

THE POLICY & RESOURCES COMMITTEE

THE PERSONAL INJURY DISCOUNT RATE

and related matters

THIS CONSULTATION BEGINS ON 5 APRIL 2022

THIS CONSULTATION ENDS ON 17 MAY 2022

ABOUT THIS CONSULTATION

Following the registration of the Damages (Assumed Rate of Return and Related Matters) (Enabling Provisions) (Guernsey and Alderney) Law, 2020 in May 2021, there are a number of issues on which the Committee wishes to consult to help inform the policy decisions to be made under the Law. These are set out in this consultation.

RESPONDING TO THE CONSULTATION

Please send your answers to the questions below and any further comments by email, preferably in a format that can be read by Microsoft Word, to:

PIDiscountRate@gov.gg

USE OF CONSULTATION RESPONSES

Please note that consultation responses may be made public (sent to other interested parties on request, quoted in a published report, reported in the media, published on www.gov.gg, listed on a consultation summary etc.).

Please indicate in your response how the committee should treat your response, the options available are:

- I agree that my comments may be made public and attributed to me
- I agree that my comments may be made public but not attributed (i.e. Anonymous)
- I do not want my comments made public

In the absence of any such indication it shall be assumed that consultation comments may be made public and attributed to the author.

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SUMMARY

The *Damages (Assumed Rate of Return and Related Matters) (Enabling Provisions) (Guernsey and Alderney) Law, 2020* ("**the Damages Law**") was registered before the Royal Court in 2021 and is shortly to be commenced by Ordinance. The policy letter introducing the Damages Law (Annex 2) provides a mandate for the enactment of secondary legislation to set the **discount rate**, and for consultation to consider the introduction of a system to **recover healthcare costs** and potentially to **limit damages awards**. The policy letter for the Damages Law stated that:

- the Committee should set the discount rate by regulations, which rate would be consulted upon prior to being set;
- periodic payment orders may be ordered by the Court, which may make rules of Court to prescribe matters to be taken into account when making a periodic payment order;
- there should be consultation on whether a scheme to recover healthcare costs should be introduced, so that the Policy & Resources Committee can consider whether to submit another policy letter for States' consideration to propose the introduction of this by Ordinance; and
- there should be consultation on whether statutory limitation to damages awards should be introduced, so that the Policy & Resources Committee can consider whether to submit another policy letter for States' consideration to propose the introduction of this by Ordinance.

The **discount rate** for personal injury claims is a contentious issue which has attracted strongly opposing views in the UK and, more recently, Jersey. Small changes in the rate can have a big effect on large lump sum awards. The rate affects insurers' pricing of risk/risk appetite and consequently affects all those buying insurance to cover personal injury risks. If the rate creates too great a risk for insurers, this could have a significant impact in the Bailiwick; escalating PI awards clearly create the potential for an insurance crisis to arise, similar to that seen in Australia. It is hoped that some of this risk will be mitigated through introducing a statutory discount rate.

In addition to setting a statutory rate, the Damages Law also permits the introduction of other measures by Ordinance. In particular, implementation of a system similar to the UK's Compensation Recovery Unit (CRU) which would allow the States to **recover healthcare costs** arising from personal injury and the introduction of **limits on awards of damages** for personal injury. (This latter mechanism was implemented in Australia during the insurance crisis of the early 2000s and they have capped damages for loss of future earning and cost of future care. If adopted, this could further reduce uncertainty and risk for insurers and improve their confidence in the local market.)

This paper:

- explains the concept of the personal injury discount rate, the proposed discount rate and considers when the rate should be reviewed (page 5),
- explains periodic payment orders (page 11),
- explains recovering healthcare costs (page 13), and
- explores possible measures to limit awards of damages (page 15).

We recognise that not all respondents may wish to provide answers to all questions, but we would be grateful if all respondents could respond to as many questions as possible.

1. THE PERSONAL INJURY DISCOUNT RATE

1.1 COMPENSATION FOR PERSONAL INJURY BY WAY OF AWARD.

The civil remedy for personal injury claims tends to be an award of damages. Such awards seek to compensate the plaintiff for past, present and future losses that have arisen, and will likely arise, from the personal injury by reference to different heads of loss: for example, loss of earnings, costs of care and accommodation expenses; and the period(s) to which the heads of loss relate¹. Because this document refers to the position in other jurisdictions where a plaintiff in Guernsey and Alderney is now a “claimant”, for ease of reference “claimant” will be used throughout this document to refer as well to plaintiffs in domestic proceedings.

1.2 PAYMENT OF COMPENSATORY AWARD IN THE UK.

In the United Kingdom, the compensatory award for actual and future losses may be paid by way of a lump sum, periodical payments or a combination of both. A lump sum award is intended to be exhausted at the end of the period for which it is given. Periodical payments should run for the duration of the anticipated loss or expense or until the death of the claimant, if earlier².

1.3 APPLICATION OF THE DISCOUNT RATE TO AWARD.

Where a lump sum payment is made, in order to take into account of the full award being paid up front, the discount rate is applied to the award to offset the anticipated gain/loss arising as a result of the claimant investing the lump sum payment over time - rather than receiving compensation on a periodic basis as the needs for which it is given arise. (In effect, receiving the full amount decades in advance can put the injured person in a better financial position than they would have been had they had to wait for periodic payments, although this may be offset by loss caused by inflation over time.) The discount rate is intended to reflect the financial gain/loss a claimant will make upon investment of a lump sum damages award, balanced against the effect of inflation. (The investment approach adopted by or on behalf of the person receiving an award and the resulting returns will determine whether the amount received is higher or lower than that expected when the award was made.)

