the text of the relevant Regulations, and the purpose behind the review system (which permitted circumstances to be re-examined when required by reason of change of circumstance) the judge was of the view that an assessment of earning capacity should focus on present capacity ("what is now achievable") rather than speculating on what might happen in the future.

7.91 This approach is further explained in paragraphs [38]-[39] of the judgment:

> "I regard the review provision as the key. There is no need to speculate. As and when circumstances dictate, the pension is reviewed. The doctors, the Medical Referee, and Selected Medical Practitioner can, and here did, indicate when they thought that that should happen. Such a power is wholly inconsistent with a need to forecast the future and then to test the calculation of the forecast against the actual out turn on a number of occasions. The means by review of correcting the pension when circumstances change obviates the need not just to speculate, but to speculate and review as well.

> I also consider that some of the problems which can arise if the Medical Referee and Selected Medical Practitioner were required to look beyond the present are not ones which it would have been left for a doctor to resolve. The way in which one might assess someone who is now wholly without earning capacity, but who was likely to regain 50% in two years, and might regain 75% in four years, is a problem for a rather different expertise. The Regulations make no provision for that sort of calculation, which, I believe, they would have done had that been intended. Instead, they have provided for the simple mechanism of review without arbitrary limit on the number or intervals between them."

7.92 Accordingly, the assessment on review was simply a matter of considering what the officer's earning capacity was at that time. The matter was pithily stated by the judge in paragraph [42] of his judgment:

> "The task, in my judgment, in assessing earning capacity is to assess what the interested party is capable of doing and thus capable of earning. It is not a labour market assessment, or an assessment of whether somebody would actually pay him to do what he is capable of doing, whether or not in competition with other workers."

7.93 The judge later turned to the issue of apportionment. In paragraph [51] of his judgment, he accepted that there was a distinction in the Regulations between the provision dealing with entitlement (our regulation 7) and that which deals with the degree of disablement (our regulation 6(5)) – the distinction drawn by Stanley Burnton J in the *Morgan* case and discussed above. On the issue of apportionment generally, the judge in *Crocker* said this[274]:

> "I accept that there is a distinction in the Regulations between A13, which deals with entitlement, and A12(3), which deals with the degree of disablement. There was no dispute but that Mr Crocker had suffered a duty injury which caused, or substantially contributed to, his disablement. He was, therefore, entitled to an injury award. The degree of disablement then fell to be examined under A12(3). A12(3) contains two components which are relevant to the answers to the question in H2(2)(d), which deals with the degree of disablement. First, the degree of disablement has to be assessed. This is assessed by the degree of loss of earning capacity. Second, it is necessary to determine the degree to which that loss is the result "of an injury received without his own default in the execution of his duty as a member of a police force." It is necessary, therefore, to discount the effect of any non-qualifying injury and any other cause whether classified as an injury or not. This could

[274] At paragraphs [51]-[53] of the judgment.

either be a non-duty injury, or an injury received through his own default, or some other cause. The focus of the Regulations is therefore not exclusively on contrasting duty and non-duty injuries. Although the latter are the most obvious example of a second cause of the loss of earning capacity, I do not consider that they represent the limits of what has to be disregarded for this purpose. I consider that what has to be disregarded is every factor which has affected the loss of earning capacity other than the duty injury.

… The policy behind this requirement for apportionment is simple: an injury award should not be paid other than for injury received and earning capacity lost in the execution of the officer's duty. The assessment process should thus discount the effect of any other factors. It looks for the loss caused by the duty injury and nothing else.

So the question to be answered under the Regulations is what degree of the loss of earning capacity is the result of the duty injury? This seemingly simple question can give rise to acute problems of causation, even though the question of whether or not there has been a disability which the duty injury has caused, or substantially contributed to, has already been answered. A separate issue of causation arises at the apportionment stage, because the entitlement stage can be passed on the basis of an injury which substantially contributes to, but is not the whole cause of, disablement."

7.94 So, the policy behind the requirement of apportionment is explained, as is the question to be answered under the Regulations. Ouseley J immediately recognized, however, that this "seemingly simple question" can give rise to very difficult issues. A number of these issues are discussed, and a course plotted through them, in paragraphs [54] to [61] of the decision of Ouseley J. Although this is a lengthy quotation from the judgment, I am not sure that I can do better than simply setting it out extensively again for consideration:

"[54] The position may be simple enough at least conceptually, where there are two separate causes of the loss of earning capacity, each making a contribution to the total loss. That is clearly the situation envisaged in the Home Office guidance. The position is more complex where the total loss is attributable to the effect of a duty injury on an underlying condition, which may or may not be an injury within the definition in the Regulations, and which by itself may or may not have contributed to a separate loss of earning capacity. An officer might suffer from a condition which would not affect him or his earning capacity until aggravated by a duty injury. These may be circumstances, for example, in which an officer in better physical shape would have avoided any injury or loss of earning capacity.

[55] I do not consider that the question of apportionment should be answered by trying to attribute a share of the loss of earning capacity to any underlying condition which, on its own, had not, or did not, cause a loss of earning capacity. The loss should be attributed wholly to the duty injury which, albeit because of that underlying condition, has directly caused the loss of earning capacity.

[56] I consider that this approach reflects the statutory question which has to be answered. It is a straightforward approach which fits with the process for making the assessment, which is comparatively informal, and one in which doctors, and not lawyers or philosophers, make the decisions. Although it may be objected that the straw which broke the camel's back may enable its owner to attribute the whole of its breakdown to a small additional load, it does at least reflect the fact that up to that moment there had been no loss of capacity for work. As the object of the Regulations is to enable an award to be made for the loss of earning capacity caused by the duty injury, it is important to see whether the underlying illness or condition had actually caused any such loss before it was affected by the duty injury.

[57] I also think that this avoids the anomalies which could arise if underlying causes of the duty injury, or of its extent, could be brought in when, in reality, it is the impact of the duty injury upon it which has caused the loss of earning capacity…

[59] Before apportionment can arise each factor must separately cause some degree of loss on its own. Although one may be able to analyse this case as a "two injury case", or "one injury exacerbating another", that is not at root a medical question. It is a causation question, or a question of where responsibility should be attributed for the loss of earning capacity in the context of these Regulations. The attribution of responsibility is the question at root so often in causation cases. It is a legal question whether if the first factor has not separately caused an injury, it is nonetheless to be treated as part of the cause of loss. Both components may pass the "but for" test, a test which is neither always necessary, nor usually a sufficient condition, for responsibility.

[60] Applying that approach here, if the stress at work caused the whole of the loss of earning capacity, whatever that degree of loss might be, it does not matter that the loss was caused by the impact of the duty injury on the underlying chemical imbalance in the brain. It is irrelevant that the stress would have had no effect upon the loss of earning capacity if there had been no underlying chemical imbalance. On the other hand, if that underlying condition by itself had already caused a loss of earning capacity, which was then worsened as a matter of degree by the stress at work, the duty injury, increasing the loss of earning

capacity, the total loss would fall to be apportioned between the two causes.

[61] It is not a question of whether that loss would have happened in due course as a result of the underlying condition alone, but a question of whether it actually had caused part of the loss of the earning capacity. There is a distinction to be drawn between the position where a duty injury and other causes, such as another injury, each separately cause a degree of disablement and loss of earning capacity, and the position where the non-duty injury has caused no loss of earning capacity itself but which the duty injury has exacerbated thereby causing the loss. Any other approach would, in this context, involve asking not what degree of disablement and loss was caused by the duty injury, but instead asking what caused the illness or injury."

7.95 Ouseley J made the point that he had not been referred to any of the many and, at times, difficult cases in the law of tort on causation of loss and liability[275]. He felt that the IMR was unlikely to have felt assisted by considering such authorities, that being "an inappropriately sophisticated approach to take in a case of a Medical Referee decision"; although he regarded his conclusions as consistent with the approach which the common law would apply in any event and "a broad and… simple approach in the context of this legislation and its purpose". Ouseley J further considered his approach to be consistent with what Stanley Burnton J had said in paragraph [25] of his judgment in *Morgan*[276].

7.96 It is impossible to summarise the reasoning and effect of Ouseley J's judgment in just a few sentences (which is why I have set out portions of it above *in extenso*). However, it seems clear that this is a strong endorsement of the principle that where a duty injury is the 'straw which broke the camel's back', it should still be regarded as the factor causing the loss of earning capacity; unless it is clear that the pre-existing condition had itself, independently and before the duty injury, resulted in an extant and actual loss of earning capacity.

Pollard (English High Court, February 2009)

7.97 The *Pollard* case – *R (Pollard) v The Police Medical Appeal Board and West Yorkshire Police Authority*[277] – is an important case in relation to the slightly different concept of 're-visiting causation'. Ms Pollard was a former police officer who challenged a decision of the PMAB made on

[275] See paragraph [62] of the judgment.
[276] See paragraph 7.84 above.
[277] [2009] EWHC 403.

25 October 2007 under the English Regulations (on an appeal brought by her against a decision by an SMP), which held that her degree of disablement was assessed at nil per cent as "her current disability was not causally related to the index incident in 1974". This overturned earlier decisions of an SMP which were given on 5 March 1987 and 11 May 1988, when the claimant was assessed as 51% disabled as a result of an injury that she incurred in 1974 when she was on duty as a police woman.

7.98 The index incident had happened in 1974 when the claimant had injured her back in the course of effecting the arrest of a woman who was violent and drunk. Her back condition continually worsened and, in 1985, she was diagnosed by a consultant orthopaedic surgeon as having a degenerative lumbar disc; before being medically discharged from the police in 1986. Shortly after this she was assessed by two SMPs. The first determined that the disability was the result of an injury on duty and assessed the degree of disablement at 51%, recommending that the authority should reconsider whether the degree of disablement had altered in a further year's time. This led to a second SMP considering the claimant's case in 1988. He made an identical assessment but did not recommend that the degree of disablement be reassessed, indicating that he did not consider there was any possibility of recovery and therefore he did not need to see the claimant again.

7.99 In 2003 Ms Pollard was told by the authority that her disablement would be reviewed. She was then seen by a Dr Freeland as SMP, who concluded that she was suffering from chronic back lumbar spondylosis and cervical spondylosis, but that the degree to which her earlier capacity was affected was 0%. He accepted that the claimant had a significant level of current functional disablement but he reached the conclusion which he did because he did not consider that there was any sufficient link between the claimant's injury on duty and the level of disability. He recorded that he could find no evidence in the file that the *index incident* made a significant contribution to the development of the lumbar disc degeneration.

7.100 The claimant appealed against Dr Freeland's determination. There was criticism of the paperwork available to him since he reached his decision on the claimant's case without sight of the her occupational health records or a full set of her general practitioner records. By the time the case was referred to him, the authority no longer had any paper or computer records of any contact with the occupational health units (although the SMPs who had earlier considered her case had seen these). In addition, when Dr Freeland reached his conclusion part of the claimant's

personnel file was available but it was incomplete; and her general practitioner records were only available from 1979 onwards. No further records were available by the time the case came before the board.

7.101 Amongst other things, the claimant also contended in her appeal to the PMAB that it was not open to the SMP to question the claimant's eligibility for an injury on duty award in the first place. The Board considered the case in October 2007. It comprised a consultant occupational health physician and a consultant in orthopaedic medicine. Notwithstanding divergent medical evidence, in particular a report relied upon by the claimant (which indicated that she had degenerative changes *brought on by* the duty incident) the orthopaedic specialist member of the board concluded that there was no evidence of tissue injury which could have been the consequence of a strain of the lower back sustained when on duty in 1974. The Board also concluded that there was no evidence of catastrophic injury to her back; and that the index incident would have given rise only to a soft tissue injury which would have resolved shortly afterwards. Accordingly, although the Board accepted that Ms Pollard's level of functional disability was probably such that she could not work part-time, they also concluded that this was not attributable to the index injury but, rather, to constitutional degenerative change.

7.102 The claimant challenged the Board's decision by way of judicial review. Unusually, neither the PMAB nor the relevant police force was represented in the proceedings[278]. *Inter alia*, the claimant contended that the SMP decisions in 1986 and 1988 conclusively decided that her lumbar disc degeneration and spondylosis was caused by a duty injury; and that, when the matter was referred back to the SMP in 2003 under regulation 37, the only question for the SMP to determine was question (d) within regulation 30(2), namely the degree of the disablement of the officer. She further contended that neither the SMP nor the Board had in fact answered this question but that, instead, they had reached a decision that the degree of disablement was 0% by a direct consideration of question (c), namely whether her undoubted lumbar disc degeneration was caused by an injury on duty, carrying out a fresh investigation into the question of causation on the merits.

7.103 At paragraph [28] Silber J referred to the issue of apportionment in the following terms: "The language of reg 7(5) may in some cases require the SMP to apportion the loss of earnings capacity between a duty injury and one or more non-duty injuries or conditions."

[278] See paragraphs [3] and [4] of the judgment of Silber J.

7.104 At paragarphs [34] to [40] Silber J set out what he considered the Regulations required of SMPs:

> "In my view it is necessary to consider what the regulations require of SMPs when they are faced with a claim that a police officer has been injured on duty.
>
> In my view the regulations show five matters. They are:
>
> 1. There are four issues to be considered by the police authority and the SMP to whom it is referred when faced with an application that an officer is permanently disabled. They are set out in reg 30(2). They can be paraphrased as follows:
>
>   (a) whether the person concerned is disabled;
>   (b) whether the disablement is likely to be permanent;
>   (c) whether the disablement is the result of an injury received in the execution of duty; and
>   (d) the degree of the person's disablement.
>
> 2. The decision of the SMP on the issues referred to him are final, subject to appeal or a review or reference back (see reg 30(6)).
>
> 3. Where an injury pension is payable, the police authority shall at suitable intervals, in the words of reg 37, consider whether: "the degree of the pensioner's disablement has altered; and if after consideration the police authority find that the degree of the pensioner's disablement has substantially altered, the pension shall be revised accordingly."
>
> 4. Regulation 37 <u>does not enable an authority to reach a different conclusion on the issues specified in reg 30(2)(a), (b) and (c) but only on the matters set out in reg 30(2)(d) which relate to the degree of the person's disablement</u>. Indeed, this is made clear in the closing words of reg 30(2) which I have emphasised.
>
> 5. <u>Therefore the question of whether a person is entitled to an injury award cannot be considered on a reg 37 review and so the board has no authority to cancel an injury award on the basis that the disablement was not the result of an injury received in the execution of duty</u>." [underlined emphasis added]

7.105 Applying those principles, Silber J went on to state that he was satisfied that the decision of the Board contained an error of law, as it sought to go outside the matters which it had jurisdiction to consider, and that the Board was at fault when it was considering whether the disablement of the claimant was a result of an injury received in the execution of her duty.

7.106 The import of this decision is that, on a review, the only question which may be considered is the extent of the degree of disablement. Whilst this may embrace the concept of apportionment discussed above (apportioning the loss of earnings capacity between a duty injury and one or more non-duty injuries or conditions), it does not permit the questions of whether the officer concerned is disabled, whether that disablement is likely to be permanent or, crucially, whether the disablement is the result of an injury received in the execution of duty to be reconsidered.

Turner (July 2009, English High Court)

7.107 The *Turner* case – *R (Turner) v The Police Medical Board*[279] – is another significant case in relation to the question of re-visiting causation, which followed closely on the heels of *Pollard*. The claimant, Mr Turner, was a serving police officer in the Metropolitan Police from 24 October 1984, until he retired on grounds of ill health on 24 September 2001. When he retired from the police force in 2001 he had lost all effective hearing in his left ear; and this was the ground for his retirement. He worked subsequently as a salesman and as a police intelligence analyst, but later gave this up to work as a full‑time carer for his disabled wife.

7.108 There were a number of potential or speculated causes for the loss of hearing in his left ear. He had engaged in a limited amount of rough shooting as a young man with a rifle on occasions, from about the age of 16 to the age of 25, doing so on occasions without ear protectors. The other potential causes of the hearing loss all, one way or the other, related to his employment with the police. He engaged in firearms training as a police officer on some occasions without ear protectors. When a police cadet, he was also subject to an assault in June 1984 when he was kicked in the head and became unconscious. He was again subject to a less serious assault in 1990 when he was hit on the left side of the head. The only other possible cause of the damage to the ear, not supported by any medical evidence, was possibly some genetic condition or other medical cause unconnected to his work.

[279] [2009] EWHC 1867 (Admin); [2009] All ER (D) 183 (Aug).

7.109 However, following his retirement, he claimed an injury benefit and, notwithstanding contested positions taken on both sides with the benefit of medical reports, there was an appeal by the claimant to a medical referee, Dr Bray, whose decision was that Mr Turner was entitled to a 100 per cent pension, on the basis that he resolved the issue of causation favourably to the claimant (that is to say, he considered the loss of hearing was entirely caused by duty injury).

7.110 The judge commented that "very sensibly" there is a review mechanism within the Regulations (regulation 37 of the English Regulations) and stated that: "That express provision for occasional review or reassessment of the pension is obviously intended to look at whether there have been any alterations for the worse or the better since the original final assessment by, in this case, Dr Bray" [underlined emphasis added] [280].

7.111 There was a review conducted by an SMP, Dr Porrit, in 2007. She issued a certificate on 18 October 2007 finding that the claimant's degree of disablement had "substantially altered". She reached this conclusion by deciding that the claimant could do one of three jobs, such that she considered there was a reduction in the potential loss of earnings as a result of the injury. The three jobs relied upon were: police station reception manager, local authority neighbourhood coordinator and junior manager. The job of junior manager was that which in fact Mr Turner had performed, with minor adjustments, at all times until his retirement and it was not in dispute that the pension could and should be assessed by reference to his earning capacity as a junior manager.

7.112 The claimant, however, challenged the suggestion that he was able to work in either of the other two capacities, which were jobs which had been available (it was not in dispute) in 2002. He appealed to the Police Medical Appeal Board, saying that he was physically unable to perform those two jobs and was supported by a medical report from a Dr Fairley. The PMAB accepted the claimant's case on appeal in respect of the jobs, i.e. that the SMP had erred in relation to the two other jobs, so that it became common ground that the appropriate comparator was the job of junior manager.

7.113 However, the PMAB reopened the whole question by reconsidering the report of Dr Bray from 2001. It recorded that it was "not convinced by the arguments [Dr Bray] put forward that the police firearms training and the physical injuries were necessarily the major causes of the left hearing loss". The Board went on to find that "the contribution of any hearing loss directly related

[280] See paragraphs [9] and [10] of the judgment.

to the index incident at the very best could only account for some 50 per cent of his overall disability". It thus reduced the claimant's pension by 50 per cent from 28% reduction in earning capacity, which was the undisputed reduction, to a 14% reduction in earning capacity (by virtue of the applicability of the new 50% divisor), thus reducing him to a lower band award.

7.114 The claimant submitted, *inter alia*, that the PMAB "had no business interfering with or reviewing or reconsidering" the decision of Dr Bray, whose decision in 2001 was final and had not been appealed; and, secondly, that the question for the PMAB was whether the degree of disablement had altered in the interval since the last 'final' determination. He relied on both the *Crocker* case and the *Pollard* case. In particular, the parties appeared to agree[281] that Silber J had effectively decided the very point in *Pollard*.

7.115 Burton J commented[282] that:

> "It does appear to me to be fundamental in this case that Regulation 30 and Regulation 37 have an entirely different role. Regulation 30 may well raise questions of great difficulty, such as here in relation to causation… It is important from the point of view of disputes such as pension entitlement that a decision once made should be final if at all possible, and that is what is provided by these Regulations. But causation questions having been put aside, it is clearly fair both for the police force and for the community that someone who starts out on a pension on the basis of a certain medical condition should not continue to draw a pension, or any kind of benefit, which is no longer justified by reason of some improvement in his condition, or, of course, the reverse." [underlined emphasis added]

7.116 Accordingly, there was and is a tension between the requirements of finality and the possibility of review where some change in circumstance no longer justifies the level of award. At paragraph [23] of the decision, having referred to the *Crocker* case, Burton J considered that "it would not justify starting from scratch in relation to earning capacity, because in the present case what is posed under Regulation 37 is the degree if any to which the pensioner's disablement has altered". He continued:

> "By virtue of Regulation 7(5) that would include a scenario in which the degree of the pensioner's disablement had altered by virtue of his earning capacity improving. To that

[281] See paragraph [20] of the judgment.
[282] In paragraph [21] of the judgment.

> extent, therefore, the approach by the SMP, had it been justifiable, which it was not because it had been overturned on appeal by the PMAB, would have been relevant. [Counsel for the claimant] accepts that if there is now some job available which the defendant would be able to take by virtue either of some improvement in his condition or in the sudden onset of availability of such a job then that would be a relevant factor. But it would all hang on the issue of alteration or change after "such intervals as may be suitable". There is no question of relitigation and, of course, suitable intervals suggests that this is not a matter which should be revisited every year, nor is it."

7.117 Ultimately, the judge concluded[283] that the PMAB had impermissibly revisited the original decision of Dr Bray without addressing the task imposed upon them by regulation 37 of the English Regulations; and that, had they applied the test under regulation 37, they would have found that the degree of Mr Turner's disablement had not altered. Finally, he agreed with and endorsed the similar approach taken by Silber J in *Pollard*, although making clear that he would have reached (and in fact did reach) the same conclusion entirely independently.

Laws (English Court of Appeal, October 2010)

7.118 The *Laws* case – *Laws v Metropolitan Police Authority*[284] – is a significant case in this field since it is a decision of the English Court of Appeal, rather than merely a judgment of the High Court at first instance, and it has been referred to and followed in subsequent cases (including *Simpson*). It also concerned what could and could not be reconsidered in the course of a review under the Regulations.

7.119 The claimant, Mrs Laws, joined the Metropolitan Police as a uniformed police officer in 1995 at the age of 27. In October 1997 she was assaulted and injured while attempting to handcuff a suspected person. Contemporaneous reports evidenced that the claimant sustained a slight soft tissue injury. Her condition deteriorated and she sought an injury award under the Police Pension Regulations 1987. In February 1999, the claimant was retired from service with the defendant on ill health grounds having been assessed as permanently disabled from performing the ordinary duties of a member of the police force. A number of pension review assessments were made of the claimant, which assessed that her degree of disablement was 85%. At this stage it was clear that the claimant was suffering from psychiatric difficulties but the IMR considered that these

[283] See paragraphs [24] and [25].
[284] [2010] EWCA Civ 1099; [2010] All ER (D) 135 (Oct).

flowed directly from her physical injuries. In 2002 and 2005, Mrs Laws' degree of disablement was maintained at 85% on reviews.

7.120 In 2008, Mrs Laws' next pension review was conducted by an SMP. At this stage she had several co-existing conditions. The Police Authority put forward three comparative jobs which, on a reduced hours basis, led the SMP to assess the claimant's degree of disablement at 25%. The claimant appealed. The appeal was heard in March 2009 by the Police Medical Appeals Board (PMAB). The appeal was dismissed. In the course of this the SMP who had reduced the degree of disablement was questioned about the reduction and relied, *inter alia*, on the fact that the claimant now had multiple pains; that the review process was now more robust than previously and that in each and every case a job comparison study is undertaken; and that "degree of disablement is fundamentally related to the impact upon earnings capacity, rather than the clinical condition *per se*".

7.121 The PMAB described its duty as being to assess the current impact upon earnings of the index event and then to determine the degree of disablement as defined in the Police (Injury Benefit) Regulations 2006. The PMAB noted that there was an inconsistency between the injuries described by the claimant under questioning and those recorded at the time of the injury and that the claimant reported symptoms unrelated to the incident and which were unsupported by clinical findings. The PMAB assessed that the claimant had the competencies to carry out the roles put forward by the defendant, having considered her mobility, level of functioning and further studies. The PMAB upheld the 25% disablement assessment. The claimant then sought judicial review of the PMAB's decision.

7.122 In November 2009 the claimant succeeded in her challenge, the judge (Cox J) finding, *inter alia*, that the PMAB had incorrectly applied the Regulations and had erroneously conducted a fresh assessment of the claimant's degree of disablement and its causes, rather than assessing whether the degree of disablement had substantially altered since the last review as required by the Regulations. In particular, the judge held that a review under regulation 37 did not allow for any redetermination of the merits of any earlier decision of either the SMP or the PMAB. The Police Authority appealed.

7.123 The Authority submitted, *inter alia*, that the starting point for the SMP or PMAB was to consider the pensioner's current degree of disablement and compare it with the previous

assessment. The requirement to treat the previous assessment as 'final' did not oblige the PMAB to accept all the clinical judgments made in or for the purpose of the previous assessment; it meant only that the PMAB had to accept that the pensioner was entitled to whatever pension was then fixed. Further, the Authority submitted that it was open to the PMAB to arrive at its own assessment on a review by a process of reasoning which might involve a frank departure from earlier clinical judgments.

7.124 The Court of Appeal (Laws, Munby and Black LJJ) unanimously dismissed the appeal, finding, in summary, that the first instance judge had been correct in her approach to the Regulations. The requirement of finality in regulation 30(6) of the Regulations[285] did not merely apply to the percentage figure arrived at to represent the pensioner's disability. It applied also to the decision of the SMP on the question or questions referred to him. That included the essential judgment or judgments on which the decision was based. That was confirmed by regulation 31(3) of the Regulations[286], which required the PMAB's decision to be in the form of a written report. The premise under regulation 37(1) of the Regulations in relation to reviews was that the defendant, via the SMP or PMAB, was to consider whether the degree of the pensioner's disablement had altered and that meant that the earlier decision as to the degree of disablement was to be taken as a given. The only duty was to decide whether, since that review, there had been a change, not merely in the outturn figure but also on the substance of the degree of disablement. It was not open to the SMP or PMAB to reduce a pension on a regulation 37(1) review by virtue of a conclusion that the clinical basis of an earlier assessment was wrong and equally it was not open to them to increase a pension in such a way.

7.125 The lead judgment was given by Laws LJ. In paragraphs [16]-[19] he rejected the suggestion on the part of the Police Authority that a review was essentially a fresh determination of the effect of a duty injury on a former officer's earning capacity, in which the SMP was free to reconsider earlier clinical judgments. He held that this approach "cannot sit with the language of the Regulations" since the requirement of finality in relation to an SMP's certificate and report did not relate only to the percentage figure arrived at but "must include the essential judgment or judgments on which the decision is based". The result was concisely described by the judge in paragraph [18] of his judgment, in discussing the role of the SMP to consider whether the degree of the pensioner's disablement has altered:

[285] Regulation 29(5) of our 2006 Regulations.
[286] Regulation 30(3) of our 2006 Regulations, relating to a report and certificate of an IMR.

> "The premise is that the earlier decision as to the degree of disablement is taken as a given; and the duty – the *only* duty – is to decide whether, since then, there has been a change: "substantially altered", in the words of the Regulation. The focus is not merely on the outturn figure, but on the *substance* of the degree of disablement." [underlined emphasis added; italicized emphasis in original]

7.126 As we have seen in the discussion of the *Simpson* judgment, this construction of the Regulations' requirements in relation to reviews is one which has been applied and developed in later cases. In short, what Laws LJ appears to me to have been saying is that a review must carefully and solely focus on whether something has changed since the last certificate. It cannot reconsider issues determined before the last certificate was issued or in the course of it being issued; nor matters which arose before then. The purpose of a review is to look simply at what, if anything, has changed since the last determination.

7.127 In turn, the purpose of this approach (and part of the reason why it is to be considered the correct interpretation of the Regulations), is "to provide a high level of certainty in the assessment of police injury pensions" (see paragraph [19] of the judgment). Clinical findings are not to be revisited outside the strict statutory mechanisms of appeal or referral back (or, exceptionally, judicial review). It is not the purpose of a regulation 37 review[287] to fix earlier errors – whether in favour of the pensioner or the authority. Thus, Laws LJ also held that:

> "It is not open to the SMP/Board to reduce a pension on a Regulation 37(1) review by virtue of a conclusion that the clinical basis of an earlier assessment was wrong. Equally, of course, they may not *increase* a pension by reference to such a conclusion; and it is right to note that Mr Butler, appearing for the Board, voiced his client's concern that so confined an approach to earlier clinical findings might in some cases work to the disadvantage of police pensioners. Strictly that is so. But the clear legislative purpose is to achieve a degree of certainty from one review to the next such that the pension awarded does not fall to be reduced or increased by a change of mind as to an earlier clinical finding where the finding was a driver of the pension then awarded."

7.128 This construction may seem surprising, namely that a mistake in an earlier assessment and certificate cannot be corrected if picked up by another (or even the same) doctor at a later review. However, the judgment of the Court of Appeal in *Laws* is clear that the Regulations' focus on

[287] Or, in the case of the 2006 Regulations in Northern Ireland, a regulation 35 review.

certainty has this result. The legislative scheme could be drafted differently – with a wider remit available on review to correct erroneous conclusions reached at an earlier stage[288] – but that is not what the Court found the current scheme to provide for. Barring appeal or referral back within the terms of the Regulations (or successful challenge by judicial review), a certificate and the conclusions on which it is based are final and cannot be revisited on review.

7.129 Taking as read, then, that a review must only focus on what has changed since the last determination or review and cannot 'start from scratch', what type of changes can lead to a conclusion that the pensioner's degree of disablement has changed. *Laws* provides some assistance on this issue, although not a detailed discussion. Firstly, it seems clear that there must be some "actual" change in the pensioner's circumstances. This can be gleaned from paragraph [21] of the judgment:

> "[Counsel for the Police Authority] submitted that if (as I would hold in agreement with the judge) it was necessary to find an actual change in the degree of the claimant's disablement, the Board properly so found. The difficulty is that while no doubt the Board had regard to events occurring since 2005, it is clear that they also revisited earlier conclusions..." [underlined emphasis added]

7.130 Again, the emphasis is on something actually having changed, or an event actually having occurred, since the last certificate or review. What then constitutes such a change or event? An interesting supplementary argument in the *Laws* case – on which the Court of Appeal disagreed with the judgment of Cox J – was whether the attainment by the claimant of a law degree since her previous review was a relevant new circumstance which might affect her present earning capacity. The judge had effectively held that the only change which might be relevant for the purposes of a review was a change in the *injury* which had been sustained in the execution of duty[289].

