



## **Bar Council response to the *Personal Injury Discount Rate: How It Should Be Set In The Future* consultation paper**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to a joint consultation by the Ministry of Justice and Scottish Government entitled *The Personal Injury Discount Rate: How it should be set in the future*.<sup>1</sup>
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, and on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

### **Overview**

4. Personal Injury is a core practice area for many barristers. The specific interests of barristers specialising in personal injury are represented by the Personal Injuries Bar Association (PIBA) who are also responding to this consultation. The Bar Council defers to the greater expertise of PIBA in specific matters relating to personal injury law.
5. This consultation is concerned with a specific issue: how the personal injury discount rate should be set in the future. The specific issue of the discount rate is of

---

<sup>1</sup> <https://consult.justice.gov.uk/digital-communications/personal-injury-discount-rate/>

importance to the Bar in general, and the Bar Council in particular. There are many barristers who practice in civil litigation for whom personal injury is a part, but not a predominant part of their practice. More importantly, the operation of the discount rate is central to the principle of ‘100% compensation’ – to put an injured party back in the position it would have been in had the wrongful act not occurred - is not only a particular aspect of personal injury law, but of general significance as a central tenet of the law of damages.<sup>2</sup> The Bar Council notes that in her ‘Foreword’ to the consultation the Lord Chancellor restates that she remains “*absolutely committed to the principle of full compensation – the ‘100% principle.’*” The Bar Council welcomes this commitment to the 100% principle which it regards as fundamental.

6. The Bar Council notes that the present consultation follows two previous consultations on ‘the legal framework’ of the discount rate and the methodology for setting the rate.<sup>3</sup> In broad terms, the Bar Council notes that policy formulation following these consultations was problematic because of “*the widely diverging views ... expressed by different interest groups*” and the lack of consensus. The Bar Council notes that although the consultation on the legal framework closed on 7 May 2013, the Government’s response was not published until March 2017. The lack of consensus and a broad range of views on the discount rate is reflected in the Bar Council’s and PIBA’s own experience. At various points in its response to this consultation PIBA notes the wide ranging views held by its members. The Bar Council shares this assessment. In particular, both PIBA and the Bar Council consider that it would be inappropriate to set out any position in relation to changes to the current law which are policy matters for the Government, and Parliament.

7. Lawyers do not provide financial or investment advice to their clients. In cases involving catastrophic injury advice is often sought from an independent financial adviser, who is likely to give specific advice on the likely rate of return on lump sum compensation and the advisability of periodical payment orders (PPOs). Financial advice is very often taken only *after* settlement terms have been agreed with the paying

---

<sup>2</sup> The classic formulation of the rule is as set out by Lord Blackburn in the Court of Appeal in *Livingston v Raywards Coal Company* (1880) 5 App Cas. 25 at 39: “*that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should nearly as possible get that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.*” *Livingston* was not a personal injury case, it was, in fact about, damage to property caused by mining.

<sup>3</sup> The Government’s responses are: *Damages Act 1996: The Discount Rate. Review of the Legal Framework*; and *Damages Act 1996: The Discount Rate: How should it be set?* Both available at <https://consult.justice.gov.uk/>

party. Other stakeholders are better placed than the Bar Council to discuss the substance of financial advice given.

**Question 1: Do you consider that the law on setting the discount rate is defective? If so, please give reasons.**

The Bar Council does not consider that the current law in relation to the discount rate can be described as 'defective'. The current law is as set out by the House of Lords in *Wells v Wells* [1999] 1 AC 345, and the power to set the rate is set out in section 2 of the Damages Act 1996.

The Bar Council recognises that there are a wide range of views on whether or not the legal framework for setting the discount rate should be reformed. Arguments for reform broadly divide along 'party' lines, but the issue of what changes should be made and why are essentially policy matters for the Government, about which the Bar Council does not have a position.

