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# Personal Injury Discount Rate

## Consultation Response

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### Introduction

1. The Bar Council is the regulatory and representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar Council is continually expanding the range of services offered to the community through negotiation, tribunal advocacy and alternative dispute resolution.
2. The Bar welcomes the opportunity to comment on the Department of Justice's consultation paper on potential changes to the legal framework for the setting of the personal injury discount rate. Members of the Personal Injury Bar Association have provided their views on the proposals contained in the paper which have also informed this submission.
3. By way of background, the Bar has engaged with the Department of Justice on the issue of the discount rate on a number of occasions in recent years, most recently writing to the Minister in July 2020. Beyond the development of a new legal framework under this consultation, we still consider that there is an urgent need to take action on the rate given that the current situation is directly detrimental to the interests of citizens in Northern Ireland, particularly those who have very serious injuries with long-term effects.
4. The consultation paper references that DOJ officials began in February 2020 to undertake the statutory consultation with the Government Actuary and the Department of Finance, required under the Damages Act 1996, on a proposal to change the current rate to -1.75%. However, our practitioners remained dismayed that this review has not concluded and that there is still no resolution to the situation which has persisted in this jurisdiction for a number of years.

Q1. Do you agree that investment decisions by claimants in Northern Ireland are likely to be similar to those made by claimants in other jurisdictions? If not, please explain.

5. Yes – the Bar notes the Ministry of Justice's conclusion in 2017 that claimants tend to invest in low-risk diversified portfolios in England and Wales. We accept that the investment decisions of claimants in Northern Ireland are likely to be similar to those made by claimants in other jurisdictions. We also take the view that claimants should continue to be treated as more risk averse than ordinary

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prudent investors in making any changes to the legal framework for the setting of the discount rate in Northern Ireland.

Q2. Do you agree that the legal framework for setting the personal injury discount rate in Northern Ireland should be changed so that it is no longer tied to *Wells v Wells*? Please explain.

6. The Bar agrees that the legal framework should be changed given that Northern Ireland is now the only UK jurisdiction in which the discount rate is still set under an unamended Damages Act 1996 and in accordance with the principles in *Wells v Wells*.

Q3. Which of the following frameworks for setting the personal injury discount rate in Northern Ireland should be adopted?  
a) the framework used in England and Wales  
b) the framework used in Scotland  
c) another framework (please describe).  
Please give reasons for your answer

7. The Bar considers that either of the frameworks used in England & Wales and Scotland could be workable options for Northern Ireland to adopt. We accept the assumptions outlined at paragraph 4.4. that a recipient of damages will invest a lump sum for the purpose of meeting all losses and costs for the entire period for which they have been awarded, that the lump sum will be exhausted at the end of this period and that the rate should be set with reference to low-risk rather than very low-risk investments. We regard the work in setting the rate as largely an expert actuarial exercise and therefore consider that the framework used in Scotland lends itself best to this.

Q4. Do you agree that adopting the England and Wales model would mean that setting the rate should be a decision for the Department of Justice; and adopting the Scottish model would mean that it should be a decision for the Government Actuary? Please give reasons for your answer.

8. The Bar considers that the setting of the rate is primarily an actuarial exercise which should involve independent expertise. Therefore it would be appropriate for the Government Actuary to set the rate with the Department of Justice laying the report before the Northern Ireland Assembly, similar to the model operating in Scotland.

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Q5. Should the person or body responsible for setting the rate in Northern Ireland be required to consult any other person or body? If so, who, and why?

9. The Government Actuary should not be required to consult any other person or body in setting the rate. However, if the DOJ has responsibility for setting the rate then it should be necessary to consult the Government Actuary or an expert panel including the Government Actuary.

Q6. Should there be a requirement in Northern Ireland to review the personal injury discount rate on a regular basis?

Q7. If so, how often should the rate be reviewed? Please give reasons for your answer.

10. The Bar agrees that the personal injury discount rate should be reviewed on a regular basis. The rate in Northern Ireland has been unchanged since 2001 and there has been a significant decline in returns on investments since then so therefore it is vital that we ensure there is a mechanism under the new model to allow for the rate to be reviewed more regularly. We consider that a five-yearly review, in line with England & Wales and Scotland, would also be appropriate for Northern Ireland.

Q8. Do you agree with the outcome of the screening exercises and regulatory impact assessment? If not, please explain why.

11. The Bar has no comments to make on these.