7.131 On this issue, Laws LJ held at paragraph [27] as follows:

> "Here I think the judge was in error. She has approached Regulation 7(5) as if it meant that the pensioner's earning capacity is fixed, unaffected by anything save the duty injury. That would be highly artificial, and is not what the Regulation contemplates. Its terms allow for

[288] Or conclusions which seemed correct at the time and have only been shown to be erroneous through subsequent developments.

[289] See Laws LJ's description of Cox J's judgment on this issue at paragraph [26] of his judgment.

> the obvious possibility that the pensioner's earning capacity may vary from time to time by force of external factors (and of course one pensioner's earning capacity will differ from another's). Objectively, the extent to which a pensioner remains disabled from work by reason of a duty injury must be capable of being affected by the acquisition of new skills. The question under 7(5) then is, what is the impact of the duty injury on the pensioner's earning capacity as the SMP/Board find it on the facts before them. I have some sympathy with the view, forcefully urged by [counsel for Ms Laws], that if matters such as his client's law degree were taken into account, there would be a "disincentive to acquiring new skills" (skeleton argument paragraph 7.3). But the regime is designed to meet objective need; and Burton J in *Turner* was surely right to observe at paragraph 23 that "[b]y virtue of Regulation 7(5) that would include a scenario in which the degree of the pensioner's disablement had altered by virtue of his earning capacity improving"." [underlined emphasis added]

7.132 This is an interesting passage, since it makes clear that events which might alter earning capacity in a relevant way for the purpose of a review are not restricted to an improvement or deterioration in the injury alone but can include "external factors" such as the acquisition of new skills (a matter relied upon by the Home Office in *Simpson* in relation to the external factor of age, but without success).

Crudace (English High Court, February 2012)

7.133 The *Crudace* case – *R (Crudace) v Northumbria Police Authority*[290] – was a precursor to the *Simpson* litigation. In *Crudace*, the claimant was a former police inspector of the Northumbria force who was required to retire from the police force as a result of ill health in March 1991 when he was aged 47. When he retired, the claimant applied for and was awarded a Band 3 injury pension on the grounds that he had been permanently disabled as a result of an injury on duty and had a degree of disablement between 51% and 75%. In April 2008, the authority wrote to the claimant stating that it intended to conduct a review of his injury pension in April 2009 when he reached the age of 65. The authority subsequently wrote to the SMP inviting him conduct a review. The letter expressly referred to Home Office Circular 46/2004 and recommended that the claimant be placed in the 0-25% degree of disablement banding on the grounds that he had reached state pension age and no longer had an earnings capacity for the purpose of the Regulations. There was no medical examination of the claimant.

[290] [2012] EWHC 112 (Admin); [2012] All ER (D) 50 (Feb).

7.134 In February 2009, the SMP reduced the degree of disablement to Band 1, stating that:

> "I am advised that the Pensioner has reached State Retirement Age and therefore, in accordance with the Regulations, the Pensioner "no longer has an earning capacity for the purposes of the Police Injury Benefit Regulations". Northumbria Police has also determined that there is no "cogent reason" why the Pensioner should not, therefore, be considered to have 0% loss of earnings capacity and as a consequence of their injury, and should be placed in the 0-25% Degree of Disablement banding. I confirm that the above recommendations are consistent with the Regulations and I attach a revised Statement of Injury."

7.135 The claimant invited the police authority to agree, under regulation 32 of the English Regulations, to refer the matter back to the SMP to reconsider the February decision. In December 2010, that request was refused. Mr Crudace then sought judicial review. He contended that the SMP's decision had been fatally flawed as a matter of law and that he did not have the benefit of a review conducted in accordance with regulation 37 of the Regulations. He submitted, *inter alia*, that the 'cogent reason' test proposed in the Guidance was wrong in law; that it was not in regulation 37 and inappropriately sought to change both the burden and standard of proof as part of the review; it did not advise the SMP to ask whether there had been an alteration in the degree of disablement of the pensioner since the pension was awarded and/or the last review and failed to advise the SMP to ask himself whether any alteration was substantial.

7.136 The English High Court (Judge Behrens sitting as a judge of the High Court) allowed the application for judicial review. The general conclusion reached by the judge was that the test proposed by the Home Office Guidance was not in accordance with what was required by the relevant regulation (regulation 37). Part of the claimant's case was a challenge to the Home Office Guidance itself. Although the judge was conscious of the fact that the Home Secretary was not participating in the proceedings to defend Circular 46/2004 (and was aware that she *was* doing so in the *Simpson* case, shortly to be heard) he nonetheless felt able to express a conclusion on the lawfulness of the test applied in the Guidance[291].

7.137 The judge's conclusion is set out at paragraph [32] of his judgment, which is in the following terms:

[291] See paragraphs [30]-[32] of the judgment.

> "I have come to the conclusion that [counsel for Mr Crudace's] submissions on this point are correct. In my view the test proposed in the Guidance is not in accordance with reg 37. The SMP is not entitled to conclude that "in the absence of cogent reason" the pensioner's uninjured earning capacity is reduced to zero when he attains the age of 65. Rather, if the Police Authority refers the matter to him for review when the pensioner attains the age of 65 he must carry out a proper review in accordance with reg 37. Thus he must consider whether the degree of the pensioner's disablement has altered and if so whether the alteration is substantial."

7.138 Most of the more detailed reasoning in the judgment is devoted to other issues – such as who the correct defendant to the proceedings ought to be[292], whether time for bringing the application for judicial should be extended[293], and whether the subsequent decision not to refer the claimant's case back for reconsideration was made by the correct person and/or on the correct basis[294]. The reasoning on what is (for present purposes) the central point, namely the basis on which the SMP's re-banding of Mr Crudace at age 65 was unlawful, is fairly limited. It might well be that the judge was conscious that the same issues were to be considered in further detail shortly by another judge of the High Court in the *Simpson* case.

7.139 However, Judge Behrens did indicate that the submissions made on behalf of Mr Crudace were correct. It seems to me that he was there referring back to the submissions he had recorded shortly before in paragraphs [28]-[29] of his judgment, in the following terms:

> "[Counsel for Mr Crudace] has a number of criticisms of the Home Office Guidance which are set out in detail in paras 18 – 21 of his skeleton argument. He reminds me that under reg 7 the degree of disablement is the difference between the pensioner's uninjured and actual earning capacity. There is no justification for assuming (or assuming in the absence of cogent reasons) that his uninjured earning capacity is reduced to nothing at the age of 65. He points out that, in fact, there are a substantial number of people over the age of 65 in the labour market. The fact that a pensioner might choose to retire at the age of 65 does not mean that he has no earning capacity at that age. Thus he submits that the equation between "normal retiring age" and a diminution to zero of a pensioner's uninjured earning capacity involves flawed logic.

[292] See paragraphs [62]-[70].
[293] See paragraphs [71]-[82].
[294] See paragraphs [83]-[96].

> He also submits that the "cogent reason" test proposed in both sets of Guidance is wrong in law. It is not in reg 37 and inappropriately seeks to change both the burden and standard of proof as part of the review. Thus he submits that the Guidance seeks to divert the SMP from the test in reg 37. It does not advise the SMP to ask whether there has been an alteration in the degree of disablement of the pensioner since the pension was awarded and/or the last review and fails to advise the SMP to ask himself whether any alteration he finds is substantial."

7.140 The key flaws identified in the Home Office Circular in *Crudace*, therefore, appear to me to be the adoption of an *assumption* that a person who has attained age 65 has no earning capacity when that might well not be the case and, relatedly, the requirement on the part of a former officer in receipt of an injury pension to provide a cogent reason as to what that is not so in his case. The nub of the *Crudace* authority therefore seems to me to be a requirement on the part of the SMP in the course of a review to look at the officer's individual case without applying any such assumption (what the judge refers to in paragraph [32] of his judgment as "a proper review"). *Crudace* is of assistance on this point but gives little guidance as to what "a proper review" should look like or entail, other than a restatement of the statutory test that what must be considered is whether the degree of the pensioner's disablement has altered and, if so, whether the alteration is substantial. Some further assistance on this issue can obviously be found in the case of *Laws* (discussed above) and more recently in the *Simpson* judgment.

Trendell (English High Court, February 2012)

7.141 Although perhaps not one of the central authorities touching upon issues which arise in this review, it is also worth mentioning the case of *Trendell – Trendell v The Police Medical Appeal Board*[295] – which is another relatively recent decision of the English High Court in relation to the application of the English Regulations.

7.142 Mr Trendell, the claimant and appellant, served as a police officer in the Metropolitan Police Service from 1982 until his retirement on grounds of permanent disability in 1997. Mr Trendell's disability was caused by two injuries sustained in the execution of his duty. At the time of his retirement, Mr Trendell was in receipt of the top scale point of a sergeant's pay scale and had an exemplary disciplinary record.

[295] [2012] EWHC 341 (Ch).

7.143 On his retirement, Mr Trendell became entitled to an injury pension. He was assessed by the SMP to have a 30% degree of disablement. In 2000, Mr Trendell's degree of disablement was first reviewed but was not found to have substantially altered and his injury pension remained the same. In June 2006, his degree of disablement was reassessed by the then current SMP and his degree of disablement reduced to 13%. Ultimately, (after an earlier decision of the PMAB was quashed on judicial review and the matter remitted back for a further hearing), the PMAB upheld Mr Trendell's appeal and found that his degree of disablement was 49.26%.

7.144 Mr Trendell then made a complaint to the Pensions Ombudsman under the provisions of section 146 of the Pension Schemes Act 1993. By letter dated 1 July 2011, the Pensions Ombudsman decided not to uphold Mr Trendell's complaint and he appealed against the PO decision to the High Court under section 155 of the 1993 Act. The two central grounds of challenge on which he relied were that his degree of disablement as found by the Board was too low because (a) his pensionable police pay should have included a competency related threshold payment (CRTP) which had been available to sergeants as a pay enhancement since 1 April 2003; and/or (b) his earning capacity was assessed by reference to inappropriate statistics, namely particular figures in the 2008 ASHE Survey[296].

7.145 The judge dispensed relatively easily with the issue of the CRTP payment, since it was not available to the claimant at the time of retirement and was therefore not considered relevant to his uninjured earning capacity. The more interesting element of the judgment for present purposes is the discussion of the use of ASHE figures.

7.146 As to the general approach to the assessment of degree of disablement, the judge said this (at paragraphs [12]-[13] of his judgment):

> "Where the assessment of the degree of disablement is made at the same time as, or immediately after medical retirement, no conceptual difficulty arises. The decision maker has to assess the person's current earning capacity and compare it with the rate of pay earned when last serving. The loss in earning capacity is then expressed as a percentage of

[296] The Board used the figures in respect of males in *full time* work, including overtime, reduced *pro rata* for a person only able to work 30 hours a week. Mr Trendell did not complain about the finding that he was able to work 30 hours a week; but contended that the ASHE figures for the hourly rate for *part time* work, multiplied by 30, should have been used to assess his earning capacity (or, alternatively, the ASHE figures for full time work, *excluding* overtime). The effect of using the wrong figures was, Mr Trendell complained, to overstate his earning capacity.

that rate, which will determine into which category of the degree of disablement in the first column of the above table the person falls.

On a review under Regulation 37 of PIBR 2006, the person's degree of disablement is reassessed as at the date of the review. There is no conceptual difficulty about assessing the person's then current earning capacity. But what is that to be compared against in order to assess the then current loss of earning capacity? In order to compare like with like (and in particular to take account of inflation), there would seem to be an implicit requirement to revalue, as at the date of the review, the person's pensionable pay earned as at the date of retirement, but the PIBR 2006 are silent on the point."

7.147 The judge went on to comment further on the fact that the English Regulations were – as are our 2006 Regulations – silent on precisely by what methodology this assessment was to be undertaken:[297]

"As the Pension Ombudsman stated in her decision, the PBIR 2006 do not prescribe a set method for the decision maker to follow in assessing a person's earning capacity. Although the Guidance does elaborate on the methodology which should be used, it sheds no real light on the particular points made by Mr Trendell on the ASHE issue, although in paragraph 13 of Section 5 the following is stated: "It is reasonable to use as a starting point the level of earnings in the UK as a whole." The ASHE survey contains various statistics of earnings grouped variously by gender, full time/part time, annual/monthly/weekly/hourly rates, including/excluding overtime and private/public sector. There is no requirement that the Board use a particular set of statistics and it seems to me that the Board can properly use such statistics in any given case as seem reasonable. The Board used, as the basis of their calculation of Mr Trendell's indicative annual salary, the figure in ASHE showing the median gross annual earnings (including overtime) for full time men in the tax year ending 5 April 2008. There is no equivalent annual figure in ASHE for median annual earnings (excluding overtime), only the hourly rate to which I have referred in the preceding paragraph. Although the Board could also reasonably have adopted this hourly rate and calculated from it an indicative annual salary for Mr Trendell (rather than, as they did, take the annual figure and calculate pro rata an indicative salary on the basis of a 30 hour week as opposed to a 39.5 hour week), I consider that the method used by the Board in this case was well within acceptable parameters of reasonableness.

Accordingly, I find that on the ASHE issue there is no arguable error of law on the part of the Pension Ombudsman…"

[297] Paragraphs [39]-[40] of the decision.

7.148 There are a number of brief points which can be made about this judgment. First, it confirms the position discussed in paragraphs 4.60 – 4.62 and 4.72 above that the calculation of a former officer's uninjured earning capacity is a static rather than dynamic assessment, simply factoring up (for inflation purposes) the salary earned when the officer retired, rather than considering what additional monies might have been paid to the officer (in this case, the CRTP supplement) had he continued to serve.

7.149 Second, although there was no challenge to the use of ASHE figures *per se* in this case[298], and the claimant's complaint related merely to the precise figures which were used from the survey, the judge appears to have been content that the use of ASHE figures in the course of a detailed calculation of percentage disablement was lawful. This is consistent with the view I have expressed above at paragraph 7.57 that the use of ASHE is not unlawful *per se*, at least as far as officers under age 65 are concerned.

7.150 Third, however, this case points up the very type of issue which has led me to the view that the nature of the detailed calculation required when using the ASHE approach is such that it may well increase, rather than reduce, the scope for argument. There will plainly be other cases where, as here, there is an argument to be had as to *which* figures from the ASHE Survey should be used and which are the most appropriate. Although the judge in *Trendell* approaches the issue on the basis that, in the absence of any prescriptive approach contained within the Regulations themselves, the question for a reviewing court is simply whether the medical authority adopted an approach which was reasonable, I still consider that considering this type of argument and making this type of judgment is far removed from what the Regulations would genuinely have intended the medical practitioner to do in the determination of one of the "medical questions" referred to him for decision.

Haworth (English High Court, May 2012)

7.151 The *Haworth* case – *R (Haworth) v Northumbria Police Authority*[299] – was another case arising out of a review of an IOD award. The claimant was a retired police officer and had been in receipt of an IOD pension since 1996. In 2006, the claimant's pension had been reviewed by the

[298] And, therefore, this issue has not been determined by the case.
[299] [2012] EWHC 1225 (Admin); [2012] All ER (D) 137 (May).

PMAB. The Board's decision, under regulation 37 of the English Regulations, had the effect of substantially reducing the claimant's pension.

7.152 In October 2010, the claimant sought agreement from the defendant for her case to be referred back to the Board for reconsideration. In December 2010, the defendant refused the claimant's request, stating, *inter alia*, that the decision of the Board had been made in 2006 and that if the claimant had not wanted the consequences of the decision to apply, she had had open to her avenues to properly challenge the decision and, by not challenging the Board's decision at that time, the claimant had accepted the findings of the Board. The defendant further stated that it was important that final decisions remained final and that the review and appeal process would take time and would cost considerable sums of public money to administer. This view was taken even though, in the proceedings, it seemed to be accepted on the part of the authority that the decision in Ms Haworth's case may well have been taken wrongly in light of the subsequent interpretation of the Regulations in *Turner* and *Laws* (since it was clear, *inter alia,* that causation had been impermissibly revisited).

7.153 The claimant applied for judicial review of that decision. She contended, *inter alia*, that the provision within regulation 32(2) of the Regulations, enabling reconsideration, should be construed as a free standing provision free of any implied time constraints, intended to be a mechanism to enable mistakes, whether of law or fact, which had deprived a police officer of the pension to which he was entitled under the Regulations, and which otherwise could not be put right, to be put right. She further contended that the defendant, in focusing its decision only upon its own financial position and the passage of time, without paying any consideration to the merits of the claim, had used its discretionary power for a purpose inconsistent with the purpose of the Regulations, namely, to ensure that the individual was paid the pension to which she was lawfully entitled. Finally, she contended that delay in seeking such a reconsideration is relevant only to the extent that such delay had prejudiced a fair resolution of the issues that had been sough to be raised on reconsideration.

7.154 In summary[300], the court ruled that:

(1) In the light of the statutory scheme as a whole, there was no reason not to construe regulation 32(2) of the Regulations as in part a mechanism to correct mistakes, either as to

[300] Using the headnote from the All ER Digest report of the case.

fact or as to law, which had or might have resulted in an officer being paid less than his full entitlement under the Regulations, which could not otherwise be put right. A refusal to consent to a reconsideration under regulation 32(2) of the Regulations on the ground that the decision in question was a final one cannot lawfully stand with the very provisions of that regulation itself. Moreover, regulation 32(2) expressly contemplated that there could be more than one reconsideration by the medical authority. Finally, it was not lawfully open to a police authority to have refused a retired officer its consent to refer a final decision back to a medical authority for reconsideration under regulation 32(2) simply on the grounds of delay, even inordinate delay, without any consideration of the underlying merits.

(2) The defendant's decision not to consent to a reconsideration of the board was flawed on conventional public law grounds for a number of reasons: (a) in failing to have any regard to the underlying merits of the claimant's application, and in refusing consent regardless of the strength of those merits, the defendant's decision had not been in accordance with the statutory purpose for which the discretionary power under regulation 32(2) was given; (b) the considerations expressly relied upon by the respondent to justify a refusal of consent had not been, in themselves, relevant considerations; and (c) in so far as the defendant had relied upon the anticipated costs to it of having to meet any increase in pension arising from the proposed reconsideration, that anticipation had not been a lawful basis upon which to refuse consent.

7.155 Having described the *Laws* authority as "the now leading case dealing on the approach to reviews under the Regulations" at paragraph [12], King J summarized the current legal position in relation to reviews (in paragraph [24] of his judgment) as follows:

> "… it is now established that such a review can be concerned only with the question as to whether there has been <u>any substantial alteration in the degree of disablement since the last review</u>. Upon any such review the starting point on disablement has to be taken as that reached by any previous review as a matter of substance and a new review cannot lawfully seek to re-open questions on disablement, and in particular on causation, already determined by earlier decisions of the material medical authority." [underlined emphasis added]

7.156 King J goes on to summarise the statutory scheme in a lengthy section of his judgment which provides a helpful overview of the main procedural provisions (at paragraphs [29] onwards]). Returning to the issue of reviews, he further explains in paragraphs [42]-[43] that:

> "Such a review is by the very wording of reg 37(1) concerned only with whether the degree of the pensioner's disablement has substantially altered since the previous decision of a material medical authority. Hence under reg 30(2) on the occasion of such a review it is only question (d) which is to be referred under reg 30. Given that that degree is defined as the degree to which earning capacity has been affected by the qualifying injury, that alteration may come about as a result of an improvement in the underlying medical condition for example or as a result of external factors such as the sudden availability of a job but the critical principle is that the review is concerning itself with changes in circumstances that have occurred since the last relevant decision and is looking to see if as a result there has been any alteration in degree of disablement which is substantial.
>
> It might be thought self evident in these circumstances that on any review, the medical authority can not go outside the narrow question referred to it and cannot revisit prior questions, for example the question relating to causation under (c) ("whether the disablement is the result of an injury received in the execution of duty") arrived at on the initial assessment or revisit the degree of disablement arrived at on a previous occasion, be it the initial assessment or the last review, by revisiting the clinical judgments taken on that previous occasion. However – critically for present purposes – that was only made crystal clear by the Court of Appeal decision in *Laws…*" [underlined emphasis added]

7.157 King J accepted that the power of the court or tribunal to refer a matter back to a medical authority under regulation 32(1)[301] was for the purpose of ensuring as far as possible that decisions of a medical authority are made on a proper evidential basis (see paragraph [48]).

7.158 In relation to the core of the case, the authority's refusal to consent to a referral back under regulation 32(2)[302], King J held[303] that it is not lawfully open to a police authority to refuse a retired officer its consent to refer a final decision back to a medical authority for reconsideration simply on the grounds of delay, even inordinate delay, without any consideration of the underlying merits of the matters which the former officer seeks to pursue on such a consideration. Such an approach

[301] Our regulation 31(1) in the 2006 Regulations.
[302] Our regulation 31(2) in the 2006 Regulations.
[303] At paragraphs [90]-[91].

imposes upon what on its face is a wide power and unfettered discretion granted to it a time limitation which could not properly be implied.

DB's Application (Northern Irish High Court, February 2013)

7.159 In the *DB's Application* case[304], the applicant sought judicial review of a decision of the Board to set a start date for his injury pension in 2009, the date when he made his retrospective application, rather than the date of his retirement in 2006, in accordance with regulation 6(7) of the 2006 Regulations[305]. The applicant had retired from the PSNI in the normal way but relied on hearing loss at a later stage.

7.160 After leave was granted, the Board wrote to the applicant accepting that it could not simply impose the date of application for an injury pension as the date of commencement of payment and that it now proposed to refer his case to a medical expert to obtain an opinion on precisely when he had first become disabled. The applicant, however, objected to this course, claiming that it would be *ultra vires* the Regulations and that they required his injury pension to be paid from the date of retirement. He relied on medical evidence which suggested that the injury must have occurred during his police service.

7.161 Treacy J agreed with the Board's submission that "the first question must be whether the applicant is permanently disabled and, if so, the date when this permanent disablement commenced"[306]. It is only if there is some attempt to assess the date of disablement that regulation 10(2) can be properly applied. Treacy J went on to say[307]:

> "Accordingly in my view the [Board] must seek to determine the date of disablement and is quite entitled in discharging that task to seek medical evidence to assist in reaching what is essentially a medical question. Fairness dictates that this is a process in which the applicant must be appropriately involved. Upon receipt of all relevant evidence and consideration of

[304] *DB's Application* ([2013] NIQB 13, Treacy J, 8 February 2013).

[305] Which provides that "where a person has retired before becoming disabled and the date on which he becomes disabled cannot be ascertained, it shall be taken to be the date on which the claim that he is disabled is first made known to the Board".

[306] See paragraph [14] of the judgment. The judge returns to this issue in paragraph [23] in terms which perhaps make more clear that these are, in fact, two separate or sequential questions.

[307] At paragraphs [15]-[16].

the issue, the [Board] will either determine the date or, if same cannot be ascertained rely upon Reg 6(7).

If the applicant refused to submit to medical examination, then the [Board] would have to make its decision on the available evidence and may conclude that the actual date of disablement could not be ascertained in which case the date of the claim would become, by default, the relevant date."

7.162 The judge then referred to article 29 of the Regulations which "makes clear" that the question whether a person is entitled to any, and if so what, awards under the Regulations "shall be determined in the first instance by the Board"[308]. This included a determination of when the applicant became permanently disabled. Although this was "essentially a medical question" it was not a matter which was required to be determined by an SMP or IMR as a medical question which should be referred to them under regulation 29(2)[309]. Accordingly, the Board had to make the determination on the basis of the medical evidence available to it.

Hawthorne (Northern Irish High Court, July 2013)

7.163 In *Re Hawthorne's Application*[310] the applicant challenged two decisions made under the 2006 Regulations relating to the award of an injury on duty pension namely: (a) a decision of the NIPB and/or DOJ whereby they refused to refer a determination by the IMR to an appeal tribunal under regulation 33 ('the appeal decision'); and (b) the decision of the IMR himself dated 28 April 2011, whereby he confirmed that the applicant remained 100% disabled, but that only 10% of his current disablement and loss of earning capacity were as a result of the injury on duty ('the medical decision).

7.164 At the conclusion of the substantive hearing the Court announced its decision but gave detailed reasons later in a written judgment. The Department had conceded that the applicant did have a right of appeal to an appeal tribunal and that it was a matter for it, the DOJ, under regulation 33 to convene an appeal. The Board took a different view but Treacy J accepted the applicant's and Department's submission that a right of appeal under regulation 33 did exist. As to the medical decision, the Court rejected the challenge to it.

[308] See paragraph [17] of the judgment and, to like effect, paragraph [23].
[309] See paragraphs [20] and [24] of the judgment.
[310] [2013] NIQB 76.

7.165 The issue for the Court seems to have been essentially whether, on reducing the applicant's injury pension on a review, the SMP and IMR had unlawfully re-visited causation or had properly apportioned the causes of his disablement (although the matter is not described in quite this fashion). Ultimately the Court concluded[311] that, on the particular facts of the case, unlike the reviewing medical authority in *Laws* the reviewing doctors in the present case had not sought to undermine the original clinical findings. On the contrary, as required by regulation 35, they had simply addressed their minds to the statutory question as to whether the degree of the pensioner's disablement had substantially altered and the extent to which his original back injury is now contributing to his disability (finding, in essence, that it had got much better). The judge concluded that this was in accordance with regulation 6(5) which provides that the degree of a person's disablement must be determined by reference to the degree to which his earning capacity has been affected as a result of a relevant injury.

7.166 At paragraph [25] of the judgment, commenting on the review provisions in regulation 35, Treacy J said this:

> "The finality of the decisions of the SMP/IMR on the referred questions is subject to the continuing duty of review at suitable intervals under Reg 35. These interlocking statutory provisions are plainly intended to introduce a degree of finality whilst at the same time ensuring that officers are not unjustly enriched by continuing to receive a pension which is no longer justified. Equally if the degree of disablement has substantially altered in the other direction it is only fair and proper that the pension should be revised accordingly. Reg 35 is on any showing a vital safeguard for police officers and the general community in ensuring fairness and probity in the disbursement of such expenditure."

7.167 Returning to the appeal decision, Treacy J held[312] that the Department was correct to concede that the impugned decision revising the pension was a decision of the Board and accordingly subject to an appeal under regulation; the decision having been arrived at by the Board after the degree of disablement had been referred to the SMP/IMR. He continued:

> "Reg 35 makes it clear that the ultimate decision maker in revising the pension is the Board. When a medical question has been referred to a medical referee (SMP or IMR) their decisions on the questions referred are final. But the primary decision maker remains the

[311] At paragraph [28].
[312] At paragraph [29].

> Board notwithstanding the finality of the medical referees decision. As a person aggrieved by a relevant decision of the Board the applicant enjoys a clear right under Reg 33 to appeal the impugned decision in accordance with that provision."

7.168 It is therefore established that there is a right of appeal available to an aggrieved officer under regulation 33 against a decision of the Board on a review[313]; but in the course of such an appeal, pursuant to regulation 34(2), subject to a referral back to the medical authority by the tribunal under regulation 31(1), in the regulation 33 appeal "the tribunal shall be bound by any final decision of a medical authority within the meaning of regulation 31". Accordingly, I find it difficult to see how the appeal against the decision under regulation 33 would assist Mr Hawthorne in his case. Although he could appeal to the tribunal, he would be 'stuck' with the IMR finding which he had also sought to challenge, which would remain binding on the tribunal. All that he could perhaps hope to do is persuade the tribunal that the evidence before the IMR who had given the final decision was inaccurate or inadequate, so prompting the tribunal to refer the IMR's decision back to him for reconsideration in the light of such facts as the tribunal may direct under regulation 31(1).

Further clarification from the courts

7.169 As is immediately obvious from even the above summary of a limited number of important cases in this field, the interpretation and application of the relevant Regulations has proven to be somewhat of a legal minefield. Particularly (although not exclusively) in relation to the question of how reviews under the Regulations should be approached, much judicial ink has been spilt. With each further authority, hopefully the relevant obligations under the Regulations become somewhat more clear; although I am bound to say that the concepts which the medical authorities are required to grapple with as a result of the authorities remain far from straightforward.

7.170 It remains the position that it is ultimately the Courts which are responsible for the authoritative interpretation and application of the Regulations. It is inevitable in my view that –

[313] Although this is not entirely clear from the wording of regulation 33(1), which might be thought to apply only to questions of initial entitlement rather than decisions on review. However, this is unlikely to be in accordance with the general purpose of regulation 33(1) and, more particularly, the availability of an appeal against a "refusal of the Board to admit a claim to receive… a higher award than that granted" might be thought to cover a revision of an injury pension by the Board under regulation 35(1). The precise reasoning of the judge on this issue is not clear; and the case could, in my view, have been decided the other way on a more strict wording of regulation 33(1).

absent radical reform of the statutory scheme in Northern Ireland[314] – there is likely to be further court challenges to decisions made under the Regulations relating to how they should properly be operated. As I have noted, the continued use of ASHE figures in relation to officers over age 65 is likely to be one further obvious area of challenge if this continues. Where decisions are contentious, are financially important to those concerned and/or where emotions are highly charged, legal challenge is likely, particularly where (as seems to be the case here) there are representative organisations which are prepared to assist with funding in certain instances.

7.171 Although, in certain respects, important cases can be very helpful in clarifying how the statutory scheme is to be operated[315], in my view continued high levels of challenge are likely to be in no-one's interests (save perhaps the lawyers conducting the cases). This is one of the reasons why I recommend that consideration be given to a simplification of the statutory scheme, whereby the scope for debate about what it requires, and about the appropriate decision in any particular case, ought to be reduced.

[314] And even with such reform, which is likely to be challenged in the event that it is contentious (which it is likely to be if officers are, or perceive themselves to be, worse off).

[315] And the Board should not itself rule out the possibility, if further fundamental issues of contention arise, or itself making an application to the High Court for declaratory relief if that were required to unblock a logjam.

CHAPTER 8

THE ISSUE OF REVIEWS

The need for reviews of injury pensions

8.01 As I have noted in several portions of this report, the issue of reviews has proven to be a particularly contentious area of the operation of the relevant Regulations. Officers tend to feel an entitlement when they are awarded an injury pension and to resent any attempt to review their entitlement to that pension unless they consider their circumstances to have changed in a relevant way.