**Question 2: Please provide evidence as to how the application of the discount rate creates under or over-compensation and the reasons it does so.**

The Bar Council is not in a position to provide evidence to the Government on how the current discount rate creates 'under' or 'over' compensation. However, the following broad points can be made:

1. It is not clear to the Bar Council how 'over' or 'under' compensation can be properly measured. As the Lord Chancellor recognises in her 'Foreword' the future is inherently uncertain, not only will prices, earnings, care costs, stocks and shares, fluctuate in value over a claimant's lifetime, but his or her personal circumstances may change.
2. All personal injury claimants are unique and the compensation payments they receive are designed to meet their particular circumstances. The extent to which lump sum and PPOs may meet those circumstances will vary greatly, and there may be considerable difficulty in establishing any discernible pattern as to whether or not investment choices result in 'over' or 'under' compensation.
3. The crucial factor which will determine whether or not lump sum compensation is sufficient to meet an injured claimant's needs is life expectancy: if the claimant lives beyond projected life expectancy there is likely to be a shortfall, hence the desirability of PPOs in catastrophic injury claims.
4. The Bar Council notes PIBA's observation that investment advice given during a period when the discount rate did not properly 'mirror' investment returns on

Index-Linked Government Securities (ILGS) may be of limited assistance to the Government. In this regard, the Bar Council notes that the current discount rate of -0.75% does not reflect current ILGS rates which are lower.

**Question 3: Please provide evidence as to how during settlement negotiations claimants are advised to invest lump sum awards of damages and the reasons for doing so.**

The Bar Council would defer to other stakeholders who are better placed to answer this question

**Question 4: Please provide evidence of how claimants actually invest their compensation and their reasons for doing so.**

The Bar Council would defer to other stakeholders who are better placed to answer this question.

**Question 5: Are claimants or other investors routinely advised to invest 100% of their capital in ILGS or any other asset class? Please explain your answer. What risks would this strategy involve and could these be addressed by pursuing a more diverse investment strategy?**

The Bar Council would defer to other stakeholders who are better placed to answer this question.

**Question 6: Are there cases where PPOs are not and could not be made available? Are there cases where a PPO could be available but a PPO is offered and refused or sought and refused? Please provide evidence of the reasons for this and the cases where this occurs.**

The Bar Council notes those situations referred to by PIBA in its response. Clearly there are situations when injured claimants seek PPOs but are refused. In summary:

1. A court may not make a PPO unless satisfied that the continuity of payments is reasonably secure, s2(3) Damages Act 1996.
2. PPOs may be inappropriate in cases where there are liability limits in the defendants' insurance policies.
3. There are specific issues in relation to the medical protection bodies who insure GPs: the Medical Protection Society ('MPS') is self-funding and PPOs are not available, and the Medical Defence Union ('MDU') has limited liability cover as in 2 above.

4. The Bar Council is also aware that there is uncertainty about the continuing role of foreign road traffic insurers to provide certainty of payment post-Brexit.
5. PPOs are usually limited to catastrophic injury cases, and that settlement is usually achieved on the basis of a lump sum payment and a PPO for future care and case management.
6. In catastrophic injury cases most claimants will be advised to offer a PPO to meet future care needs when these are substantial. In many cases defendants offer lump sum payments or refuse to agree PPOs. The reasons why defendants refuse PPOs is obviously a matter which they can address in their responses to this consultation.

**Question 7: Please provide evidence as to the reasons why claimants choose either a lump sum or a PPO, including where both a lump sum and a PPO are included in a settlement.**

The Bar Council is not able to provide evidence in relation to the reasons given by claimants for choosing lump sums or PPOs by reference to individual cases, however, there are a number of factors that are taken into account in determining the basis of settlement:

1. PPOs are usually only considered in the most severe cases, in particular when there are large claims for future care and case management.
2. In many cases PPOs will be limited to future care and case management and other heads of loss will be compensated by way of lump sum.
3. PPOs are attractive to claimants because of the certainty they provide for tax-free regular payments over the claimant's lifetime.
4. PPOs in relation to future care are particularly successful as they are index linked to carer's earnings under ASHE 6115. An appropriate index needs to be available to give certainty that the 100% compensation principle will be met. Other heads of loss, such as therapies or Court of Protection and Deputyship costs, are rarely linked to an appropriate (earnings) index (e.g. ASHE 222 for therapies), and therefore less commonly subject to PPOs.
5. An important factor in many maximum severity claims is accommodation costs. Because of the way such claims are calculated in accordance with the decision in *Roberts v Johnstone*, claimants require significant lump sum awards in order to purchase suitable accommodation. It is typical to use sums compensated by way of pain, suffering and loss of amenity (PSLA), future earnings, miscellaneous costs,

and holiday costs etc to provide the lump sum. Effectively *Roberts v Johnstone* operates to 'ring fence' part of a claimant's lump sum award.

6. PPOs for substantial awards are a suitable mechanism for compensating claimants when resolution is achieved on a full or near full liability basis. Where a claim is compromised on a partial liability basis a lump sum may be more appropriate than a PPO. In such cases claimants often need a degree of flexibility to use the lump sum award to fund a private care regime, having regard to 'top up' care being provided by the state.
7. As PIBA has pointed out some claims are not suitable for PPOs because future costs are likely to be sporadic and/or not capable of being fixed to any particular index, for example prosthetic costs.
8. The Bar Council agrees with PIBA that there is scope for developing practice in relation to applying PPOs to heads of loss other than future care. The problem with such claims is identifying appropriate indexation, and the reluctance of defendants to agree such PPOs.

**Question 8: How has the number of PPOs changed over time? What has driven this? What types of claims are most likely to settle via a PPO?**

The Bar Council is not able to comment on the number of PPOs and how this has changed over time.

**Question 9: Do claimants receive investment advice about lump sums, PPOs and combinations of the two? If so, is the advice adequate? If not, how do you think the situation could be improved? Please provide evidence in support of your views.**

Investment advice is usually restricted to those claimants who have suffered catastrophic injuries. Usually such advice involves consideration of a combination of lump sum payment and PPOs, having particular regard to how the needs of the claimant are best met in his/her individual circumstances, and how lump sum payments or PPOs for each individual heads of loss are appropriate to meet those needs.

The Bar Council is not in a position to comment on the adequacy of financial advice, and have no recommendations to make in this regard.

**Question 10: Do you consider that the present law on how the discount rate is set should be changed? If so, please say how and give reasons.**

The Bar Council considers that it is in a position to discuss the current law in relation to the discount rate, but would defer to the Government in terms of any policy decisions to be made or not made in relation to reform of the current law.

The Bar Council notes that hitherto there has been little consensus between stakeholders about how the law should be reformed. In the consultation Government sets out five main criticisms of the current law:

1. Assuming a very low risk approach over-compensates claimants *“because they are not, as a class, as risk averse as is assumed in the setting of the rate”*.
2. ‘Risk free’ investments protect vulnerable claimants but over-compensates other claimants who are not as risk averse and will earn higher returns on their investments.
3. In practice, claimants do not invest in ILGS, and therefore to base a discount rate on ILGS is unrealistic; the rate should be based on *“what they do invest or are advised to invest”*.
4. Returns on ILGS are not an appropriate rate as the ILGS market is distorted by special factors that do not apply to personal injury claimants.
5. A negative discount rate must be flawed on the basis that *‘it would be irrational to pursue an investment strategy with certainty of loss’*.
6. Parliament, unlike the courts, is in a position where it can take into account the potential impact of changes to the discount rate on insurers, local authorities, and the health service. Parliament can decide how *“the balance to be struck between different interests”*.

The Bar Council makes no submission on whether or not or how the current law should be changed, but makes the following observations on these particular points:

1. In relation to 1 and 2 *Wells v Wells* assumes that claimants are risk averse, but the Government considers that this assumption can be questioned by way of evidence. The Bar Council is not in a position to provide such evidence itself, and would defer further comment on this aspect of the consultation until the Government’s response is published. The Bar Council anticipates that the Government will publish the data relied upon and the methodology used to substantiate any conclusions reached in relation to 1 and 2. Unless supported by such evidence points 1 and 2 will be unsustainable.

