



We would welcome responses to the following questions set out in this consultation paper, either generally or specifically in relation to one or more of the jurisdictions in the United Kingdom. In providing your responses to these questions, it would be helpful if you could include any analysis or evidence you have to support your responses, drawing on experience of other sectors or countries as appropriate.

General issues

Question 1: do you agree that the general principles of:

- accuracy
- transparency and simplicity, and
- stability

should be used to assess the appropriateness of proposed solutions?

☒ Yes ☐ No

If not, please give reasons.

Question 2: do you agree that accuracy is the most important of these three general principles?

☒ Yes ☐ No

If not, please give reasons.

We agree that the principles of accuracy, transparency, simplicity, and stability should be used to assess the appropriateness of proposed solutions. We agree that it is important that the rate should provide as accurate as possible a reflection of the return on investments that claimants might be expected to make, and we strongly support the principle of full compensation. However the reality is that investment returns are dependant on a number of variables and whilst accuracy is desirable this should not be confused with unachievable precision.

We also believe that transparency, simplicity and stability are important to ensure that there is a degree of predictability about compensation awards which ensures that defendant insurers and other indemnifiers are able to anticipate and calculate liabilities in order to inform the appropriate pricing of premiums or subscriptions.

Question 3: are there any other issues relating to the setting of the discount rate and the possible encouragement of the use of periodical payments that you would wish to draw to our attention? Please give reasons.

MPS believes that deserving claimants who have been injured as a result of another's negligence should receive fair compensation as quickly as possible. Whilst we support the concept of full compensation, nevertheless it must be recognised that settling personal injury claims, either by lump sum payment of periodical payment orders, can only ever be an imprecise method of ensuring that the claimant's needs are met.

Whilst one claimant might prefer to receive compensation by way of a lump sum, for other claimants, periodical payments might be a better option depending on their circumstances. For that reason it is important that claimants continue to have a choice whether to choose lump sum settlements or periodical payment orders (PPOs).

A reduction in the discount rate will inevitably result in higher lump sum settlements. One unintended effect might be that there will be less take up of PPOs. The impact assessment states that this would be an added cost for defendants. This is a cost which is ultimately borne by tax payers, for example as result of increased claims met by the NHSLA, or consumers, by increased insurance premiums. An increase in the discount rate will have the opposite effect and we believe that it is right that in considering these issues there is a debate about what society can afford.

Discount rate

Question 4: do you consider that the legal parameters governing the setting of the discount rate should be changed?

☒ Yes ☐ No

Please give reasons.

The current discount rate is set on the basis that a claimant would invest solely in Index-linked gilts (ILGS) and hold them to maturity.

As we explained in our previous response to the first consultation paper, as a medical defence organisation, we are not in a position to establish how claimants invest their compensation payments and as such we do not have any data on the investments typically made by claimants. Common sense would suggest that given the limitations and lack of flexibility of an entirely ILGS based portfolio, claimants would in fact be advised to invest in higher yielding investments.

In this respect we are aware of two funds which are managed specifically for individuals who have been granted personal injury awards. There is the CF7IM Personal Injury Fund run by Seven Investment Management Ltd, and IM Asset Management Ltd. The monthly data update (March 2013) for the CF7IM personal injury fund suggests that the investment objective is described as the following:

'The portfolio is based on a strategic asset allocation that offers an optimal combination of investments intended to deliver long-term growth while keeping a risk profile that is appropriate for investors with a cautious approach'.

In other words, we believe that the legal parameters should reflect the reality of the way in which claimants choose to invest their compensation payments.

Question 5: if you consider that the legal parameters governing the setting of the discount rate should be changed, what do you think they should be? Please give reasons and define any terms used.

The legal parameters governing the setting of the discount rate should no longer be based on Index-linked gilts (ILGS) on the assumption that claimants are investors with a low appetite for risk, but should reflect the reality that, independently and professionally advised claimants should be assumed to be ordinary, prudent investors, looking for income and long term growth.

Question 6: if you consider that the legal parameters governing the setting of the discount rate should be changed, what investments do you think the hypothetical claimant should be deemed to make for the purposes of calculating the rate of return? Please indicate the types and proportions of assets that should be included in the hypothetical claimant's portfolio of investments. Please give reasons.