8.02 The Board, for its part, has consistently made the point that it is under a statutory obligation to conduct reviews and that, in short, it cannot simply abandon the review process. This is because regulation 35(1) of the 2006 Regulations, under the heading 'Reassessment of injury pension', provides as follows:

> "Subject to the provisions of this Part, where an injury pension is payable under these Regulations the Board shall, at such intervals as may be suitable, consider whether the degree of the pensioner's disablement has altered; and if after such consideration the Board find that the degree of the pensioner's disablement has substantially altered, the pension shall be revised accordingly." [underlined emphasis added]

8.03 The core of regulation 35(1) is the obligation that the Board "shall… consider whether the degree of the pensioner's disablement has altered". In summary, it is not generally permissible to make a once-and-for-all assessment of the degree of disablement, since this may change (either by increasing or decreasing). Accordingly, the Regulations, unsurprisingly, impose a general obligation on the Board to consider whether there has been an alteration.

8.04 As a number of the authorities note, this is a protection both for the officer (who may find that he is entitled to a greater pension if, for instance, his condition has worsened) and the paying authority and the public (who may find that the officer is entitled to a lesser pension from public funds if, for instance, his condition has improved). Thus, Treacy J commented in *Re Hawthorne's*

Application[316] that: "[Regulation] 35 is on any showing a vital safeguard for police officers and the general community in ensuring fairness and probity in the disbursement of such expenditure."

The broad nature of the review obligation

8.05 There are a number of important points to note about the obligation to review in regulation 35, however, which arise directly from a textual analysis of the regulation. First, the consideration of whether the degree of disablement has altered must only be undertaken "at such intervals as may be suitable". Accordingly, there is considerable leeway in determining when it is suitable to conduct such a reconsideration. I return to this issue below.

8.06 Second, the regulation is silent as to how the Board should determine when a "suitable interval" will arise or has arisen. There is again, therefore, some scope for the Board to fulfill the obligation to keep the degree of disablement under consideration in a variety of ways; although it seems clear that the Board, when conducting a review at a suitable interval, is obliged by the terms of regulation 29(2) to refer the question of the degree of the pensioner's disablement to an SMP for determination.

8.07 Third, the purpose of the exercise is to determine whether the degree of disablement has "substantially altered"; and it is only then that the obligation to revise the pension accordingly arises. I think it can properly be inferred that the obligation to reconsider is designed to identify those cases where there *has been* a substantial alteration to the degree of disablement; but it is not the case, as I think some submissions to me assumed, that the obligation to reconsider *only arises* where there has been substantial alteration[317].

8.08 Important also is the following basic point: the purpose of a review is to assess "whether the degree of the pensioner's disablement has altered". As I noted in Chapter 4[318], under the Regulations 'degree of disablement' is a term of art[319] and separate from the more simple notion of disablement[320]. It is the degree of disablement which has to be reconsidered to see whether it has altered; rather than simply asking the question whether the officer's disablement itself has

[316] Discussed at paragraphs 7.163 – 7.168 above.
[317] Although it is only then that the Board is required to revise the pension accordingly.
[318] See the discussion at paragraphs 4.37 – 4.42.
[319] Defined in regulation 6(5) of the 2006 Regulations.
[320] Defined in regulation 6(4) of the 2006 Regulations.

altered[321]. This gives rise to the possibility, discussed in a number of the cases considered in Chapter 7, that the officer's earning capacity can alter in a relevant way by the advent of some *external factor* and without the officer's condition changing at all (the most relevant example being some new job opportunity presenting itself). The controversy around Home Office Circular 46/2004 focused on whether the attainment of a particular age (CRA or SPA) could be such an external factor; *Simpson* giving the answer that it could not.

8.09 Finally, it is important to bear in mind that, although the need for reassessment is an important interest given effect to by regulation 35, this also has to be balanced against the interest in finality in pensions decisions which the authorities also emphasise as arising, in particular, out of those provisions of the Regulations which provide that the certificates of medical authorities are to be final. Accordingly, the whole area of reviews involves an important tension between the interests of certainty and finality on the one hand and the interests of accuracy and responsiveness on the other.

The policy on when to review

8.10 The NIPB Guidance Booklet states[322] that it also "explains the review process that is required to take place every 5 years to reassess a percentage injury on duty award previously made". In fact, the use of the word "required" is potentially misleading. As noted above, there is a broad statutory obligation to review; but regulation 35 does not itself set the intervals at which this will occur. That has presently been done by the adoption of a policy by the Policing Board and it is this policy which 'requires' review at at least fixed 5 year intervals.

8.11 Page 6 of the Guidance Booklet puts the matter this way:

> "To minimise the inconvenience and any possible discomfort of injury on duty reviews, the present Board policy is that reviews only take place once every 5 years. This means that a

[321] So, for instance, I understood one of the submissions made to me by the Disabled Police Officers' Association to be that, unless the injury had substantially altered there should be no review. As discussed further below, given the meaning of 'degree of disablement' within the Regulations, it is possible for this to substantially alter even though there is little or no change to the injury itself. One can quite understand how the Regulations could be read as suggesting that there should be no review unless the disablement (*i.e.* the injury) has altered; but, for the reasons I have set out, this does not seem to me to be the meaning of the Regulations on their proper construction.

[322] On page 1.

former police officer will only be assessed or reviewed by the SMP on one occasion during the duration and possible extension of the new [SMP] contract period."

8.12 This position was reached as a result of a joint review between the Board and the Department of Justice in 2010, when it was determined that reviews would be carried out at 5 year intervals (unless a request was made to defer the review, for a period of up to 12 months, on medical grounds). The first recommendation of the Review Panel was in the following terms:

> "There should be a minimum 5 year period before review for all cases. Any reviews currently planned with a review date of less than 5 years should be extended to the 5 year period. Individuals retain the right to apply for an earlier review if they believe their position has materially changed."

8.13 The present position of the Board, therefore (subject to the suspension of reviews discussed below) is that officers in receipt of an IOD pension should be reviewed every five years, unless they request a sooner review.

8.14 In its submissions to me, the Police Federation indicated that it had some sympathy with the use of a 5 year review period, since anything less than 5 years does not allow time for significant change in circumstances. I was also told by the Federation representatives that it was accepted that five years is a "decent benchmark" and that the 5 year review period was generally considered reasonable and acceptable.

8.15 However, the issue of reviews is still plainly contentious. This is perhaps most obviously so in cases where the officer concerned felt that they had been designated as to have no further review of their case. But even in cases where this does not apply, there is understandable anxiety and inconvenience generated by the process, the need to submit to further medical assessment, the risk of a significant source of income being reduced or removed and so on. The point was also made to me that, in some cases, particularly where PTSD is a factor, the review process itself can not only be upsetting and inconvenient, but it can also itself give rise to further psychiatric damage or an exacerbation of the condition.

8.16 I note that this was also an issue considered by the joint Board and Departmental Review Panel. Its second recommendation was that:

> "In principle there should be provision to allow for the need for reviews to be set aside in cases of the most severe psychological conditions where a suitably qualified specialist indicates the consequence of the review process might be to cause harm to the individual concerned. The precise terms will need to be included in detailed guidance but it is envisaged this arrangement will normally apply in cases where a level 3 or 4 award has been made."

8.17 I understand the Board has also adopted this recommendation and that it is therefore possible to postpone one of the five-yearly reviews for up to one year on the basis of appropriate medical evidence establishing that the review process itself may cause harm to the individual.

The suspension of reviews

8.18 As a result of a build up of concern and complaint concerning several facets of the review process, in March 2013 the Board decided to suspend reviews. In July 2013 the Human Resources Committee of the Board agreed to lift the suspension in cases where reviews were requested by the officer[323]. Other than such cases, however, the suspension remains in place pending the outcome of this review and, more generally, consideration by the Board of this report and any actions arising out of the Board's Working Group's consideration of the IOD scheme of which this review forms a part.

The cost of reviews

8.19 Board officials also explained to me that the review process is extremely costly to administer. As well as the significant number of new applications the Board is dealing with, there is now a backlog of several hundred reviews. In February 2014, I was informed that there were around 350-400 suspended reviews. By late May 2014[324], this figure was around 500; and I understand that it is now higher still.

8.20 There is a significant cost to the Board in having these reviews carried out by an SMP[325]; and a greater cost still where, as happens in roughly half of such cases, there is an appeal to an IMR[326].

[323] The 17 appellants whose appeals were affected by this were asked if they wanted them to be held in abeyance until after the Working Party review or for them to be continued. Some opted to continue and others to keep their case on hold.

[324] See the reference to relevant correspondence from that time at paragraphs 1.18 and 1.19 above.

[325] Costing, on average, around £500 *per* case.

This is also not taking into account the significant staff hours within the Board which itself which are devoted to these matters.

8.21 This is plainly not a matter which ought to be determinative of when a review should or should not take place; but it is also a relevant factor to be taken into consideration, particularly in the context of non-requested reviews where an important object of the process may be thought to be the saving of public funds in the event that the officer is being paid a greater pension than he is then entitled to. In short, if the administration of the review system were to result in a net loss to public funds because of the cost simply of holding the reviews (*i.e.* if there was a clear element of over-review), this would hardly be an efficient operation of the system[327]. There was no evidence to suggest to me, however, that this was presently the case.

The flexibility available to the Board

What is a suitable interval?

8.22 As noted above, regulation 35 of the 2006 Regulations leaves it to the Board to determine when a review should take place, making clear only that this is to occur "at such intervals as may be suitable", which in my view plainly means as such intervals as the Board considers suitable in the circumstances of the case.

8.23 I have already suggested[328] that this may well be an area where a general policy, applicable to all cases, is not the best way to proceed. This is because there may well be cases where it is obvious that very little indeed is likely to change within five years time, so that one might be able to predict with a considerable degree of confidence that a review within that time period would serve little purpose. On the contrary, there may also be cases where the likelihood is that much will change within a much shorter period, so that leaving a review for 5 years is likely to mean that the payments being received by the officer are out of kilter with his true entitlement (whether

[326] Costing, on average, around a further £800 *per* case. I was informed that, at January 2014, there were around 130 live appeals; with this figure having risen to around 160 by late May 2014.

[327] I accept, of course, that the position is not entirely so straightforward, since part of the purpose of the review process will be to pick up those officers who are unwittingly being *under*-paid; and there is a value in itself of the accuracy of awards being established by review, even in circumstances where there is no change in the award.

[328] See the comments at paragraph 3.05 above.

greater or lesser) for a period of several years. In short, I am concerned that a one-size-fits-all policy fails to give adequate consideration to the particular merits of individual cases.

8.24 Given the contention around reviews, it also occurs to me that officers might be more receptive to being called back for review where they can be satisfied that this was considered to be an appropriate response to the particular circumstances of their case, rather than merely the result of a 'bureaucratic' policy of general application.

8.25 The present policy is also, of course, subject to some exception, since an officer can request a review sooner than the five year period; and can also seek (on proper medical grounds) to postpone a review some time beyond that. But, generally, the Board's decision as to what is suitable in a particular case is simply dictated by a stringent policy.

8.26 In light of the above concerns, I would recommend that there should be a move away from automatic review for all cases at any fixed interval set in policy, which is necessarily arbitrary. Instead, there should be a more case-sensitive approach to fixing the time period in which review is appropriate.

8.27 This seems to me to be entirely consistent with a number of comments made by Ouseley J in the *Crocker* case. Having made the point that the review system is the means of correcting the pension when circumstances change, he stated at paragraph [33] that [329] "these are reviews which can be undertaken *as occasion requires rather than at mandatory but necessarily arbitrary intervals*"; and at paragraph [39][330] that "*as and when circumstances dictate*, the pension is reviewed", the Regulations having provided for "the simple mechanism of review *without arbitrary limit on the number or intervals between them*". The approach I recommend would provide flexibility to meet the needs of any particular case rather than simply applying an arbitrary spacing between reviews.

Who should determine when review is appropriate?

8.28 The obvious question, then, is who should determine when further review is likely to be necessary. The Regulations presently make clear that this is a decision for the Board. However, it

[329] Set out at paragraph 7.89 above.
[330] Set out at paragraph 7.91 above.

is plain that, in considering the merits of the particular case and when the officer's condition(s) may be likely to change, this is really a question on which the medical practitioner considering the case is best placed to give a view.

8.29 Indeed, I detected support from a number of those with whom I consulted for the concept of the medical practitioner determining when (and, indeed, whether) further review was appropriate. (In particular, the Police Federation were keen to emphasise that they wanted reassessments of officers to be based on their own medical grounds, rather than any policy.) This also seems to have been the position in South Wales which is described in the *Crocker* case, in which Ouseley J commented (at paragraph [39]) that, "As and when circumstances dictate, the pension is reviewed. The doctors, the Medical Referee, and Selected Medical Practitioner can, and here did, indicate when they thought that that should happen."

8.30 As with the implementation date[331], given that the question of when further review might be appropriate is not a question to be referred to a medical authority under regulation 29, any view expressed by the SMP/IMR on this issue could not be binding on the Board – but is likely to be followed by it in the absence of some good reason for taking a different view. I consider that this is a further issue, therefore, which SMPs and/or IMRs should be asked to consider in the course of their report, insofar as they can do so.

The power to review when something arises

8.31 Although, in the normal course, I consider that a review should not be held to ascertain whether the pensioner's medical condition has altered otherwise than in accordance with the view on this issue expressed by the SMP or IMR, it is of course important that a power to review remains open where this appears suitable for some other reason. In particular, if a relevant change in circumstance comes to the attention of the Board, there should remain the possibility of calling an officer for review. The most obvious example of this is likely to be where the officer himself notifies the Board that his condition has changed (usually, that it has worsened) and that he therefore feels review would be appropriate.

8.32 However, there may also be other occasions where information comes to the attention of the Board which *prima facie* suggests that there has been a relevant change since the last

[331] See the discussion at paragraphs 6.61 – 6.63 above.

consideration. This might be information suggesting that the officer's condition has improved (for instance, if he is undertaking physical activities he was previously determined not to be able to undertake); or that some other external factor has altered his earning capacity (for instance, that he has taken up a highly paid job not previously available or known about). The Board must retain the flexibility to review where something of this nature comes to its attention which itself indicates that the time is ripe (or the interval is suitable) to consider whether there has been a substantial alteration in earning capacity.

'Revisiting causation' and apportionment

8.33 The issues of re-visiting causation and apportionment are complex. I am unsure whether there is much that I can usefully add at this stage to the general discussion of these concepts in Chapter 4 of this report and to the discussion of the relevant case-law in Chapter 7, which now fairly clearly outlines the approach which may be taken to these issues on review. In particular, *Pollard*, *Turner* and *Laws* set out clear guidance in relation to not revisiting matters which have been finally determined in earlier certificates; and *Crocker* sets out clear guidance on the question of how apportionment should be approached.

8.34 I would recommend that any further guidance prepared for the benefit of claimants and medical authorities carefully follows, and as clearly as possible sets out and explains, the approach set out in these judgments.

8.35 Some general observations occur to me, however. Firstly, the prohibition against revisiting causation can, in some cases, clearly give rise to some surprising results. As noted above, part of the rationale behind the review system is to ensure that former officers are not being paid awards to which, when their degree of disablement is re-examined, they are not properly entitled. This is a valuable safeguard against public expenditure which is not in truth warranted. However, once this important policy objective is acknowledged, why should there not also be an opportunity for an award to be reduced if it becomes clear (particularly for some reason not previously apparent) that an earlier assessment was erroneous. This arises perhaps most acutely where later evidence suggests that earlier decisions were unduly favourable to the officer concerned, although there may well also be cases where, if causation could be reconsidered in the light of later evidence, this could work to the advantage of the officer[332].

[332] A possibility expressly adverted to in *Laws* at paragraph [19].

8.36 The prohibition on revisiting causation appears to be the result merely of the fact that the Regulations, on a review, require and permit only the regulation 29(2)(d) medical question to be referred for further consideration, rather than the other questions set out in regulation 29, which accordingly cannot be revisited. But there is nothing to little to explain why this conscious choice was reached when the Regulations were framed, if indeed it was a conscious choice.

8.37 The result is that the possibility of review can 'fix' certain difficulties where changes occur and an officer's entitlement should be altered; but that it cannot fix other difficulties where it becomes clear that the officer was and is being paid on an erroneous basis. Although there may be an interest in certainty and finality, such that these questions should not continually be the subject of endless reconsideration and debate, there must also be a strong public interest in officer's being paid what he is properly entitled to on a correct understanding of the Regulations and the officer's particular situation[333].

8.38 It can, I am sure, be frustrating for an SMP or IMR who makes clinical findings or sees clinical evidence which suggests that a fundamental question surrounding entitlement to an award has previously been misunderstood or erroneously determined to be told that he is powerless to correct that. Such circumstances are also likely to give rise to a temptation, conscious or subconscious, to alter the award accordingly by a determination on the one permitted question (relating to degree of disablement) in order to better reflect what the true entitlement ought to have been.

8.39 Indeed, Dr Crowther of the PSNI OHW thought that SMPs should be permitted to look again at the issue of causation in the course of a review.

8.40 The interest in certainty and finality is also undermined by the possibility of an SMP or IMR applying apportionment in the course of a review, which can result in a former officer's degree of disablement for the purpose of the calculation of his award being altered even though there may be no change in the disablement caused by his duty injury.

8.41 In summary, I am far from sure that the Regulations in their present form strike the right balance between the competing interests of accuracy and finality. Although the obligation to

[333] This broad interest was clearly acknowledged in the *Haworth* case.

conduct reviews ensures that matters are kept under consideration, only some inaccuracies in the payments being made which are discovered in the course of reviews can be put right. To my mind, this calls into question whether the Regulations should be amended to allow a fuller look at *all* of the medical questions in the course of a review ('full review'); or, indeed, if some element of inaccuracy in payments may be warranted in the interests of finality, whether the review system in its entirety should be jettisoned ('no review').

8.42 I suspect the Regulations have sought to plot a middle course between these two extreme positions[334]. However, in doing so, they may have reached an unsatisfactory compromise which serves neither interest well. Officers may be continually reviewed and feel they have no certainty in relation to their ongoing entitlement; and the Board may have the benefit of reviews but be able to do nothing where it appears that an earlier decision was erroneous but is now beyond correction. Meanwhile, the review system is not only costly to run but extremely difficult for SMPs and IMRs to administer for the reasons discussed above and emerging from the cases discussed in Chapter 7.

8.43 My own feeling is that there is much to be said for a much more simplistic approach to the payment of injury benefits, which is easier to administer and provides much more certainty to all those affected by it. An example is the injury benefits scheme provided for the armed forces in the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011. A detailed discussion of this scheme is beyond the scope of this report. For present purposes, however, I note that this scheme provides a lump sum in each case but also, for more serious injuries where the individual's ability to earn income beyond their service career is detrimentally affected by their injury, an income stream for life in the form of a guaranteed income payment; and that the scheme is designed so that awards take into account the expected effects of the injury and treatment over the person's lifetime, so that once an award is made, it cannot generally be amended or removed (except in limited circumstances[335]).

[334] And that, for instance, the obligation to revise a pension only where there is a "substantial alteration" to the degree of disablement is further expression of this.

[335] There are very limited circumstances under which an award may be reduced or removed (where it can be shown that an award was made in ignorance of a fact or based on a mistake). Gaining employment or recovering more quickly or more fully than originally expected does not result in removal or reduction of compensation. There are a limited number of opportunities for a recipient of an award to request a review if, exceptionally, there is some unexpected deterioration; and the majority of reviews, which should be rare in any event, cannot lead to a reduction of a compensation payment.

8.44 The Ministry of Defence's Statement of Policy in relation to the Armed Forces Compensation Scheme (AFCS) states that "this is to enable individuals to move forward with their lives following injury with financial security and to encourage individuals to take up future employment and activities of life according to their ability, without fear that doing so could reduce or remove their income or assets." In my view, such an approach has much to commend it. As I have already commented, the requirement to hold reviews, even at discretionary intervals, is costly, often contentious, and undermines the certainty and finality which the Courts have indicated other elements of the Regulations seek to enhance.

'Substantially altered'

What does this mean?

8.45 Regulation 35(1) requires revision of a pension where the degree of disablement "has substantially altered". An issue has been raised with me as to how this phrase should be interpreted.

8.46 NIRPOA complained, for instance, that it was aware of cases where "the SMP is also making slight amendments to banding levels reducing from 26% to 25%, which could hardly be deemed substantial yet costs the individual affected thousands of pounds per annum".

8.47 I understand from the Board that the approach it has taken is simply that, where the alteration in the calculation of the degree of disablement results in an alteration of the relevant band, that is considered to be a substantial alteration; whereas where the degree of disablement does not result in the alteration of the relevant band, that is not considered to be a substantial alteration.

8.48 I do not consider this approach to be satisfactory. This is primarily for the reason advanced by NIRPOA, namely that a very small percentage change of (say) 1%-2%, which would otherwise not be considered to be a substantial alteration in the degree of disablement, might be considered to be a "substantial alteration" requiring revision of an IOD pension under regulation 35 simply because the percentage calculation happened to be on the borderline of two of the applicable bands. It seems to me illogical to say that such an alteration is substantial when, for instance, a percentage change

of 20% or more would not be considered to be substantial, simply because the magnitude of change happens to be incorporated within one banding.

8.49 I suspect that the reason for the requirement that there be a substantial alteration in the officer's degree of disablement before his award is revised is two-fold: first, that reviews will not be held where it is clear that any alteration there may have been is likely to be insubstantial; and, second, so that there is some margin for error in the assessment (*i.e.* that it is only clear changes which give rise to a revision of the award). The second of these factors clearly militates against an approach whereby a very small percentage change can be relied upon as a substantial alteration in the officer's degree of disablement.

8.50 This is a further reason, in my view, why what I have referred to elsewhere in this report as the 'mathematical' approach to calculating the degree of disablement resulting in a percentage figure may not be the best approach. There will be cases where the modest but precise change which this process gives rise to ought to see an officer's banding altered but where one could not say confidently that there has been a substantial alteration in his degree of disablement. There are at least two possible ways of dealing with this. One[336] is to abandon the mathematical approach and revert to the position whereby the medical authority simply makes a judgment as to which is the correct banding in the circumstances of the case. In those cases, a clear opinion from the medical authority that there should be a move from one banding to another is likely to constitute a substantial alteration in the degree of disablement.

8.51 The other option is to continue with the present approach but to build in a *minimum threshold* percentage change below which the change would not be considered to be substantial[337]. I understand, for instance, that at least one police force in England and Wales considers any change in the percentage figure below 10% not to be a substantial alteration which would require a revisiting of the award. I also consider that there is some merit in this approach if the mathematical approach is to be maintained. The precise percentage change required before the alteration was considered to be substantial would be a matter for careful consideration. I have already commented in Chapter 4[338] that it is difficult to place figures on such concepts. However, in this context, 10% seems to me to be well pitched. It is a significant enough change and, viewed in the context of the present band widths (ranges of 25%) could properly be regarded as 'substantial'.

[336] Which I have urged the relevant authorities to carefully reconsider.

[337] So that, even if on the present approach that would have resulted in a change in banding, it would not.

[338] See paragraph 4.93.

Can this be considered before a full review takes place?

8.52 Another issue which was raised with me – in the context of considering how unnecessary reviews might be avoided – was whether the Board could consider the question of whether a substantial alteration in the degree of earning capacity had occurred in advance of calling the officer in question for full review. Various methods of undertaking such a limited 'first look' were discussed with me, with the suggestion occurring most often being the provision of some information or evidence from another clinician treating or familiar with the officer (such as his GP) to assist the Board in determining whether a review should take place. Provided the Board was satisfied of the reliability of such an assessment – both in terms of independence and sufficient knowledge of the officer's circumstances – this could be an extremely cost effective and non-intrusive way of dispensing with reviews which appear unnecessary.

8.53 If the general system of reviews set out in the present Regulations is to remain, this suggestion seems to me to have some merit and to be well worth considering in further detail. It would allow the Board to keep awards under review in a broad sense but obviate the need for a full review where it was possible to screen out cases where the review was likely to result in no change.

8.54 My principal concern about the suggestion is that a determination on whether there has been a substantial alteration in the officer's degree of disablement is, on the present wording of the Regulations, to be the *result* of the review and is neither a condition precedent nor trigger for the holding of a review. Where a review is actually held, it seems to me that the text of regulation 29, as presently worded, requires the question of degree of disablement to be referred to an SMP for determination, rather than simply being addressed by the Board. Indeed, there is an argument that any assessment of this issue by the Board itself may be *ultra vires*, since it is trespassing into the field of a mandatorily referred medical question.

8.55 Although regulation 35(1) provides that "the Board shall… consider whether the degree of the pensioner's disablement has altered", it is clear from regulation 29 that "if it [the Board] is considering whether to revise an injury pension, [it] shall so refer question (d) above", namely refer to an SMP the question of the degree of the pensioner's disablement. In short, where the Board is conducting a review, it must involve the SMP.

8.56 I then considered whether there may, however, be room for what I have called a 'first look'

not in the course of the review process itself but as part of the anterior question for the Board, namely whether it was a "suitable interval" at which to conduct a review. Although I am not entirely without misgivings about this, I consider that this would be a permissible approach for the Board to take. It would obviously require the cooperation of the officer concerned. It may also be superfluous if, as I have also recommended, an SMP or IMR considering the case had given a clear steer that review at a certain period would be appropriate, so that the Board is likely to carry one out in any event. Nonetheless, there may be circumstances where it would be a useful facility for the Board, with the officer's consent, to invite or receive information from an appropriately qualified person about the officer's present circumstances (both in terms of his medical condition and earning capacity) for the purpose of informing itself whether it was, or was not, a suitable interval at which to hold a review; with the purpose of *not* holding a review if it seemed clear that there was unlikely to have been any significant change of relevance since the previous certificate.

8.57 I am fortified in this view to some degree by the import of authorities such as *Laws* and *Simpson,* which suggest clearly that a detailed recalculation of the officer's degree of disablement should only occur if there is something of substance which has changed since the last certificate. Although certain cases will require a medical assessment by an SMP to determine whether this is the case, it is likely that there will be some cases where it could be judged with some confidence that it is not so that the Board could take the view that it is not a suitable interval for the holding of a review. However, given my misgivings about using this type of inquiry outside the formal review process, in my view it would be better if there was some legislative amendment made whereby the actual review could be carried out, in appropriate circumstances, by the Board itself on the basis of medical evidence provided *without* the automatic need to refer to an SMP (but, of course, with the possibility of such referral being maintained).

Reviews of ill-health pensions

8.58 A different regime applies to the review of ill-health pensions under the 1988 Regulations and now under the 2009 Regulations. As noted in Chapter 2[339], there is no *obligation* to conduct reviews of ill-health pensions. They could, in the Board's discretion, be reviewed and cancelled in certain circumstances under regulation K1 of the 1988 Regulations and can, again in the Board's discretion and in certain circumstances (limited by reference to the officer's age), be reviewed and

[339] See paragraph 2.39.

revised or cancelled under regulation 48 of the 2009 Regulations. Whether to review at all is a matter for the Board. I understand that there is presently no policy of reviewing ill-health pensions.

8.59 The review provisions for ill-health pensions are also curious since they effectively provide a right for an officer who is reviewed and determined to no longer be disabled from police service to rejoin the police[340], with his pension being cancelled if he neither responds to a request to rejoin or offers to rejoin[341]. Regulation 48 of the 2009 Regulations also provide for an officer whose condition has significantly worsened, so as to disable him from regular employment, to receive an enhanced top-up ill-health pension[342]; and for an officer whose condition has significantly improved, so as to enable him now to work in regular employment when he could not previously, to lose his enhanced top-up ill-health pension[343]. Aside from these adjustments, however, there is no broad power to revise an ill-health pension on the basis of an alteration in degree of disablement.

8.60 Review of ill-health pensions was the subject of correspondence between the Minister for Justice and the Board in late 2012 to early 2013. Following an enquiry from an MLA, the Minister wrote to the Chief Executive of the Board[344] stating that he was "mindful of the need to safeguard the public purse" and asking therefore whether "the Board has given any consideration to the introduction of a process to reconsider/review ill-health pension awards to ensure that continued payment of police ill-health pension awards are appropriate where circumstances change".

8.61 The Chief Executive wrote back[345] to say that there was provision for the Board to review ill health pensions in both the 1988 Regulations and the NPPS. Given that the cancellation provisions for ill-health pensions involve seeking to re-employ an officer in the PSNI who has since become fit for service again, the Chief Executive continued that, "As a result of 50-50 recruitment and new standards introduced as part of the recruitment process for entry to PSNI, the Board has not previously considered the establishment of a review process". It seems that, at least in early 2013, only one former officer had enquired in respect of a review of his ill-health retirement. Given the operational issues which might arise in relation to re-employment of previously ill-health retired officers, the Board also copied the Minister's correspondence to the Chief Constable.

[340] See regulation 48(4) of the 2009 Regulations (and regulation K1(3) of the 1988 Regulations).
[341] See regulation 48(6)
[342] See regulation 48(12).
[343] See regulation 48(11).
[344] On 12 December 2012.
[345] By letter dated 30 January 2013.

8.62 Mr Stewart, the PSNI Director of Human Resources in turn replied to the Board[346] noting that the facility to reconsider ill-health pensions had always been available under the Police Pension Regulations but that neither the Police Authority nor the Board had chosen to use it. Some Chief Constables in the UK[347] had reviewed ill-health pensions and found officers fit, who were then offered reinstatement – but there were very small numbers involved. Apart from an element of retraining being required, the PSNI did not "envisage much of a problem with this", should the Board decide to do it.

8.63 However, Mr Stewart continued:

> "In terms of benefit to the public purse DOJ would need to be reforming the appeals system as this, in my opinion, lead to inappropriate medical retirements and massively inflated injury awards. This is a matter under review for 5 years+ and the potential cost saving is much greater than the review of ill health pensions suggested by [the MLA who had raised the matter with the Minister for Justice]."

8.64 These observations obviously relate to the IOD award system, which is the subject of the present review. Oddly, as we have seen, there is no provision within the 2006 Regulations for a finding on a review that (in the words of regulation 48 of the 2009 Regulations in relation to ill-health pensions) the officer's "disablement for the performance of the ordinary duties of a member of the police service has ceased". All that is reviewed under the 2006 Regulations is the officer's degree of disablement and, even in circumstances where that is determined to be 0%, this will result in the officer being placed in Band 1 and still being paid an injury pension in some sum.

