

Draft Damages (Jersey) Law

Corporate Services Scrutiny
Panel

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Draft Damages (Jersey) Law

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Executive Summary

The Draft Damages (Jersey) Law 201- (the “Damages Law” or the “draft law”) aims to address two issues relating to the awards of damages for those who suffer long-term injuries and ongoing care. The Damages Law introduces a statutory discount rate for lump sum damages awards, and provides statutory power to award damages by way of “Periodical Payment Order” (annual payments to cover care costs and loss of earnings).

Our report covers all parts of the Damages Law, with a particular focus on the proposed Discount Rate, Periodical Payment Orders, Transitional Provisions, and the use of the Government Actuary Department’s Report, on which Jersey’s statutory discount rate is based.

In relation to the reform of the Damages Law, we have noted the powers the Damages Law provides the Chief Minister to amend the discount rate, subject to consulting the Bailiff, and the provisions of being unable to change it to a percentage less than 0%. We have recommended that regulations are introduced within the next six months to make provision for how future changes to the discount rate are calculated.

We have also recommended that Regulations be introduced to explain the basis on which Periodical Payment Orders (PPO’s) can be reviewed. PPO’s are made by the court for an award of damages that can be paid on a periodic basis. The Regulations would introduce much-needed clarity regarding how PPO’s operate, and how they can be amended.

We have further recommended that the tax treatment for lump sum awards and investment returns on PPO’s is published.

Findings and Recommendations

1. **FINDING 1** – Most stakeholders acknowledged the need for a statutory discount rate. ([page 7](#))
2. **FINDING 2** – Article 2(7) of the draft law prevents the discount rate from being amended to below 0%. The rationale for this is explained in a footnote on page 8 of P131/2018. Some stakeholders were concerned that in extreme economic conditions, this could lead to under-compensation for damages claimants. ([page 8](#))
3. **FINDING 3** – The discount rate is split into two periods – claims for below 20 years and claims for over 20 years. This is recommended in the report from the Chief Economist and Treasurer of the States included at page 15 of P131/2018. However it is not clear what evidence this recommendation was based on. ([page 9](#))
4. **RECOMMENDATION 1** – The Chief Minister should keep the need for a split discount rate under review and consider moving to a single rate if economic conditions change. ([page 9](#))
5. **FINDING 4** – There is an absence of detail in the draft Damages Law as to how any changes to the discount rate will be calculated in the future. ([page 10](#))
6. **RECOMMENDATION 2** – The Chief Minister should bring forward Regulations within 3 months to provide more detail as to how changes to the discount rate will be managed in the future. ([page 10](#))
7. **RECOMMENDATION 3** – The Regulations brought forward by the Chief Minister should include a requirement to take appropriate professional actuarial advice when determining a change to the discount rate. ([page 10](#))
8. **FINDING 5** – The draft Scottish Damages Bill proposes to use the UK Government Actuary to set the discount rate in Scotland. Without access to an equivalent body in Jersey, the setting of a discount rate in Jersey will be a political decision. ([page 11](#))
9. **FINDING 6** – The proposed discount rate for Jersey is based on a report of the UK Government Actuary's Department. The report was commissioned by the Ministry of Justice as part of its review of the discount rate in the United Kingdom and used data from UK wealth managers on how their clients invested damages awards. ([page 12](#))
10. **FINDING 7** – The proposed discount rate for Jersey is based on a report from the Chief Economist and the Treasurer of the States, and a UK Government Actuary's Department report. There has been no external expert verification of the basis on which the proposed discount rate has been arrived at. ([page 12](#))
11. **FINDING 8** – A number of stakeholders criticised the reliance on the UK Government Actuary's Department report in setting the discount rate. ([page 13](#))
12. **FINDING 9** – The evidence we received highlighted that Periodical Payment Orders can be made currently under Jersey customary law. The draft Damages Law expressly provides this power in statute. ([page 13](#))
13. **FINDING 10** – The Draft Damages Law does not limit the number of times a Periodical Payment Order can be reviewed. Some stakeholders highlighted the lack of clarity around the grounds on which a PPO can be reviewed. ([page 14](#))