1.4 SETTING OF THE DISCOUNT RATE.

In England and Wales, the discount rate is fixed by statute by the Lord Chancellor, pursuant to s.1 of the Damages Act 1996 and although the Courts in England and Wales have discretion to depart from the statutory rate, it is understood that they have not done so. The discount rate is kept under review

¹ An award for future damages is usually calculated by reference to two figures referred to as the multiplicand and the multiplier. The multiplicand is the amount that is required annually for the anticipated period of loss. The multiplier is the period of time during which the claimant is expected to suffer the loss subject to a deduction for accelerated receipt and mortality. When the ‘multiplicand’ and ‘multiplier’ are multiplied, this produces the amount of the (anticipated) financial loss during the claimant’s lifetime. The ‘discount rate’ is then applied to that amount. The term ‘discount rate’ might be misleading as application of the rate will not always result in a discount, ‘adjustment rate’ might be more accurate as the rate may be positive or negative (a negative discount rate will increase the amount of the loss). This rate is intended to compensate for the anticipated fluctuation in the value of the award over time subject to investment returns and inflation.

² This is detailed further in this consultation: [the Personal Injury Discount Rate. How it should be set in future. A joint consultation produced by the Ministry of Justice and the Scottish Government, 2017](#)

and is evaluated by actuarial assessment. In Guernsey and Alderney, the Royal Court used to follow the UK discount rate but in *Simon v Helmot*³ the Privy Council departed from the UK rate (then 2%) and determined that at that time the applicable Guernsey discount rates were negative, i.e. application of the rate resulted in an increase in the amount payable by the defendant by rather than a decrease (-1.5% for certain losses and -0.5% for others). This judgment and the consequential uncertainty concerning the applicable discount rate is understood to have increased the cost of insurance in the Bailiwick, as it has increased the underwriting risk for insurers of such risks.

To provide certainty, the Damages Law has been introduced which permits a statutory discount rate to be set by regulations of the Policy & Resources Committee, subject to review over time. This issue has been comprehensively researched (Appendix 1 contains a summary of the discount rates believed to be in use in various Commonwealth jurisdictions).

If a rate is not set, the issue the Bailiwick may face is one seen previously in other jurisdictions, for example, Australia, where the rising cost of awards for damages for personal injury cases had become unsustainable, driving up insurance premiums and creating an 'insurance crisis'⁴.

At present, the Bailiwick has no statutory discount rate and no legislative framework supporting the use of Periodic Payment Orders (PPOs). In *Simon v Helmot*, Lady Hale expressed the view that “*it might be prudent for the States of Guernsey...to legislate*”. This has now been done by way of the Damages Law which provides a framework in which to review the rate, including the purpose, how it is set elsewhere and work out what would be best for the Bailiwick. As a small jurisdiction, the Bailiwick does not have access to the same size data samples as the UK and the differences in healthcare systems must also be kept in mind. This does not mean however, that we cannot learn from issues that have arisen in the UK and seek to ensure that the appropriate balance is struck for Guernsey and Alderney.

A. THE PROPOSED RATE

1A.1 BACKGROUND

A key issue when setting the discount rate is the expected rate of return on investment of the lump sum awarded as damages, which requires consideration of the risk appetite of the hypothetical investor. Some commentators suggest that the recipient of damages is not an ordinary investor and as such should not be expected to take significant risks with investing the award to achieve full compensation. In the UK, the expected rate of return was linked to Index Linked Gilts (ILGS) after their introduction in 1981, as many saw this as the best option a claimant could use to ensure the investment rose with inflation whilst assuming the least risk.

Many responses to the 2017 UK consultation queried whether the discount rate should continue to be based on ILGS returns as, many argued, this did not reflect the real-life investment behaviour of claimants. Furthermore, as the economy in the UK declined after the 2008 crash, many argued that using ILGS alone was no longer a realistic investment approach, as any system that produced a real

³ [2012] UKPC 5

⁴ This was considered in depth in the [Final Report on the Review of the Law of Negligence](https://treasury.gov.au/sites/default/files/2019-03/R2002-001_Law_Neg_Final.pdf) (the IPP Report) (https://treasury.gov.au/sites/default/files/2019-03/R2002-001_Law_Neg_Final.pdf).

negative rate must be flawed on the basis that it would be irrational to pursue an investment strategy with certainty of loss⁵.

It has also been suggested that the key legal principle governing the rate should be that "*the rate should be [that which]... a properly advised recipient of a lump sum of damages for future financial loss could be expected to achieve if he or she invested the lump sum in a diversified low risk portfolio with the aim of securing that (a) the lump sum and the income from it would meet the losses and costs for which they are awarded when are expected to fall; and (b) the relevant damages would be exhausted at the end of the period for which they are awarded.*"⁶

As a consequence of the above, when considering what rate would be most appropriate the Committee has borne in mind the needs (i) to strike a balance between the interests of potential claimants and the premium paying public and (ii) to avoid an insurance crisis. The Committee has also been mindful of the rate set in nearby jurisdictions. The discount rate in the UK under the Damages Act 1996, recently amended by the Civil Liability Act 2018 is currently set at -0.25% which clearly anticipates a very conservative investment strategy. Jersey has also recently introduced discount rates under the Damages (Jersey) Law, 2019, these are 0.5% if the loss is expected to be incurred for under 20 years, and 1.8% if over 20 years. These rates anticipate a less conservative investment strategy. The Jersey rates were set after a review of the discount rate by the States of Jersey's Senior Economist and Director of Treasury Operations and Investments (set out more fully at Appendix 2 to the States of Jersey States' report accompanying the draft Damages (Jersey) Law⁷). **Accordingly, the Committee proposes not to adopt a negative rate at this time, and appreciating the rationale of Jersey's rates and the benefits to insurers and insured persons in insurers being able to price across both markets, proposes initially to adopt by regulation the rates set by Jersey.**

Given the Committee's preliminary decision to adopt the Jersey rates, subject to consultation feedback, we are seeking comments on this proposal. This section explores the principles that underpin how the rate is set and invites views on whether the present principles should continue to be used going forward. It also explores what investment returns should be taken into account in setting the rate, including the key issue of investment risk appetite.

The following issues arise:

- what compensation principle should apply (see 1A.2)
- the expected rate of return on investment of the lump sum (see 1A.3)
- dual rates (see 1A.4)
- setting the rate (see 1A.5)

⁵ [The Personal Injury Discount Rate. How it should be set in future. A joint consultation produced by the Ministry of Justice and the Scottish Government, 2017](#)

⁶ [Ministry of Justice – 'Personal Injury Discount Rate: Response to the Report of the Justice Select Committee', March 2018 page 5](#)

⁷ [Draft Damages \(Jersey\) Law 2019- \(gov.je\)](#)

1A.2 WHAT COMPENSATION PRINCIPLE SHOULD APPLY?

