Ministry of JUSTICE

Damages Act 1996: The Discount Rate
How should it be set?

Questionnaire

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.

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.

Option 1 – ILGS based approach

Question 1: Do you agree that the claimant should be assumed to hold all ILGS until redemption?

☒ Yes ☐ No

If not, what alternative assumption would you make? Please give reasons.

Question 2: By reference to what ILGS yields should the discount rate be set? Please give reasons.

The reference should remain the same and the discount rate based on the average real rate of return on ILGS over the past 3 years, net of tax with rounding up of no more than .1%

Investment in ILGS, held to redemption, is the only way of guaranteeing (as far as anything is certain) that claimants will receive full compensation without risk

It is particularly essential that claimants with on going care needs are fully compensated for their future needs. The lump sum they receive must be calculated with reference to actual returns achievable on investments

Question 3: What range of ILGS yields should the discount rate be based on and what calculation should be applied to them? Please give reasons.

The calculation should remain as simple as possible, with the calculation based on the real rate of return on all ILGs for the past three years, net of tax, without weighting for maturity dates

Question 4: Should any allowance be made for potential differences between RPI inflation and health care costs inflation? Please give reasons.

While the base discount rate should be calculated in the most uncomplicated method available, variations should be considered for certain specific heads of loss. Following the decision in Thompstone, care costs should be discounted by reference to healthcare costs inflation and where compensation is paid for loss of earnings the reasoning in Helmot -v Simon applied and separate inflation rates for earnings investigated

Question 5: What considerations should be applied to the rounding up or down of the discount rate? Please explain your reasons.

Rounding, up or down, while is sensible to avoid percentages running to several decimal points, should not run contra to the principle of full compensation

Question 6: Should the rounding of the discount rate be restricted to one half per cent? If not, what degree of rounding would be appropriate? Please give reasons.

Rounding should be kept to a minimun. We suggest rounding up to the nearest .1% When the Lord Chancellor last set the discount rate despite the actual rate being between 2 and 2.25% the figure was rounded up to 2.5% when, if following the usual practice, a figure of 2.24% or less would be rounded down. The effect of rounding up to the nearest .5% caused a significant undervaluation of claimants' losses

Question 7: What allowance should be made for investment expenses and tax? Please give reasons.

If the ILGS based approach is retained there should be a modest flat rate allowed for investment advice. This approach would be consistent with the principle that investing in all ILGS achieves, as near as possible full compensation without risk. However, this would only be the case if the discount rate were regularly reviewed, probably on an annual basis Allowances for tax should be made in full. This is consistent with the method of calculating losses that are subject to deductions when paid in the ordinary way. For instance loss of earnings are calculated net of tax and national insurance.

Option 2 – mixed portfolio applied to current data

Question 8: Do you agree that setting the discount rate on the basis of the expected return from a mixed portfolio of assets is in principle consistent with the decision of the House of Lords in *Wells v Wells*?

☐ Yes ☒ No

Please give reasons.

It is impossible to have a mixed portfolio of investments without some risk, however small. Thus such investments can never be consistent with the principles of Wells -v- Wells where it was decided that ILGs were the appropriate investment for a claimant who required certainty that they were not at risk of the vagaries of the stock market or the ravages of inflation.

The current evidence of the drop in value of pension funds alone demonstrates the risk of even the most cautious long term investment strategy

Question 9: If option 2 is adopted, what should the mixed portfolio of assets on which the calculation of the discount rate is to be based contain? Please indicate the type and proportions of assets to be included and give reasons for your choice.

We defer to those who have expertise in the the markets and investments to suggest a suitable mixed portfolio of assets. However, we continue to maintain that such a calculation exercise is too risky for ordinary litigants who are relying on the investments of lump sums to provide for all their care and material needs for their lifetime

Question 10: Assuming the return on the portfolio you have identified is broadly to be the basis on which the discount rate is to be calculated, what range of data should be included in the calculation? Please consider whether the data should be historic and whether any averages should be simple or weighted.

We defer to those with expertise in investment and financial advice to respond

Question 11: Should any other factors, such as allowances for inflation, tax or investment expenses, be taken into account and if so, how? Please give reasons.

Full allowance should be made for tax for the same reasons as give in question 7 above. With regard to investments expenses, if a claimant is to be expected to invest their damages in a mixed portfolio the claimant will need a significant amount of investment advice in the initial stages. The claimant may have no idea about investments and will need careful explanations in terms that they can understand. The investment advisors will then be required to oversee the investment on an ongoing basis, reporting to the claimant regularly. All these costs will be incurred by the claimant as a result of the method of calculating the discount rate and will fall as a loss for the claimant from damages that would otherwise be put to practical uses, paying for care, equipment etc. Thus the claimant should be able to make a significantly greater claim for investment advice (and probably deputy costs) in the special damage claim but these expenses should also be taken into consideration when calculating the discount rate.

We defer to those with expertise in investment and financial advice to suggest methods of calculating the discount rate with regard to tax and investment costs

Discount rate methodology – what approach should be adopted?