2. The Government is aware that advice given in relation to investment prior to the change in the discount rate has to be considered in the particular context that the discount rate at 2.5% has for a long time not reflected returns on ILGS. The more pertinent question may be what the appropriate advice is now or what advice would be given if the discount rate did properly mirror returns on ILGS?
3. The current methodology for setting the discount rate was the subject of a previous consultation, and that the Ministry of Justice obtained advice from an expert panel in October 2015. The Bar Council would defer to the experts on the suitability of fixing the discount rate by reference to ILGS.
4. The Bar Council notes the particular issues that arise in relation to a negative discount rate, but note that setting the rate at such a level reflects the current legal framework as is made clear by the Lord Chancellor in her statement of reasons. If the legal framework is to be changed, the primary policy considerations for the Government are as set out above: (i) whether or not the assumption that claimants are not as risk averse as assumed in *Wells v Wells* should be displaced; and (ii) whether or not the discount rate should be fixed by reference to ILGS.
5. The matters identified in 4 above are proper considerations for Parliament, and it is for Parliament to decide how any reform of the law may take into account the interests of claimants and defendants.
6. The Bar Council observes that it is the Government's express intention that any proposed reform will be consistent with the 100% principle. To a large extent the Government's ability to propose reform that is consistent with this principle will depend on the evidence obtained during the course of this consultation, and the Bar Council would welcome the opportunity to give further consideration to the analysis of such evidence in due course.

**Question 11: If you think the law should be changed, do you agree with the suggested principles for setting the rate and that they will lead to full compensation (not under or over compensation)? Please give reasons.**

The Bar Council's observations on this subject are as set out in answer to Question 10 above.

**Question 12: Do you consider that for the purposes of setting the discount rate the assumed investment risk profile of the claimant should be assumed to be:**

- (a) Very risk averse or "risk free" (*Wells v Wells*)
- (b) Low risk (a mixed portfolio balancing low risk investments)
- (c) An ordinary prudent investor
- (d) Other.



**Please give reasons.**

The Bar Council notes the Government's desire to obtain empirical evidence on the risk behaviour of claimants, and the Bar Council would welcome the further opportunity to comment on such evidence.

**Question 13: Should the availability of Periodical Payment Orders affect the discount rate? If so, please give reasons. In particular:**

- **Should refusal to take a PPO be taken as grounds for assuming a higher risk appetite? If so, how big a difference should this make to the discount rate?**
- **Should this assumption apply in cases where a secure PPO is not available?**

The Bar Council does not consider that the availability of PPOs should affect the basis upon which the discount rate is set:

1. It would only be appropriate for the Government to take into account the availability of PPOs in setting the discount rate if there was a comprehensive and robust system by which claimants would routinely have PPOs for future loss. However, this is not the system we have at present when PPOs are very often resisted by defendants; and when PPOs are used they are very often limited to the most severe cases and, even then, only in relation to future care.
2. Current practice is that PPOs are used in the most severe cases where the investment decisions made by the claimant reflect long term care needs. It is highly unlikely that such claimants would consider a lump sum rather than a PPO because they have an 'appetite' for risk. Such decisions would reflect the nature of the investment advice given.
3. Current practice is that most claimants who have a PPO will also receive a lump sum. The Bar Council doubts that there is any binary choice between 'lump sum' or PPO: for reasons that we have already set out some heads of loss do not fit easily within the framework of PPOs, and accommodation and other needs mean that a lump sum is required. There is a real issue about the efficacy of PPOs when a claimant does not achieve resolution of the claim on a full liability basis.
4. The Bar Council agrees with PIBA that a 'two tier system' by which different discount rates may apply when a PPO is either in place or not is potentially discriminatory and likely to result in unwelcome satellite litigation.