We believe that the types of assets would include gilts, index linked gilts and corporate bonds with high credit ratings but also a diverse portfolio of return seeking assets which would include equities, some property exposure, higher yielding bonds and diversified growth funds.

The proportions of such asset types would depend very much on the individual needs of the claimant.

Question 7: do you consider that the availability of periodical payments should affect the level at which the discount rate is set?

☐ Yes ☒ No

Please give reasons and indicate what effect you think it should have.

The availability of periodical payments should not affect the level at which the discount rate is set. The consultation is based on the principles that accuracy, transparency and stability are important objectives for the setting of the discount rate. If the discount rate is set with this criteria in mind then it should ensure that the claimant receives the maximum compensation possible and the question of whether a PPO is available is irrelevant.

Question 8: should the court have power to depart from the prescribed rate?

☐ Yes ☒ No

If so, should the terms on which it may do so be expressly defined?

☐ Yes ☒ No

Please specify the terms and give reasons.

We note that under section 1(2) of the Damages Act 1996 the courts already have the power to take a different rate of return into account if one of the parties shows that it is more appropriate than the prescribed discount rate.

Again, if the objective in setting the discount rate is to achieve accuracy, transparency, simplicity and stability then we question why a court should have the power to vary a discount rate, even if in exceptional circumstances.

We are not aware of any cases where the court has applied a different rate and we would agree with the narrative in the consultation paper that this is probably reflective of the logic that the courts have accepted that the prescribed rate is intended by Parliament to be the rate applied.

Question 9: should the power to prescribe different rates be available for:

- | | | |
|--|------------------------------|--|
| a. different classes of case? | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No |
| b. different periods of time over which damages are paid? | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No |
| c. different heads of damages? | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No |
| d. cases where periodical payment orders are available and where they are not? | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No |

If so, for which classes, periods or heads would you specify different rates? Please give reasons.

Again, we believe that the power to prescribe different rates is incompatible with the objectives of seeking to achieve accuracy, transparency, simplicity and stability.

Giving courts the power to prescribe different rate for the variables listed above would result in greater uncertainty and additional complexity when assessing claims for compensation. We would anticipate settlement negotiations becoming more protracted and delayed requiring more legal and expert scrutiny with resultant increases in legal challenge, costs and court time.

Question 10: if you consider that the legal base for setting the rate should be changed, what methodology should be used to set the rate, including:

- a. what quantitative and qualitative data should be used (e.g. historic or forward looking, specific indices)?
- b. what assumptions should be made (e.g. asset mix, weighting of assets)?
- c. how should inflation be taken into account?
- d. what allowances should be made for tax, administration or management expenses and investment expenses?

Please give reasons.

We believe that the methodology used should be based on a range of data. Given the volatile market conditions of the last three years, basing the discount rate on recent historic returns would be misleading.

We believe that the discount rate should be based on forward looking expected returns on mixed portfolios as described in our answer to Q6, with some reference to index-linked gilt yields.

We agree that tax and investment management expenses should be considered when setting the rate.

Some allowance should be made for inflation and in this respect we note that the government target is 2%.

Claimants will be most concerned about wage inflation outstripping price inflation and the best way for understandably risk adverse claimants to protect themselves would be by accepting periodical payments to cover future care costs.

Periodical payments

Question 11: do you consider that the present level of usage of periodical payments is appropriate and that no change is necessary?

☒ Yes ☐ No

Please give reasons.

We note that under the Courts Act 2003, s100, the court already has the power to make an order for periodical payments without the consent of the parties. We are unaware of any case where the court has done so and we believe that this is reflective of the desire of the court to respect the wishes of the parties, particularly those of the claimant.

We consider that the present level of use of periodical payments is appropriate and no change is necessary. Provided that claimants are independently advised by their lawyers and by other professional advisers, eg IFAs, it is right that they should be able to continue to choose settlement by way of lump sums if that better suits their personal circumstances.

Question 12: if you consider that the present level of usage of periodical payments is not appropriate and that change is necessary, please indicate the measures that you think should be taken to increase their use.

Please give reasons.