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14. **RECOMMENDATION 4** – The Chief Minister should bring forward Regulations within 3 months to set out the grounds and process by which a Periodical Payment Order can be reviewed. ([page 14](#))
15. **RECOMMENDATION 5** – Revenue Jersey should publish and maintain guidance on the tax treatment of damages awards (both lump sum awards and Periodical Payment Orders). ([page 15](#))
16. **FINDING 11** – One of the purposes of the draft Damages Law is to minimise the time given to legal argument regarding compensation, however this is unlikely to be seen in cases which are already active. ([page 16](#))

Introduction

17. The [Draft Damages \(Jersey\) Law 201-](#) (the “Damages Law” or the “draft law”) was lodged by the Chief Minister on 24th October 2018 and is due to be debated on 29th January 2019.
18. The Damages Law addresses two issues relating to awards of damages for those who suffer long-term injuries and require ongoing care. It introduces a statutory discount rate for lump sum damages awards and it provides a statutory power to award damages by way of “Periodical Payment Orders” (annual payments to cover future care costs and loss of earnings).
19. The two key features of the draft law are:
 - Setting a statutory discount rate, to be used when determining damages that are awarded as a single lump sum;
 - Creating a statutory power to award damages by way of Periodical Payment Orders. This would provide for annual payments to cover future care costs and lost earnings as they arise, as distinct from a single lump sum payment.
20. We invited a number of submissions from key stakeholders, medical practitioners and members of the public. Three public hearings were held;
 - a. The Chief Minister on the [5th November 2018](#);
 - b. The Primary Care Body and Hempsons Solicitors on [12th November 2018](#); and,
 - c. BCR Law on [17th December 2018](#).
21. We wrote to the Chief Minister on [20th December 2018](#) outlining a number of concerns about the draft law raised in the evidence we received, and asking for clarification in a number of areas. All submissions, hearings, and letters are published on our website.
22. This was a difficult and complex review. There were strong competing arguments on both sides. Some of the language quoted in this report reflects those positions.
23. Some evidence we received highlighted that the draft law had been rushed and was poorly constructed:

“It is a deeply flawed piece of legislation which has clearly been prepared in haste without proper research or analysis.” (BCR Law)¹

“The proposals put forward are not fit for purpose” (Hempsons)²

¹ [BCR Law submission, p4](#)

² [Hempsons Commentary on Draft Damages Law, p1](#)

24. In a public hearing, BCR Law expanded upon their concerns:

Deputy J.H. Perchard:

“...Obviously while I tend to agree that we should not be passing legislation that is not fit for purpose, the argument we have been presented with in response to that is: “We can change it later.” What would your response be to that?”

Managing Partner, BCR Law:

There are so many things wrong with that, I do not know where to start. The first of those, as I say, it is this principle of a knee-jerk reaction to legislating because you are trying to meet an immediate concern. Whenever one rushes anything, it is never going to be the same as if you take your time over it, scrutinise it and come to a proper and measured view in relation to it and look for best in class.”

³

25. However, the Chief Minister told us that legislation in this area was needed, particularly in relation to a statutory discount rate:

“Essentially probably week one of me being in this role we were given a briefing which basically said that there was a rather large law case coming down the line, which at that point I think was £238 million, which kind of focused the attention. Secondly, that potentially there were other potential liabilities ahead and that there was something that could be done to address this. In essence, the problem is that at present when damages are assessed we have an open liability, as it were, because of not having a discount rate under law in Jersey and that discount rate impacts quite significantly on the amount of money that can be awarded in damages.”⁴

26. Then, in his letter to us of [10th January](#), the Chief Minister explained:

“During the coming year, the Royal Court will be considering a number of significant personal damages cases against both the States of Jersey and other defendants. The current lack of a statutory framework gives rise to legitimate concerns about the long-term consequences in respect of insurance premiums.