In most jurisdictions there is an underlying principle that an innocent injured party should be fully compensated for any losses arising.

The principle that underpins the setting of the discount rate in England & Wales is the 100% compensation principle⁸. Lord Hope states in *Wells v Wells*⁹:

"the object of the award of damages for future expenditure is to place the injured party as nearly as possible in the same financial position as he or she would have been in but for the accident. The aim is to award such a sum of money as will amount to no more, and at the same time no less, than the net loss."

Australia does not follow the 100% compensation model as evidenced from a response paper in June 2006:

*"As the Government sees it, the task is to strike a balance between the rights of the injured person to compensation, and the ability of the rest of the community to pay for that compensation"*¹⁰

The question to consider is whether or not the rate should be set according to the 100% compensation principle. The proposed adoption of the Jersey rates is based on both the 100% compensation principle and also an assumption that a positive return should be achievable if a less conservative investment strategy is assumed.¹¹

Q 1: Should the discount rate be set by applying the 100% compensation model? Please give reasons.

1A.3 THE EXPECTED RATE OF RETURN ON INVESTMENT OF THE LUMP SUM

As noted on page 7, the Committee's proposal to adopt the Jersey rate assumes that a claimant will adopt a less conservative investment strategy than traditionally assumed.

⁸ This has also been accepted as the underlying principle more recently in Jersey when setting the discount rate, however it was questioned. The Chief Minister said: *"The discount rate in the draft law is based on a full compensation model...The draft Law, however, leaves open the question as to whether or not the statutory discount rate should, in the future, be based on a full compensation model, an economic balance model or an entirely different compensation model. This is for the Assembly to determine"* [Letter from Chief Minister of Jersey to Senator Moore dated 10th January 2018](#).

Likewise in the UK, Mr Chris Daykin (Former Government Actuary) acknowledged that the Lord Chancellor took account of things outside of the analysis in *Wells v Wells* when fixing the discount rate. He consulted widely and considered political issues as well as the consequences for the Ministry of Defence and the National Health Service in setting the rate. In the Bermuda Court of Appeal case *Thomson v Thomson* [2015] SC (Bda) 84 Civ, Bell JA endorsed the critique by the claimant's actuary Chris Daykin: *"[I]f one were to test a model proposed in place of the Wells mechanism then there would have to be a demonstration that the payments were sufficient for the claimants in at least 90 to 95% of cases in order to come close to providing full compensation"*.

⁹ *Wells v Wells* [1999] 1 AC 34

¹⁰ [NSW Government – 'Response to the Legislative Council General Purpose Standing Committee No. 1 Inquiry Report into Personal Injury Compensation Legislation'](#)

¹¹ [See the comments of the New South Wales Government, Response to the Legislative Council General Purpose Standing Committee No. 1 Inquiry Report into Personal Injury Compensation Legislation](#)

Q 2: Do you consider that the correct investment risk profile of the typical claimant has been chosen? If not, what do you consider is the correct risk profile, should it 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.

1A.4 DUAL RATES

Section 1(3) of the Damages Law provides for different rates to be set for different types of cases. In the UK, only one rate has been adopted. The Committee propose to adopt the split rates chosen by Jersey, which change according to the length of time for which the award is given.

Other jurisdictions use systems with differential rates in relation to the type of loss that the damages have been awarded for (see Appendix 1 for further detail).

Q 3: Do you agree with the proposed adoption of split rates? If not, please give reasons.

Q 4: Do you agree with the proposed adoption of split rates based on the period damages are awarded for? If not, please give reasons.

Q 5: Do you consider that different rates should be set for different types of personal injury or losses? Please give reasons.

Q 6: Where future costs of care are included in a lump sum payment, should they attract a separate discount rate?

1A.5 SETTING THE RATE

This is the most critical issue that needs to be determined, as it will affect both the size of awards and the extent of compensation provided.

Q 7: Do you agree with the proposed adoption of the Jersey rates? If not, what should the rate(s) be? Please give reasons.

B. WITH WHOM SHOULD THE COMMITTEE CONSULT ABOUT THE RATE IN FUTURE?

This section considers with whom the Committee should consult before setting the rate in future. It considers what type of expertise should be sought.

Section 1 of the Damages Law enables the Committee to set the discount rate by regulations. Section 1(3) states that these regulations shall be made "after consultation with such persons as appear to the Committee to be appropriate". It may be helpful to prescribe that the Committee must consult with certain people, or groups of people, from multiple interested fields to ensure that they are as informed as possible when setting the rate.

There are a number of ways to decide who the Committee should consult when setting the rate. It could be done on a public, *ad hoc* basis, an advisory panel could be created to help inform the Committee or there could be a requirement to consult certain bodies or persons.

- Q 8: Do you consider that the Committee should consult on a public, ad hoc basis or with a particular panel of experts when reviewing the rate? If the latter,**
- (a) do you consider the use of a formal panel would be appropriate?**
 - (b) of whom should the panel comprise?**
 - (c) should such a panel be unique to the Bailiwick or operate on a pan-Channel-Islands basis?**

C. WHEN SHOULD THE RATE BE REVIEWED?

The Law allows for a review of the discount rate ‘at least every 5 years’. Regular reviews could help ensure that the rate accurately reflects the current market and isn’t under or overcompensating the claimant due to recent fluctuations. This section considers whether there should be a specific trigger for reviewing the discount rate.

Creating a trigger for review needs to have a suitable measure to use as an index. For simplicity, the trigger might be set by reference to changes in a single representative index or rate. A review on a trigger point could reset the time period cycle so that over-frequent reviews were avoided. (Any review of the rate should be clearly documented and the reasons for the outcome explained.)