**Question 14: Do you agree that the discount rate should be set on the basis that claimants who opt for a lump sum over a PPO should be assumed to be willing to take some risk? If so, how much risk do you think the claimant should be deemed**

**to have accepted? Please also indicate if you consider that any such assumption should apply even if a secure PPO is not available. Please give reasons.**

The Bar Council does not agree that the discount rate should be set on the basis that claimants who opt for a lump sum over a PPO should be assumed to be willing to take some risk - see the answer to Question 13 above. Claimants who opt for a lump sum over a PPO will have a wide variety of reasons not solely related to risk.

**Question 15: Do you consider that different rates should be set for different cases? Please give reasons. If so please indicate the categories that you think should be created.**

The Bar Council notes that there are different views about the suitability of different rates for different cases, and is not in a position to make any specific recommendations. If the Government were to decide that different rates should apply to different cases, it is essential to ensure that any distinction made between cases still adheres to the 100% compensation principle. The application of different rates to different cases may result in increased litigation. If such a policy were to be implemented either by rule change or primary legislation, careful consideration will need to be given as to how cases are appropriately differentiated. The Bar Council would welcome the opportunity to comment on such rule changes should this policy be pursued.

**Question 16: Please also indicate in relation to the categories you have chosen whether there are any special factors that should be taken into account in setting the rate for that category.**

The Bar Council does not comment in relation to this question given the answer to Question 15.

**Question 17: Should the court retain a power to apply a different rate from the specific rate if persuaded by one of the parties that it would be more appropriate to do so? Please give reasons.**

The court should have the power to apply a different rate in appropriate circumstances, but there has to be a high degree of certainty in the conduct of personal injury litigation and the application of a different rate should be limited to exceptional cases. What cases may be considered 'exceptional' are not necessarily obvious. PIBA highlights the example of claimants living abroad.

**Question 18: If the court should have power to apply a different rate, what principles should apply to its exercise?**

If the court's power to set a different rate is limited to exceptional cases, it is not straightforward to identify broad principles should apply. However, a basic consideration may be if either party can demonstrate that it would be manifestly unjust for the specific rate to apply. In order to maintain the degree of certainty and avoid satellite litigation, the Bar Council would submit that the threshold for demonstrating such unfairness would have to be a high one.

**Question 19: Do you consider that there are any specific points of methodology that should be mandatory? Please give details and reasons for your choice.**

The Bar Council notes the previous consultation the Government carried out in relation to methodology and the advice it has received from its expert panel. Such matters are for the appropriate experts.

**Question 20: Do you agree that the law should be changed so that the discount rate has to be reviewed on occasions specified in legislation rather than leaving the timing of the review to the rate setter? If not, please give reasons.**

The Bar Council acknowledges that the fact that the discount rate was not changed when there was considerable evidence that it no longer reflected returns on ILGS gave rise to judicial review proceedings and the previous consultation exercises. A transparent framework for the timing of review is appropriate.

**Question 21: Should those occasions be fixed or minimum periods of time? If so, should the fixed or minimum periods be one, three, five, ten or other (please specify) year periods? Please give reasons.**

The Bar Council has no fixed view on this issue. Review could take place either at a fixed period of time or triggered by certain measurable changes to the rate of return on, for example, ILGS.

The Bar Council agrees with PIBA that a transparent framework that allows for certainty is the most important aspect of review. The anticipation of change will drive litigation behaviour, but this is an inevitable part of litigation.

**Question 22: When in the year do you think the review should take effect? Please give reasons.**

The Bar Council has no view on this issue.

**Question 23: Do you agree that the rate should be reviewed at intervals determined by the movement of relevant investments returns? If so, should this be in addition**

**to timed intervals or instead of them? What do you think the degree of deviation should trigger the review?**

The Bar Council expresses no view on this for the reasons set out at Question 21.

**Question 24: Do you agree that there should be a power to set new triggers for when the rate should be reviewed? If not, please give reasons.**

The Bar Council expresses no view on this for the reasons set out at Question 21.

**Question 25: Do you consider that there should be transitional provisions when a new rate is commenced? If so, please specify what they should be and give reasons.**

The Bar Council expresses no view on this issues and notes the diversity of views expressed by PIBA members.

