**RESPONSE FOR THE FACULTY OF ADVOCATES**

to the Consultation on the

# Personal Injury Discount Rate

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## Questionnaire

**Q1: Do you consider that the law on setting the discount rate is defective? If so, please give reasons.**

We do not consider that the underlying principles are defective as such, but the law has not been operated in an effective manner by successive Lord Chancellors or by the Scottish Ministers. It has been reasonably clear for many years that the rate of 2.5% did not reflect the principles in *Wells*. The recent massive change from 2.5% to -0.75% without any corresponding recent alteration in market conditions strongly suggests that there ought to have been a change in the rate much earlier. We have no reason to think that the existing legal framework does not justify the new discount rate but the effect of this abrupt and huge change is to create real injustice for both pursuers and defenders. There is a significant difference between what pursuers would have received and what defenders would have had to pay out before and after the change, and that will be most striking for those whose settlements were closest in time either side.

**Q2: Please provide evidence as to how the application of the discount rate creates under- or over-compensation and the reasons it does so.**

We are unaware of any evidence that the application of the discount rate creates under-or over-compensation. We are unable to comment from any position of direct knowledge as to how claimants actually invest their damages but we suspect that there may be a wide variation of approach depending on individual circumstances. We think what is important to consider is what degree of risk should a claimant be reasonably be expected to take with the investment of damages. In our view the answer to this question varies with the head of claim under consideration. In relation to compensation for the cost of future care a very risk averse approach is reasonable. On the other hand, the replacement of future loss of income permits a greater degree of risk to be assumed.

**Q3: 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.**

As counsel it is not our role to provide financial advice to our clients. Settlement negotiations are not concerned with any question of investment. Pursuers are informed of the basis on which their damages are assessed. They are advised that this is not a matter for negotiation.

**Q4: Please provide evidence of how claimants actually invest their compensation and their reasons for doing so.**

We are unable to provide evidence because once a case has concluded we have no further professional role.

**Q5: 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?**

As counsel we are not involved in matters of this kind. We would simply recommend that investment advice should be sought. We think that there are two possible reasons for using ILGS as a benchmark for the discount rate. Some consider as a matter of pure principle that any potential gain over and above the ILGS rate should be disregarded – the chance of a better outcome being something the wrongdoer should be required to shoulder. The justification for this view is that the cost of the risk of a better outcome should rest with the wrongdoer rather than forcing the risk of a poorer one on to the pursuer. On this view, what actually occurs in practice is irrelevant. Others consider that in practice pursuers will tend to place at least some of their funds for care in low risk and low return investments, so as to be sure that funding is secure and is not exposed to the vagaries of the stock market. Thus, using ILGS as the basis of assumed returns is realistic.

**Q6: 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.**

In Scotland PPOs are rare because unlike elsewhere in the United Kingdom the court has no power to impose an order. The Scottish courts have traditionally taken a detached attitude to damages awards and the damages protection regime is not as sophisticated as it is in England. The NHS, (represented by the Central Legal Office) do offer PPOs in catastrophic cases particularly where there is a dispute about life expectancy (see answer to Q7 below). In our experience, other defenders generally dislike PPOs and hitherto (with a discount rate at 2.5%) had little incentive to propose them. For pursuers there may be concern with regard to the long term financial stability of the defender particularly in recent times.

**Q7: 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.**

In Scotland they seldom have the choice. From experience however, in catastrophic cases involving children requiring significant future care, parents are keen for a PPO. This is because, in such cases, there are usually issues of life expectancy and compromises require to be made in order to achieve resolution. If a case is settled on a lump sum basis and the child lives longer than expected, the family will run out of funds to pay for future care. This tends to be the main factor taken into consideration when agreeing a PPO. Understandably most parents want their child to have access to an annual payment so that care for life is guaranteed.

**Q8: 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?**

We cannot say whether the number of PPOs has changed over time. However, the majority of cases that settle by way of PPO in Scotland are those that are backed by the state e.g. claims against health services or the MIB. The most common claims to settle this way are cerebral palsy cases where there is a dispute over life expectancy. If the case is settled on a lump sum basis and the child dies earlier than expected, on the one hand, it could be considered that there has been overcompensation. On the other hand, as we have commented on in Q7 above, in cases where there is a requirement for annual funding of significant care costs, there is an incentive on the part of many families to agree a PPO.

**Q9: 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.**

We understand that pursuers are routinely offered investment advice in relation to lump sum awards. If a PPO is proposed either on its own or in combination with a lump sum then if that is attractive to the claimant investment advice will be provided. We are not involved in advice after the damages are agreed or awarded. Currently, the cost of financial advice is not a recoverable head of claim (see *McDonald v Chambers* 2000 SLT 454 at 463 I –K and *Eagle v Chambers* (No 2) 2004 1 W.L.R. 3081 at paragraph 95).

**Q10: 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.**

Yes. There should be regular review by a body independent of the government. Regular review would allow financial conditions to be monitored and prevent large step changes such as have occurred with the most recent announcement. There is a strong perception that government is not impartial because it pays damages in many of the higher value cases. There is therefore a need for an independent body to take the responsibility for setting

the discount rate. We also consider that there should be scope to review the appropriate time period for the calculation of the expected return and the extent to which, if any, forecasting of future returns should feature. These are of course matters for specialist financial expertise.