- Q 9: Do you believe the rate should be reviewed more frequently than every 5 years? Please give reasons.**
- Q 10: If so, should there be a specific trigger for review of the rate? Please provide reasons.**
- Q.11 If so, what circumstance(s) or change in such, should trigger a review? Please provide reasons.**

2. PERIODIC PAYMENT ORDERS ('PPOS')

PPOs are annual payments that are intended to meet the claimant's predicted future costs and expenses. They are most commonly awarded to cover the cost of future care and are often combined with a lump sum payment to cover large initial upfront costs such as home modifications. As PPOs are paid in instalments and not in advance, there is no need to apply a discount rate as the claimant does not need to bear the future investment risk. That said, PPOs are not without financial risk to claimants as the price of the care/services needed might, for example, inflate faster than the index to which the PPO payment is linked. Life-time periodical payments pass longevity risk to the defendant, who will have to fund the payments to be made.¹²

The Court will be able to order PPOs by virtue of section 2 of the Damages Law, and pursuant to section 2(7)¹³ rules of Court may be made requiring the Court to take specified matters into account when making PPOs. Whilst rules of Court are a matter for the Court to determine, it would be useful to gather consultation response to the issues that arise for the Court to consider.

An essential element of PPOs is that the future payments are secure and not likely to be affected by the solvency of the defendant. Some jurisdictions have legislated to define this in terms, for example, Jersey's legislation provides that:

"4(4) For the purposes of paragraph (3), the continuity of payment under a periodical payment order is reasonably secure if –

- (a) the order is enforceable against a Minister;*
- (b) it is protected by a scheme, statutory or otherwise, established under any jurisdiction, such scheme being one which the court is satisfied gives protection equivalent to the scheme established under section 213 of the Financial Services and Markets Act 2000 of the United Kingdom; or*
- (c) it is subject to a guarantee given under Article 5(2) by the Minister for Treasury and Resources in respect of that particular order."*

The UK has similar provisions to define security in section 2 of the 1996 Damages Act:

"(4) For the purpose of subsection (3) the continuity of payment under an order is reasonably secure if—

- (a) it is protected by a guarantee given under section 6 of or Schedule 1 to this Act,*
- (b) it is protected by a scheme under section 213 of the Financial Services and Markets Act 2000 (compensation) ..., or*
- (c) the source of payment is a government or health service body."*

Although PPOs are available in many jurisdictions, it is widely considered that they are underused. If damages were to be awarded as PPOs, this may lessen the burden on defendants who might be able

¹² [The Personal Injury Discount Rate. How it should be set in future. A joint consultation produced by the Ministry of Justice and the Scottish Government, 2017](#)

¹³ *"...(7) Rules of court enacted by Order of the Royal Court may require a Court to take specified matters into account when considering –*

- (a) whether to make a Periodic Payment Order,*
- (b) the security of the continuity of payment, and*
- (c) whether to approve an assignment or charge or agreement to assign or charge."*

better to manage the cash flow requirements of annual payments instead of single lump sum. To ensure that PPOs are used more often, rules of Court could create a presumption that damages for will be awarded via PPO if a secure PPO is available. This presumption could be rebuttable if the claimant was able to show that a PPO would be unsuitable or a lump sum would better meet their needs. This requirement could also be made subject to the condition that the claimant agrees to a PPO, that a defendant wishes to provide compensation in this way or both or none. PPOs could be used generally or restricted to certain types of loss, such as future cost of care¹⁴.

The main issues are:

- how to determine whether PPOs are secure,
- whether PPOs should be voluntary or awarded more routinely under a rebuttable presumption that they provide the best method of compensation,
- whether PPOs should only be awarded for certain heads of loss, and
- how awards via PPOs should be indexed.

Q 12: What factors should be taken into account when determining if a PPO is secure?

Q 13: Should there be a rebuttable presumption that a PPO will be used in all cases for pecuniary loss? Please give reasons.

Q 14: Should PPOs be the default for any specific heads of loss? Please give reasons.

Q 15: Should PPOs be the default when the losses are expected to continue for long lengths of time? If so, what length of time do you believe is appropriate? Please give reasons.

Q 16: Should a PPO be capable of variation at a later date during the period it has been awarded for? If so, how and for what reasons?

A. THE GROWTH IN WAGES OVER TIME

When the Court awards damages through the use of a PPO, the PPOs tend to be indexed so that the amount paid annually will vary according to that variation of that index. Traditionally, Courts in England and Wales used RPI as an index for this purpose. However, the growth of wages has been shown to change at a different rate to price inflation and therefore awards for future loss of earnings and future cost of care have a different rate of growth to that of other heads of damages¹⁵. In England and Wales, cost of future care is now linked to the [ASHE 6115 index](#) when awarded via PPO. Data collected on earnings in the Bailiwick is more limited than that available in the United Kingdom, so there is no equivalent, reliable source for tracking growth in wages. Nonetheless, awards relating to the cost of wages in the Bailiwick (such as cost of care and loss of future earnings) should still be adjusted annually to reflect the relevant local inflation.

Q 17: How should damages awarded via PPO be indexed in the Islands? Please give reasons.

¹⁴ [The Personal Injury Discount Rate. How it should be set in future. A joint consultation produced by the Ministry of Justice and the Scottish Government, 2017](#)

¹⁵ Ibid

3. RECOVERING HEALTHCARE COSTS AND BENEFITS

In the UK, there is a body called the Compensation Recovery Unit ('CRU') which recovers healthcare costs arising from personal injury accidents that the Government has paid up until the point of settlement of a claim. If, for example, an ambulance callout and a two night hospital stay was required as a result of a claimant's injury, the CRU can recover these costs from the damages awarded against the defendant or their insurer (the 'compensator'). This means the claimant should not be compensated twice through the awards of damages for past loss/treatments and through receiving such treatment services free of charge.

Section 3 of the Damages Law permits the introduction of a similar scheme by Ordinance of the States. Before such a scheme can be introduced, the Policy & Resources Committee would have to submit a policy letter for States' consideration, and so the Committee therefore wishes to gather feedback via this consultation prior to deciding whether to recommend the introduction of such a scheme.