8.65 In a revised scheme, it seems to me that there might well be provision made for an officer's IOD award to be cancelled in circumstances where he was assessed as no longer being disabled to serve as a police officer, much as is the case in relation to ill-health pensions. Whether this is a good idea or not, of course, takes one back to the purpose of the scheme generally; and whether it is intended to merely provide compensation for loss of one's job in the police or whether it is a more broad recognition by way of compensation for injury in the course of service. Any such power might or might not be coupled (as in the case of ill-health pensions) with a right on the part of the

[346] By letter dated 9 May 2013.

[347] To whom the power to review ill-health pensions had been delegated, unlike in Northern Ireland.

officer affected to rejoin the police[348] should he wish to do so; although as the correspondence referred to above makes plain, there are a host of additional issues raised by this prospect.

8.66 Given the peculiar nature of what might result from a review of an ill-health pension under the present Regulations, different considerations obviously apply to such reviews as compared with reviews of IOD awards. Whether the carrying out of reviews in these cases ought to be pursued will depend to some degree (as the correspondence referred to above suggests) on how easily the possible requirement to re-employ previously medically retired officers can be accommodated. I also understand that the level of public funds expended in paying ill-health pensions is likely to be significantly less than those payable for injury awards and that, particularly with the workload NIPB is currently dealing with reviewing IOD awards, there is no imperative presently to conduct such reviews. I was not informed of anything during the course of the review which would lead me to the conclusion that there is any pressing need to change this position. I would say, however, that if a streamlined review system can be introduced to deal with IOD awards, and such a system beds in and begins to run smoothly, there is no reason in principle[349] why such a system should not also then be extended to those in receipt of an ill-health pension.

The way forward for IOD award reviews

8.67 Regulation 35(1) of the 2006 Regulations requires the Board to consider whether the degree of a pensioner's disablement has altered at such intervals as may be suitable. There is a tension between the requirement to review and the flexibility to do so only when, in the Board's view, it is suitable to do so. This tension reflects the interface between the need to ensure that IOD awards remain accurate and appropriate on the one hand and, on the other, the needs of officers for certainty and finality and the needs of the Board to avoid unnecessary reviews which can be costly and time-consuming. The difficult question is how to balance these competing considerations. I deal specifically with the previous policy in relation to age 65 reviews in the next chapter. My thoughts as to how 'normal' reviews should be scheduled are set out below.

8.68 Although there is unlikely to be anything unlawful in determining when reviews should be held by reference to a general policy, for the reasons given above I think it is preferable that this issue is addressed on a more case-specific basis. I would recommend that the determination of

[348] Subject to relevant age limits.
[349] Subject to the caveat about possible re-employment mentioned above.

what is a suitable interval should, in the first instance, be guided by medical advice provided by the SMP (or IMR, as the case may be) who should be asked to provide advice in their report as to when they consider it would be appropriate to review the case again. This should cater for reviews likely to be suitable on the basis of a change in the officer's medical condition. In the absence of good reason to the contrary, the Board should generally hold a review when suggested by the medical authority as being appropriate. For the moment, there should be a move away from automatic review for all cases at any arbitrary fixed interval set in policy.

8.69 The Board should also retain the facility of reviewing upon the officer's request and should generally do so when requested[350]. Moreover, the Board should also be able to, and should, review a case when some information comes to light which positively suggests that there has been a relevant change in circumstance[351]. This might be a change in the officer's medical condition or a change in his earning capacity (as evidenced, for example, by his obtaining a new job). The Board should consider ways of ensuring that it is likely to become aware of any such relevant change in circumstances.

8.70 The current policy of reviewing at fixed intervals set out in a policy is particularly objectionable since it may bear no resemblance to a medical assessment of when further medical review would be appropriate. However, I recognize that even such arbitrary reviews may serve a purpose of simply providing an opportunity for the Board to check whether there has been some *other* relevant change in circumstance, such as the attainment of a new job indicating a change in earning capacity. Accordingly, a fixed interval review may be appropriate again in the future if it could be undertaken without the requirement of referring the officer to the SMP for medical assessment.

8.71 I also consider that there should be increased scope for the Board to either dispense with a planned review, or to actually conduct a review, without the need for a full referral to an SMP. The former course could be undertaken in the manner discussed at paragraph 8.56 above, with the Board obviously retaining the power to require a full review where it was not satisfied on the information provided that a review was unnecessary.

[350] Unless, for instance, repeated reviews are being requested at short intervals.

[351] Even if this pre-dates the interval at which the medical authority has suggested review would be appropriate.

8.72 Perhaps more appropriate, however, would be a legislative amendment allowing a review to be conducted by the Board on the basis of medical and/or other evidence provided by the officer, at least in the first instance, *without* the need to refer a medical question to the SMP, in circumstances where it was clear that where the review could adequately be dealt with in a more summary fashion (again, always retaining the right to refer to an SMP where appropriate for whatever reason). This should hopefully assist in reducing the backlog of cases awaiting consideration by an SMP and/or reduce the costs of the review process.

8.73 Consistent with recommendations made elsewhere within this report, further guidance should be issued by the DOJ and the Board setting out clearly, for the benefit of both officers and medical authorities, the approach which should be followed on review.

CHAPTER 9

AGE 65 REVIEWS

The issue of age 65 reviews

9.01 I have already mentioned on a number of occasions the fact that the most contentious issue raised with me, and raised with me repeatedly, in the context of consultation with interested parties in the course of this review was the approach of the Board (and the Department) to reviews of former officers in receipt of IOD awards at age 65.

9.02 In this chapter, I set out proposals for how this issue should now be dealt with (at least until it is addressed by some form of express statutory provision within the Regulations). These proposals flow largely from the analysis of the Simpson litigation contained in Chapter 7[352]

HO Circular 46/2004 and its implementation

9.03 The issue of age 65 reviews appears to have become contentious with the introduction of Home Office Circular 46/2004, which is set out in some detail in the discussion of relevant guidance in Chapter 3[353].

9.04 There was some discussion about the extent to which this circular had been implemented by police forces in England and Wales; and it certainly seems that there was not a consistent approach taken across all forces. NIRPOA (in conjunction with NARPO) informed me that 26 (out of 43) police forces in England and Wales did not implement the guidance contained in this circular; and that, of the remainder, some implemented it only in part.

9.05 It remains unclear why some forces in England and Wales do not appear to have taken the approach recommended by the Home Office in the circular. Given the lack of clarity about this, I am not sure I can read very much into this. Indeed, given the much lower numbers of officers who seem to be in receipt of IOD awards in forces in England and Wales, the effect of applying Circular

[352] See paragraphs 7.13 to 7.66.
[353] See paragraphs 3.33 to 3.39.

46/2004 is likely to have been limited in many instances and it may simply have been overlooked. In any event, I did not find consideration of how forces in Great Britain dealt with the issue to have been of much assistance.

Was NIO Circular 06/2007 implemented by the Board?

9.06 In Northern Ireland, the NIO produced Circular 06/2007 which set out to replicate HO Circular 46/2004. It is unclear why it took so long for this to occur.

9.07 Both the PFNI and NIRPOA laid considerable emphasis on the factual question of whether the Board had, in fact, implemented NIO Circular 06/2007. Both bodies accepted that the Board disavowed implementing the Circular; but each also suggested that there was at least some evidence to the contrary. This was obviously a cause of some concern given the perception that the Board was saying one thing but doing another.

9.08 On 6 July 2012 the NIPB's Director of Policy wrote to the Secretary of NIRPOA, in response to a freedom of information request about the conduct of age 65 reviews, and said, *inter alia*, that:

> "(a) No former police officers had their banding automatically reduced at age 65 to Band 1. The Board's SMP, on completing the injury on duty review, calculates a percentage award using the ASHE Survey. If the resulting calculation is 25% or less the former officer's Banding is Band 1.
>
> (b) Of the 49 former police officers who have had their percentage injury on duty reviewed at age 65 since 2007 in 39 cases the percentage award was reduced below 25% so the former officers moved to Band 1. In 3 cases the percentage award resulted in the former officer moving from Band 3 to Band 2.
>
> (c) In 6 cases the percentage disablement award calculated resulted in the former officers remaining in the same Band."

9.09 In relation to the particular question as to whether the Board had implemented Home Office Circular 46/2004, the Director of Policy's letter said this:

> "The NIPB did not implement the Home Office nor NIO (now DOJ) guidance contained in Circular 6/2007 that in the cases of 'Simpson' and 'Howarth' has been judged to be unlawful." [underlined emphasis added]

9.10 To like effect, on 7 August 2012 the Head of NIPB's Police Administration Branch wrote to the Chairman of NIRPOA – in a letter to which both NIRPOA and PFNI referred me – and said that:

> "As previously advised the [Policing] Board did not accept the then NIO guidance of Circular 6/2007 to place all former police officers aged 65 on Band 1 at review. The Board's Selected Medical Practitioner (SMP) uses the ASHE Survey figures in the calculation of any injury on duty percentage award." [underlined emphasis added]

9.11 NIRPOA also told me that "numerous elected representatives have been advised in similar terms". It is also clear that the terms of reference for this review which were produced by the Board cite as a background facts the following:

> "Home Office Circular 46/2004, published August 2004, instructed police forces to place former officers who had reached compulsory retirement age for the service (i.e. over 65) in the lowest band of Degree of Disablement upon review of their injury on duty award. The Northern Ireland Office issued similar guidance (Circular 06/2007) to the Board in 2007. The Board did not apply this guidance."

9.12 PFNI and NIRPOA questioned whether this was in fact correct. They drew my attention to a number of information requests and responses under the Freedom of Information Act which led them to the conclusion that NIO Circular 06/2007 had in fact been implemented by the Board.

9.13 For instance, the minutes of the Board's Human Resources Committee meeting on 13 June 2007 state that the Committee resolved "that the SMP should not be instructed to place the ex officer in Band 1 at age 65 but that the current policy [was] to place an ex officer in Band 1 should they request a review at age 65 and the review is completed"[354]. Thereafter, on 21 June 2007, the Board's Manager of Police Service Regulations (Pay and Conditions), Mr [redacted], wrote to Dr McGread of Capita Health Solutions (the Board's then appointed SMP) and stated:

[354] NIRPOA also noted that this extract from the Human Resources Committee minutes had been set out in the decision of the Deputy Pensions Ombudsman in the *Black* case.

"I enclose for your information copy of NIO Policing Division Circular 06/2007 dated 30 May 2007 which provides new guidance on the role of the SMP and IMR in the consideration and review of IOD awards. The guidance was approved by the Board's Human Resources Committee at its meeting on Wednesday 13 June 2007 and brings Northern Ireland into line with the guidance already in use in England and Wales."

9.14 Mr [redacted]'s letter then sets out the "main aspects of the guidance" in the following terms:

"+ Applications received for injury awards from former officers who are already over 65 will not normally be referred to the SMP for consideration.

+ When considering an application or undertaking a review of an IOD award in respect of former officers who are over the compulsory retirement age (60 for ranks up to and including Chief Inspectors and 65 for Superintendents and Chief Officer ranks) it is no longer appropriate to use the police salary in the calculation and therefore only the ASHE survey should be used.

+ All officers on Bands 2-4 will be reviewed at age 65."

9.15 NIRPOA made the case to me that "it is simply impossible to reconcile the decision of the HR Committee with the letter that was sent to the SMP", resulting in confusion about the Board's position but the SMP being clearly directed to apply the policy. Indeed, NIRPOA went further and suggested that "the directions contained in the letter of 21 June 2007 were clearly put into effect by both the Board and the SMP". I consider the decision of the Board's Human Resources Committee at its meeting of 13 June 2007 in further detail below.

9.16 PFNI also referred me to Mr [redacted]'s letter to Dr McGread of 21 June 2007 for a similar purpose, namely as a document which (PFNI contended) showed "that the NIPB did approve and rely on guidance from NIO Police Division Circular 6/2007". The PFNI also relied upon the minutes of a meeting between NIPB and Capita of 21 September 2009 in which it was said:

"**Officers reviewed at 65 years**

Every officer must be reviewed at 65 and issued Band 1 not zero rated. [Redacted] has issued updated guidance."

The Human Resources Committee's decision of 13 June 2007

9.17 The following extract is taken from the Board's Human Resources Committee minutes for its meeting on 13 June 2007, under the heading 'NIO Policing Division Circular 6/2007 dated 30 May 2007 – Guidance regarding the role of the Selected Medical Practitioner (SMP) and the Independent Medical Referee (IMR) in the consideration and review of Injury on Duty (IOD)':

> "The Committee considered recommendations contained in NIO Policing Division Circular 6/2007 regarding guidance in the future consideration of injury on duty awards and review.
>
> It was:-
>
> **RESOLVED**:
>
> - that all current injury pensions should be kept under review at such intervals as considered appropriate, including when the former officers concerned were now above compulsory retirement age;
> - when a former officer reached the compulsory retirement age for his rank, and was in receipt of an IOD award, the Board should consider a review of the award payable, since it was no longer appropriate to use the former officer's police pay scale as the basis for his or her pre-injury earning capacity. The ASHE survey should be used for the review. Only ex officers in receipt of Band 2, 3 or 4 awards should be required to be reviewed;
> - that the SMP should not be instructed to place the ex officer in Band 1 at age 65 but that the current policy to place an ex officer in Band 1 should they request a review at age 65 and the review is completed. All officers in Band 2, 3 or 4 should be subject to review at age 65;
> - the applications received for injury awards from former officers who are already over age 65 should not normally be referred to the SMP for consideration.
>
> The Board's Selected Medical Practitioner be advised to apply the above guidance with effect from 1 July 2007."

9.18 This does not say, in terms, that NIO Circular 6/2007 will be 'implemented' by the Board; and there is an ambiguity as to whether the "above guidance" to which the SMP was to be advised to

give effect refers merely to the resolutions of the Committee set out in the bullet points, or the NIO's Circular[355]. However, what matters in substance, in my view, is whether the Board did in fact give effect to the Circular. For the reasons set out below, it seems to me that it plainly did, although with some modification to what the Circular envisages.

9.20 The modification mentioned above relates principally to the suggestion in the Circular that, once a former officer reaches the age of 65, "the force then has a discretion, in the absence of a cogent reason otherwise, to advise the SMP to place the former officer in the lowest band of Degree of Disablement". The first part of the third bullet point of the Human Resources Committee's resolution seems to make clear that the Board determined that this was not the correct way to proceed (*i.e.* that SMPs should not be advised to automatically place officers over age 65 in Band 1). However, it remains unclear precisely what is meant by the reference to the "current policy" being "to place an ex officer in Band 1 *should they request* a review at age 65 and the review is completed".

9.21 A number of the officers' representative organisations asked me to consider what in fact happened in relation to the various categories identified in Mr [redacted]'s letter of 21 June 2007, which I discuss briefly below.

New applications from those over 65

9.22 Mr [redacted]'s letter of 21 June 2007 says that "applications received for injury awards from former officers who are already over 65 will not normally be referred to the SMP for consideration". This seems to me to be entirely consistent with what had been agreed at the meeting of the Human Resources Committee, which had resolved that "applications received for injury awards from former officers who are already over age 65 should not normally be referred to the SMP for consideration". The intention of this seems to be that those over age 65 should not obtain any award. NIRPOA suggested that this was immediately put into effect and that the Board refused to accept applications for retrospective IOD awards from officers over 65.

9.23 On 23 February 2010 the Chairman of the Medical Appeal Tribunal, Mervyn Morrow QC, issued a determination in the case of Ex-Superintendent [redacted]. This was an officer

[355] Although I would have thought that the more natural reading of these words *may* be to the Circular itself since it is also referred to as "guidance" in the opening paragraph of relevant extract from the minutes.

who had been medically retired in 1988 and who, in 2007, when he was aged 70, applied to the Board for a retrospective IOD award. (Although his application did not specify the injury relied upon, it related to [redacted] rather than the [redacted] issues which had given rise to his medical retirement, and was based on evidence only available to him after he had attained the age of 65).

9.24 Applying NIO Circular 6/2007, he was informed that applications received after 1 July 2007 from former officers who were over 65 were not eligible for a retrospective injury award. NIRPOA said that the decision of the MAT indicated that the Board could not refuse to accept applications from those over 65. However, what the Tribunal actually determined was that Circular 06/2007 "does not apply an absolute rule that applicants over 65 years of age are not eligible to apply for an award" and accordingly ordered the Board to reconsider the application for an award and pursuant to regulation 29.

9.25 NIRPOA accepts that the Board did, ultimately, change is approach and agree to accept applications from former officers over age 65; but relies on the initial unwillingness to process such applications. NIRPOA is also critical of the fact that the Board continues to use two separate application forms – one for those over age 65 and one for those under 65.

Use of ASHE rather than police salary as comparison for officers over CRA

9.26 Mr [redacted]'s letter of 21 June 2007 also notes that "when considering an application or undertaking a review of an IOD award in respect of former officers who are over the compulsory retirement age… it is no longer appropriate to use the police salary in the calculation and therefore only the ASHE survey should be used". This is again consistent with what had been agreed by the Human Resources Committee. It determined that, when such a case was being considered[356], "it was no longer appropriate to use the former officer's pay scale as the basis for his or her pre-injury earning capacity". The Committee went on to say that "The ASHE survey should be used for the review".

9.27 NIRPOA commented to me that this is a "clear fettering of the SMP's discretion by a statement with no basis in fact". This is a matter I return to later in this report. I do not think it is particularly helpful to address the issue as one of fettering of discretion in the public law sense.

[356] Whether, and how often, this should happen is another matter.

The more important issue is one of substance, namely whether a proper comparator for the purpose of calculating loss of earning potential of a former officer who has reached the CRA is the amount a serving police officer would earn having regard to the purpose and effect of the 2006 Regulations.

9.28 I understand the suggestion from NIRPOA that the Board's approach had "no basis in fact" to be a reference to the fact that there are persons working as police officers who have passed compulsory retirement age, thereby illustrating that it is possible to continue to work as a police officer past the age at which the Board's approach assumes this is not possible.

All officers on Bands 2-4 reviewed at age 65

9.29 Mr [redacted]'s letter also states that "all officers on Bands 2-4 will be reviewed at age 65". Again, this is consistent with the Human Resources Committee decision which states that "all officers in Band 2, 3 or 4 should be subject to review at age 65".

9.30 I have also been provided with the minutes of a meeting between the Board and Capita (then the Board's appointed SMP) of 21 September 2009. Under the heading 'Officers reviewed at 65 years', the minutes note that: "Every officer must be reviewed at 65 and issued Band 1 not zero rated". Further updated guidance also appears to have been issued (presumably to the same effect)[357]. NIRPOA pointed to this direction giving rise to five decisions which have been challenged before the Pensions Ombudsman[358]. They considered this to be clear proof that the approach set out in the Home Office and NIO Circulars had been implemented by the Board in guidance or directions given to its SMPs[359].

9.31 The current position (prior to the suspension of reviews) was also described by Mr Pollock in a letter to Mr Allister QC MLA of 24 January 2014 in the following terms:

> "I can advise you that it is the Board's policy that <u>all</u> current Injury on Duty Awards for officers on band 2 and above are kept under review at such intervals as considered

[357] And I was told by NIRPOA that the Minister of Justice had since confirmed (in a response to an Assembly question in June 2012 from Mr Jim Allister QC MLA, reference AQW 17707/11-15) that the instructions to the SMP remain the same since the meeting of 21 September 2009.

[358] Those of Diamond, Black, Mr M/ Mr A, C[redacted] and Collum.

[359] Since they also pointed out that there was no material distinction, in terms of what was actually payable, between an officer who was 'zero-rated' and one who was in Band 1.

appropriate (minimum of 5 years) including those who have 'permanent no further review' stated on their certificate. A final review is conducted at age 65. A final review is conducted at an age when a police officer is required to retire by statute (60 and 65) and, for the purposes of an earning loss capacity award such as the IOD award, is no longer in receipt of a police salary. This final review is normally carried out around the age of 65.

We have received legal advice for this policy, which was originally agreed by the Board in June 2007. This policy was agreed at the Board's Human Resources Committee on 13 June 2007."

The upshot

9.32 A good deal of emphasis was placed by the officers' representative organisations on the issue discussed above of whether, and how, the Board implemented NIO Circular 7/2006. There seems to me to have been a great deal of mistrust and ill-feeling generated by the Board's claims that it had not implemented the Circular in the face of suspicion on the part of the former officers, and some fairly strong evidence, that it had.

9.33 My conclusion on this issue is probably not of any great significance, since it relates to events which are largely historic and which have been superceded by the suspension of age 65 reviews and the procedure giving rise to this report. Its main significance is to emphasise again the importance of clear communication between the Board and the other stakeholders in the IOD process[360]. This is because I take the view that the parties were often speaking at cross-purposes and that each is partly correct.

9.34 I have been told repeatedly by the Board officials that it did not 'zero-rate' officers, whereas in England and Wales they did so. It has also been emphasized to me that the reduction in any officer's banding at age 65 was not an automatic matter but based on a review conducted by an SMP and a further calculation of percentage disablement. This meant that, although some officers aged 65 would have their banding reduced (indeed, this seems to have been the case in the majority of cases), this was not necessarily so. Some officers remained in the same band; and others were reduced in band but not down to Band 1. These are the points made in the Board's Director of Policy's letter of 6 July 2012 mentioned in paragraph 9.08 above.

[360] See, for instance, paragraphs 5.68 to 5.74 above.

9.35 The Board viewed this as materially different to what was suggested in the Home Office and NIO Circulars, namely that where officers reached age 65 the force could simply advise the SMP to place them in the lowest banding – without any assessment and/or without conducting a further percentage disablement calculation[361]. What happened in the *Simpson* case, for instance, on foot of the local guidance issued by the Northumbria force, was that officers at age 65 were reviewed as a purely paper exercise by the SMP and simply reduced to 0% disablement without any real consideration of the circumstances of their case[362].

9.36 Indeed, the reviews which gave rise to the relevant litigation in England and Wales were an entirely paper exercise. It seems that some 70 cases were dealt with by the relevant SMP (Dr Broome) on the one day[363]. There was no medical examination. Nor, it appears, was there any attempt to assess the officer's assumed earning capacity by reference to the ASHE survey. Rather, the approach which was taken was that an officer who had reached age 65 had "no earning capacity" and, therefore, was automatically to be placed in the lowest band. Where (on the assumed basis) the officer would have had no earning capacity, he could not have lost any of that capacity by reason of his injury and the loss of earning capacity would, logically, be 0%.

9.37 This is what the Board determined would not be appropriate. In contrast, therefore, in Northern Ireland, where an age 65 review was conducted, there would be a full review by an SMP, including a medical assessment and a recalculation of the percentage disablement figure but using the ASHE survey in relation to the uninjured earning capacity (*i.e.* the type of exercise the Home Office and NIO Circulars envisaged for officers having reached CRA but not age 65).

9.38 This is also significant because the English High Court in the *Simpson* case quashed only that aspect of the Home Office guidance dealing with age 65 reviews, which suggested that the SMP could be advised simply to place officers in Band 1 on the basis that (eve uninjured) the officer would have no expectation of employment at that age. It did not, at that stage, quash the element of the Home Office guidance dealing with reviews at CRA, where the ASHE survey was to be used as a substitute for the officer's uninjured police salary. This meant that the Board had some

[361] On the basis, effectively, that, had they not been injured, they would no longer be expected to be earning any salary in the employment market and, therefore, their loss of earning capacity (in the absence of cogent reason shown to the contrary) must be nothing.

[362] See paragraph 7.14 above.

[363] See, for example, paragraph [42] of the *Crudace* decision.

justification for assuming that *its* approach had not been found to be unlawful in the *Simpson* judgment.

9.39 The position is complicated further still, however, by the fact that the Department (the Board says) *had* implemented the Circular, so that where cases went on appeal, the IMRs would follow the guidance. After the *Simpson* judgment, the Department wrote to the Board informing them that they should no longer 'zero-rate', which was a source of a little bemusement to Board officials, since the Board considered that it had not been doing so.

9.40 I accept, therefore, that the Board did not implement NIO Circular 7/2006 *in full* or could be said to have only *partially* implemented it, particularly by requiring an assessment of earning capacity for those over age 65 (using the ASHE survey) and not simply assuming, as the Circular does, that their uninjured earning capacity[364] at that point would be nil. It seems to me that this is what the Board was seeking to convey – or ought to have been seeking to convey – in its protestations that it had not implemented the NIO Circular. This position is much more clearly expressed in my terms of reference than in some previous statements by or on behalf of the Board about whether it implemented the NIO Circular or not.

9.41 However, I also consider that there is considerable force in the criticisms made by the officers' representative organisations that the Board's statements that it had not implemented the NIO Circular did not provide a full and accurate picture. Until the introduction of the relevant circulars, those aged over compulsory retirement age or state pension age do not appear to have been singled out for different treatment. After the introduction of the circulars, they were. They were subject to review for age-related reasons alone; their uninjured earning capacity came to be assessed in a completely different fashion from previously for the purpose of calculation of the percentage disablement figure; and, at least for a time, new applicants over age 65 were not referred to the SMP at all.

9.42 In light of the change of approach adopted by the Board to those aged over 65 on foot of the introduction of the NIO Circular, I do not think it is possible to maintain, in straightforward terms, that the Board "did not implement" the Circular. To my mind, the Board *did* implement the Circular but did not implement it *fully* in some limited respects, since it decided to adopt a different approach to how age 65 reviews would be conducted on the basis that this would be a fairer and

[364] In the absence of cogent reason to show otherwise.

more accurate way to proceed than what the Circular envisaged and what some forces had done in England and Wales as a result.

9.43 Insofar as the Board did, at some time, instruct SMPs to automatically place former officers aged 65 or over into Band 1 (see paragraphs 9.16 and 9.30 above) and this instruction was given effect to, this is plainly a much clearer step towards full implementation of the approach set out in the Circular.

9.44 However, the argument about whether the Board did implement the Circular or not, which took up quite some time in the consultation meetings I conducted in the course of this reviews, seems to me to have generated far more heat than light in the debate. The Board here did not adopt the same approach as gave rise to the *Simpson* litigation in London; although for those former officers who were reduced to Band 1 at age 65 (even if their percentage disablement figure remained much higher than 0% but still below 25%), this will have been little comfort. The officers' organisations also cannot ignore the fact that the Board did not simply 'zero-rate' at age 65 and, more importantly, that not all age 65 reviews conducted here after the introduction of the NIO Circular resulted in a reduction to Band 1.

9.45 The more important issues are plainly whether age alone, or at all, is a factor which should justify a review and/or influence the percentage disablement calculation. These questions are common to the approach set out in the Circular and the approach which was, in the event, adopted by the Northern Ireland Policing Board.

The suspension of reviews

9.46 As discussed in Chapters 3 and 7, the approach ushered in by Home Office Circular 46/2004 was soon the subject of legal challenge in the *Simpson* litigation and, later, the *Slater* litigation. Particularly following the judgment in *Simpson*, there was strong opposition to the continuation of age 65 reviews. As my terms of reference note, "a number of concerns raised by former officers and various representative groups a decision was taken by the Board in March 2013 to suspend the review of injury on duty awards".

9.47 I have seen correspondence from the Chief Executive of the Board in which he has stated that:

> "The Northern Ireland Policing Board have continued to support me in my advice to them that IOD reviews instigated by the Board should be suspended until such times as I can advise the Board as to the defensibility of processes in line with the Regulations and clear guidance for members or retired members of the Police Service. The first element of my advice to the Board will stem from David [Scoffield]'s opinions to me on the key issues.

9.48 The suspension of reviews seems to me to have been a sensible measure to permit some breathing space for this issue to be considered in greater detail.

The significance of the *Simpson* and *Slater* cases

9.49 The approach which should be adopted to the question of reviews at age 65, at least on the current wording of the Regulations, must in my view be gleaned from the *Simpson* judgment. I have discussed this, and the follow-on *Slater* case, in great detail in Chapter 7 and do not intend to repeat what I have set out there, to which the reader is again referred.

9.50 Of particular significance, in my view, is the Court's rejection in *Simpson* of the "working assumptions" behind the Home Office guidance[365], which may in themselves seem sensible, but which Supperstone J found no basis in the Regulations, with the Regulations requiring "a very different approach" to that set out in the Circular under challenge. This meant that a review could not be triggered by age-related factors alone and that age should not make a difference as to how a review is approached[366].

9.51 These conclusions flowed from a strict application of the review provision in the Regulations and also broader conclusions about the nature and effect of the statutory scheme: namely (i) that the purpose of an injury pension is *not* simply "to make up for the financial consequences of an enforced inability to continue operating as a member of a police force"; and (ii) that there is nothing in the Regulations to suggest that the "life entitlement" to which they give rise "is affected by reference to the age when the individual would have been compulsorily retired from the police service or from state pension age…"[367].

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[365] See paragraphs 7.19, 7.21 and 7.26 of Chapter 7.

[366] See paragraphs 7.23 – 7.26 of Chapter 7.

[367] See paragraphs 7.27 – 7.30 of Chapter 7. See also the further discussion of this aspect of the *Simpson* reasoning at paragraphs 7.36 – 7.44.

9.52 The implications of the *Simpson* case are clearly, therefore, at the very least, that reviews should not be conducted merely because an officer has reached the age of 65.

9.53 Although the *Simpson* conclusions do not expressly condemn the use of the ASHE survey for officers over CRA or over age 65, I consider that they point strongly in favour of abandoning the use of ASHE for such officers[368]. Moreover, although the Home Office does not accept that the result in the *Slater* litigation impugned the use of the ASHE survey in any way, it seems significant to me that, unlike in the *Simpson* litigation, there has now been an order quashing as unlawful that part of Home Office Circular 46/2004 which introduced the ASHE survey as a tool for determining percentage disablement for the first time (albeit for reasons unspecified in the order). The result in *Slater* seems to me to point towards the Home Office at least having accepted that the difficulty with its guidance which was identified in *Simpson* went beyond the mere reduction in banding without there being a proper calculation of percentage disablement.

9.54 If the ASHE survey is not used to try to calculate the (notional) uninjured earning capacity of a former officer who has attained CRA or SPA, how is that figure to be settled upon? This poses a conundrum. One approach is simply to continue to use the officer's police salary as a basis for calculation of the injured earnings figure. There is an element of artificiality to that since, as the Home Office and NIO's guidance has pointed out, ordinarily the officer would not continue to be employed as a police officer at that time. However, this may be the simplest way of dealing with the issue and avoiding potential illegality identified by the approach taken in *Simpson*. The problem only arises, however, if the percentage disablement figure is arrived at by an arithmetical comparison between precise figures for both injured and uninjured earning capacity. As I have already made clear earlier in this report[369], I would personally favour a move away from this approach, which I also consider to suffer from quite a degree of artificiality.