There is a stark choice to be made. We could withdraw the draft Law and seek to navigate the competing views expressed by different stakeholders, which based on the experience of other jurisdictions could take many years. Or we can take action now. Delay simply risks making the perfect the enemy of the good.”⁵

27. Despite the concerns raised by [BCR Law](#) and [Hempsons](#), both acknowledged the need for legislation in this area, as did most other stakeholders.

28. In relation to the level of the discount rate, we received evidence that the rate was both too high and too low. Some stakeholders pointed to the need for a rate of 5% as in

³ [Public hearing with BCR Law, 17th December 2018, p9](#)

⁴ [Public hearing with the Chief Minister, 5th November 2018, p2](#)

⁵ [Letter from the Chief Minister 10th January](#)

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Australia⁶, others pointed to the need for a negative discount rate closer to the current UK rate of minus 0.75%⁷.

29. The draft law proposes a floor of 0% for the discount rate. Some evidence we received supported this approach, while other submissions criticised it.
30. The draft law deals with two technical points of damages claims; the discount rate and periodical payment orders. Hempsons argued that a wider review of how society treats people who require long-term care, particularly resulting from medical negligence: “There needs to be a broadly-based attack on the concept of the one-patient institution and a battery of measures such as those used in Australia”.⁸
31. In response to this the Chief Minister told us:

“The discount rate in the draft law is based on a full compensation model (i.e. claimants will receive full compensation for their loss). Members of the medical community who are concerned about insurance premiums have called for a higher discount rate, but raising the rate would not provide full compensation for injured victims.

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.”⁹

32. The submission we received from Hempsons included a warning that the proposals contained within the Draft Law “set out to emulate an English system that can only be financed by a government prepared to run a national debt and it is neither reasonable nor practical to expect such a burden to be carried by two hundred doctors in Jersey or their indemnifiers.”¹⁰
33. The differing views expressed to us reflect the competing interests of stakeholders in this area. That may be as a legal or actuarial adviser for damages claimants or defendants, an insurer who has to pay out on a claim or a doctor or other person seeking insurance cover.
34. We have tried in this report to balance all the competing interests and provide a balanced and objective summary of the evidence presented to us.

⁶ [Hempsons submission, p11](#)

⁷ [Mr Chris Daykin submission, p3](#)

⁸ [Hempsons submission, p16](#)

⁹ [Letter from the Chief Minister 10th January](#)

¹⁰ [Hempsons Commentary on Draft Damages Law, p1](#)

Discount rate

35. The discount rate refers to the predicted effect of inflation and investment return on the amount needed to provide for full and adequate damages. The rate dictates the amount which, including any interest on the award or other investment return, would provide the exact amount needed by a claimant to pay for care costs and compensate for loss of earnings without under compensating or over compensating the claimant.
36. In the absence of statutory provision in this area, discount rates are currently determined by the courts based on common law precedent in previous cases and expert evidence. The proposition explains the problem with this:

“Relying on the rate set in leading cases leaves future litigants in the hands of those who made the decisions in those leading cases. On the other hand, revisiting the rate in each case creates chaos and uncertainty, as well as significant expense in terms of calling witnesses. Ultimately, both approaches require non-expert judges of fact to choose between experts.”¹¹
37. The Damages Law proposes to set the discount rate in law, a move similar to what has taken place in England & Wales.
38. As noted above, most stakeholders acknowledged the need for a statutory discount rate.
39. **FINDING 1 – Most stakeholders acknowledged the need for a statutory discount rate.**

Method of Calculation

40. The Discount Rate proposed in the Damages Law is set on the basis that it will provide full compensation.
41. Calculating the discount rate set out in the Damages Law requires the use of low-risk portfolios and an assumed level of risk. This is detailed in the report included in Appendix 2 of the proposition.
42. The rate proposed in the Damages Law is based on the predicted returns of two low-risk portfolios over periods of between 5 and 50 years (see P.131, Appendix 2). These returns are then used to arrive at a discount rate to ensure that a lump sum damages award neither under compensates nor over compensates a victim.
43. The [Association of British Insurers \(ABI\)](#), argue that the methodology used for setting the rate should reflect a “real-world approach to investment,”¹² which they believe would be the best way of delivering full compensation to claimants. They criticise the discount rate in England & Wales of minus 0.75% as reflecting a “purely theoretical investment approach.”¹³