This type of scheme would allow the States to recover costs that they have paid for the benefit of the claimant, from the 'compensator', under the principle that the injured party should not be compensated twice. The sum that the States has paid will be deducted from the sum payable by the compensator to the injured party. The UK CRU works with insurance companies, solicitors and any Department of Work and Pensions ('DWP') customers, to recover:

- amounts of social security benefits paid as a result of an accident, injury or disease, if a compensation payment has been made (the Compensation Recovery Scheme)
- costs incurred by NHS hospitals and Ambulance Trusts for treatment from injuries from road traffic accidents and personal injury claims (Recovery of NHS Charges)¹⁶

An example of how this would work in practice in the UK is provided online and set out below for convenience:

An award of compensation totalling £100,000 is agreed and broken down as follows: £40,000 in respect of general damages (pain and suffering), £30,000 in respect of loss of earnings and £30,000 in respect of loss of mobility.

A CRU Certificate lists Incapacity Benefit totalling £5,000, Income Support totalling £10,000 and Disability Living Allowance (mobility component) totalling £10,000.

A compensator may not under any circumstances offset against the general damages element of the award. Incapacity Benefit and Income Support can be offset against the loss of earnings head of compensation, as set out in Section 8 and Schedule 2 to the Recovery of Benefits Act. Therefore a total of £15,000 can be deducted from the loss of earnings sum, leaving £15,000 to be paid to the injured person.

¹⁶ <https://www.gov.uk/government/collections/cru>

Similarly, the compensator may offset the £10,000 DLA (mobility) against the loss of mobility head of compensation, leaving £20,000 to be paid to the injured person.

The injured person has settled their claim for a total of £100,000. Following offsetting, they receive £75,000 from the compensator in addition to the £25,000 they have already received from the state benefits system, thus avoiding double compensation.¹⁷

The Committee now intends to consider whether a similar such scheme should be introduced.

Q 18: Should the States create a regime similar to the UK CRU? Please give reasons.

Q 19: Do you consider it appropriate for the cost of past and future loss to be recoverable under a scheme for recovery of healthcare costs and benefits?

¹⁷ [Recovery of benefits and lump sum payments and NHS charges: technical guidance, 23 March 2020](#)

4. LIMITING AWARDS OF DAMAGES FOR PERSONAL INJURY

As noted in section 1, the increasing costs of personal injury awards affects the cost and availability of insurance for personal injury, whilst the discount rate has a part to play in this, another way of seeking to ensure that personal injury insurance will remain both available and affordable is to consider whether or not to place restrictions on the amount recoverable as damages from a personal injury claim¹⁸.

Awards of damages could be limited by Ordinance pursuant to section 5(1) and 5(2) of the Damages Law. Before such a limit can be introduced, the Policy & Resources Committee would have to submit a policy letter for States' consideration, and so the Committee therefore wishes to gather feedback via this consultation prior to deciding whether to recommend the introduction of such a limit. The aim of such limit(s) would be to balance prospective claimants' interests with those of the public as, in effect, the cost of large personal injury awards is met by the insurance premium paying public, and by those who pay medical specialists who rely upon insurance to provide services, as in all cases the cost of insurance and medical care increases as premiums for personal injury rise.

In addition, personal injury awards can create inequality in relation to the level of care available to disabled people, as the Australian IPP report noted:

"...only a very small proportion of disabled people recover compensation under personal injury law. Very many are more or less dependent on the social security system. Benefits for the disabled under the social security system are much lower than those available to people with similar disabilities under the full compensation principle of personal injury law, even taking account of statutory modifications of that principle. It is sometimes said that this differential properly reflects the fact that people who recover compensation under personal injury law have been injured by someone else's fault. But there is much evidence to suggest that only a relatively small proportion of those injured by the fault of others recover compensation under personal injury law. Furthermore, it may be doubted that the fault factor justifies the potentially huge disparities between the treatment of the disabled under the social security system and personal injury law respectively. It is the view of the Panel that in considering the quantum of damages available under personal injury law, it is relevant to consider the fact that only a very small proportion of disabled people receive the relatively generous levels of compensation that personal injury law allows and requires...."

It is also important to consider the purpose of personal injury awards, as Lord Woolf said in *Heil v Rankin*: "... The aim of an award of damages for personal injuries is to provide compensation. The principle is that full compensation should be provided... This principle of "full compensation" applies to pecuniary and non-pecuniary damages alike ... The compensation must remain fair, reasonable, and just. Fair compensation for the injured persons. The level must also not result in injustice to the defendant, and it must not be out of accord with what society as a whole would perceive as being reasonable."¹⁹

¹⁸ Australia presently operates on a system using caps and thresholds to limit awards of damages as a separate matter to avoid using a discount rate to lower awards.

¹⁹ *Heil v Rankin* [2001] QB 272

In light of the issues above, the Committee should consider how it can best ensure that damages awards are 'fair, reasonable and just' and whether or not limits on damages should be imposed as a consequence of the same.

Q 20: Do you consider that awards of damages should be capped? If so, please explain how and please provide reasons.

Q 21: Should there be any other limits or caps on damages awarded in respect of a personal injury claim? If so, please give reasons.

There are a number of different issues that could also be considered, as detailed further below.

A. BENCHMARK HEALTH CARE STANDARD?

It would be possible to impose a benchmark healthcare standard that requires that future care is to be that ordinarily provided by the States. This would remove the risk from those acting on behalf of claimants in having to estimate the healthcare needs of the affected individual many years into the future. Under the full compensation principle, the claimant is entitled to recover the full cost of medical care reasonably incurred in the past and likely to be incurred in the future.

Often it is the cost of future care that comprises the largest portion of the sum awarded in claimants' damages awards. Under the law of England and Wales, the claimant is "*entitled to damages to meet his reasonable needs arising from his injuries. Reasonableness always depends on the particular circumstances and it applies both to the head of loss claimed and to its amount.*"²⁰

The question that follows is what is the appropriate benchmark against which to assess 'reasonableness'. Defendants usually contend that the benchmark should be the use of public hospital facilities whereas claimants usually contend that the benchmark should be private treatment.²¹ Each case will depend on its own circumstances, however it is worth considering the potential difference in cost between a claimant that receives State care instead of private 1-1, or even 2-1, care.