Other objections to the conduct of age 65 reviews

9.55 The objections made to me in relation to the holding and conduct of age 65 reviews centred upon the implications of the *Simpson* litigation (and earlier litigation such as the *Turner* and *Laws*) decisions; but also incorporated two further themes. First, the fact that there were (the officers' representative organisations contended) police officers who were working beyond retirement age

[368] For the reasons set out in paragraphs 7.52 – 7.57.
[369] See paragraphs 4.48 – 4.56.

and, indeed, beyond age 65. Second, that the change of treatment represented unlawful age discrimination. And, third, that some of those who had been reviewed had been informed that their award was "for life" and/or would not be subject to further review.

9.56 In light of the conclusions I have reached about the nature and effect of the English High Court's ruling in the *Simpson* case, and what this means for the correct approach to the interpretation of the Regulations, these issues can perhaps be dealt with more briefly than might otherwise have been necessary. I make a number of comments in relation to each of them below.

Officers who continue to serve after reaching CRA

9.57 The officers' organisations placed considerable emphasis on the fact that there were officers serving well beyond compulsory retirement age. NIRPOA relied upon the fact that "the default retirement age was repealed in 2011". It went on in its submission to state that:

> "The PSNI Policy in respect of age limit is well known to the NIPB and it is not that compulsory retirement age is 60 years. The policy allows for two extensions of one year and then the possibility of further extensions of one year and then the possibility of even further extensions. Mrs Karen Todd MBE of PSNI Pensions Branch has stated publicly that there are regular officers serving at 64 years of age.
>
> **However, it does not end there as members of the Part Time Reserve who carry all the powers of a Constable are still serving at 70 years**.
>
> … It is obvious that those in receipt of IOD had they been fully fit would have welcomed the opportunity to remain in the PSNI on extensions." [bold emphasis in original]

9.58 One example was mentioned to me of a part-time reserve constable whose award was reduced at age 65 by applying ASHE "despite colleagues in her old station serving at 70 years old". This was echoed by the Police Federation who also told me that there were officers still serving at 68 and 69 years of age; and by the Disabled Police Officers' Association, which said that there were members working over the age of 65.

9.59 The Board informed me that officers do have to retire at the relevant CRA (age 60 for officers up to the rank of Chief Inspector; and age 65 for those of the rank of Superintendent or above). I

was also informed that there had been a challenge to police compulsory retirement ages, which had been unsuccessful.

9.60 I understand that the Board accepts that there are a small number of reserve officers who are working past age 65. However, they do not believe that these officers are in the same position as regular officers. I queried this with the PSNI who told me that there are some part-time officers over 65. However, they are not thought to be in a comparable position to regular officers. In particular, they were not pensionable (and, if they had been, they would have had a compulsory retirement age). However, it seems such officers may now be pensionable because of auto-enrolment.

9.61 The Board enquired into this issue further and provided further information to the effect that there are no regular police officers still in service beyond the age of 65. However, there are currently 21 serving members aged over 65 in the Part-Time Reserve. I am told that these are "a very different type of officer to regulars" and are mainly engaged in a community policing and support role to regular officers, so that a direct comparison cannot be made.

9.62 In addition, members of the Part-Time Reserve (only since February 2004 when the PSNI Reserve (Part-Time) Regulations 2004 came into force) are now required to serve a minimum of 144 hours duty *per* year (see regulation 16). Regulation 12 provides that retirement is compulsory at 65. They are paid at an hourly rate (currently about £12 *per* hour) and they also receive what is referred to as a "monthly retainer" of £58.52 *per* month (with regular officers receiving approximately £200 *per* month in a similar allowance). In summary, however, the Board officials would not consider that either the role or, perhaps more importantly, the salary received by part-time reserve officers to be equivalent to that of regular members of the PSNI.

9.63 I confess that this was another area of debate and disagreement which (much like the question of whether or not the Board had implemented NIO Circular 6/2007) seemed to me to be one where the various parties were often talking at cross-purposes and which, in the final analysis, is not really of much assistance as to how the Regulations ought to be interpreted and applied. The officers are right that there are people who are working beyond the age of 65 *as police officers*, so one cannot maintain that no-one beyond the age of 65 is or can be employed as a police officer. But the authorities are also right that there are general ages of compulsory retirement for police officers, which do not extend beyond 65. In the vast majority of cases, officers will be retired at or

before that age; and those who continue in employment are both an exception to the rule and, in the main, part-time reserve officers whose remuneration (for the purposes of considering earning capacity) is not properly comparable to a regular officer in standard police employment.

9.64 All that I really draw from this is that (i) it is a further indication, as indicated in *Simpson*, that sweeping assumptions are likely to be unhelpful, particularly in relation to age; (ii) accordingly, each case should be considered on its own merits[370]; and (iii) this debate is a further illustration of why a move away from (what I have called) the arithmetical approach to trying to ascertain percentage disablement may be warranted.

Age discrimination?

9.65 Age discrimination in the context of employment is a complex matter and not one in which I profess any expertise. This was another area of debate in the course of the review process which I did not find to be of particular assistance, particularly because it was suggested to me on the part of a number of the officers' organisations that the approach to age 65 reviews was "age discrimination" without much elucidation of what was meant by this or how the issue should be analysed, much less any legal authority for the proposition.

9.66 My instinct in relation to this issue is that it is unlikely to add much to the discussion about the purpose and effect of the 2006 Regulations, so that if the Regulations (correctly applied) result in a former officer being treated less favourably at the age of 65, this is likely to be lawful even when viewed through the prism of age discrimination.

9.67 Age discrimination in the context of employment in Northern Ireland is prohibited by the Employment Equality (Age) Regulations (Northern Ireland) 2006. There is significant doubt in my mind as to whether the review of an IOD award by the Board is caught by these Regulations at all. It is unlikely to be discrimination by an employer under regulation 7 of the Regulations; nor discrimination in the context of an occupational pension scheme under regulation 12. However, it could conceivably be discrimination by the Board under regulation 14(1)(b) read in conjunction with the application of the Regulations to 'relevant relationships' which have come to an end under regulation 25(1).

[370] And, insofar as relevant, the question should be asked whether the particular officer in question would be likely to have been employed beyond CRA or SPA and on what terms.

9.68 Even assuming that to be so, however, regulation 28 provides a broad exception to the provisions of these Regulations where the act in question is done in order to comply with a statutory provision: "Nothing in Part 2 or 3 shall render unlawful any act done in order to comply with a requirement of any statutory provision." This seems to me to be likely to cover a reduction in award pursuant to the obligation to keep injury pensions under review which is contained in regulation 35 of the 2006 Regulations. In other words, if the reduction in award at age 65 is a proper application of the 2006 Regulations, this is likely to give rise to an exemption from the Regulations dealing with age discrimination (assuming the review of IOD awards is subject to those regulation in the first place). This would apply *a fortiori* if even more clear provision was made in the Regulations as to how age 65 reviews should be dealt with.

9.69 I also note that the Regulations provide an exception relating to retirement in regulation 32, to the effect that nothing in Parts 2 or 3 of the Regulations shall render unlawful dismissal of a person at or over the age of 65 where the reason for the dismissal is retirement. In other words, the Employment Equality (Age) Regulations do not make compulsory retirement on the grounds of age at 65 unlawful. Again, therefore, if the reduction of a former officer's banding at age 65 was a result of consideration of a lawful compulsory retirement age, it seems to me likely that it would not fall foul of age discrimination prohibitions.

9.70 Of interest in this context also is the content of regulation 36(1) providing an exception for provision of life assurance cover to retired workers. Although that provision is unlikely to be directly applicable to IOD awards, it provides (broadly) that where an employer arranges for retired employees to be provided with life assurance cover after early retirement on grounds of ill-health, it is not unlawful for that cover to be withdrawn when the worker reaches the normal retirement age (the age at which they are normally required to retire) or age 65. This seems to me to indicate that, had the Regulations had the effect which the Home Office imagined and contended for in the *Simpson* litigation, that itself would not have been inconsistent with the spirit of anti-age discrimination provisions in relation to benefits provided to employees who have retired early on ill-health grounds.

9.71 I also bear in mind, however, that in the *Crudace* case, the judge (at paragraphs [33]-[34]) was fortified in his view by decisions of the Pensions Ombudsman to which he had been referred in argument – to the effect that one should not start from the assumption that at state retirement age an officer's earning capacity reduced to nothing (or that it was for him to prove otherwise)

"particularly in view of the coming into force of the Employment Equality (Age) Regulations 2006" – a comment with which the judge expressly agreed.

9.72 Notwithstanding this, I remain of the view that this type of analysis – discussed only briefly in this report – is not determinative of the issues I have been asked to address. Given my conclusions resulting from the *Simpson* judgment, the manner in which former officers reviewed here at age 65 were dealt with is likely to be unlawful on the basis of the 2006 Regulations themselves, whether or not it also amounted to age discrimination. Conversely, if such treatment was (or in the future was to be) simply the result of the requirements of the 2006 Regulations, that is likely to engage an exception to the Employment Equality (Age) Regulations in any event.

'No review' and 'for life' cases

9.73 I consider that there is a good deal more force in the submissions made to me in relation to officers who had expressly been told that their case was not for review or that their particular level of award was for life.

9.74 I was told by a number of consultees of cases in which the officer's award was designated as "permanent, no review"[371] or "for life" or words to that effect. NIRPOA said that the recalling of such officers for review has caused great concern; and PFNI also described this as "a particular area of concern", since "these retired officers have quite reasonably assumed that this statement does indeed mean the OID award is permanent and no further review will be required".

9.75 Mr [redacted]'s letter to the SMP of 21 June 2007 also advised that "Permanent awards in Bands 2-4 should not be made in order to enable reviews to take place at age 65", recognizing, it seems, that it was best to avoid such an expectation being engendered in future.

9.76 NIRPOA also informed me that there was an email from the Board to Mr Chris Lyttle MLA in which it was said that "there are no permanent Injury on Duty (IOD) Awards" as "all IOD Awards are subject to review" in accordance with the Regulations[372]. The email also goes on to say, however, that "it had been past practice for the Selected Medical Practitioner (SMP) in some cases to mark an IOD Award as permanent and therefore not subject to review".

[371] For instance, an officer who lost a leg in a bomb.

[372] I have been provided with a copy of part of this email but it is not possible to see, for instance, by whom it was sent or when.

9.77 The Board is not able to provide a figure as to the number of IOD awards which were previously marked as permanent; but it is clear that there is a cohort of such cases.

9.78 An ancillary point which was made to me in this regard was that where there was some other form of compensation claim available (such as a criminal injuries compensation claim or even a normal civil claim), when that was assessed it is likely that the injury pension "for life" would have been taken into account in order to reduce the claim.

9.79 On this topic, I was also referred to a decision of the Pensions Ombudsman in the case of *Jayes*[373]. That was a complaint against the Nottingham Police Authority. Mr Jayes' injury benefit had been reduced from Band 3 to Band 1. Having been awarded the injury benefit in 1994, he had been reviewed in 1997, his award was unchanged and the SMP had recommended that no further reviews were necessary. This was communicated to him by the authority but he was subsequently reviewed in 2007, having reached the relevant compulsory retirement age for a constable, in accordance with Home Office Circular 46/2004. The SMP found Mr Jayes fit for full-time work, that his degree of disablement had substantially altered and that the degree to which his earning capacity had been affected was slight. He was reduced to Band 1. A large part of his complaint was that the authority should honour the assurance given to him in 1997 that his injury benefit would remain unchanged and that no further review would be necessary.

9.80 The Force Solicitor responded that, although Mr Jayes received a letter in 1997 telling him that there would be no further reviews, the Regulations imposed a statutory obligation on the authority to conduct these. The Force conceded that the review had been conducted incorrectly in reliance on the Home Office Guidance but did not feel at liberty to substitute a new determination in the absence of the extant decision being set aside by a court, tribunal or the Ombudsman.

9.81 On the issue under discussion at present, namely whether the communication to Mr Jayes that he would not be subject to further review meant that it was wrong to subsequently recall him for review, the Deputy Ombudsman (at paragraph 19 of her decision) said simply this:

> "Regulation 37(1) clearly requires [the authority] to periodically review ("at such intervals as may be suitable") injury awards. I therefore do not find that NPA are prohibited from doing so because they told Mr Jayes in 1997 that no further reviews would be necessary."

[373] PO-279.

9.82 Whether it is lawful or not to review someone in this category of case will depend on the particular circumstances of their case and, in particular, on the application of the public law doctrine of substantive legitimate expectation. This doctrine is the principal means by which promises are enforced against public authorities.

9.83 There are many reported cases discussing the nature and application of the doctrine of legitimate expectation but a fairly recent, helpful authority on the topic summarizing the relevant principles in this jurisdiction is *Re Loreto Grammar School's Application*[374]. For instance, at paragraph [42] of its judgment, the Court said:

> "Whatever undesirable uncertainties may exist in the law of substantive legitimate expectation, it is clear from the authorities that a legitimate expectation can only arise where there has been, in Bingham LJ's succinct terminology, a 'clear and unambiguous representation devoid of relevant qualifications' as to the decision maker's future conduct (see for example *A-G of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346, [1983] 2 AC 629, *Bancoult*, *Coughlan* and *Association of British Civilian Internees – Far East Region v Secretary of State for Defence* [2002] EWHC 2119 (Admin), [2002] All ER (D) 271 (Oct))."

9.84 The Court was also clear that, even where such a representation has been held to have been made, the public authority must still be afforded discretion to depart from it if it (the authority) feels that this is in the public interest, subject to the Court concluding (in an area where the Court enjoys a much more intensive role for scrutiny of the authority's decision) that to do so is so unfair as to amount to an abuse of power. At paragraph [45] of the Court's judgment, one finds the following:

> "… the doctrine of legitimate expectation should be narrowly construed. Enforcement of a legitimate expectation involves a restriction on the width of the decision maker's discretion. The legislature in conferring statutory discretionary powers cannot cater for all circumstances. The decision maker will have to make decisions in the light of changing circumstances. The need for flexibility is the underlying rational for the principle the decision makers cannot lawfully fetter their discretion through inflexible policies, a principle most clearly enunciated in *British Oxygen Co Ltd v Minister of Technology* [1970] 3 All ER 165, [1971] AC 610. The court will thus lean against the finding of a fettering of discretion. If the doctrine of legitimate expectation were too loosely and widely interpreted and applied, public authorities could too readily be disabled by their

[374] [2012] NICA 1; [2013] NI 41.

> representations from acting subsequently in what they truly consider to be and in what may very well be the public interest. Different considerations arise, however, where the authority has undertaken responsibility by clear, unambiguous, unequivocal representations made to an individual in circumstances in which it would be conspicuously unfair and hence an abuse of power to act contrary to the representation. In such a situation the balance must be struck differently."

9.85 I have little difficulty in concluding that clear statements to an individual – particularly if expressed in the SMP's certificate or report – to the effect that their case would not be subject to review would have the necessary qualities to give rise to a substantive legitimate expectation on their part that there would in fact be no such further review. The question is whether or not it would be lawful for the Board to frustrate this expectation.

9.86 I also have no difficulty in concluding that this was not lawful in the case of officers called back merely because they had attained the age of 65. In fact, given the conclusions in the *Simpson* case, one does not have to have recourse to the doctrine of legitimate expectation to reach this conclusion. However, if one looks at the issue through the prism of legitimate expectation, in light of the ruling in *Simpson*, the reaching of a particular age in itself was obviously not a sufficient reason to frustrate the legitimate expectation engendered by the initial representation that there would be no review. Looked at in either way, I consider that a review on that basis alone will have been unlawful.

9.87 The position is more complicated where the reason for conducting a review is not related to age but arises on some other basis. The lawfulness of frustrating the legitimate expectation in those cases would have to be considered on a case-by-case basis. I tend to the view that, provided there are cogent reasons for determining that a review is appropriate, it is likely to be lawful for a review to be held, notwithstanding the previous indication to the officer that there would be no further reviews. This is principally because, as highlighted above, there is an obligation within regulation 35 to keep awards under review. I also do not think it could be seriously suggested, for instance, that if a relevant change of circumstances came to light (for example, if the officer in question benefited from a full but unexpected recovery) the Board would be legally precluded from initiating a review simply because the officer had been told in the past that a review would not be necessary.

9.88 Broadly speaking, therefore, in my view reviews can be held even where an officer has been told that his case will not be one for review. Bearing in mind that this representation will have engendered a legitimate expectation in the officer that his case will *not* be reviewed, I would recommend that such officers only be called back for review where there is some apparently compelling reason for this. As indicated by the discussion above, the mere attainment of a particular age is plainly not such a reason. This has also been confirmed by a number of the recent Pensions Ombudsman's cases dealing with this area, which are discussed further in

9.89 I would not go so far as to say that there will *never* be a case where a representation to the officer by an SMP (that his case is not for review) will give rise to an effective legal prohibition on the case being reviewed. This will generally not be the case, since the Board is required to keep awards under review at appropriate intervals. However, I have also indicated my view that what is appropriate in this regard (in the absence of some new compelling information) should primarily be based on medical advice and is primarily a medical question. Bearing in mind also that the authorities emphasise the importance of certainty in this area, officers are plainly entitled to rely strongly on a representation that has been made to them that their case will not be reviewed.

9.90 In summary, therefore, a representation of 'no review' will rarely be a complete prohibition on review; although it could be in an appropriate, exceptional case; but, nonetheless, where such a representation has been made, compelling reasons should be present before the Board decides to review, in my opinion; and, on any view, the attainment merely of a particular age is not such a reason.

The way forward

9.91 What then should the Board do about the matter of age 65 reviews and, in particular, those which have been suspended for the moment?

9.92 On the basis of the conclusions set out earlier in this chapter, particularly in relation to the significance of the *Simpson* judgment, any suspended reviews which were prompted merely by the officer's attainment of age 65 or other compulsory retirement age should be abandoned. Payment should simply continue at the earlier amount unless and until there is a lawful review (prompted otherwise than simply the officer's attainment of a particular age).

9.93 Where a completed review has resulted in an officer having had his banding reduced by virtue of his attainment of a particular age, that is to say in a *Simpson*-type case, this should be looked at again, with a view to restoring the officer to the banding he was on before the review. This should be done with a view to consequential backdating of any payment which the officer should be due, unless and until a lawful review has been conducted.

9.94 There are a number of ways in which this corrective approach might conceivably be achieved. Unfortunately, however, it is not possible in my view simply to ignore the certificate issued by the SMP in the course of the review, since this is presumptively lawful and has legal effect by virtue of the provisions of the Regulations, including the provision that such a certificate is 'final'.

9.95 One way of dealing with the matter might be for the officer in question and the Board to agree to refer the matter back to the SMP; or for this to occur in the context of an appeal. What happens, however, if the referral back results in the same determination or a different determination, but still one which is less beneficial than the position the officer would have been in had the review not happened at all? Also, in the absence of any clear and agreed guidance at the moment as to how these issues should be dealt with, how should the SMP (or IMR on appeal) assess any case which is referred back?

9.96 If the Board accepts my advice that (on the current Regulations as interpreted by *Simpson*) reviews triggered simply by reason of the officer's attainment of a particular age 65 simply should not have occurred, a mechanism requires to be found to undo the certificate resulting from such a review. (This is the concern which was expressed in the *Jaye* case referred to above at paragraph 9.80).

9.97 Initially, it was thought that a collective referral of all of these concluded reviews could be made to the Pensions Ombudsman for the purpose of quashing the SMPs' decisions; but, upon tentative exploration of this option with the Pensions Ombudsman's Office, this now seems unrealistic[375]. Another option would be one application for judicial review (preferably on consent) brought by the Board in relation to all of the relevant decisions which require to be undone. This potentially represents a relatively low cost and effective means of addressing the issue but will no doubt have to be discussed in further detail.

[375] See paragraph 11.14 below.

9.98 Indeed, it may well be that, if my conclusions on these issues are accepted by the Board, the appropriate course is for this to be conveyed to the officers' representative organization(s) and an effort made to agree a mechanism for giving effect to it. No doubt there is further work which can be done in this regard. However, on the basis of the law as it currently stands, it seems to me that the age 65 reviews which were undertaken on the basis of (even the modified implementation of) NIO Circular 6/2007 ought not to have occurred and should be rectified for the officers concerned.

CHAPTER 10

APPEALS

The separate appeal streams

10.01 There are two 'appeal streams' provided for in the 2006 Regulations. The first is a pure appeal on the medical questions under regulation 30. Such an appeal is made to an IMR. The second is an appeal against the decision of the Board on eligibility and quantum under regulation 33. Such an appeal is made to an appeal tribunal, originally appointed by the Secretary of State (now the Minister for Justice).

10.02 There is some overlap between the two streams – and, indeed, they do not necessarily fit neatly together – because an appeal tribunal hearing an appeal under regulation 33 can make a further reference to a medical authority under regulation 31. This is another way of having the determination of a medical question looked at again but is not, strictly speaking, an appeal of itself.

10.03 Each of these procedures is discussed in further detail below.

Appeal to the Independent Medical Referee

The right of appeal

10.04 The decision of the SMP on a particular issue is not the last word. Notwithstanding that his decision on medical questions referred to him is said to be 'final', this is expressly subject to regulation 30. Regulation 30(1) provides:

> "Where a person is dissatisfied with the decision of the selected medical practitioner as set out in a report and certificate under regulation 29(5), he may, within 28 days after he has received a copy of that report and certificate or such longer period as the Board may allow, and subject to and in accordance with the provisions of Schedule 6, give notice to the Board that he appeals against that decision."

10.05 Accordingly, provided the appeal is made within time[376], there is an appeal as of right against decisions of the SMP on medical questions which have been referred to him. The only qualification on this right is that it arises where a person is dissatisfied with the decision.

10.06 Interestingly, regulation 30(1) does not specify that the person dissatisfied must be the person who is the subject of the report, leaving open the possibility of third party appeals (for instance, by another officer who was said to be responsible for having caused an injury to the officer concerned in the execution of his duty). It seems to me that the obvious intention and effect of the rule is to give a right of appeal to the person who is the subject of the report. Time for appeal runs from the time when he has received a copy of the SMP's report and certificate, which is likely to refer back to the obligation under regulation 29(6) to supply those to "the person who is the subject of that report". It might also be, however, that the person entitled to appeal is, as in regulation 33(1) dealing with appeals to the tribunal, the police officer himself "or a person claiming an award in respect of such a police officer".

The procedure on appeal

10.07 As to the procedure to be followed, the obligation in regulation 30(1) is for the person dissatisfied to given *notice* that he is appealing within 28 days after receipt of the report and certificate. This then triggers a further 28 day period (running from service of the notice of appeal) within which the appellant must supply to the Board a statement of the grounds of his appeal[377]. If he does, the Board must then notify the Minister of Justice, who must appoint an IMR "to decide".

10.08 Little guidance is given as to the form or procedure for an appeal but it seems likely, given the terms of regulation 30(2), that the IMR is entitled to approach the medical questions which had been referred by the Board afresh. That said, he is plainly entitled to have regard to the report provided by the SMP. Indeed, regulation 30(3) expressly envisages that he will see the SMP's report and certificate and that he (the IMR) need only provide his own report and certificate if he disagrees with any part of the report and certificate of the SMP.

10.09 This leaves open the possibility that an IMR could consider an appeal and produce no report or certificate, provided he agreed with the report and certificate issued by the SMP. My view is

[376] Or an extension permitted by the Board.
[377] See regulation 30(2).

that, in such a circumstance, it would be unnecessary for the IMR to issue any fresh certificate (which would replicate the certificate of the SMP); but that it would be preferable for the IMR to issue a report, or at least some form of written summary, identifying why he agreed with the SMP and how he reached his conclusions. Indeed, this seems to be envisaged by the provision within Schedule 6 to the 2006 Regulations that the IMR must supply the Minister of Justice with a written statement of his decision[378].

10.10 The appeal is partly a review in nature therefore, that is to say, involving the IMR looking at the SMP's existing report and certificate to see if he disagrees with them. As I have noted above, however, there is no particular threshold to be overcome before the IMR is entitled to disagree with the SMP. He is entitled simply to reach his own conclusions.

10.11 But this raises the issue of whether the IMRs should be practitioners of greater experience or expertise in the relevant field than the SMP who initially dealt with the case. When legislation provides a right of appeal, this is usually considered by someone of more authority or experience than the first instance decision-maker, rather than merely being a second opinion of someone equally (or even perhaps less) experienced than the person whose decision is appealed against.

10.12 I am aware that there has been some discussion in the past as to the appropriate status of the IMR who considers the appeal. In particular, the DOJ Review Report[379] recommended that the Department explore the costs and benefits of using a two-person appeal panel, chaired by an Occupational Health specialist, with a view to carrying out this function. The Review Panel noted that it would assess progress in relation to this in March 2011. I understand from the consultation meeting I had with representatives of the Department that this issue is still under consideration but without any firm proposals in this regard. The use of additional medical specialists is no doubt now less likely given the present pressures on public finances.

10.13 I understand that often the IMR will be a consultant in the particular field of medicine relevant to the injury, or claimed injury, sustained whilst on duty. There will no doubt be occasions where this is entirely appropriate because a specialist knowledge is required. However, the risk with such a system is that particular specialists may be called upon only very infrequently to undertake an IOD appeal and will be completely unfamiliar with the legislation which they are

[378] See Schedule 6 to the 2006 Regulations, paragraph 6.
[379] See paragraphs 3.60 to 3.62 in Chapter 3 above.

called upon to apply, much less the policy and case-law which may also be relevant to it. This will be less of a problem where an IMR has built up a level of experience in conducting appeals under the Regulations (and perhaps if training has been provided to him); and should also pose less of a problem if, as I have recommended, clear and comprehensive guidance for both SMPs and IMRs is produced.

10.14 However, I believe there is some force in the suggestion by the DOJ Review Panel that occupational health expertise should be included in the appeal procedures. Indeed, given that occupational health practitioners (such as the SMPs themselves) will often have to deal with specialist areas which are not their own particular field, that they will have access to other specialist reports to enable them to do so, and that cases may often throw up a number of specialist areas in which no one doctor will have expertise, I wonder whether it may not be better simply to have a single IMR dealing with each appeal, from a small panel of well qualified occupational specialists who will, in turn, have developed experience and expertise in this particular injury benefits scheme. Provided the IMR has adequate specialist assistance, there is no reason why they necessarily ought to be a consultant in the field in question (if, indeed, there is only one type of injury in issue).

10.15 I have recommended elsewhere in this report that there should be a fundamental overhaul in the decision-making structures established by the 2006 Regulations (so that there is no longer a strict dichotomy between the decision-making body for medical and non-medical issues respectively). In the context of any consideration of that issue, further consideration would obviously also have to be given to the appellate body also.

10.16 Returning to the present mechanism for appeals to the IMR, however, Schedule 6 to the 2006 Regulations makes further provision for the procedure to be followed in a medical appeal. Every notice of appeal under regulation 30(1) and statement of grounds under regulation 30(2) shall be in writing[380]. On receiving a notice of appeal against a report and certificate issued under regulation 29 and the appellant's statement of grounds for appeal, the Board (unless there is a referral back to the SMP by agreement), must forward copies of those documents, and all other documents determined as necessary by the Department, to the Department[381].

[380] Schedule 6, paragraph 1.
[381] Schedule 6, paragraph 2.

10.17 The IMR must then appoint a time and place "for hearing the appeal", at which he may interview or examine the appellant, and for any such further hearings as he may consider necessary[382]. He must give reasonable notice thereof to the appellant and the Board, who must then before the date appointed for the hearing inform the Department whether they intend to be represented at the hearing[383].

10.18 Where either party to the appeal intends to submit written evidence or a written statement at a hearing arranged by the IMR, they must submit it to the Department and the other party before the date appointed for the hearing[384]. The IMR may postpone or adjourn the date appointed for the hearing where it appears necessary to do so for the proper determination of the appeal[385].

10.19 Any hearing (including any examination) may expressly be attended by the SMP and a duly qualified medical practitioner appointed for the purpose by the appellant, although they may only observe any examination; and if the SMP does not attend any examination then a duly qualified medical practitioner appointed for that purpose by the Board may attend the examination as an observer[386]. In addition, if any hearing includes an examination, then only medical practitioners may be present for that part of the hearing[387].

10.20 The IMR must supply the Department with a written statement of his decision. Where he disagrees with any part of the SMP's report, he must also supply a revised report and certificate, which shall be final[388].

10.21 Paragraph 7 of Schedule 6 makes provision for payment to the IMR of fees and allowances which, subject to paragraph 8(5), must be paid by the Board and treated as part of the expenses of the Board. Paragraph 8(5) empowers the Board, where the IMR "decides in favour of the Board and reports that in his opinion the appeal was frivolous or vexatious", to require the appellant to pay towards the cost of the appeal, subject to the IMR finding exceptional reasons why the

[382] Schedule 6, paragraph 3(1).
[383] Schedule 6, paragraph 3(2).
[384] Schedule 6, paragraph 4(1).
[385] Schedule 6, paragraph 4(2).
[386] Schedule 6, paragraphs 5(1) and (2).
[387] Schedule 6, paragraph 5(3).
[388] Schedule 6, paragraph 6.

appellant should not be so required[389].

10.22 Generally, the expenses of each party to the appeal shall be borne by that party[390]; although in certain circumstances, the IMR has the power to require the parties to pay expenses or costs incurred by the other[391]. In addition, where the IMR decides in favour of the appellant, the Board must refund to him any expenses actually and reasonably incurred by him in respect of actually attending the hearing[392].

10.23 As can be seen from a consideration of the provisions of Schedule 6 relating to appeals to the IMR, a fairly formal 'hearing' is envisaged, in respect of which the parties may submit written statements and be represented, with the possibility of costs awards and related argument. I understand it is rare that IMR appeals take on such a formal or adversarial format but the provisions of the Regulations in this regard reinforce my view that it is unsatisfactory to have medical practitioners holding what are essentially quasi-legal proceedings, just as it would be unsatisfactory to have Board officials struggling with medical issues without appropriate assistance.

10.24 These are the type of considerations which have resulted in my recommending that a new approach to decision-making should be found in relation to the Regulations, both in respect of first instance decisions and appeals, whereby one composite body[393] would be responsible for all aspects of the decision (or, as the case may be, the decision on appeal), including factual disputes, eligibility generally, medical assessment, the resolution of legal questions, the determination of implementation dates and quantum, *etc.*.