¹¹ [P131/2018, p6](#)

¹² [ABI submission, p1](#)

¹³ [ABI submission, p1](#)

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44. The “real world approach” suggested by the ABI would include a 0% floor for the rate, a view shared by Royal and Sun Alliance (RSA)¹⁴, Insurance Corporation of the Channel Islands (ICCI)¹⁵, DAC Beachcroft¹⁶, and LV= General Insurance (LV=)¹⁷.
45. However, the [Institute and Faculty of Actuaries \(IFoA\)](#) are sceptical of the reasoning for a 0% floor, noting that personal injury claimants “may be particularly vulnerable during such economic conditions. It is therefore not clear to us that they would then be in relatively less need for full compensation.”¹⁸
46. Stewarts are not strongly opposed to the introduction of a 0% floor but only in relation to price related heads of loss, with the Courts being granted discretion to make further adjustments as necessary, notably for earnings related losses. However, on their analysis and using the GAD’s highest return of RPI+1%, Stewarts contend that a discount rate of minus 2.75% for prices related heads of loss, and of minus 4.5% for earnings related heads of loss would currently be required to maintain the full compensation principle.¹⁹
47. [Chris Daykin](#), a former UK Government Actuary, believes that a 0% lower limit “would be entirely inappropriate,”²⁰ and believes a negative discount rate would be preferable “in currently foreseeable circumstances.”²¹
48. **FINDING 2 – Article 2(7) of the draft law prevents the discount rate from being amended to below 0%. The rationale for this is explained in a footnote on page 8 of P131/2018. Some stakeholders were concerned that in extreme economic conditions, this could lead to under-compensation for damages claimants.**

Split Discount Rate

49. The Damages Law proposes to set a discount rate of 0.5% for a damages claim of up to 20 years, and a discount rate of 1.8% for a claim for more than 20 years.
50. Although we [received evidence that split rates](#) are used in Ontario, Canada, in Hong Kong and (in a slightly different manner) Australia²², most jurisdictions use a single discount rate. In England and Wales (and in the current bill going through the Scottish Parliament), legislation provides for a split rate to be set if required in the future.
51. Several submissions identified issues with a split discount rate.
52. Firstly, Hempsons Law makes note of how a higher discount rate would mean that a fund for a victim with a life expectancy of 20 years will receive a multiplier of 19.13 whereas someone who has to provide for a longer period of 22 years will actually receive somewhere between 17.30 (1.5%) and 16.51 (2%).
53. The IFoA note that “the abrupt change in discount rate after a 20 year expected duration could give rise to practical difficulties where the expected lifespan of the claimant were

¹⁴ [RSA submission, p3](#)

¹⁵ [ICCI submission, p3](#)

¹⁶ [DAC Beachcroft submission, p2](#)

¹⁷ [LV= submission, p1](#)

¹⁸ [IFoA submission, p6](#)

¹⁹ [Stewarts submission, p14](#)

²⁰ [Chris Daykin submission, p3](#)

²¹ [Chris Daykin submission, p3](#)

²² [Letter from the Chief Minister 10th January](#)

around 20 years. Substantially different lump sums could be payable to claimants with 19 versus 21 year expected remaining lifespans”. They go on to note that the proposed stepped basis could generate significant debate over its operation.