**Q11: 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.**

We are not qualified to comment on this. What is clear is that any departure from the approach of the House of Lords in *Wells* would require claimants to take a greater degree of risk than is currently the case. We consider that this may be justified in relation to certain heads of claim such as loss of earnings and loss of pension but not in respect of the cost of future care.

**Q12: 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.**

We consider "(a) Very risk averse or "risk free" for heads of damages covering care needs. All investment carries some risk. Anyone who has been seriously injured is, by definition, vulnerable. We think that it is right that the wrongdoer should carry the risk it has created ("polluter pays"). With other heads of claim covering loss of future income we think that there is some scope for greater risk and would suggest that for these heads (b) is appropriate. We consider that the justification for the distinction in the degree of risk lies in the fact that with loss of future earnings and pension an income stream is being replaced. There is therefore some flexibility as to how funds recovered under this head may be deployed going forward. With future care the funds must be secured to meet a certain need in all time coming.

**Q13: 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?**

No. If the court considers a PPO to be appropriate, it should have the power to impose one. We also think that a discount rate properly set at the levels we propose would encourage compensators to offer PPOs.

**Q14: 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.**

No. This is speculative and unquantifiable.

**Q15: 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.**

Yes. The part of an award for future care requires greater protection from investment risk than the part required to replace future loss of income. It would be a coherent approach to expect pursuers to incur some investment risk with the latter.

**Q16: 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.**

We have nothing further to add.

**Q17: Should the court retain a power to apply a different rate from the specified rate if persuaded by one of the parties that it would be more appropriate to do so? Please give reasons.**

No, we think this would lead to unnecessary litigation. If there are two rates set, and on the basis of regular reviews, i.e. every two years at most, then we think this would be sufficient.

**Q18: If the court should have power to apply a different rate, what principles should apply to its exercise?**

Not applicable

**Q19: Do you consider that there are any specific points of methodology that should be mandatory? Please give details and reasons for your choice.**

We are not qualified to comment.

**Q20: 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.**

Yes

**Q21: 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.**

A review every two years would provide certainty and reduce the risk of a sudden and major change in the discount rate as has just occurred. This would also avoid parties holding off on settling cases in case of a positive change in the discount rate in their favour. It would also encourage consistency of approach over time.

**Q22: When in the year do you think the review should take effect? Please give reasons.**

We are unaware as to any reason to pick one time over another.

**Q23: Do you agree that the rate should be reviewed at intervals determined by the movement of relevant investment 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?**

We are unable to comment.

**Q24: 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.**

No. We think it is better to have certainty as to when the review will occur.

**Q25: 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.**

No, so long as there is a biennial review.

**Q26: 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.**

Appropriately qualified economists, investment advisers and actuaries. It would make sense that there should be a link to the panel responsible for the Ogden Tables.

**b) A panel of independent experts subject to agreement of another person? If so, on what terms and whom?**

No. This should not be a political decision.

**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**

No.

**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.**

**Q27: Do you consider that the current law relating to PPOs is satisfactory and does not require change? Please give reasons.**

We do not consider that the current law in Scotland is satisfactory. There is no provision in the Rules of the Court of Session to give the Court the power to impose a PPO in any circumstances. There should be far greater use of PPOs, particularly where life expectancy is in dispute. In the higher value claims, a lump sum award is very unlikely to provide the right level of compensation and there is a significant risk of substantial over or under compensation.

**Q28: 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?**

There should be a presumption that any claim involving significant annual future care costs should be the subject of a PPO. As we said in our response to the 2013 Consultation – "We believe it is important that the courts in Scotland have power to enforce periodical payments. This is the only way to overcome all of the hurdles previously discussed. Although there are complications in setting up periodical payments, they are the only way to ensure that the pursuer is not over or under compensated."

**Q29: 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?**

Yes. The Court should have the power, in the event of being satisfied that the PPO is secure, to impose a PPO on parties.

**Q30: 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?**

We agree that the current law relating to PPOs should be changed. Conditions could be a) there is a dispute in relation to life expectancy b) that the court must be satisfied that periodical payments will be secure for the claimant's lifetime. In terms of the Damages Act 1996 (as amended) s. 2 (3), courts cannot make an order for periodical payments "unless satisfied that the continuity of payment under the order is reasonably secure." Section (4)(c) provides that continuity of payment is deemed to be reasonably secure if the source of payment is "a government or health service body".

**Q31: Do you consider that the cost of providing PPOs could be reduced? If so, how.**

We are not qualified to comment.

**Q32: Please provide details of any costs and benefits that you anticipate would arise as a result of any of the approaches described above.**

We are unable to comment.

**Q33: 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.**

We are unable to comment

**Impact Assessment**
**Q34: Do you agree with the impact assessment that accompanies this consultation paper? If not, please give reasons and evidence to support your conclusions.**

Not qualified to comment.

**Equalities Statement**
**Q35: 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?**

No comment

**Q36: 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?**

No comment.

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