New evidence on appeal

10.25 A particular issue which the Board has asked me to consider arises as follows. Where an officer has appealed to an IMR following a decision of the SMP and introduces new evidence which had not been considered by the SMP, the practice is to remit the matter back to the SMP (with the appeal to the IMR being held in abeyance pending the SMP's further consideration). Following the

[389] Schedule 6, paragraph 8(6).
[390] Schedule 6, paragraph 8(1).
[391] Schedule 6, paragraphs 8(2) to 8(4).
[392] Schedule 6, paragraph 8(7).
[393] Perhaps a panel involving both legal and medical (occupational health) expertise and perhaps also policing expertise (much like the current panel under regulation 33(2) – although these persons would likely all be employed directly by the Board or other body responsible for administration of the IOD system).

SMP's determination – either to stand by his previous decision or to amend it – the officer will be asked whether he wishes to continue with his appeal to the IMR.

10.26 The NIPB Guidance Booklet states that[394]:

> "If, after the DOJ has appointed an IMR/s and you have been advised of the appointment date/s and time/s and prior to your attendance for the appeal appointment/s, you supply new information or facts not previously made available to the SMP, the IMR appointment/s will be cancelled and your case may be referred back to the SMP for a review of the doctor's assessment in light of the new information provided. After the SMP has reviewed the new evidence, you will be advised by the NIPB of the SMP's decision and you will have the opportunity to cancel your appeal or request, in writing, that your appeal continues."

10.27 This practice seems to have been encouraged by, or is at least consistent with, some of the recommendations made by the DOJ Review Report in 2010[395].

10.28 The Board recognizes that there is no express provision within the Regulations permitting this approach. However, it is considered appropriate that an SMP should be able to consider new evidence allowing them to revise their original decision (if that is appropriate) before proceeding to an IMR on appeal. Accordingly, the Board's guidance contains the above section advising officers that any new evidence introduced once an appeal has been requested will be remitted back to the SMP for consideration.

10.29 I am asked to advise on the propriety of this approach and, assuming it is proper, what the timescale should be for submitting new evidence. I understand that the Department currently accepts fresh evidence up to the date of the officer's appointment with the IMR. The Board's correspondence and Appeal 1 Form state that all relevant information should be submitted. I am asked whether it is reasonable that the Department should accept new evidence on appeal or whether this should be treated as a new review (where that is relevant). The additional time which is taken up by the delay in the provision of new evidence and its subsequent referral back to the SMP has a significant impact on the efficiency of the process.

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[394] At section 22 (page 14).

[395] See, in particular, recommendation 6 to the effect that the IMR should consider only evidence about the situation when the SMP made his decision; and that there should be revised guidance indicating that, if new medical evidence is produced, that would lead to a new review with the SMP.

10.30 My advice would be that this is a practice which may be legally vulnerable. I can quite understand why it has been adopted, which might be for a number of reasons. Firstly, because there may be a concern about the fairness of the SMP having his decision overturned on the basis of evidence which was never presented to him. Secondly, because the appeal process is more costly than the SMP process (particularly where the SMP is simply reconsidering a case with which he is already familiar), so that it is likely to be more cost effective to permit the SMP to reconsider the matter if there is new evidence which would have led him to have answered the medical questions differently. And, thirdly, in many cases this may be a more efficient and speedy mechanism of determining the matter (again, if the new evidence would have led to a more favourable result for the officer) than proceeding to an appeal before an IMR who has not previously been involved in the case.

10.31 My concern about the legality of the practice arises from the provision within regulation 29(5) that the decision of the SMP – subject to regulations 30 and 31 – shall be final. As we have seen, regulation 30 allows for an appeal of the SMP's decision and regulation 31 allows for a reference back to the SMP either by a tribunal (hearing an appeal under regulation 33) or *by agreement* between the Board and the claimant. However, unless the SMP's decision is altered by an IMR, or it is referred back to him by one of the specified means set out in regulation 31, I would consider that the Regulations do not permit a further referral of the matter back to the SMP[396].

10.32 This will not cause a difficulty where the officer, pursuant to regulation 31(2), agrees with the Board that the matter should be sent back to the SMP for further consideration in light of the new evidence. However, if the officer declined to agree to that course, and simply indicated that he wished the matter to proceed to appeal before the IMR, I do not consider that a requirement can be imposed on him (or, indeed, on the SMP) that the SMP consider the issue again. The same would also apply, of course, if the Board did not consent to the SMP reconsidering the matter for some reason. I also do not consider that it is within the power of the Department, or the IMR himself, to require the matter to be sent back to the SMP[397].

[396] The proper construction of the Regulations being likely to be (particularly in light of the wording of regulation 29(5)) that regulation 31 sets out exhaustively the ways in which the SMP's decision may be sent back to him to look at again. This is a reflection of the legal maxim *expressio unius est exclusio alterius.*

[397] Such a power is provided to a tribunal hearing an appeal under regulation 33 on certain grounds (see regulation 31(1)) but there is no equivalent power provided to the IMR.

10.33 The concerns about the fairness of proceeding in this way, and the IMR determining an issue which has not been looked at fully by the SMP, are also probably misplaced in my view. This is partly because, as I have advised above[398], I consider the appeal to the IMR to be a reconsideration *de novo* in which the IMR is entitled to reach his own view afresh on whatever evidence (including whatever additional evidence) is before him. He has the function of answering the medical questions referred for determination and is not merely limited to a review function in relation the decision of the SMP as the evidence stood before him. Moreover, given that Schedule 6 to the 2006 Regulations provides for involvement of the SMP at the hearing, it is likely that he will see and be permitted to comment upon any additional evidence. He will be able to make clear in that forum whether the additional evidence would have made any difference to his consideration.

10.34 There may be cases where the new evidence is so compelling that it makes practical sense for the SMP to see it, since it may change his view. There may be other cases where the new evidence would not make any difference to the SMP's decision (but may be found persuasive by the IMR), in which case reconsideration by the SMP may simply add a further layer of delay and expense. However, whatever the practical advantages or disadvantages in any particular case, the Regulations seem to me to be clear that referral back to the SMP is permitted only in limited and defined circumstances. The mere fact that new evidence has been provided on appeal is not one of these and therefore I would be concerned that a requirement (in the absence of agreement on the part of the officer concerned and the Board) that an appeal must be held in abeyance pending a referral back to the SMP where new evidence has been submitted is unlawful.

Appeal to the tribunal

Nature of the appeal

10.35 Regulation 33(1) provides that:

> "Where a police officer, or a person claiming an award in respect of such a police officer, is aggrieved by the refusal of the Board to admit a claim to receive as of right an award or a larger award than that granted, or by a decision of the Board as to whether a refusal to accept medical treatment is reasonable for the purposes of regulation 6(3), or by the forfeiture under regulation 38 by the Board of any award granted to or in respect of such a member, he may, subject to regulation 34, appeal to the [Minister for Justice]."

[398] See paragraph 10.08.

10.36 Although the appeal is formally to the Minister for Justice, previously the Secretary of State, the Regulations make plain that he or she is not personally to determine the appeal. Rather, regulation 33(2) provides that:

> "The [Minister for Justice], on receiving such notice of appeal, shall appoint an appeal tribunal (in paragraphs (3) to (8) referred to as the tribunal), consisting of three persons, including a barrister or solicitor of not less than seven years' standing and a retired police officer or retired member of a police force in Great Britain who, before he retired, held a rank not lower than that of superintendent."

10.37 Regulation 34, to which regulation 33 is subject, provides that an appeal shall not lie "against anything done by the Board in the exercise of a power conferred by these Regulations which is expressly declared thereby to be a power which is to exercise its discretion"[399]. Accordingly, the regulation 33 appeal is not a full appeal on the merits against any decision taken by the Board.

10.38 Interestingly, there is express provision to make clear that – subject to any reference back to the medical authority under regulation 31(1)[400] – in a regulation 33 appeal "the tribunal shall be bound by any final decision of a medical authority within the meaning of regulation 31"[401]. In short, a regulation 33 appeal against the decision of the Board is an appeal on *non-medical* questions. The appeal tribunal is as bound by the decision on the medical questions of the SMP or IMR (as the case may be) as was the Board. Accordingly, it is a misnomer to refer to the appeal tribunal, as has sometimes been the case, as a Medical Appeal Tribunal. It is not. It is a forum for appeal against those elements of eligibility which the Board can determine, *apart from* the medical questions referred by the Board to a medical practitioner under regulation 29. It is for this reason that the constitution of the appeal tribunal must include a lawyer and someone experienced in police work but not a medic.

10.39 On the basis discussed above, I would recommend that the Board alter its Guidance Booklet[402] in which reference is made to the Medical Appeal Tribunal. Although the Guidance Booklet correctly advises that the tribunal is not a forum for further appeal against decisions of the

[399] See regulation 34(1).
[400] Discussed below.
[401] See regulation 34(2).
[402] In particular at section 23.

IMR, the use of the terminology 'Medical Appeal Tribunal' is not an apt description of the tribunal constituted under regulation 33 and is likely to give rise to further confusion rather than reducing it.

The procedure on appeal

10.40 In relation to such an appeal, the Regulations provide a little more by way of assistance as to the precise procedure to be followed by the appeal tribunal. By virtue of regulation 33(3), the time and place for the hearing, or any postponed or adjourned hearing, is to be determined by the tribunal, with reasonable notice being given to the appellant and the Board. Either party may be represented by counsel, solicitor or another appropriate person and either party may adduce evidence and cross-examine witnesses[403]. The rules of evidence applicable in the case of an appeal to a county court under article 28 of the County Courts (Northern Ireland) Order 1980 apply[404]. However, subject to the matters specified above, the procedure to be adopted is to be determined by the tribunal itself[405].

10.41 The tribunal, after enquiring into the case and arriving at a decision, "may make such order in the matter as appears to it just" and its order, to a copy of which each of the parties is entitled, must state the reasons for the decision[406]. An appeal lies from a decision of a tribunal, on a point of law only, to the High Court[407].

Further reference to medical authority

10.42 There are a number of ways in which an SMP or IMR's decision on medical questions can be referred back to him for redetermination.

10.43 First[408], it is open to the Board and a claimant under the Regulations, *by agreement*, to refer any final decision of a medical authority back to him for reconsideration. Where the Board and the claimant do so, the SMP or IMR (as the case may be) "shall accordingly reconsider his decision and,

[403] Regulation 33(4).
[404] Regulation 34(5).
[405] Regulation 34(6).
[406] See regulation 33(7).
[407] Regulation 33(8).
[408] Although not expressed first in the provision (regulation 31) which deals with these matters.

if necessary, issue a fresh report and certificate"[409]. Where he does so, this further certificate – subject to any further reconsideration required by another such agreement or ordered by the tribunal[410] – shall then be taken as final.

10.44 This is plainly a flexible facility which can be used at any time, for a wide variety of reasons, to permit a matter to be reconsidered by the medical authority where the parties agree this is a good idea. Indeed, that this is so is supported by the judgment in the *Crudace* case[411]. At paragraph [91] of his judgment in that case, the Judge said:

> **"**There is nothing in the wording of [the English equivalent regulation to regulation 31(2)] that limits the power to refer the matter back to the medical authority. The power is expressed in general terms. If it had been the intention to limit the power in the way suggested by [counsel for the police authority] it would have been perfectly possible for it to be so expressed. Whilst it is true that the Regulations do contain references to finality, each of those references is expressly made subject to the power in [regulation 31(2)]. It has to be borne in mind that the Regulations are concerned with the provision of pensions for former officers who were disabled in the course of duty through no fault of their own. In such a case it may well be thought that the need for accuracy is at least as important as the need for finality. Suppose case law establishes that an interpretation of the Regulations by either the SMP or the PMAB has been wrong I do not see why [regulation 31(2)] cannot be used to enable the SMP or (as the case may be) the PMAB to reconsider the decision in the light of the correct interpretation of the law."

10.45 Second, where a tribunal is hearing an appeal under regulation 33, pursuant to regulation 31(1), if it considers that the evidence before the medical authority which gave the final decision was "inaccurate or inadequate", it may "refer the decision of that authority to him for reconsideration in light of such facts as the tribunal may direct, and the medical authority shall accordingly reconsider his decision and, if necessary, issue a fresh report and certificate…"[412]. That report and certificate then becomes final, subject to any further reconsideration under regulation 31.

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[409] Regulation 31(2).

[410] See immediately below; or, if the decision is of an SMP, subject to any appeal under regulation 30.

[411] Discussed briefly at paragraphs 7.133 – 7.140 in Chapter 7.

[412] Regulation 31(1).

10.46 This provision is interesting in two respects. First, the trigger for the power to refer back is a view on the part of the tribunal that the SMP or IMR give his initial decision on "evidence which was inaccurate or inadequate". There is an interesting question as to when that is to be judged. For instance, if the SMP was appraised of all relevant facts and evidence at the time his decision was made but there has been some material change in circumstance before or in the course of the appeal (which could not have been put before the SMP because it arose subsequently), can it properly be said that the evidence before the SMP was inaccurate or inadequate? On one view, no. Certainly, it would be difficult to see how it could be said that the evidence before the SMP had been inaccurate[413]. That evidence might, however, be described as "inadequate", on the basis that the SMP was not aware of a factor (albeit which arose subsequently) which would have been relevant to his assessment.

10.47 There is also a question whether an appeal tribunal should refer a matter back to an SMP or IMR simply on the basis that the officer concerned later provided evidence which *could have* been provided to the SMP or IMR but was not, particularly in cases where no good reason is given for its non-provision. It is clear that the tribunal has a *discretion* to refer back to the medical authority under regulation 31(1) and is not under an obligation to do so.

10.48 My view of these matters is that the regulation 31(1) discretion should be interpreted and used purposefully, so that the tribunal is able to refer a matter back to the SMP or IMR if there is a factor which is material (or which might be material) of which the medical authority was not aware and where the tribunal feels it would be of assistance to have the authority's view on the case having considered that material.

10.49 The second interesting feature of the regulation 31(1) facility is that the matter can be referred back to the medical authority for reconsideration "in the light of *such facts as the tribunal may direct*". This emphasizes that there must be some form of fact-finding function in the tribunal hearing an appeal under regulation 33, notwithstanding that the Board (from whom the appeal to the tribunal under regulation 33 lies) has a very limited fact-finding function under the Regulations, particularly since most of the key facts are likely to fall within the ambit of medical questions referred under regulation 29. This is a further instance which might be thought of as a lack of

[413] Unless, for instance, the change of circumstance was the discovery of some latent condition which had been present at the time of the initial SMP examination but which was not disclosed by the evidence at that stage.

consistency in the Regulations or, at the very least, a certain lack of clarity as to who the various decision-making structures are to operate.

10.50 Regulation 31 says little about the procedure on a referral back (whether by agreement or upon referral by the tribunal). However, regulation 31(3) makes provision for a circumstance where the medical authority who initially considered the case "is unable or unwilling to act". Where that is so, "the decision may be referred to a duly qualified medical practitioner selected by the tribunal or, as the case may be, agreed upon by the claimant and the Board, and his decision shall have effect as if it were that of the medical authority who gave the decision which is to be reconsidered". This will be a useful facility where, for instance, the initial SMP or IMR is no longer available for some reason or where the challenge to his decision from the officer has been framed in such terms that the SMP or IMR is unwilling to see the officer again (or could not properly be expected to).

Timescale for further reference back

10.51 I have also been asked to consider the timeframe within which a case may be referred back to the medical authority for further consideration. This is dealt with in the *Haworth* case[414], where the authority refused to agree to a reference back to the PMAB given the passage of time (which was by that time several years) since the PMAB's decision, even thought there was a *prima facie* case that the decision had been reached on a wrong interpretation of the Regulations. The Court again found that the referral back mechanism was a broad power to, *inter alia*, correct mistakes. The finality of decisions of a medical authority under the Regulations was expressly subject to the power to refer back and, importantly in the present context, it was not lawfully open to a police authority to refuse a retired officer its consent to refer a final decision back to a medical authority for reconsideration simply on the grounds of delay, even inordinate delay, without any consideration of the underlying merits.

10.52 The result of this is that, absent a statutory time limit[415], it is not permissible for the Board to impose an absolute time limit on when it will agree that a case can be referred back for further reconsideration by the SMP or IMR. It is also not possible for delay to be used as a reason for

[414] See the discussion of this authority at paragraphs 7.151 to 7.158 above, within Chapter 7.

[415] [redacted]

declining agreement in the absence of consideration of the merits. This does not mean, in my view, that delay cannot be a reason for declining consent to a referral back; but there must be a consideration of the merits of the case so that the Board's discretion in this regard is considered in a proper way, taking into account all relevant considerations, and without being fettered by an unduly strict approach.

10.53 I am advised that the Board's guidance has been amended to reflect the decision in the *Haworth* case, including that a case can be sent for reconsideration more than once where appropriate. The present position of the Board is that if, within six months of an SMP or IMR assessment, a pensioner (or claimant) approaches the Board with new evidence which they wish to be considered, the Board will agree to refer the matter back for reconsideration. Outside of this time limit, unless there has been an error of fact or law, a reconsideration will not be permitted; although a pensioner could of course request a review at any stage (and a claimant could submit a fresh application).

10.54 I am asked whether this seems to be a reasonable approach. I consider that it is, save that the requirement of an error of fact or law in order to avoid the policy of refusing agreement to a referral back outside the six month period may be too strict. The Board should not shut out the possibility that there might be some other truly exceptional case, not falling within these categories, where it would be appropriate (on the merits) for its consent to a referral back to be given. Provided the Board is always able to make an exception to its policy in an appropriate case, and that it considers each case on its own merits (*i.e.* not confining itself to the question of delay alone), there is no difficulty in my view with the Board adopting a general approach to when it will permit a referral back and when it will not. The length of time provided in this general policy is a matter for the Board, subject to *Wednesbury* unreasonableness, but a period of six months, which ought to allow for the garnering of such additional evidence as the officer wishes to present, seems to me to be reasonable.

Back-dating and reclaiming overpayments after appeal

10.55 The question of 'back-dating' where an appeal is successful, and correlatively seeking to reclaim overpayments where an appeal resulted in the reduction of an award, was considered in the course of the 2010 DOJ Review. In its final report, the Panel summarized the issue as follows:

"6.1.1. In the interim report, the Review Panel noted the particular concerns which had been raised on the issue of successful appeals against review decisions not being backdated to the date the award was reduced.

6.1.2. The Panel was advised that the NIPB adopted this policy as a consequence of cases where individuals were required to pay back substantial sums after the appeal reduced or removed their awards."

10.56 The Panel discussed input from other police forces which it had sought. It seems that there was no consistent policy but that the forces which had addressed the issue generally appear to have backdated an award to the date the pension was reduced if the officer appealed successfully; but to have applied the reduced award, where the pension was reduced on appeal, only from the date of the appeal (although most forces had not experienced this). Generally, however, with a relatively quick turnaround time for appeals, the sums at issue were not very substantial.

10.57 In light of the evidence obtained from other police forces, the Review Panel recommended that successful appeals against review decisions should be backdated to the date when the pension was reduced. The Panel did not make any explicit finding or recommendation as to what should occur when the appeal resulted in the award being reduced further.

10.58 This issue is currently addressed in the NIPB Guidance Booklet as follows[416]:

"If on appeal the IMR issues a certificate to award a higher percentage award than that awarded by the SMP, either at the first assessment or any subsequent review, the IMR certificate will be applied from the date the reduction was made in the pension payment as a result of the SMP decision. If on appeal the IMR removes an award made by the SMP on a first assessment, or reduces the percentage IOD first assessment award or at any subsequent review, PSNI Pensions Branch will only apply the IMR certificate from the next IOD payment due as explained above."

10.59 Accordingly, an officer receives the benefit of a favourable appeal decision from the time of the initial SMP assessment; but does not receive the burden of an unfavourable appeal decision from that time, it being applied simply to the next payment due after the appeal.

[416] Within section 29, page 21.

10.60 In relation to this issue, the PFNI relied on the Pensions Ombudsman case of *Henderson*[417], in which the Ombudsman stated that "no revision of Mr Henderson's injury benefit should take effect until the appeal process has been properly undertaken and exhausted", that is to say that the change in entitlement should only occur after the officer's appeal had been exhausted.

10.61 Although there may be some inconsistency in the approach which is adopted by the Board (on foot of the DOJ Review Panel's recommendations), I would support it. Different permutations are likely to arise depending upon whether the appeal to the IMR occurs on a first application or during a review process. In the case of a review process, the SMP may either increase or decrease the award being paid to the officer and the IMR may then either increase or decrease the award further (either as compared with the officer's initial entitlement and/or his entitlement as altered by the SMP). No real guidance is given in the Regulations as to how these issues should be dealt with. The SMP certificate will be 'final', but this is *subject to* (*inter alia*) appeal.

10.62 The Regulations do not make clear whether, after an appeal has concluded and altered the SMP certificate, the original SMP certificate should be viewed as having been extant until altered by the IMR or whether the IMR certificate should be viewed as replacing the initial certificate *ab initio*, much less whether different approaches should be taken depending upon whether or not the appeal is favourable or unfavourable to the officer concerned. A judge might take the view that the finality of the original certificate means that it should be effective unless and until overturned; or might alternatively take the view that its being 'subject to' appeal means that it should be replaced for all purposes with the certificate later issued by the IMR; or he might take the view that the precise approach to these questions is a matter for the Board under its general decision making power contained in regulation 29(1). There is simply no clear answer within the Regulations. Different considerations may also arise where the appeal decision is made on fresh evidence which was not available to the SMP (and this is attributable to the failure of the officer), rather than merely a difference of view between the SMP and the IMR on precisely the same evidence.

10.63 This is a further instance therefore where it seems to me that the Regulations would benefit from some amendment to set out clearly what they intend and how the system is designed to operate. If officers knew that an unfavourable decision on appeal would result in clawback of overpayments made pending the appeal, this might dissuade some from appealing. Whether this is

[417] Case 81368/2.

a proper or acceptable approach in order to protect public funds which should not have been paid, or would represent an unwarranted chill factor on exercising the right of appeal granted by the Regulations, is a matter for the Department.

10.64 Broadly speaking, however, it seems to me to be the case that, if an officer successfully appeals an SMP decision, the fairer approach is that he should have the benefit of the IMR's decision from the time when the original SMP decision was made. This is particularly the case in circumstances where, on review, the SMP has *reduced* the officer's previous entitlement and it is found that this reduction was unwarranted. I recognize that it is somewhat inconsistent that, if the IMR reduces an award from that which the SMP determined, that that decision should also not be back-dated and overpayments reclaimed. However, this might be explained by the nature of the scheme which grants a right of appeal only to the officer. It is not open to the Board to appeal an SMP certificate to the IMR on the ground that it is unduly generous. The purpose of the appeal mechanism under regulation 30 is to provide a protection to the officer, not a protection to the Board. Where an officer appeals, he must take the risk of the IMR reducing his award going forward; but it seems to me to be fair that he should not be penalized in the intervening period for having exercised his right of appeal. On this basis, the current approach, which I support (although without clear statutory basis), seems to me to fair and defensible[418].

10.65 What I would say, however, as I have noted elsewhere in this report, is that as much as possible should be done to try to expedite the appeal process and ensure that it is as efficient as possible. Where appeals are progressed swiftly, the amounts of money at issue when considering questions of back-dating or reclaiming overpayments will be much reduced.

The availability of judicial review

10.66 The jurisdiction of the Pensions Ombudsman in this field is discussed in the following chapter. However, it is also worth mentioning the availability of judicial review in relation to decisions relating to IOD awards. The invocation of the High Court's supervisory jurisdiction in this area appears to be increasing. The role of the Court in judicial review is limited. It does not

[418] Although I should not be taken as saying that there are not valid reasons why the Department and Board may not consider that, in the event of an appeal reducing an award, the overpayments in the *interim* should not be repaid (or perhaps recouped over time by a modest reduction in future payments). These are again policy issues about how generous the scheme should be both substantively and in facilitating appeals, which obviously sound on issues of funding more generally.

provide an appeal and is generally not concerned with the merits of a particular decision but is, rather, directed to conducting an 'audit of legality' of the decision-making. Part of this review function is to look at whether procedures have been followed correctly (that is to say, whether the statutorily required procedures have been applied and whether the requirements of procedural fairness have been observed); and part is to look at whether the statutory scheme has been correctly interpreted and applied.

10.67 The various respects in which the present Regulations lack clarity and certainty, both procedurally and substantively, has therefore proven a fertile ground for judicial review. This has added a further layer of possible challenge to a decision-making scheme which already has a plethora of mechanisms built in for appeal, referral back, reconsideration, *etc.*. It is obviously neither possible, nor desirable, to remove the supervisory jurisdiction of the High Court but the availability of this further avenue of redress is another reason, in my view, why the earlier decision-making stages ought to be simplified if possible. I also consider it to be a further reason why the statutory scheme ought to be refined and clarified, so that the intention of the elected policy-makers is clear and the role of the Court in seeking to discern the purpose and intention of provisions which do not clearly express them is accordingly reduced.

CHAPTER 11

THE PENSIONS OMBUDSMAN

The jurisdiction of the Pensions Ombudsman

11.01 The Pensions Ombudsman has had increasing involvement in recent times in the resolution of disputes relating to IOD awards. This is no doubt welcome to officers, since it provides them with a further avenue to challenge decisions with which they are unhappy, and an accessible and relatively cheap avenue to do so at that. A difficulty with the involvement of the Pensions Ombudsman, however, is that it provides yet another avenue of challenge which, in conjunction with the available procedures discussed in Chapter 10 above, has given rise (at least in some cases) to a seemingly interminable process in which a final decision takes many years to be arrived at.

11.02 The Ombudsman's jurisdiction arises by virtue of Part X of the Pensions Schemes (Northern Ireland) Act 1993. The Pensions Ombudsman is established by section 141 of the Act and is to be the person appointed under section 145 of the Pension Schemes Act 1993 (which the Northern Ireland Pension Schemes Act closely mirrors). His functions are set out in section 142 and include the power to "investigate and determine" a number of matters. In turn, these matters include:

(a) "A complaint made to him by or on behalf of an actual or potential beneficiary of an occupational or personal pension scheme who alleges that he has sustained injustice in consequence of maladministration in connection with any act or omission of a person responsible for the management of the scheme"[419]; and

(b) "Any dispute of fact or law in relation to an occupational or personal pension scheme between (i) a person responsible for the management of the scheme, and (ii) an actual or potential beneficiary" [420].

[419] Section 142(1)(a).
[420] Section 142(1)(c).

11.03 At first glance, it may be thought that the Ombudsman would have no role in relation to IOD awards since these do not form part of an 'occupational pension scheme'; but that term is defined in section 1 of the 1993 Act as follows:

> ""*occupational pension scheme"* means a pension scheme –
>
> (a) that –
>
> (i) for the purpose of providing benefits to, or in respect of, people with service in employments of a description, or
>
> (ii) for that purpose and also for the purpose of providing benefits to, or in respect of, other people,
>
> is established by, or by persons who include, a person to whom subsection (2) applies when the scheme is established or (as the case may be) to whom that subsection would have applied when the scheme was established had that subsection then been in force, and
>
> (b) that has its main administration in the United Kingdom or outside the EEA states, or
>
> a pension scheme that is prescribed or is of a prescribed description"

11.04 The first question, therefore, is whether the IOD scheme is a "pension scheme" within the meaning of section 1(1). That phrase is defined by section 1(5) of the 1993 Act, as follows:

> "In subsection (1) *"pension scheme"*… means a scheme <u>or other arrangements</u>, comprised in one or more instruments or agreements, having or capable of having effect <u>so as to provide benefits</u> to or in respect of people –
>
> (a) on retirement,
> (b) on having reached a particular age, or
> (c) <u>on termination of service in an employment</u>."

11.05 This is plainly a wide definition and it seems to me that the IOD scheme, which is a scheme to provide (or at least capable of providing) benefits to police officers on termination of service in

an employment falls within the definition of a pension scheme for the purpose of section 1(1) of the 1993 Act.

11.06 It also seems likely that the scheme meets the other requirements in section 1(1) of an 'occupational pension scheme' (particularly given that office-holders are to be treated as employees for this purpose[421])[422]. Further, it is likely to meet the definition of a 'public service pension scheme', also set out in section 1(1) (as below), which makes clear that a public service pension scheme is a type of occupational pension scheme:

> "*"public service pension scheme"* means an occupational pension scheme established by or under an enactment… being a scheme —
>
> (a) all the particulars of which are set out in, or in a legislative instrument made under, an enactment… or
>
> (b) which cannot come into force, or be amended, without the scheme or amendment being approved by a Minister of the Crown or government department,
>
> and includes any occupational pension scheme established, with the concurrence of the Department of Finance and Personnel, by or with the approval of another government department and any occupational pension scheme prescribed by regulations made by the Department and the Department of Finance and Personnel jointly as being a scheme which ought in their opinion to be treated as a public service pension scheme for the purposes of this Act."

11.07 As I have also noted in earlier chapters of this report, the IOD scheme (and the 2006 Regulations) are made in exercise of the powers conferred by sections 25 and 26 of the Police (Northern Ireland) Act 1998, read with Articles 14 and 15 of the Superannuation (Northern Ireland) Order 1972; and they create a injury *pension*, amongst other things.

11.08 It appears therefore that the IOD scheme does fall within the purview of the Pensions Ombudsman and he is accordingly empowered to consider complaints about maladministration relating to IOD awards and, perhaps even more wide-ranging, "any dispute of fact or law" in relation to the scheme between those administering it and an actual or potential beneficiary.

[421] See section 1(3) of the 1993 Act.

[422] Although this is perhaps an issue on which advice from a pensions expert would be better suited.

11.09 I have been referred to the provisions of the Public Service Pensions Act (Northern Ireland) 2014, which makes provision[423] for disconnecting injury benefits from the Police Pension Scheme with which they are connected. I do not consider that this assists in determining whether the present IOD scheme is within the jurisdiction of the Pensions Ombudsman, which turns on the interpretation of the 1993 Act discussed above.