54. **FINDING 3 – The discount rate is split into two periods – claims for below 20 years and claims for over 20 years. This is recommended in the report from the Chief Economist and Treasurer of the States included at page 15 of P131/2018. However it is not clear what evidence this recommendation was based on.**
55. **RECOMMENDATION 1 – The Chief Minister should keep the need for a split discount rate under review and consider moving to a single rate if economic conditions change.**
56. As a potential solution, the IFoA recommend the following:

“Apply a single discount rate to all claim payments within a specified duration, and then apply a separate discount rate to any subsequent payments. Using the duration/ discount rates in the draft legislation for illustration, this would mean applying a 0.5% per annum discount rate to all expected payments within 20 years from outset. However, a revision to the scope of any stepped discount rate should then reconsider the pre/ post step discount rates, and also timing of any such step.”²³
57. Stewarts illustrates that a Claimant with a loss spanning 19 years “would receive more compensation than one of a little over 20 years.” Instead, they recommend the Courts are given broad discretion to set a differential discount rate to provide full compensation for earnings-related head of future loss rather than having the issue prescribed in primary or secondary legislation.²⁴
58. Hempsons describes the selection as “curious,”²⁵ and “cannot be sensible on any footing,”²⁶ given the stark divide in compensation for claimants on either side of 20 years.
59. However, the split discount rate is welcomed in the submissions from the [ABI](#)²⁷, [RSA](#)²⁸ and [ICCI](#)²⁹. The latter two argue in favour of more than one discount rate to differentiate the discount rate either side of a 15- or 20-year period.
60. ABI believes that the Draft Law’s combined proposal of 20 years and a rate of +0.5% represents “a suitable compromise,” given that “...opinions differ as to the period of years to be covered by such a strategy [dual rate] and this is reflected by the differing approaches in Ontario and Hong Kong, but the consensus appears to be for at least 10-15 years.”³⁰

²³ [IFoA submission, p17](#)

²⁴ [Stewarts submission, p9 and p11](#)

²⁵ [Hempsons submission, p11](#)

²⁶ [Hempsons submission, p44](#)

²⁷ [ABI submission, p4](#)

²⁸ [RSA submission, p2](#)

²⁹ [ICCI submission, p2](#)

³⁰ [ABI submission, p4](#)

Powers to Review the Discount rate

61. Article 2(3) of the Draft Law provides the Chief Minister with the power to amend the discount rate, subject to consulting with the Bailiff and on the proviso that it cannot be changed to a percentage less than 0%.
62. BCR Law makes the recommendation for a “proper framework” to be outlined for setting the statutory discount rate by an appropriate person or body and also that this should be further adjusted to take account of the impact of taxation and the costs of investment advice and fees.³¹
63. BCR Law recommends further discounting the statutory discount rate to mitigate the risks of under-compensation, as introduced in the [Damages \(Investment Returns & Periodical Payments\) \(Scotland\) Bill](#).
64. The Damages (Investment Returns & Periodical Payments) (Scotland) Bill removes the rate itself from the law, but provides a framework by which it can be calculated.
65. Likewise, BCR Law believe the discount rate should be obliged to be reviewed on a frequent basis, and should afford the Royal Court a discretion to depart from applying the statutory discount rate when it appears to the Royal Court that justice requires a different discount rate to be applied to the case before.
66. The ABI argue that the power to set the rates should rest with the appropriate Minister, so that a policy decision is taken for which they are politically accountable for. They note that the discount rate must achieve full compensation for the claimants, whilst also accounting for the interests of defendants (including state-funded bodies) when making these decisions.
67. The Institute and Faculty of Actuaries believe that claimants should be fully compensated, and that PPOs “can often be the better solution” for claimants. Further, IFoA argue that PPOs can “avoid some of the difficulties with lump sum awards in personal injury claims,” and thus manage uncertainty over future investment returns.
68. We note that the Draft Law includes an ability for the States to make Regulations to make provision for the discount rate and the way it is calculated.
69. **FINDING 4 – There is an absence of detail in the draft Damages Law as to how any changes to the discount rate will be calculated in the future.**
70. **RECOMMENDATION 2 – The Chief Minister should bring forward Regulations within 3 months to provide more detail as to how changes to the discount rate will be managed in the future.**
71. **RECOMMENDATION 3 – The Regulations brought forward by the Chief Minister should include a requirement to take appropriate professional actuarial advice when determining a change to the discount rate.**