Q 22: Should a benchmark healthcare standard be introduced? If so, what should this be? Please give reasons.

B. GRATUITOUS CARE

Another matter on which the Committee invites views is whether it would be beneficial to introduce a cap on recompense for gratuitous care. This is care provided for free by someone close to the claimant, which care can then be included in a compensation claim. In England and Wales this is often paid at approximately 2/3 of the equivalent professional care costs. The Ipp Report²², which looked at personal injury law reform in Australia, recommended that:

²⁰ Manna -v- Central Manchester University Hospitals NHS Foundation Trust [2015] EWHC 2279 (QB)

²¹ [Review of the Law of Negligence, September 2002 page 183](#) ('Ipp report')

²² [Ibid](#)

- a. damages for gratuitous services should not be recoverable unless such services have been provided or are likely to be provided for more than six hours per week and for more than six consecutive months,
- b. the maximum hourly rate for calculating damages for gratuitous services should be one fortieth of average weekly full-time adult ordinary time earnings ('FTOTE').
- c. the maximum weekly rate for calculating damages for gratuitous services should be average weekly FTOTE.
- d. damages for gratuitous services should be awarded only in respect of services required by the claimant as a result of the injuries caused by the negligence of the defendant.

Q 23: Do you think that caps and/or thresholds should be introduced regarding gratuitous care? If so, at what level? Please give reasons.

C. LOSS OF FUTURE EARNINGS

It can be a very difficult challenge to estimate what career path, and therefore earnings, an individual would have had but for the injury. Consideration should be given as to whether a limit should be placed on how much should be claimable for future earnings.

In Western Australia, the Civil Liability Act 2002 caps damages for loss of earnings at three times the average weekly earnings at the date of the award. This Act was introduced after the Ipp Report suggested that those who are extremely high wage earners should be expected "*to take steps to protect themselves against the risk of severe impairment of their earning capacity*"²³.

Q 24: Do you think a limit should be placed on the quantum of damages available for loss of future earnings claims arising from personal injury? If so, what should this be? Please give reasons.

D. THRESHOLD/CAP FOR GENERAL DAMAGES

The Ipp Report also noted that in Australia, imposing a threshold for awards of general damages would be an effective and appropriate way of significantly reducing the number and cost of smaller claims, due to the high proportion of general damages awards in smaller claims. These are non-economic losses, where compensation is given effectively for pain and injury. The report also proposed a cap on general damages.

Q 25: Should there be a threshold below which general damages are not payable? Please give reasons.

Q 26: Should there be a cap on general damages? Please give reasons.

²³ Ibid

QUESTIONNAIRE

Q 1: *Should the discount rate be set by applying the 100% compensation model? Please give reasons.*

Q 2: *Do you consider that the correct investment risk profile of the typical claimant has been chosen? If not, what do you consider is the correct risk profile, should it 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.*

Q 3: *Do you agree with the proposed adoption of split rates? If not, please give reasons.*

Q 4: *Do you agree with the proposed adoption of split rates based on the period damages are awarded for? If not, please give reasons.*

Q 5: *Do you consider that different rates should be set for different types of personal injury or losses? Please give reasons.*

Q 6: *Where future costs of care are included in a lump sum payment, should they attract a separate discount rate?*

Q7: *Do you agree with the proposed adoption of the Jersey rates? If not, what should the rate(s) be? Please give reasons.*

Q 8: *Do you consider that the Committee should consult on a public, ad hoc basis or with a particular panel of experts when reviewing the rate? If the latter,*
(a) do you consider the use of a formal panel would be appropriate?
(b) of whom should the panel comprise?
(c) should such a panel be unique to the Bailiwick or operate on a pan-Channel-Islands basis?

Q 9: *Do you believe the rate should be reviewed more frequently than every 5 years? Please give reasons.*

Q 10: *If so, should there be a specific trigger for review of the rate? Please provide reasons.*

Q.11 *If so, what circumstance(s) or change in such, should trigger a review? Please provide reasons.*

Q 12: *What factors should be taken into account when determining if a PPO is secure?*

Q 13: *Should there be a rebuttable presumption that a PPO will be used in all cases for pecuniary loss? Please given reasons.*

Q 14: *Should PPOs be the default for any specific heads of loss? Please give reasons.*

Q 15: *Should PPOs be the default when the losses are expected to continue for long lengths of time? If so, what length of time do you believe is appropriate? Please give reasons.*

Q 16: *Should a PPO be capable of variation at a later date during the period it has been awarded for? If so, how and for what reasons?*

Q 17: *How should damages awarded via PPO be indexed in the Islands? Please give reasons.*

Q 18: *Should the States create a regime similar to the UK CRU? Please give reasons.*

Q 19: *Do you consider it appropriate for the cost of past and future loss to be recoverable under a scheme for recovery of healthcare costs and benefits?*

Q 20: *Do you consider that awards of damages should be capped? If so, please explain how and please provide reasons.*

Q 21: *Should there be any other limits or caps on damages awarded in respect of a personal injury claim? If so, please give reasons.*

Q 22: *Should a benchmark healthcare standard be introduced? If so, what should this be? Please give reasons.*

Q 23: *Do you think that caps and/or thresholds should be introduced regarding gratuitous care? If so, at what level? Please give reasons.*

Q 24: *Do you think a limit should be placed on the quantum of damages available for loss of future earnings claims arising from personal injury? If so, what should this be? Please give reasons.*

Q 25: *Should there be a threshold below which general damages are not payable? Please give reasons.*