11.10 I can see reasons why it might be said that IOD awards should not be subject to the Pensions Ombudsman's oversight – particularly since they are not a pure 'pension' in the normal sense and, perhaps more compellingly, since there are already, within the 2006 Regulations, detailed statutory mechanisms for appeal on both medical and non-medical grounds and points of law (which will not usually be available in the majority of occupational pension schemes). The possibility of involvement on the part of the Pensions Ombudsman complicates the procedure further in terms of securing a final and binding determination. It might well be that legislative amendment is appropriate to remove IOD awards from the Pensions Ombudsman's jurisdiction given the range of other remedies available to officers but this would, in my view, require to be clearly addressed in legislation.

11.11 What precisely is the Ombudsman empowered to consider? The Board has expressed some reservation about the Ombudsman considering the way in which SMPs or IMRs have approached a case[424], when these are primarily medical issues. The precise role of the Ombudsman may vary depending on whether he is considering a complaint of maladministration under section 142(1)(a) or a dispute of fact or law under section 142(1)(b) – although often a complaint may incorporate both grounds of challenge or may be treated as including both. Maladministration is not defined but is generally related to failure to follow correct procedure, rather than failure to achieve a particular substantive outcome. In either case, much like a challenge by way of judicial review, it is not for the Ombudsman simply to substitute his own view on the entire merits of the matter[425], particularly in relation to medical issues. Rather, he will focus principally on the way in which the decision was reached[426].

[423] See sections 19 and Schedule 6, paragraph

[424] For instance, in the *Mr A* case.

[425] Although the Ombudsman's jurisdiction to determine a 'dispute of fact' gives him much more scope to intrude into the merits .

[426] Again, subject to finding a plain error of fact.

11.12 But provided that there is a basis for indicating that the SMP or IMR has erred in law (for instance, by misinterpreting the Regulations or failing to give effect to case law) or has failed to properly follow applicable guidance, it seems to me that the Ombudsman is likely to be able to intervene. This would apply, for instance, in a case where, as a number of the Ombudsman's recent decisions in this area illustrate, the Ombudsman concludes that the SMP or IMR has erred in law by failing to correctly construe and apply the Regulations (as elucidated in case-law such as *Turner*, *Laws* and *Simpson*), including (for instance) by wrongly revisiting causation.

11.13 Sections 145 and 146 of the 1993 Act make provision in relation to the Ombudsman's investigations. Section 147 provides for determinations of the Ombudsman. These must be provided in writing, with reasons, to the complainant and any person responsible for the management of the scheme to which the complaint or reference relates[427]. The Ombudsman has power to "direct any person responsible for the management of the scheme to which the complaint or reference relates to take, or refrain from taking, such steps as he may specify" in the determination[428]; and, subject to an appeal to the Court of Appeal on a point of law, "the determination by the Pensions Ombudsman of a complaint or dispute, and any direction given by him… shall be final and binding on… the person by whom, or on whose behalf, the complaint or reference was made [and]… any person (if different) responsible for the management of the scheme to which the complaint or reference relates…"[429]. In addition, any determination or direction of the Pensions Ombudsman shall be enforceable as if it were a judgment or order of the county court[430].

11.14 The Pensions Ombudsman accordingly has very broad powers, which include the power to direct the payment of moneys to a complainant. Indeed, the Act goes on to make clear that[431], where the Ombudsman directs a person responsible for the management of an occupational pension scheme to make any payment in respect of benefit under the scheme which, in his opinion, ought to have been paid earlier, his direction may also require the payment of interest at the prescribed rate.

[427] Section 147(1).
[428] Section 147(2).
[429] Section 147(3).
[430] Section 147(5).
[431] In section 147a.

11.15 As noted in Chapter 14, I had initially wondered whether the Pensions Ombudsman's jurisdiction may be an appropriate route to use to 'undo' SMP certificates which had been issued in the course of age 65 reviews which should now be revisited (by means, perhaps, of a self-referral to the Ombudsman by the Board of all of the relevant cases). Unfortunately, it seems that this prospect is unlikely since, under the 1993 Act, the Ombudsman can only accept an investigation made by the person responsible for the management of the particular occupational pension scheme in limited circumstances[432] and the Ombudsman's Office has advised they are unable to deal with 'group actions', which would therefore require each case to be submitted separately.

Pensions Ombudsman's determinations

11.16 In the course of this review, I have been provided with, or referred to, a wide range of decisions of the Pensions Ombudsman in the field of IOD awards. Several of these were Northern Ireland cases taken against the Board; although there are also a number of English cases raising similar issues. I do not propose to discuss all of these determinations in detail but make a number of general points in relation to them below and address one particular issue raised with me by the Board.

11.17 It is clear, however, that the Pensions Ombudsman has taken a strong line against the Board in relation to age 65 reviews following the decision of the English High Court in *Simpson*. Adverse findings from the Ombudsman are likely to continue in this regard in the event that the Board proceeds as before. The approach taken by the Ombudsman reinforces me in the view (set out in Chapter 9 above and summarized in Chapters 1 and 14) that the Board needs to act to put right the reviews which have been carried out on the basis only that the officer has attained a particular age.

11.18 Amongst others, I have been provided with a copy of the determination of the Deputy Pensions Ombudsman in the *Black* case[433]. That was case where a former officer attained age 65 and was reviewed, with his degree of disablement being reduced from 55% to 0%. Ultimately, upon a referral back to the IMR, Mr Black's degree of disablement was reassessed as 100% (backdated to the time of the original review). The Pensions Ombudsman was considering the position in the *interim*, namely the period before the IMR's final reassessment on the referral back.

[432] See sections 146(b)(i), (c) and (d).
[433] Reference PO-630.

11.19 The Ombudsman, having considered some of the English authorities[434], found that the questions for the SMP and NIPB on review were (1) whether there had been any change in Mr Black's disabling condition since the last review and (2) whether there were now jobs available to him which he could undertake, but which had not previously been available[435]. A similar approach has been adopted by the Ombudsman in a number of the other recent cases, such as *Diamond*[436], *Mr M*[437] and *Mr A*. The Ombudsman considers, therefore, that the degree of disablement (*i.e.* the effect on officer's earning capacity in view of the injury) may be affected either by a change in his condition or by a change in the job opportunities available to him, consistent with the case-law discussed in Chapter 7.

11.20 The emphasis on the part of the Ombudsman (or Deputy Ombudsman as the case has mostly been) has been to restrict the carrying out of a fresh degree of disablement calculation unless there has been a key event since the last review which triggers that exercise in the form of a change in condition or change of employment circumstance. As discussed in Chapter 7, the case-law has now reached a point where it is tolerably clear that these are the only bases on which a fresh exercise can be undertaken (and that the attainment of a particular age does not represent a relevant change in this regard). In the event that there has *not* been such a relevant change, it is not permissible to recalculate the degree of disablement. Where there *has* been such a relevant change, this may be done, but the questions contained in regulation 29(2)(a)-(c) may not be considered afresh (including whether the officer's condition was the result of an injury on duty[438]). Apportionment, which is part of the recalculation of the regulation 29(2)(d) question[439], may be carried out, provided it does not conflict with the obligation not to reconsider regulation 29(2)(a)-(c) questions in the circumstances of the particular case.

11.21 The Board is concerned about the formulation of issues by the Ombudsman set out at paragraph 11.19 above. In particular, it is said that the second question proposed by the Pension Ombudsman does not take account of the fact that an alteration in the pensioner's medical condition could mean that they are able to undertake a job (previously available) which they had not been capable of undertaking at their last review. Given how the second question is phrased (are there now jobs available which could be undertaken which were *not previously available*?) the

[434] The *Pollard*, *Turner* and *Laws* cases.
[435] See paragraph 13 of the decision.
[436] Reference PO-828. See paragraph 18 of this decision.
[437] Reference PO-643. See paragraph 28 of this decision.
[438] That is to say, the injury on duty "caused or substantially contributed to" the condition (see regulation 7).
[439] As read with regulation 6(5).

Board is concerned that this may restrict the circumstances in which the Board may alter the percentage award on review and that it does not recognize the potential for an individual's condition to improve (particularly with time or with treatment).

11.22 I am not sure that these concerns are well-founded. To my mind, the Ombudsman is seeking to emphasise that, consistent with the approach set out in the case-law, there are two ways in which something may change from the previous review which would justify an alteration in the degree of disablement. One of these is a change in the medical condition (including an improvement); and the other, where there is no change in the medical condition, is a relevant change in job opportunities. The circumstance about which the Board is concerned, described at paragraph 11.21 above, seems to me to fall within the first of these categories. If there had been a material change in the pensioner's *condition* such that he could now undertake work which he could not previously undertake, that would be a basis for reassessing his degree of disablement, whether or not the job which it was now thought he could undertake was available or not at the time of the last review.

11.23 The second category (and the Ombudsman's second question) relates to a circumstance where there is *no change* in the medical condition. Alteration of the degree of disablement may still be warranted in such circumstances, but only where there has been some other material change since the last review, in this case by a new job becoming available which had not been available at the time of the last review. If the job had been available at the last review and there is no change in medical condition, it would be revisiting matters finally concluded in the previous review to determine that (contrary to the earlier decision) the pensioner *in materially the same condition* could in fact avail of that job opportunity.

11.24 One of the longest running IOD cases appears to be that of Mr A[redacted]. The Deputy Pensions Ombudsman (DPO) reached a provisional decision in Mr A[redacted]'s case on 18 February 2014. Mr A[redacted] had complained about the review of his injury benefit which was carried out in 2012. The DPO determined that the complaint against NIPB should be upheld because it had reduced Mr A[redacted]'s injury benefit on the basis of a review which had not been carried out in accordance with the relevant Regulations.

11.25 Mr A[redacted] retired on the grounds of ill health in 1997. He was awarded an injury benefit in 1999. Originally, his degree of disablement was assessed at 20% (Band 1) for hearing impairment

and anxiety. This was increased to 47% (Band 2) in 2004 on review and 65% (Band 3) on appeal for PTSD. Mr A[redacted]'s award was reviewed again in 2007 and his degree of disablement was reduced to 57% (still within Band 3).

11.26 Mr A[redacted] reached age 65 in 2009. The Board wrote to him in May 2008 and advised him that, as he had reached 65 years of age and in accordance with NIO guidance, his injury award was due for review. (This review was the subject of a previous application to the Pensions Ombudsman, which was determined by the DPO on 30 April 2013.) Whilst Mr A[redacted]'s previous application was being investigated by the DPO, the Board agreed to refer his case back to the Principal IMR, Dr D[redacted], under regulation 31(2). It is this review of Mr A[redacted]'s injury benefit which formed the subject matter of his most recent complaint to the Pensions Ombudsman.

11.27 Mr A[redacted]'s case was reviewed by Dr D[redacted] in August 2012. Dr D[redacted] said he was asked to reconsider his previous decision (which had been taken following the NIO Circular 06/2007, which had since been withdrawn). In that previous decision, in 2011, he had indicated that, according to advice he had been given by the DOJ, the percentage disablement to be awarded for disability due to injury on duty "must be 0%".

11.28 In his 2012 report, Dr D[redacted] assessed Mr A[redacted] as being totally incapable of working as a police officer as a result of both psychological difficulties and musculoskeletal difficulties, the latter not being related to an injury at work. Dr D[redacted] calculated Mr A[redacted]'s loss of earning capacity as 100%, but reduced this by 50% apportionment for musculoskeletal problems and 10% for constitutional psychological factors, resulting in 40% disablement directly attributable to the duty injury.

11.29 Mr A[redacted] had a range of complaints about this decision, including that apportionment can only be undertaken at the initial assessment and that an SMP/IMR is not entitled to revisit issues of causation or apportionment. The DPO found that the introduction of apportionment in relation to constitutional psychiatric issues "was, in effect, revisiting the question of whether Mr A[redacted]'s PTSD was the result of an injury on duty"[440] and that the introduction of apportionment for his musculoskeletal condition was essentially "the same approach as determining that a former officer over the age of 65 can have no earning capacity" in that it was considering how his notional

[440] See paragraph 18 of the decision.

uninjured earning capacity would have altered in any event, in circumstances where neither of the correct 'triggers' for a further calculation of the degree of disablement had arisen[441].

11.30 The long-running saga in the *Mr* A [redacted] case is a particular illustration of how and why clear guidance is required for IMRs and SMPs, particularly in relation to the approach to be followed at review under the current Regulations (*i.e.* when it is appropriate to undertake a further calculation of the degree of disablement) and the difficult issues of revisiting causation and apportionment, which should be addressed having regard to the case-law discussed in Chapter 7. It is also an illustration, however, of why I consider[442] there may be much to commend a more simple scheme which reduces the scope for continual review.

11.31 In its submission to me NIRPOA mentioned that – in respect of the cases of over 65 reviews where the Pensions Ombudsman has found maladministration – "it is understood from a statement by Mr Pollock that not all of the Officers in NIPB accept the decision of the Ombudsman". I am not sure precisely on what this suggestion is based. I have been asked to consider whether the Ombudsman has jurisdiction to investigate and determine IOD cases as he has been doing and have indicated my view above that he does, on the basis of the present statutory arrangements and the nature of the challenges which have been made (that the SMP/IMR erred in law or was guilty of maladministration by not applying the Regulations correctly). In addition, the decisions of the Ombudsman were not challenged[443] and I also understood that the Board paid the recommended compensation in the relevant cases. There may have been a view that the Ombudsman's reading of the *Simpson* judgment went beyond what was warranted by the precise conclusions in that case but, for the reasons expressed in Chapters 7 and 9 in relation to this, if that was a concern on the part of the Board I do not think it can be sustained.

Conclusion in relation to the Pensions Ombudsman

11.32 I am not persuaded that it is helpful having a yet further avenue of challenge to IOD decisions in the form of the Pensions Ombudsman, particularly given the range of options for appeal, reconsideration and review already available (discussed in Chapter 10 above) – although

[441] See paragraphs 20 and 22 of the decision. See also paragraph 11.18 above.

[442] See, for instance, paragraphs 8.43 – 8.44 and paragraph 14.06.

[443] [redacted]

affected officers may well disagree, since it provides them with another opportunity to question decisions with which they are unhappy with much lower costs risk than an application for judicial review. However, for the present, and unless there is some legislative amendment clearly taking these issues out of the Ombudsman's remit, it seems to me that recourse to the Pensions Ombudsman is likely to continue to be a feature of disputed IOD cases for some time.

11.33 The recent decisions of the Ombudsman, particularly in relation to age 65 reviews, have reinforced my own view that these have not been handled in accordance with the Regulations as explained by relevant case-law and require to be put right. They have also reinforced my view that clear, comprehensive and agreed guidance for SMPs and IMRs is necessary.

CHAPTER 12

MISCELLANEOUS ISSUES

12.01 There are a number of important issues which have arisen in the course of my consideration of the relevant Regulations in the present review which are worth discussion but which perhaps do not fit neatly within other Chapters of this report. These are the questions of (what I have termed) 'double recovery'; whether the Policing Board should be responsible for the administration of the IOD scheme at all; the scheme's fit with disability discrimination legislation; and its approach to length of service.

12.02 I had also considered that there was some merit in discussing the provision in the 2006 Regulations, regulation 15, which has been controversial for some time, which provides for the termination of an adult survivor's award on the beneficiary's remarriage[444]. It occurred to me that there might well be serious concerns about the compliance of this provision with the European Convention[445]. However, I understand that there has now been a decision, implemented through section 30 of the Public Service Pensions Act (Northern Ireland) 2014, to revoke the relevant provisions in this regard in the 1988 Regulations. In light of this, I do not propose to address the issue further[446], save to say that it seems to me that, in view of this development, consideration ought obviously to be given to revoking the equivalent provision in the 2006 Regulations (regulation 15)[447].

Double recovery

12.03 Regulation 22 of the 2006 Regulations provides for the abatement of certain awards payable under the Regulations in respect of damages or compensation. Regulation 22(1) provides:

> "The Board shall take into account against any gratuity payable under regulation 11 or 20 any damages or compensation which are recovered by any person in respect of the death or

[444] Or civil partnership; or cohabition with someone whom they would be free to marry.

[445] Either in respect of Article 12 (the right to marry), Article 8 (the right to respect for one's private life) and/or Article 14 (the right to freedom from discrimination on the basis of various statuses, including marital status) in conjunction with Article 1 of the First Protocol.

[446] Although would be happy to do so in separate advices, should this be requested.

[447] I note that there does not appear to be an equivalent provision in the 2009 Regulations.

disability to which the gratuity relates and the gratuity may be withheld or reduced accordingly."

12.04 Pursuant to regulation 22(2), for the purposes of regulation 22(1), a person shall be deemed to have recovered damages whether they are paid in pursuance of a judgment or order of the court or by way of settlement or compromise of his claim and whether or not proceedings are instituted to enforce the claim[448]. This also includes an award of compensation made to a person in accordance with the Northern Ireland Criminal Injuries Compensation Scheme (unless the amount of that award was reduced by the amount of any gratuity paid or payable to him under regulations 11 or 20 of the 2006 Regulations).

12.05 Regulation 22(3) provides that:

> "No payment in respect of a gratuity under regulation 11 or 20 shall be made to a person unless he has given to the Board a written undertaking that if he recovers any damages or compensation in respect of the death or disability to which the gratuity relates he will inform it thereof and, unless the damages or compensation have been taken into account in pursuance of paragraph (1), will pay to the Board such sum as it may demand not exceeding —
>
> (a) where the amount of the payment made by the Board is less than the net amount of the damages or compensation, the amount of that payment;
>
> (b) where the amount of that payment is not less than the net amount of the damages or compensation, an amount equal to the net amount of the damages or compensation;
>
> and, in this paragraph, "the net amount" in relation to damages or compensation recovered by any person means the amount of the damages or compensation after deducting tax payable in the United Kingdom or elsewhere to which the damages or compensation are subject."[449]

[448] Or if they are recovered for that person's benefit in respect of a claim under the Fatal Accidents (Northern Ireland) Order 1977.

[449] Regulation 22(4) imposes limitations on the Board's right to demand payment in pursuance of such an undertaking after the death of the person to whom the gratuity was paid or after two years from the date when the final determination of the amount of damages or compensation first came to the knowledge of the Board.

12.06 It is clear, therefore, that, where an officer is in receipt of a disablement gratuity[450], this may be reduced by damages or compensation which the officer receives in relation to the disability to which the gratuity relates, whether the damages or compensation are received before or after the award under the 2006 Regulations.

12.07 The taking into account of such damages or compensation seems to me to reflect a principle against double recovery, so that damages or compensation received by an officer in respect of an injury are subtracted from certain awards payable to him under the Regulations as a result of that injury, meaning he is not, in effect, paid twice for the same injury. This is also a feature of other such schemes[451].

12.08 However, I cannot understand why this is the case where a disability gratuity is payable under regulation 11, but it is *not* presently the case where a police officer's injury award (consisting of both a gratuity and injury pension) is payable under regulation 10[452]. To my mind, the policy behind the principle applies equally in both instance.

12.09 A police officer, or former officer, may bring a civil claim for compensation arising out of an injury he has sustained in the execution of his duty. The most common example – and by far the most common type of IOD claim – relates to hearing loss, which service in the police has either caused or to which it has contributed. Under the Regulations as they presently stand, the officer can be paid a significant sum from public funds in compensation for sustaining this injury in satisfaction of a legal claim against the Chief Constable, including an element for loss of earnings or loss of earning capacity, and then proceed to make a claim for an IOD award under the 2006 Regulations in respect of exactly the same injury[453].

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[450] Or an adult survivor or, as the case may be, a child or dependent relative is in receipt of a death gratuity.

[451] See, for instance, article 32 of the Armed Forces and Reserve Forces (Compensation Scheme) Order 2005; and rule 3(7) of Part 2 of the Firefighters' Compensation Scheme (Northern Ireland) 2007 (contained within the Annex to the Firefighters' Compensation Scheme Order (Northern Ireland) 2007).

[452] In the first provision mentioned in the preceding footnote, the abatement of benefits by reason of damages received in relation to the qualifying injury relates to *any* benefit payable under the scheme. (In the second provision mentioned in the preceding footnote, the abatement relates again only to benefits arising from death or permanent incapacity from any occupation – although this scheme is plainly closely modeled on the police scheme found within the 2006 Regulations).

[453] Indeed, there is some anecdotal evidence that such hearing loss claims are treated as 'stage 1' by officers who are able to bring such proceedings (which will involve the Chief Constable paying his legal costs and expenses, including the fees for the obtaining of supporting medical reports, as well as damages in respect of the hearing loss); and then treating the IOD application (which will be supported by the medical reports obtained, at the Chief Constable's expense, in the earlier legal proceedings) as 'stage 2'.

12.10 The principle against double recovery in regulation 22(1) applies whether the damages received in respect of the injury come from public funds (for instance, under the Criminal Injuries Compensation Scheme) or private funds (for instance, the if the officer has a claim against some third party who caused the injury whilst he was on duty[454]). However, the issue is particularly stark where the officer has a claim against the Chief Constable himself, so that the compensation and the IOD award in respect of the same injury each come from the Chief Constable's budget. For myself, I see it extremely hard to justify how or why this could be considered to be a fair use of public funds.

12.11 I know that this is an issue which has caused some concern on the part of the Department also. For instance, I have seen a note of a meeting between Board, PSNI and Departmental representatives which was held on 10 July 2014 in order to discuss the ongoing operation of the IOD award scheme in which one of the Departmental representatives "expressed concern that duplicate payments were being made" particularly in relation to cases where hearing loss claims had been made:

> "The Court ruling provided compensation for the injury on duty. If Injury Benefit awards were given this would create duplication and potential misuse of public funds."

12.12 Since the regulation 22(1) mechanism presently does not include the taking into account of damages or compensation where the officer receives an IOD award under regulation 10, in cases where there is a successful claim for compensation, this will result in the officer being compensated twice in respect of the same injury in a way which is not permissible if he would be entitled to a disablement gratuity. I consider it highly unusual that the Regulations prohibit this in the case of a disablement gratuity, where the officer will have a more serious injury (because it results in the officer being *totally and* permanently disabled), but not in the case of a less serious injury giving rise to an award under regulation 10. It may be that there is some policy reason for this or it may be, as I would suspect, that this was in error.

12.13 It should be noted that the effect of the regulation 22(1) mechanism is not to deprive an officer who has successfully recovered damages from claiming or being paid an IOD award[455], but merely to ensure that any damages are subtracted from that award. The IOD award can still be

[454] An example being the driver of a car who intentionally or negligently collided with the officer's vehicle whilst he was on duty.

[455] Unless the damages awarded are so great that they completely cancel out any IOD award payable.

used to 'top up' the payments available as a result of an injury on duty in respect of which a successful claim has been or may be brought.

12.14 In light of the above discussion, I would recommend that the legislation be amended to prohibit double recovery in respect of regulation 10 awards also, where the officer has received, or later does receive, compensation in respect of the injury from another source, including a claim against the Chief Constable.

Should injury pensions and awards be administered by the Chief Constable?

12.15 Another issue which was raised on a number of occasions in the course of consultation meetings during the review process was why the Policing Board was responsible at all for the administration of IOD awards.

12.16 NIRPOA told me that when, in 2007, the NIO had carried out a review into police pensions, the Association's position was that responsibility for police pensions should move from the Board to the Chief Constable for two reasons. First, the *B* and *C* decisions made it clear that pensions are deferred pay and, as Pay Branch and Pensions Branch had moved from NIPB to the PSNI, so too should all matters relating to pension. Second, the NIPB was created arising out of the arrangements put in place after the Good Friday Agreement and was "clearly a political entity". It was contended that the remit of the Board is to ensure an effective, efficient, impartial, representative and accountable Police Service – but that pension provision was not part of that remit.

12.17 Notwithstanding these views, NIRPOA also indicated that it accepted the statutory duty which the Board currently has in respect of the administration of police pensions. Their point was that there was no reason why the Board ought to be responsible for pensions (including ill-health pensions) and that some difficulties arose as a result of its being so responsible.

12.18 It seemed to me that NIRPOA's position in this regard may have been based upon a view that former officers would be treated more favourably by, or would at least have more confidence in, medical officers directly employed by the PSNI (whom they considered would have a greater understanding of the policing role and injuries sustained in the execution of duty than do the present SMPs). Indeed, as I have noted at paragraph 6.47 above, NIRPOA suggested that problems with IOD awards began when independent SMPs were engaged by the Board.

12.19 For my part, I consider that there is a good deal of force in the suggestion that the administration of the IOD scheme ought to find its home within the PSNI organization itself. This is not because I consider that officers would be treated more favourably by OHW staff than by external SMPs, although if officers would have more confidence in those staff, that may itself be a relevant consideration. Rather, it is for a range of different reasons, some of which were touched upon by NIRPOA and others not.

12.20 The main reason why I consider that it may be more appropriate for the IOD scheme to be administered by the PSNI itself is because determinations in relation to individual awards are not (or at least ought not to be) politically contentious matters; nor are they matters which require independent oversight in the way in which policing functions generally might. In short, I am unclear why this aspect of police administration has found its way into the Board's functions, given the nature and purpose of the Board as it was created[456]. Since it relates closely to pay and pensions, it seems to be the type of issue which could and should naturally be administered by the PSNI itself.

12.21 A yet more practical reason for the PSNI administering the scheme is that it has more resources than the Board which may be of assistance in doing so and which may render the processing of applications and reviews more speedy. I have already observed in Chapter 5 that one of the factors giving rise to inefficiency is the involvement of several bodies in the process, requiring the sharing of information between various branches of the PSNI and the Board. If the process was administered internally by the PSNI, it seems to me likely that the sharing of information (for instance, between Human Resources, Pensions Branch, OHW, DCUs, *etc.*) is likely to be easier and streamlined. In addition, the PSNI has in-house legal and medical support which the Board does not. In short, all of the information and disciplines necessary to process IOD applications are to be found within the PSNI. In particular, I would have thought that the use of employed OHW doctors is also likely to be more cost effective than contracting this function out[457].

12.22 If the Chief Constable himself was responsible for administering the scheme, this would also bring the position in Northern Ireland into line with the way in which the equivalent scheme is administered in England and Wales[458]. This is because the Police Pensions (Amendment)

[456] And I have not yet been advised of any clear rationale as to how or why this function came to rest with the Board.

[457] Although this is not something in respect of which I have been provided with any information.

[458] IOD awards are administered by the Scottish Police Authority for all police officers in Scotland

Regulations 2011 confer responsibility on Chief Constables for administering pensions and injury benefits for all police officers (save for themselves).

12.23 I am conscious that this is obviously a policy issue but it seems to me that it is worth seriously considering why the present function of administering IOD awards sits within the functions of the Board. I am told that there may soon be a review of the Board's functions carried out in conjunction with the Department. This might provide an opportunity for this issue to be reconsidered and debated. Any decision to transfer the function from the Board to the Chief Constable would, of course, require amendment of the Regulations, given that they clearly confer the relevant functions for the moment on the Policing Board.

12.24 I am also aware that Dr Crowther of the PSNI OHW was not in favour of the administration of the scheme being taken back in-house to the PSNI. He particularly valued the independence which the SMPs brought to the process; and there is no doubt some force in an argument to the effect that OHW staff ought to be free to act in a supportive role for officers without also being required to undertake an adjudicative role. These are all issues which may require further discussion.

12.25 On the question of independence, however, it seems to me that concerns about that could be met by the provision (as at present) of an independent appeal from the first instance decision-making. It might well be that if the function of administering the IOD scheme was taken back within the PSNI, the Board could host the appeal functions, rather than that being hosted as at present by the Department. This might sit more naturally with the Board's independent role and indeed the Department's policy making role, freeing it from responsibility for the detailed arrangements for appeals. Again, these are issues which I raise merely for consideration in due course.

The scheme's fit with disability discrimination legislation

12.26 Another issue which was raised with me, which is fairly fundamental, involving as it does the core concept of 'disability' within the statutory scheme, is the fact that an officer who is unable "to perform the ordinary duties of a police officer" is considered to be disabled, without (it seems) taking into account either (a) the possibility of the officer performing the duties of a police officer with reasonable adjustments being made by reason of his condition or (b) the possibility of the officer continuing to be employed within the police in a position which does not require him to

perform the physically demanding 'ordinary duties' of a police officer. This results, or can at least potentially result, in a significant number of police officers being medically retired and compensated in circumstances where it seems that they may be able quite properly[459] to continue to be employed by the Police Service.

12.27 I have discussed the meaning of "disabled" in this context in Chapter 4[460]. It is acknowledged that there may be a danger in the Chief Constable having to retain within the Police Service officers who are, by reason of injury, not fit to fulfill all of the physically demanding requirements of operational policing, since this may have an effect on the overall operational effectiveness of the Police Service. This issue, therefore, is clearly an issue of policy. But it seems to me that there is a debate to be had as to whether the bar set for medical retirement has been set too high, so that officers who could usefully continue to be employed within the PSNI, even with some disability caused by injury, should not be deemed suitable for medical retirement.

12.28 The duty of employers to make reasonable adjustments to ensure that disabled persons are not placed at a substantial disadvantage in comparison with persons who are not disabled is set out in section 6 of the Disability Discrimination Act 1995[461]. This can include, for instance, the terms, conditions or arrangements on the basis of which employment, transfer or other benefits are afforded; and might, particularly, include re-allocation of duties, transfer to another vacancy within the organization, alteration of working hours or place of work, the provision of leave, *etc.*.

12.29 I do not suggest that the present definition of 'disability' for the purpose of the relevant Regulations is inconsistent with the 1995 Act, not least because section 6(11) makes plain that the section 6 obligation:

> "… does <u>not</u> apply in relation to any benefit under an occupational pension scheme or any other benefit payable in money or money's worth under a scheme or arrangement for the benefit of employees in respect of —
>
> (a) termination of service;
> (b) retirement, old age or death;

[459] And in a manner more in keeping with the evolution of disability discrimination legislation.
[460] See paragraphs 4.12 to 4.24.
[461] And section 64A(1) of the 1995 Act provides that for the purposes of Part II of the Act, the holding of the office of constable as a police officer shall be treated as employment by the Chief Constable and by the Policing Board as respects any act done by them respectively in relation to that office or a holder of it.