³¹ [BCR Law submission, p39](#)

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Discount rate in other jurisdictions

72. As part of our review, we looked at how discount rates are set in a number of other jurisdictions.

The Scottish system

73. A [new damages law](#) is currently before the Scottish parliament. The principles were approved on 18th December 2018 and the Bill was due to pass Stage 2 (debate of the articles) on 22nd January 2019.³² The Scottish law would set a legal framework for calculating a discount rate, but the mechanics of performing the calculation and setting the rate would be the responsibility of the UK Government Actuary.
74. The focus of the Scottish Law has been to define a hypothetical investor and notional investment portfolio which represents a “cautious” investment approach. The rate-assessor (i.e. the UK Government actuary) would then be required to calculate the rate of return for the investment portfolio set out in law, subject to a number of parameters included in the law.³³
75. Under the Scottish law, one discount rate would be set, however Scottish Ministers would have the power to set more than one discount rate by Regulations.
76. Since 2002, and until the new Scottish damages law comes into force, Scotland has followed the damages rate in England and Wales, which is currently **minus** 0.75%.
77. **FINDING 5 – The draft Scottish Damages Bill proposes to use the UK Government Actuary to set the discount rate in Scotland. Without access to an equivalent body in Jersey, the setting of a discount rate in Jersey will be a political decision.**

The Australian system

78. Discount rates in Australia are set by individual states. The most common rate is 5%, although in some states, it is as high as 6%. Rates are also often split.
79. The rates in Australia have been influenced by a widely perceived insurance crisis in 2002.
80. A recent report commissioned by the UK Government explained: “the discount rate in Australia seems to be set by reaching a compromise between a discount that accurately reflects the real rate of return a tort plaintiff might obtain if investing in reasonably safe investments and one that takes into account the fact that too low a rate of return might have adverse consequences on the provision and cost of liability insurance...”³⁴

Ontario, Canada

81. The discount rate in the Canadian province of Ontario uses a “stepped-rate” system; applying two rates to a single rate. The long-term rate for Ontario is set by statute at 2.5%. The RSA argues that the Ontario model is advantageous because it “removes any unintended behavioural consequences around negotiation of multipliers and

³² <https://www.parliament.scot/parliamentarybusiness/Bills/108711.aspx>

³³ [Damages \(Investment Returns and Periodical Payments\) \(Scotland\) Bill \[as introduced\]](#). See also [Stage 1 Report by the Economy, Energy and Fair Work Committee](#) and [Scottish Parliament Information Centre Briefing](#)

³⁴ [Briefing Note on the Discount Rate applying to Quantum in Personal Injury Cases: Comparative Perspectives, British Institute of International and Comparative Law, 2017](#)

multiplicands that might exist with other split discount rate models.”³⁵ However, a recent report by the UK government argued against this system, arguing that “a single rate gives simplicity, transparency and certainty, and that more than one rate would be likely to cause extra litigation, disputes, delays and costs.”³⁶