Q 26: *Should there be a cap on general damages? Please give reasons.*



ANNEX 1

Jurisdiction	Rate	Comments
England & Wales	Single rate: - 0.25%	Rate effective from 5 th August 2019
Scotland	Single rate: - 0.75%	Rate was set in 28 March 2017 and confirmed by the Government Actuary's review ²⁴ on 27 th September 2019.
Northern Ireland	Single rate: - 1.75%	<p>This rate which is effective from 31st May 2021 was set following consultation²⁵ in 2020. It was set by the Damages (Personal Injury) Order (Northern Ireland) 2021.²⁶</p> <p>It is intended as an interim rate to be reviewed when the Damages (Return on Investment) Bill has been enacted, hopefully in early 2022²⁷.</p>
Republic of Ireland	Split rate: 1% for future care and 1.5% for other future pecuniary loss	<p>These rates (1% and 1.5%) apply to catastrophic injuries²⁸ and were confirmed in 2015 by Court of Appeal in <i>Gill Russell (a minor) suing by his mother and next friend Karen Russell v Health Service Executive</i> [2015] IECA236</p> <p>Damages are divided as follows:</p> <p>(a) General damages (non-economic) – pain and suffering to the date of determination and into the future. Case law has established a ‘cap’ on the amount of general damages which can be awarded. This is currently €450,000.</p> <p>(b) Special damages (Pecuniary Damages) – these include:</p> <ul style="list-style-type: none"> (i) medical expenses; (ii) loss of earnings (past and future); (iii) nursing care (past and future); (iv) maintenance of equipment.

²⁴ [The Personal Injury Discount Rate – review and determination of the rate in Scotland \(www.gov.uk\)](https://www.gov.uk/government/news/personal-injury-discount-rate-review)

²⁵ [Northern Ireland department of justice \(2020\), consultation on the personal injury discount rate](#)

²⁶ [Damages \(Personal Injury\) Order \(Northern Ireland\) 2021](#)

²⁷ [Northern Ireland Department of Justice \(2021\), Personal Injury Discount Rate Set to Change](#)

²⁸ [British Institute of International and Comparative Law \(2017\), Briefing Note on the Discount Rate applying to Quantum in Personal Injury Cases: Comparative Perspectives](#)

		<p>A Court may also award: (a) aggravated damages, where the plaintiff suffers further injury due to:</p> <ul style="list-style-type: none"> (i) the manner in which the wrong was committed; and/or (ii) the conduct of the defendant after the commission of the wrong; and/or (iii) the defendant's conduct in the defence of his action, including the trial, and <p>(b) exemplary damages where, given the nature of the wrong in question and the manner of its commission, a Court wishes to mark its disapproval of a defendant's conduct.²⁹</p>
Jersey	Split rate: 0.50% for losses expected to last for less than 20 years and 1.80% for losses expected to last longer than 20 years	Effective from 3 rd May 2019
Australia	<p>At Common Law a single rate of 3% applies but various states and one territory have intervened by statute and set single or split rates which are set out below.</p> <p><u>Victoria</u>: 6% for motor vehicle and workplace accident victims and 5% for other accident victims</p> <p><u>Tasmania</u>: 5% for non-workplace accident victims and 3% for workplace accident victims</p> <p><u>New South Wales</u>: 5%</p> <p><u>Queensland</u>: 5%</p> <p><u>Western Australia</u>: 6%</p> <p><u>South Australia</u>: 5%</p> <p><u>Northern Territory</u>: 5%</p>	<p>The common law discount rate is 3%, which was decided by High Court of Australia in <i>Todorovic v Waller</i> in 1981. However this only applies in one Australian jurisdiction (the Australian Capital Territory). In all other jurisdictions the discount rate is set by statute.</p> <p>The setting of the statutory discount rate in Australia does not follow the same calculations or principles as set out in the UK. The award of damages is not based purely on compensatory principles, but a wider balancing of social and economic interests.³⁰</p>

²⁹ Ibid

³⁰ Ibid

Canada	<p>Various Canadian provinces and territories have intervened by statute and set single or split rates which are set out below.</p> <p><u>Saskatchewan: 3%</u></p> <p><u>Manitoba: 3%</u></p> <p><u>New Brunswick: 2.5%</u></p> <p><u>Nova Scotia: 2.5%</u></p> <p><u>PEI: 2.5%</u></p> <p><u>Northwest Territories: 2.5%</u></p> <p><u>Nunavut: 2.5%</u></p> <p><u>British Columbia: 2.0%</u> for future care and 1.5% for future Wage Loss</p> <p><u>Ontario: 0%</u> for first 15 years, 2.5% thereafter for Future Care & Wage Loss</p> <p><u>Quebec: 1%</u> for future wage loss, 3.25% for future care (goods), 2% for future care (services)</p>	<p>Eight provinces and two territories have legislation to mandate the Discount Rate used for the assessment of future pecuniary damages in civil litigation. Only Alberta, Newfoundland and Labrador, and the Yukon do not have a mandated Discount Rate.³¹</p>
Hong Kong	<p>Split rate</p> <p>-0.5% (for loss up to 5 years), 1% (for loss up to 10 years) and 2.5% (for loss over 10 years)</p>	<p>Laid down by Bharwaney J in <i>Chan Pak Ting v Chan Chi Kuen</i> [2013] 2 HKLRD 1 and endorsed by the Court of Appeal in <i>Chan Wai Ming v Leung Shing Wah</i> [2014] 4 HKLRD 669</p>

³¹ Ibid

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

POLICY & RESOURCES COMMITTEE

INSURANCE – STATUTORY DISCOUNT RATE AND OTHER MATTERS

The Presiding Officer
States of Guernsey
Royal Court House
St Peter Port

8 February, 2019

Dear Sir

1. Executive Summary

- 1.1 This Policy Letter is recommending the introduction of legislation designed to remove elements of uncertainty pertaining to the value of personal injury claim settlements. This will remove some of the risk allowance which inevitably forms part of the pricing of insurance premiums which are paid by individuals, companies and government.
- 1.2 It is understood that the absence of this legislation is a factor in local insurance rates being proportionately higher than in the United Kingdom. This is particularly relevant to insurance for medical professionals and improvements in insurers' confidence in the local market will help mitigate rises to future premiums for clinicians which will inevitably be recovered, either from the States as part of the secondary health contract or through patient charges.

2. Statutory Discount Rate

- 2.1. In some personal injury cases, where the injury is permanent or long lasting, damages are awarded to cater for the cost of future lifetime care. This means that insurers have to pay as a lump sum the full amount that it is estimated it will cost to look after that person for the likely remainder of that person's life at the time of judgment together with compensation for loss of earnings (this can run into several millions of pounds).