(c) accident, injury, sickness or invalidity; or

(d) any other prescribed matter."[462]

12.30 However, in the event that there is any fundamental review of the statutory scheme here, as I have recommended, consideration should in my view be given to whether it would be possible to reduce the number of officers who are medically retired by reason of the provision of alternative arrangements for them which would enable them, or at least some of them, to continue to be employed in the Police Service. The spirit of disability discrimination legislation is generally that those with disabilities should be accommodated as far as reasonably possible. Certainly, in cases where a degree of disablement calculation shows that the officer's earning capacity is only modestly reduced, or where the injury concerned impacts only on limited aspects of the officer's ability to perform the ordinary duties of a constable, it seems odd that some place might not be able to be found for them to continue serving in the PSNI, with a consequent saving in terms of cost and avoiding losing valuable experience which the officer may have.

12.31 As noted at paragraph 1.14(f) above, this was an issue which was discussed in the course of the consultation meeting I held with the PSNI and it is clear that the Human Resources Branch there is aware that there may be some further thinking which could be done in this area

The approach to length of service in injury pensions and awards

12.32 Similarly, another issue touched upon in my consultation meeting with the PSNI, which is a broader issue on which it is not for me to seek to dictate policy, but which it is proper for me to mention as a matter to which further consideration should be given in the event that there is a further review of the statutory scheme, is whether (as is presently the case) the Regulations ought to financially reward longer service before medical retirement or, on the contrary, ought to be more generous where the officer's career has been cut extremely short by reason of injury.

12.33 I recognize that there will be competing views on this, related in part to the different conceptions of precisely what the Regulations are designed to achieve. There will, I suspect, be little argument that the long service of officers who, at an advanced stage of their career, have to retire on medical grounds should be respected and rewarded. To some degree this will be done by

[462] I also note that in the *Crudace* case (see paragraph [97]) the judge concluded that it was unnecessary to consider additional arguments raised by the claimant under the Disability Discrimination Act 1995, although expressing doubts as to the relevance of such arguments.

the use of their average pensionable pay as part of the calculation of their award. However, such officers will also receive an enhanced award by reference to their period of years in pensionable service. The greater those years, the higher the percentage of their average pensionable pay the minimum income guarantee will be.

12.34 The point I am making, and which was made to me in the course of some discussions in the progress of this review, is that an officer whose career is cut extremely short by virtue of an injury received in the execution of duty which renders him disabled from performing the duties of a police officer, may receive very meagre recompense through the IOD scheme, because his average pensionable pay may be low and his MIG may be as low as 15% of that pay[463]. Although there is an argument that, provided the degree of disablement is not significant, that former officer may have other fulfilling and rewarding career options open to him[464], there is also an argument that it is persons in this position, whose police careers are cut off in their infancy, who may be in need of particular assistance.

12.35 Again, I raise this issue only the context of it being an interesting matter (going to the core of what the Regulations are designed to provide) which may be ripe for further discussion in the event that there is some more wide-ranging review of policy or legislation in this area which may be prompted by this review or otherwise. Where precisely the balance is to be struck as between the benefits the scheme provides to various categories of retired officers is not for me to say.

[463] Although the position is much less stark in cases of very serious injury – where the degree of disablement is more than 75% – in which case the MIG is, whatever the length of service, 85% of the officer's average pensionable pay.

[464] Which would perhaps not be available to a much older officer who has to retire.

CHAPTER 13

THE POSSIBILITY OF REFORM

How realistic is the expectation of reform?

13.01 In the course of this review report, I have highlighted a number of areas of concern in relation to the existing statutory provisions governing ill-health retirement and, in particular, IOD awards for former officers. I have also recommended both a major reconsideration of whether the present statutory model is the most appropriate in the circumstances of Northern Ireland policing, both in terms of substance and procedure, and more limited reconsideration of some aspects of the current scheme which might occur in the meantime. Details of these concerns and recommendations are contained throughout the body of this report, with the most significant summarized in Chapters 1 and 14.

13.02 I am aware, however, of a number of limitations in respect of these recommendations. The first, as I have acknowledged throughout this report, is that it is not for me to set policy, much less make the law, in this area. This falls to others and will need to be progressed, if there is a political will to do so, by the Department, no doubt after consultation with other stakeholders. The Department's ability to do so will, in turn, depend on other factors such as its own priorities, the availability of time in this or further Assembly terms, compliance with any statutory requirements[465] in respect of new Regulations and political agreement in respect of issues which may be significant, controversial or cross-cutting.

13.03 Nonetheless, there should be no doubt that the situation which has given rise to the need for the present review represents somewhat of a crisis in my view and, I understand, that of the Board. That is why I have also sought to identify other means of ameliorating the situation, principally by the introduction of new, agreed and clear Northern Ireland-specific guidance; and also by the introduction of more limited legislative reform which might be more achievable in the short to medium term.

[465] For instance, under the 1972 Order or the Police Act 1996.

13.04 I do understand, however, that there is at least the possibility of new Regulations being introduced at some stage in the relatively near future – modeled on the draft Regulations issued for consultation in England and Wales in 2013, which largely adopt the present scheme with some modifications – which might provide the opportunity for some further change.

13.05 There has been discussion about a wholesale legislative amendment of the injury benefits scheme for some time. In September 2010 the DOJ Review Report noted[466] that "the nature of the scheme itself… has recently been reviewed at a national level and a new injury on duty scheme is expected to be established in 2010/11".

13.06 Similarly, the draft NIPB Guidance Booklet (formulated in December 2012 although not, in the event, published) noted[467] that:

> "A new Injury on Duty Scheme is possibly being introduced by Government in 2013 and this guidance will be amended when this new scheme becomes law and applies in Northern Ireland."

13.07 New draft Regulations have been circulated in England and Wales and are discussed in the next section. The Chief Executive of NARPO (who attended NIRPOA's consultation meeting with me) has summarized the position in relation to these draft regulations as follows:

> "There has been considerable debate and consultation over proposed new injury benefit regulations in England and Wales going back over several years.
>
> In fact a discussion document was circulated for comment as long ago as 2010 and subsequent to that I understand that there has been considerable discussion at the Police Negotiation Board… on these matters.
>
> The draft regulations were not open to further detailed consultation when they were circulated to [NARPO] in April 2013 and our understanding was that they would be put into legislation at an appropriate time in the future. We did understand that the Home Officer were and, in fact, still are engaged on more pressing matters… and this has been responsible for the delay.

[466] At paragraph 2.5.
[467] At page 2.

> I should also point out that we (NARPO) do not support all the proposed changes to the regulations…".

13.08 The position in England therefore appears to be stalled but, in due course, new Regulations are likely, which is also likely to prompt legislative amendment in this jurisdiction (given the Department's broad desire, as I understand it, to maintain parity in these matters across the UK). Insofar as such developments might provide an opportunity for legislative change, or there is some earlier opportunity for legislative amendment, I would urge as full a consideration of the issues raised in this report as possible, rather than an unquestioning introduction of a mirror image of the new English provisions for Northern Ireland. I do not believe this approach has served this jurisdiction well in the past, at least in recent years.

13.09 I am aware that there is ongoing engagement between the Board and the Department as to the difficulties which have arisen with the operation of the injury benefits scheme. For instance, on 26 August 2014 the Chief Executive of the Board wrote to the Department stating, *inter alia*, that:

> "The most significant risks we have identified concern the legislation governing the Injury on Duty Award Scheme. The legislation is shared with England and Wales but applied here in a very different context… Considerable legislative uncertainty also arises following the Slater and Simpson judgements. These are risks that must be addressed by the Department as managers (ie. the entity responsible for making and amending the regulations) of the Injury and Duty Award Scheme…
>
> It is apparent that the new Injury on Duty Award Scheme regulations being drafted by the Home Office are unlikely to provide the legislative clarity required. Without this clarity in the legislation and the associated guidance, the Board will continue to encounter confusion and further challenges. It is essential that the legislation meets the specific requirements of the policing context in Northern Ireland and addresses the ambiguities arising through case law and the consequent challenges experience to the process by the Board."

13.10 As recently as 2 September 2014 the Director of Safer Communities in the Department wrote to the Chief Executive of the Board, accepting that "the Department is responsible for setting the policy and legislation for the scheme" but emphasizing that "it is for the Board to ensure the efficient and effective administration of the scheme". Plainly, the Board does not feel that the scheme is operating either efficiently or effectively, which is part of the reason why the present review was initiated. In the course of this correspondence, the Department also asked the Board

to forward to it "details of the specific aspects [of the legislation" that are causing difficulty for you and which you would like us to review". It is a matter for the Board to identify those. I suspect that the contents of this report may go some way to assisting the Board in this task (but do not presume that the Board will necessarily agree with my conclusions or recommendations).

13.11 The most effective driver for change may prove to be the concern on the part of some, particularly in the PSNI, that the system is now simply too costly and is eating into the policing budget disproportionately, to the detriment of funding for operational policing. There is no doubt that, in the particular circumstances of Northern Ireland, the injury benefit scheme is particularly costly, largely as a result of the atypical features of policing in Northern Ireland which are related to the Troubles.

13.12 In the DOJ Review Report of September 2010 it was noted that there were 1930 injury awards in payment by the PSNI. In 2009/2010 the Chief Constable paid out £16.5m in injury on duty awards (some £350,000 of this being injury gratuity but the rest being injury pensions). In 2014, injury awards presently cost some £24m *per* year, with this expected to rise to around £30m in coming years[468]. Given that injury awards are not based on pension contributions and are funded by the PSNI and not the pension scheme, it is understandable that, with increasing pressure on public budgets, there are some who might wish to see greater control and predictability in relation to this element of spending.

13.13 Although former officers will (naturally) not wish to see any diminution in the sums to which they feel they are entitled under the Regulations, I also believe that they, and their representative organisations, are frustrated by some of the shortcomings in the Regulations highlighted in the course of this review process, particularly in relation to decision-making structures, but also in relation to the issue of reviews and the lack of clarity as to how when and how these should be conducted. Greater clarity in new legislative provisions is likely to be to the benefit of all.

13.14 I turn, then, to consider (in brief compass only) the new provisions envisaged in the draft English Regulations which have been made available for consultation.

[468] As the NIPB representative informed the quarterly NAMF meeting in June 2014.

[redacted]

13.15 [redacted][469] [redacted][470]

[redacted]

13.16 [redacted]

[redacted]

13.17 [redacted]

[redacted]

13.18 [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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470 [redacted]

471 [redacted]

472 [redacted]

473 [redacted]

[redacted]

13.19 [redacted]

13.20 [redacted]

13.21 [redacted]

13.22 [redacted]

474 [redacted]

475 [redacted]

476 [redacted]

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13.23 [redacted]

[redacted]

13.24 [redacted]

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13.25 [redacted]

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486 [redacted]

487 [redacted]

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488 [redacted]

489 [redacted]

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13.42 [redacted]

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13.43 [redacted]

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13.44 [redacted]

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490 [redacted]

491 [redacted]

492 [redacted]

[redacted]

13.45 [redacted]

13.46 [redacted]

13.47 [redacted]

493 [redacted]

494 [redacted]

CHAPTER 14

CONCLUSION AND RECOMMENDATIONS

14.01 As I stated in the opening Chapter of this report[495], it is not for me to set policy in the area of police injury benefits nor, in fact, was that the task which was set for me. I was asked, however, to identify shortcomings in the present arrangements, which necessarily includes some consideration of how any shortcomings may be addressed.

14.02 As with the Executive Summary set out in Chapter 1, the summary of conclusions and recommendations set out below is not a substitute for the more detailed discussion of the various issues touched upon in the preceding chapters of this report.

14.03 The following conclusions and recommendations are provided to the Board for its consideration, in the expectation that it will review and reflect upon them and reach its own conclusion on which, if any, should be taken forward. In many instances, where it is determined that a particular recommendation should be taken forward, this will simply be the start of the process, which will involve consultation and engagement with other stakeholders. Of course, responsibility for any legislative change ultimately lies with the Department, subject to the oversight of the Executive and Assembly.

Consideration of major reform (long term)

14.04 I would not go as far as to say that the present arrangements are not fit for purpose; but they are certainly very far from satisfactory. As I have already commented, the shortcomings in the present Regulations, both substantive and procedural, would not be a cause for really significant concern were it not for the huge number of IOD applications made and IOD awards payable in Northern Ireland, arising out of the particular nature of policing in this jurisdiction over the period of the Troubles. It is principally this factor, along with the obligation to keep awards under review under regulation 35 of the 2006 Regulations, which has led to the present situation in which the administration of the system is crippled.

[495] See, for instance, paragraph 1.07.

14.05 Hopefully these pressures will ease with time, as policing in Northern Ireland continues to normalize. However, for the foreseeable future the Board and the Department are presently left with the prospect of administering a scheme which does not, and has not in my view, served either the officers concerned nor the authorities administering the scheme well, at least over the last number of years. The scheme of the regulations appears to have been devised several decades ago in the context of England and Wales and there has never been a truly Northern Ireland specific scheme, tailored to our own needs and context.

14.06 I would accordingly recommend that consideration be given to major reform of the 2006 Regulations and their replacement with a much more simple scheme, perhaps along the lines of a tariff scheme with minimal requirements for review (such as the Armed Forces Compensation Scheme). A new scheme of this nature would be both easier to administer and would promote certainty and clarity for injury award recipients, who would no longer live with the constant prospect of reviews which might exacerbate their injury (in the case of PTSD) or radically alter the financial position on the basis of which they had made life plans. This certainty and clarity would also give budget predictability to the paying parties, who would be also be freed from the vagaries of the current system with endless reviews.

Recommendation 1: That the Board and Department, in consultation with other relevant stakeholders, consider major reform of the injury award system and replace it with a simpler scheme.

Recommendations for legislative reform broadly within the present statutory framework (medium term)

14.07 In the absence of a completely new legislative scheme, I still consider that the existing arrangements require substantial overhaul. That is to say, if the decision is taken to retain a scheme broadly in accordance with the current arrangements, there are a number of significant flaws in the scheme which, in my view, ought to be rectified. Some of these issues are addressed, to a greater or lesser degree, in the current draft of Regulations which are being considered for introduction in the near future.

14.08 The first of these flaws is the failure of the legislation to grapple expressly with the nature and purpose of police officer's injury awards and, in particular, whether their character is primarily an award for life in compensation for an injury sustained *or* more in the nature of a temporary

facility to off-set a loss of earnings up to the date when the officer would have been expected to retire. As I have noted in the course of this report, the *Simpson* judgment appears to resolve this question clearly in favour of the former interpretation, although this is at odds with how the Home Office and Department (and, accordingly, the Board) saw the scheme for some time. New Regulations should deal expressly with how, if at all, there is to be a difference between awards payable to those respectively over and under CRA and SPA, this being a policy issue as to the type of provision the scheme is designed to provide.

14.09 In addition, any amendment to the Regulations in this regard would require to specify clearly the extent (if at all) to which it is retrospective. My recommendation is that it should be prospective only; that is to say, if it affects the entitlement of officers presently in receipt of IODs at all, their entitlement should only be affected from a date after the introduction of the new regulations.

Recommendation 2: New Regulations should deal expressly and unambiguously with how the injury awards scheme is intended to apply to those reaching compulsory retirement age and/or state pension age.

14.10 The cumbersome decision-making process imposed by the statutory scheme, which splits issues into medical questions and non-medical questions, each with separate decision-making processes and appeal routes, ought to be radically simplified. Such a process builds into the system a significantly increased risk of delay, confusion and/or conflict between the various limbs administering the scheme and seems to me to be unduly complicated.

14.11 The difficulties are particularly exacerbated by the fact that the dichotomy between medical questions and non-medical questions seems to me to be poorly drawn. As pointed out by Latham J in *Ex parte Y* [redacted] some 15 years ago[496], this is an unsatisfactory approach to decision-making. It sees SMPs and IMRs having to grapple with legal issues, factual disputes and essentially accountancy assessments, which are plainly not issues of medical judgment. On the other hand, the determination of the date when an officer became permanently disabled, which does seem to me to be an exercise of medical judgment, on the wording of the present Regulations, is left to the Board.

[496] See the discussion of this case at paragraphs 7.74 to 7.78 above.

14.12 It is a matter for the Department how a new decision-making process could be streamlined. However, I recommend that there be a wholesale reconsideration of the way in which IOD award decisions are made. For my own part, I would favour the use of one body with sufficient expertise to deal with all aspects of an application (or review) at the one time, whose decision would then be subject to appeal on one occasion only, whatever the nature of the appeal. There are various ways in which this could be achieved but it may be by the creation of a board or panel with both medical and legal expertise and the power to make factual findings as well as assessing the officer's medical condition. Importantly, however, one composite decision would be taken rather than various elements of the decision making being separated off to distinct decision-makers[497].

Recommendation 3: New Regulations should radically simplify the decision-making process for IOD awards. In particular, they should remove the distinction between decision-makers, and separate appeal routes, for medical and non-medical questions.

14.13 I also consider that there plainly ought to be a time limit introduced limiting the date on which retrospective IOD applications can be made. Although this might be of limited significance in the short term (since officers aware of the new time limit will rush to submit applications in advance of it[498]), this should be an important safeguard against those administering the scheme being flooded with applications from former officers in relation to events which occurred many years ago and which can be, accordingly, extremely difficult to assess. The absence of such a time limit is one of the key reasons why the present difficulties with processing applications has arisen, given the large number of applications submitted relating to historic hearing loss.

14.14 It is a quite remarkable feature of the scheme that applications can be made retrospectively with no limitation at all. Time limits are one of the major legal tools deployed to ensure certainty and finality, which have been emphasized in the authorities as an important interests in this field. I recommend that a time limit be introduced restricting the ability of former officers to make applications many years after both the relevant events and when the permanent disablement is said to have arisen.

[497] [redacted]

[498] Which, in fairness, they ought to be permitted some reasonable opportunity to do.

Recommendation 4: A time limit should be introduced restricting the ability of former officers to make retrospective applications many years after the relevant events.

14.15 I also consider that there is a lacuna in the present Regulations, whereby damages or compensation received by an officer in respect of an injury are subtracted from certain awards payable to him under the Regulations as a result of that injury, but not the most common type of award (a police officer's injury award payable under regulation 10). I see no reason why a police officer of former police officer should effectively receive double compensation in relation to the one injury where he is able to achieve compensation through a civil action against the police and also qualify for an injury on duty award.

14.16 I would accordingly recommend that any new Regulations provide that compensation recovered in relation to the injury which later forms the basis of an IOD application be subtracted from any IOD award payable. I have considered in Chapter 12 above whether such a provision could go further, removing the entitlement to an IOD award in circumstances where a claim has been made. I consider that there are difficulties with such a proposal but that this may be an issue which would benefit from further consideration.

Recommendation 5: New Regulations should provide that compensation recovered in relation to an injury which later forms the basis of an IOD application be subtracted from any IOD award payable.

14.17 As I have discussed in some detail in Chapter 12 above, there is also a serious debate to be had about whether the administration of IOD awards for former officers should fall to the Policing Board at all, rather than (as is the case in other parts of the United Kingdom), the Chief Constable. In my view, there may be a number of benefits to this function being passed back to the Chief Constable, perhaps with the Board hosting the appeal function currently undertaken by the Department.

Recommendation 6: Serious consideration should be given to legislative amendment moving the responsibility for administering IOD awards for former officers away from the Policing Board and to the Chief Constable.

Recommendations assuming no significant legislative change (short term)

14.18 In the absence of any significant legislative change, what steps should be taken within the present statutory framework in order to simplify or improve the administration of IOD awards and the process of review, including making attempts to clear the present backlog of cases? (I address the issue of over 65 reviews separately below.) Much of the reasoning behind the following recommendations is set out elsewhere in the discussion sections of this report.

14.19 As I have indicated, another major limitation I have identified is the present state of policy guidance in Northern Ireland for those administering the ill-health retirement and IOD schemes. At one and the same time there is an absence of relevant guidance at the moment in some of the key areas of contention, particularly in relation to reviews and the assessment of percentage disablement, following the withdrawal of such guidance in the light of the *Simpson* and *Slater* litigation; and also a plethora of potentially relevant policy guidance on other aspects of the system, not all of which is consistent or up-to-date, issued by a range of bodies throughout the UK. Accordingly, I would make the following recommendations:

Recommendation 7: One authoritative, Northern Ireland-specific guidance document should be issued to assist SMPs and IMRs to interpret and apply the Regulations in a consistent manner (and to enable applicants to understand how this will be done). This should be agreed at least between the Board and the Department, although ideally also with officers' representatives.

Recommendation 8: In the course of development of this further guidance, serious consideration should be given to abandoning the currently recommended method of calculating percentage disablement, including detailed reliance on the ASHE survey and comparison with the officer's notional uninjured police salary, in favour of a much more basic approach, whereby the relevant medical authority would simply make a judgment in the round as to the severity of the impact of the duty injury on the officer's earning capacity, so as to select the officer's appropriate band without the need to calculate a specific percentage disablement figure.

Recommendation 9: In such guidance, given the approach of the case-law such as the *Simpson* case, the word "permanent" should be taken to mean for the rest of the officer's life, rather than simply until at least the attainment of compulsory retirement age for their rank.

Recommendation 10: The guidance should also provide SMPs and IMRs with more detailed assistance, in as straightforward language as possible and drawing upon recent case-law, on how to avoid impermissibly revisiting matters finally determined in previous certificates and applying the concept of apportionment.

14.20 The present approach to reviews has proven to be particularly controversial. Although there is an obligation to keep a pensioner's degree of disablement under review, there is some discretion on the part of the Board as to when to do this, since it is for the Board to determine what are suitable intervals at which reviews should take place. My recommendations as to how these should be dealt with are as follows:

Recommendation 11: There should be a move away from automatic review for all cases at any fixed interval set in policy. The judgment as to when a review is appropriate should be made on a more case-sensitive basis, driven particularly by medical advice on this issue from the SMP and/or IMR (although it ought to remain open to an officer to request a review himself at any time and the Board should also retain the right to initiate a review at any time if information comes to its attention identifying an apparent relevant change in circumstances). SMPs and IMRs should expressly be asked to provide the Board with advice on this issue in their completion of reports.

Recommendation 12: More limited legislative amendment to that recommended above should be considered more urgently, if possible, to permit a review to be dealt with, at least in the first instance, on the basis of medical evidence provided *without* a reference to an SMP, where this is appropriate.

Recommendation 13: For the moment, there should be no automatic reviews of officers at age 65 or other compulsory retirement age; nor should any such officer's banding be reduced on the basis of a calculation taking into account that, had he not been injured, he would in any event have ceased to be a police officer.

Recommendation 14: Those officers who were told in clear terms that they would not be subject to review, or words to that effect, should not be further reviewed in the absence of a request from them or some compelling reason why a review is considered appropriate (such a reason not to include merely their attainment of a particular age).

Recommendation 15: SMPs and IMRs should not be precluded in future from designating a case as one for no further review but this should occur only very rarely and guidance should be formulated for them as to when this may be appropriate.

14.21 Although I recognize that this is a particularly difficult issue in the present state of public finances generally, I have also identified as a major limitation in the administration of the IOD award system at present a lack of resources on the part of the PAB within the Board which deals with applications and reviews. Accordingly, whilst recognizing that this involves difficult questions for others as to the allocation of scarce financial resources, I am compelled to make the following recommendation:

Recommendation 16: Additional staff should be provided to the Police Administration Branch within the Policing Board to assist it with its present case-load relating to applications for, and reviews of, IOD awards.

Recommendations relating to the suspended reviews or recent over-65 reviews (immediate)

14.22 My recommendations in relation to the currently suspended reviews (or reviews which took place shortly before the suspension), particularly relating to those called for review because of their attainment of age 65, the rationale for which is set out in more detail in Chapter 9, are as follows:

Recommendation 17: Any suspended reviews which were prompted merely by the officer's attainment of age 65 or other compulsory retirement age should be abandoned.

Recommendation 18: Any suspended reviews which were prompted merely by the Board's five-yearly review policy should also be abandoned.

Recommendation 19: Where a completed review has resulted in an officer having had his banding reduced by virtue of his attainment of a particular age, that is to say in a *Simpson*-type case, this should be looked at again, with a view to restoring the officer to the banding he was on before the review (with consequential backdating of any payment) unless and until a lawful review has been conducted.

14.23 In relation to this last recommendation, I recognize that the appropriate mechanism for doing this (which is discussed in some further detail in Chapter 9) may be complicated; and that it may, in particular, differ depending upon whether the review decision is, or is not, subject to appeal (and whether the officer does, or does not, wish to proceed with the appeal). Further discussion and consideration of the appropriate mechanism to give effect to this recommendation is therefore likely to be required, especially since the certificate issued by the SMP on the review is

presumptively lawful and has legal effect pursuant to the terms of the 2006 Regulations. Initially, it was thought that a collective referral of all of these concluded reviews could be made to the Pensions Ombudsman for the purpose of quashing the SMPs' decisions; but, upon tentative exploration of this option with the Pensions Ombudsman's Office, this now seems unrealistic.

14.24 It may well be that, if this recommendation is accepted by the Board, the appropriate course is for this to be conveyed to the officers' representative organization(s) and an effort made to agree a mechanism for giving effect to it.

Conclusion

14.25 The review I was asked to conduct into the arrangements for the payment of ill-health pensions and injury on duty awards to former police officers has proven to be an extremely challenging task. I do not purport to have all, or perhaps many, of the answers to the difficult issues which have been highlighted to me in the course of this review; nor even to have discussed them all. I am conscious that the recommendations set out above will now have to be considered by the Board, and perhaps others, in determining how best to proceed and how to seek to meet some of the difficulties which have presented themselves in the administration of the relevant Regulations over the last number of years.

14.26 As I said in the Preface to this report, I hope that it will clarify a number of issues which have been raised with me by the Policing Board for consideration. Perhaps more than anything, the report (and the recommendations set out above) point up that there is further work to be done at the legislative, policy and administration levels. I have no doubt that further challenges lie ahead before the administration of ill-health pensions and, especially, injury on duty awards for former officers in Northern Ireland is restored to an even keel. I nonetheless repeat my hope that this report will make at least a modest contribution to the progress towards that goal.

APPENDIX A

TERMS OF REFERENCE

Background on Injury on Duty Awards

The Board has a statutory duty under the RUC Pensions Regulations 1988; the PSNI and PSNI Reserve (Injury Benefit) Regulations 2006; and the Police Pension (NI) Regulations 2009 to administer applications for ill health retirement, injury on duty awards and other awards in respect of serving and former police officers.

Home Office Circular 46/2004, published August 2004, instructed police forces to place former officers who had reached compulsory retirement age for the service (i.e. over 65) in the lowest band of Degree of Disablement upon review of their injury on duty award. The Northern Ireland Office issued similar guidance (Circular 06/2007) to the Board in 2007. The Board did not apply this guidance.

In light of the *Simpson* judgment in February 2012[499], Home Office Circular 46/2004 and the reciprocal Northern Ireland Office Circular 06/2007 were withdrawn. The Board's policy at that time was to continue to calculate loss of earnings, with the exception that police salary would no longer be used in the calculation. This approach was afterwards approved by the Department of Justice (policing and justice powers were devolved from the Northern Ireland Office in 2010) in June 2012.

Following a number of concerns raised by former officers and various representative groups a decision was taken by the Board in March 2013 to suspend the review of injury on duty awards. A working group chaired by the Board's Chief Executive and comprising of various stakeholders was also established to consider the current policies and procedures for the review of injury on duty awards and make recommendations to the Board and Department of Justice on present policies and procedures.

[499] In *Simpson* Mr Justice Supperstone found that the section in Home Office Circular 46/2004 "Review of Injury Pensions Once Officers Reach Age 65" and paragraph 20 of the Guidance on Medical Appeals which instructed police forces to place the former officer in the lowest band of Degree of Disablement as they would not normally be expected to be earning a salary in the employment market was unlawful.

Senior Counsel Review

In July 2013 the Board agreed to engage Senior Counsel to review the Board's existing administrative process within the current statutory and policy framework.

Mr David Scoffield QC was appointed to carry out the review.

The review will include:

1. Consultation with stakeholders;

2. An examination of the legislative landscape and regulatory policy framework for the administration of injury on duty awards, including any limitations;

3. Consideration of recent Pension Ombudsman and Medical Appeal Tribunal decisions;

4. Analysis of the processes and procedures followed by the Board in accordance with legislation and policy; and

5. Identification of any limitations in the legislative framework and policy guidelines.

APPENDIX B

INTERESTED PARTIES CONSULTED

Policing Board staff

Mr Sam Pollock, Chief Executive

Mr Peter Gilleece, Director of Policy

Mr [redacted], Head of Police Administration Branch

Mr [redacted],

Ms [redacted],

Policing Board members

Ms Joan O'Hagan

Prof Brice Dickson

Mr Jonathan Craig MLA

Police Federation for Northern Ireland

Mr Marty Whittle, Secretary

Mr Ronald Kenning, Treasurer

Mr Raymond Johnson (Solicitor, Edwards and Co)

Northern Ireland Retired Police Officers' Association

Mr Sam Lamont, Chief Executive

Mr Harry Scott

Mr David Turkington

Mr Wilson Houston

National Association of Retired Police Officers

Mr Clint Elliott QPM, Chief Executive Officer

Disabled Police Officers' Association

Ms Elaine Hampton, Chief Executive Officer

Mr Billy Allen QGM, Vice Chairman

Police Service of Northern Ireland

Assistant Chief Constable Alistair Finlay

Dr Geoff Crowther, Occupational Health Unit

Mrs Karen Todd, Head of Police Pensions Branch

Department of Justice

Ms Lorraine Montgomery, Head of Police Powers & HR Policy Branch

Ms [redacted],

Selected Medical Practitioners

Dr [redacted],

Dr [redacted],

APPENDIX C

GLOSSARY OF ABBREVIATIONS

AFCS	Armed Forces Compensation Scheme
APP	Average pensionable pay
ASHE	Annual Survey of Hours and Earnings
CRA	Compulsory retirement age
DOJ	Department of Justice
DPO	Deputy Pensions Ombudsman
IMR	Independent Medical Referee
IOD	Injury on duty
MIG	Minimum income guarantee
NIO	Northern Ireland Office
NIPB	Northern Ireland Policing Board
NIRPOA	Northern Ireland Retired Police Officers' Association
NARPO	National Association of Retired Police Officers
NPPS	New Police Pension Scheme
OHW	Occupational Health and Welfare Unit (PSNI)
PAB	Police Administration Branch (NIPB)
PFNI	Police Federation for Northern Ireland
PMAB	Police Medical Appeal Board (England and Wales)
PNB	Police Negotiating Board
SMP	Selected Medical Practitioner
SOC	Standard Occupation Classification