**Question 26: Do you consider that the discount rate should be set by:**

- (a) A panel of independent experts? If so, please indicate how the panel should be made up.
- (b) A panel of independent experts subject to agreement of another person? If so, on what terms and whom?  
Would your answers to the questions above about a panel differ depending on the extent of the discretion given to the panel? If so, please give details.
- (c) The Lord Chancellor and her counterparts in Scotland or another nominated person following advice from an independent expert panel? If so, on what terms?
- (d) The Lord Chancellor and her counterparts in Scotland as at present?
- (e) Someone else? If so, please give details.

The Bar Council accepts that the legislative framework for setting the discount rate must be decided by Parliament. However, independent expert advice must play a central role in how the discount rate is set in the future. We defer to Parliament in deciding whether or not this is best achieved by the rate being set by an independent panel, another body, or the Lord Chancellor. The Bar Council observes that in setting the current rate the Lord Chancellor expressly acknowledged that her decision was mandated by the current legal framework, and the key is that any future legal framework should be clear and it is applied in a fully transparent manner.

**Question 27: Do you consider that the current law relating to PPOs is satisfactory and does not require change? Please give reasons.**

The Bar Council does not consider that the current law relating to PPOs requires further clarification.

**Question 28: Do you consider that the current law relating to PPOs requires clarification as to when the court should award a PPO? If so, what clarification do you consider necessary and how would you promulgate it?**

The Bar Council does not consider that the current law relating to PPOs requires further clarification.

**Question 29: Do you consider that the current law relating to PPOs should be changed by creating a presumption that if a secure PPO is available it should be awarded by the court? If so, how should the presumption be applied and on what grounds could it be rebutted?**

The Bar Council agrees with PIBA that a presumption in favour of PPOs might be helpful in encouraging insurers to make more PPO offers, but its practical effect is likely to outweigh such benefits as a PPO will not be appropriate in many (if not most cases) and for many heads of loss; any threshold for such a presumption is likely to complicate settlement negotiations; increased costs will be incurred in having to deal with this issue and in administering PPOs; and there is an increased risk of satellite litigation. In practice the operation of such a presumption is likely to be highly contentious.

**Question 30: Do you consider that the current law relating to PPOs should be changed by requiring the court to order a PPO if a secure PPO is available? If so, what conditions should apply?**

The Bar Council does not support the suggestion that the court should require a PPO when available and secure. The court must have a wide discretion to take all the circumstances of the case into account, including the claimant's views on the suitability and appropriateness of a lump sum or PPO.

**Question 31: Do you consider that the cost of providing PPOs could be reduced? If so, how.**

The Bar Council would defer to other stakeholders who are better placed to answer this question with evidence. However, any reduction in the costs associated with PPOs would be welcome.

**Question 32: Please provide details of any costs and benefits that you anticipate would arise as a result of any of the approaches described above.**

The Bar Council is unable to assist in providing evidence in relation to this question.

**Question 33: Please provide any evidence you may have as to the use or expected use of PPOs in the light of the change in the rate and more generally.**

The Bar Council is unable to assist in providing evidence in relation to this question.

**Question 34: Do you agree with the impact assessment that accompanies this consultation paper? If not, please give reasons and evidence to support your conclusions.**

The Bar Council has no comment on this question.

**Question 35: Do you think we have correctly identified the range and extent of effects of these proposals on those with protected characteristics under the Equality Act 2010?**

The Bar Council has no comment on this question.

**Question 36: If not, are you aware of any evidence that we have not considered as part of our equality analysis? Please supply the evidence. What is the effect of this evidence on our proposals?**

The Bar Council has no comment on this question.

Bar Council  
11 May 2017

*For further information please contact  
Adrian Vincent, Head of Policy: Remuneration and Employed Bar  
The General Council of the Bar of England and Wales  
289-293 High Holborn, London WC1V 7HZ  
Direct line: 020 7611 1312  
Email: [avincent@barcouncil.org.uk](mailto:avincent@barcouncil.org.uk)*