See question 11.

Question 13: do you consider that claimants and defendants are sufficiently informed about the availability of periodical payments and how they operate?

☒ Yes ☐ No

Please give reasons.

We consider that defendants, when backed by insurers or other indemnifiers, are well informed about periodical payments and how they operate. Again we believe that independantly and appropriately advised by their lawyers and other experts, claimants should be adequately advised on the availability of periodical payments.

Question 14: why are periodical payment orders not used in a larger proportion of cases? Are there, for example, types of cases where periodical payment orders are not appropriate? Or are there particular costs, obstacles, risks or circumstances which limit the use of periodical payment orders?

As we have said earlier the wishes and needs of the claimant will dictate whether they prefer to accept a lump sum settlement over periodical payment orders. For claimants with capacity, a lump sum settlement may give a better degree of flexibility, and the ability to make a "clean break" from the defendant. They may also be advised that, with good investment advice, they are in a position to ensure both an income stream and long term growth in relation to a lump sum and, in weighing up their options, believe that their needs are better served by a lump sum settlement.

Question 15: where periodical payments are used in conjunction with a lump sum, what determines the balance between the lump sum and the periodical payment elements of the overall award of damages?

In our experience where periodical payments are used in conjunction with a lump sum, the periodical payments are often set so as to meet the likely costs of future care but that other heads of loss, for example, accommodation and loss of earnings are wrapped up in the lump sum element of the settlement.

Question 16 [Scotland only]: do you consider that there would be merit in reviewing the existing approach to periodical payments in Scotland? If so, please give reasons.

N/A

Impact Assessment

Question 17: do you agree with the impact assessment that accompanies this consultation paper?

☐ Yes ☐ No

If not, please give reasons.

We do not comment on the impact assessment

Question 18: do you have any information regarding:

- the effect of the current discount rate on the size of awards of damages and as to the likely effect of a change in the rate on the size of awards in the future;
- on whether awards made under the present law turn out to be inadequate;
- on the reasons why periodical payments are used;
- the effect of periodical payments on the overall long-term total cost of awards;
- or on any other issues relevant to the assessment of the impact of the proposals under consideration?

If so, please could you provide details.

Question 19: do you consider that a change in the approach to setting the discount rate or any encouragement of the use of periodical payments would affect the behaviour of businesses or voluntary sector organisations?

☐ Yes ☐ No

If so, please give reasons.

Small Firms

Question 20: do you consider that a change in the approach to setting the discount rate or any encouragement of the use of periodical payments would have any direct affect on small or micro-businesses?

☐ Yes ☐ No

Please give reasons.

Question 21: do you consider that a change in the approach to setting the discount rate or any encouragement of the use of periodical payments must apply to small and micro-businesses as it applies to others?

☐ Yes ☐ No

If not, please give reasons.

Equalities impacts

Question 22: do you agree with the initial assessment of the equalities impacts of the possible changes under discussion in this consultation paper?

☐ Yes ☐ No

If not, please give reasons.

Question 23: if you consider that the changes under consideration in this consultation paper in relation to the discount rate or the use of periodical payments will affect people with different protected equality characteristics please give reasons and provide evidence of any ways in which this will occur.

About you

Full name	Emma Hallinan
Job title	Director of Claims and Litigation
Capacity in which you are responding to this consultation exercise (select all which apply)	<div>Legal representative: <input type="checkbox"/> claimant/plaintiff/pursuer <input type="checkbox"/> defendant/defender <input type="checkbox"/> Insurer <input type="checkbox"/> Judiciary <input type="checkbox"/> Financial institution <input type="checkbox"/> Academic <input type="checkbox"/> Public sector body <input type="checkbox"/> Business <input type="checkbox"/> Equality group <input type="checkbox"/> Member of public <input checked="" type="checkbox"/> Other [Medical Defence Organisation - see attached cover note]</div>
Date	3 May 2013
Company name/organisation (if applicable)	Medical Protection Society (MPS)
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<input type="checkbox"/> If you would like us to acknowledge receipt of your response please tick this box (emailed responses will be acknowledged automatically).	
Address to which this acknowledgement should be sent, if different from above	

Please post the completed questionnaire to:

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