Question 12: Should the Lord Chancellor and his counterparts in Scotland and Northern Ireland set the discount rate under section 1 of the Damages Act 1996:

☒ a) by retaining an ILGS based approach but changing some or all of the detailed criteria used (option 1);

☐ b) by moving away from an ILGS based approach to a mixed portfolio of investments based approach (option 2); or

☐ c) by reference to some other approach? If so please give details.

Please give reasons for your choice.

Option 1 is the only way of ensuring full compensation without risk

A single rate

Question 13: Do you agree that one prescribed discount rate is sufficient?

☐ Yes ☒ No

If not, please specify what classes of cases should be affected by different rates and what the differences should be in the ways that the different rates are to be set. Please give reasons.

A single prescribed discount rate should be the starting point for calculating lump sum damages. But further adjustments should be made to the basic discount rate to take into account such variables as wage rate inflation in carers wages or in salaries upon which the loss of earnings claim is based

Suggested discount rate or rates

Question 14: What discount rate or rates do you consider would be appropriate now? Please indicate the basis for your decision.

With reference to the rate of return on ILGS. We would suggest that the rate is calculated annually. We have no strong views on what the annual date should be but as many indices are calculated at the end of the callender year then an appropriate discount rate for 2012 would be .4%

Impact assessment

Question 15: Do you agree with the impact assessment at Appendix B?

☐ Yes ☒ No

If not, please explain why.

The analysis of non-monetised benefits for option 2 assumes that there would be a lower level of benefits that for option 1, given the assumption that the discount rate for option 2 would be higher than option 1

While in purely numerical terms the sums awarded under option 1 may be higher than under option 2 there should be no difference in the income derived from investment of the lump sum whichever option is adopted. Otherwise a fundamental principle of full compensation would be breached

Which ever option is decided upon the ultimate benefits to the claimant should remain the same

Question 16: Please provide evidence of the investments typically made by claimants with their lump sums and the expected and actual duration of awards of damages for personal injuries.

AvMA does not hold this information

Question 17: Please indicate whether you consider that these investments carry the appropriate degree of risk for a personal injury claimant reliant on the money to be produced by the award.

AvMA believes that a claimant should be entitled to take the least risky investment option

Question 18: Do you consider that investing in ILGS alone is relatively a less cost-effective way to protect claimants against future cost inflation than investing in a low risk mixed portfolio of investments? Please give evidence to support your conclusion.

No.

As the cost of financial advice and ongoing management costs required will be considerably less, the multiplier in Option 1 lower, and investment risks as low as they can be, we cannot see that investing in ILGs alone will be less cost effective than low risk investments for a claimant. It may be that the overall costs to a defendant will be less but this cannot be allowed if the result is a claimant being under compensated

Small Firms

Question 19: Do you agree that the choice of the method of setting the discount rate will not have any direct effect on small firms?

☐ Yes ☒ No

If not, please give details.

Small firms are generally covered by insurance in the same way as firms of any other size

Question 20: Do you agree that the discount rate must apply in cases involving small firms in the same way that it does in other cases?

☒ Yes ☐ No

If not, please give details.

Equality impact assessment

Question 21: Do you agree with the equality impact assessment at Appendix C?

☒ Yes ☐ No

If not, please explain why.

Question 22: Do you agree with the equality screening at Appendix D?

☒ Yes ☐ No

If not, please explain why.

Question 23: Please provide evidence of any ways in which the current discount rate affects people with different protected equality characteristics. (see paragraph 111-112)

The way in which the discount rate is currently calculated does not in our view affect people with different protected equality characteristics.

Question 24: Do you consider that the choice of how the discount rate should be set will affect people with protected equality characteristics? (see paragraph 111-112)

☒ Yes ☐ No

If so, please give details.

If option 2 is adopted we envisage those with certain disabilities and those from black and ethnic minorities whose first language is not English wil be adversely affected as they may need more extensive and more costly advice to enable them to fully understand the risks and benefits of the investment advice they must obtain

Further as on going care needs will be one of the largest heads of damage for those disabled by the injury, individuals with disabilities will be disproportionately affected by a short fall in damages awarded if the discount rate remains at an unrealistically high percentage

Other approaches and issues

Question 25: Are there any other comments you wish to make on how the discount rate should be set?

About you

Full name	Catherine Hopkins

Job title	Legal DIrector
Capacity in which you are responding to this consultation exercise (select all which apply)	Legal representative: ☐ claimant/plaintiff/pursuer ☐ defendant/defender ☐ Insurer ☐ Judiciary ☐ Financial institution ☐ Academic ☐ Public sector body ☐ Business ☐ Equality group ☐ Member of public ☒ Other [Charity campaigning for patient safety and justice for claimants)
Date	22.10.12
Company name/organisation (if applicable)	Action against Medical Accidents
Address	44 High Street, Croydon
Postcode	CR0 1YB

☐ 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	A/A

Please post the completed questionnaire to:

Damages Discount Rate Consultation
Ministry of Justice
Post Point 6.21
102 Petty France
London SW1H 9AJ

Alternatively, please email it to: **damagesdiscountrate@justice.gsi.gov.uk**