- 2.2. In order to cater for the fact that the award is paid up front, a discount is often given to the defendant to offset the gain that can be made in investing the full amount at the time of judgment - rather than the injured person receiving the cost of their care on a periodic basis as the needs arise. In effect, receiving the full amount decades in advance can put the injured person in a better financial position than they would have been had they had to wait for periodic payments, although this may be offset by loss caused inflation over time. Therefore, the discount rate is intended to reflect the financial gain a plaintiff will make upon investment of a lump sum damages award, balanced against the effect of inflation upon the value of that investment. The investment approach adopted by or on behalf of the person receiving an award and the resulting returns will determine whether the income is higher or lower than that expected when the award is made.
- 2.3. In England, the rate is fixed by statute by the Lord Chancellor, pursuant to s.1 of the Damages Act 1996 and the Courts in England and Wales have not departed from the statutory rate. The discount rate is kept under review and is evaluated by actuarial assessment.
- 2.4. In Guernsey, the courts used to adopt the UK discount rate but in the case of *Helmut v Simon* in 2010 the Privy Council departed from the UK rate (then 2%) and determined that the applicable discount rate was negative, i.e. effectively an increase in the amount payable rather than a decrease (-1.5% for certain losses and -0.5% for others)¹. This judgment and the consequential uncertainty concerning the level of discount rate that the court will set has increased the cost of insurance in the Bailiwick, as it has increased the underwriting risk for insurers of such potential claims.
- 2.5. To avoid uncertainty, **it is proposed to legislate to introduce a statutory discount rate which would be set by regulations of the Policy & Resources Committee and regularly reviewed.** The Policy & Resources Committee would comprehensively research and consult extensively on the appropriate rate in Guernsey with interested parties including insurers; medical professionals; advocates, actuaries, etc. This means that the States will be able to balance the interests of insurers (and those of the public paying premiums) against the needs of potential claimants by setting an appropriate rate.

¹ This was a combination of the difference between Guernsey and UK Inflation; lower income tax rates in Guernsey and limited statistical information available to track the movement of prices and earnings in Guernsey.

3. Periodic Payments

- 3.1 In cases of damages awarded for catastrophic injury, often rendering the claimant unable to support themselves financially and requiring lifelong care, the damages awarded are designed to provide funding to cover for the rest of the claimant's life. However, it is impossible to predict with accuracy how long the claimant will live; care requirements may alter from those anticipated at the time of the settlement; the cost of providing care may change; or investments returns may be above or below those assumed by the prevailing discount rate. Therefore, a lump sum award payment could result in the claimant not having sufficient funding to meet their needs during the last years of their life or receiving more funding than is necessary which cannot be recovered by the insurer.
- 3.2 The Damages Act 1996 also permits personal injury awards to be made by way of periodic payments. This is not presently possible in Guernsey, where only lump sum payments can be made. It would be sensible to have a similar provision in Guernsey to allow flexibility as to how personal injury awards can be paid.
- 3.3 Therefore, **it is proposed that legislation is introduced that enables the court to order the payment of damages by means of periodical payments.** This could be instead of, or additional to, the payment of lump sums. A claimant would receive regular damages designed to cover the financial costs and losses which arise over time. A Periodic Payment Order could be subject to regular review or on application and thus can take account of changes in circumstances.

4. Recovery of healthcare costs falling to the States

- 4.1 The United Kingdom has a Compensation Recovery Unit which '*works with insurance companies, solicitors and Department for Work and Pensions customers, to recover:*
- *amounts of social security benefits paid as a result of an accident, injury or disease, if a compensation payment has been made (the Compensation Recovery Scheme)*
 - *costs incurred by NHS hospitals and Ambulance Trusts for treatment from injuries from road traffic accidents and personal injury claims (Recovery of NHS Charges)'*
- 4.2 It is **proposed that legislation is introduced which would enable a scheme to recover costs which would otherwise fall to the States be introduced by subordinate legislation.** There would need to be States approval to introduce this subordinate legislation and a Policy Letter would be submitted following consultation with interested parties.

5. Statutory limitation to damages awards

- 5.1 The cost of personal injury awards continues to rise with consequential increases in insurance premiums. Whilst there is the principle that a claimant should be fully compensated for the losses he has incurred, there are options in how the necessary care is provided. This includes requiring claimants to make use of the services provided by the States where appropriate instead of receiving private care.
- 5.2 It is **proposed that legislation is introduced which would enable the introduction by subordinate legislation of a statutory limitation to damages awards.** There would need to be States approval to introduce this subordinate legislation and a Policy Letter would be submitted following consultation with interested parties.

6. Next Steps

- 6.1 The proposals set out in this Policy Letter are for the preparation of enabling legislation to introduce: a statutory discount rate; a scheme to recover costs which would otherwise fall to the States; and a statutory limitation to damages awards. The Policy & Resources Committee will extensively consult with interested parties prior to enacting a regulation to set a statutory discount rate and, if appropriate, submitting Policy Letters for a scheme to recover costs which would otherwise fall to the States and a statutory limitation to damages awards. The timing of the introduction of new measures will be dependent on the enactment of the enabling legislation but it is intended that the consultation exercise will commence in the second quarter of 2019.

7. Compliance with Rule 4

- 7.1 Rule 4 of the Rules of Procedure of the States of Deliberation and their Committees sets out the information which must be included in, or appended to, motions laid before the States.
- 7.2 In accordance with Rule 4(1), the Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications. She has advised that there is no reason in law why the Propositions should not to be put into effect.
- 7.3 In accordance with Rule 4(3), the Propositions are not requesting the States to approve funding.
- 7.4 In accordance with Rule 4(4) of the Rules of Procedure of the States of Deliberation and their Committees, it is confirmed that the propositions above have the unanimous support of the Committee.

7.5 In accordance with Rule 4(5), the Propositions relate to the duties of the Committee to examine issues which expressly do not fall within the mandates of other committees.

Yours faithfully

G A St Pier, President

L S Trott, Vice-President

A H Brouard

J P Le Tocq

T J Stephens