GAD Report

82. A number of submissions raised concerns regarding the conclusions and methodology featured in the [UK Government Actuary Department's \(GAD\) Report](#) that is heavily cited in the draft law and included as an appendix on page 21 of the draft law.
83. The GAD report is included within the report accompanying the draft law (at page 21). It was prepared for the Ministry of Justice in July 2017 as part of the MoJ's review of the way the UK discount rate was set.
84. The report accompanying the draft law also states that “There is no reason to believe that a different investment return to that identified by the UK Government's Actuary Department would be applicable to Jersey, nor that there would be anything to be gained in duplicating this. The ground has been covered thoroughly in the UK Government's Actuary Department analysis by its experts, using considerable time and resources.”³⁷
85. The discount rate proposed for Jersey is based on the predicted returns from two model portfolios set out in the GAD report, thereby providing the GAD Report with a sizeable influence on the outcome of the overall discount rate(s).
86. **FINDING 6 – The proposed discount rate for Jersey is based on a report of the UK Government Actuary's Department. The report was commissioned by the Ministry of Justice as part of its review of the discount rate in the United Kingdom and used data from UK wealth managers on how their clients invested damages awards.**
87. **FINDING 7 – The proposed discount rate for Jersey is based on a report from the Chief Economist and the Treasurer of the States, and a UK Government Actuary's Department report. There has been no external expert verification of the basis on which the proposed discount rate has been arrived at.**
88. BCR Law argued that, “The GAD Report is fundamentally flawed for a number of reasons, and the reliance placed upon the GAD Report shows an extraordinary lack of analysis and care on the part of those who propose the Draft Law.”³⁸
89. BCR go on to note that the model portfolios in the GAD report were not independently chosen, but were selected by the Ministry of Justice, based on response to their own consultation.³⁹

³⁵ [RSA submission, p4](#)

³⁶ [The Personal Injury Discount Rate: How it Should be Set in the Future, 2017](#), p22

³⁷ [P131/2018, p7-8](#)

³⁸ [BCR Law submission, p23](#)

³⁹ [BCR Law submission, p23](#). See also p11-12 of the [GAD report](#)

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90. The GAD report also excludes investment advice/management fees and taxes. The report itself suggests that an allowance be made for these. BCR Law said that “the impact of taking those figures into account is a significant reduction in the assumed return.”⁴⁰
91. Submissions we received from Stewarts Law and the former Government Actuary of the United Kingdom, Mr Chris Daykin, also drew attention to issues with the GAD report.⁴¹
92. Mr Daykin referred to the GAD report as “unsatisfactory in a number of aspects”, including that the selected portfolios were not low risk, that tax and investment management costs were ignored and that no consideration was given to the different types of inflation which can arise in personal injury claims.⁴²
93. In contrast to the views expressed by other stakeholders, the Forum of Insurance Lawyers stated in their submission that the portfolios identified in the GAD report represent “a realistic and appropriate approach to setting the rate”.⁴³
94. The ABI note the GAD report was pessimistic in basing the model portfolios on a 30 year investment period (i.e. life expectancy). The ABI suggest that average life expectancy is actually 46 years “for claims exceeding £1 million.”⁴⁴
95. The ABI goes on to say that under the proposals in the draft law, the sums of money received by claimants will be reduced as against current awards, but that it is likely that current awards “significantly over compensate claimants”. They also say that for those claimants choosing a lump sum award, “the sum recoverable will be discounted appropriately...”⁴⁵
96. **FINDING 8 – A number of stakeholders criticised the reliance on the UK Government Actuary’s Department report in setting the discount rate.**

Periodical Payment Orders

97. A Periodical Payment Order (PPO) is an order made by a court for an award of damages to be paid periodically, instead of as a lump sum. The court must be satisfied that the continuity of payment is reasonably secure.
98. The award must still reflect the principal of full compensation, but matters such as investment returns or life expectancy become less relevant to the financial calculations. PPOs also avoid the possibility of a surplus remaining after the claimant dies.⁴⁶
99. **FINDING 9 – The evidence we received highlighted that Periodical Payment Orders can be made currently under Jersey customary law. The draft Damages Law expressly provides this power in statute.**

⁴⁰ [BCR Law submission, p24](#)

⁴¹ BCR Law, Stewarts Law and Mr Daykin all worked on the recent X Children v Minister for Health and Social Services case before the Royal Court in Jersey

⁴² [Chris Daykin submission, p1](#)

⁴³ [FOIL submission, p5](#)

⁴⁴ [ABI submission, p5](#)

⁴⁵ [ABI submission, p5](#)

⁴⁶ [P131/2018, p6-7](#)

100. The system of periodical payment orders in the UK has been criticised for being too inflexible because an Order can only be varied once in the lifetime of the Order. Jersey's draft law has taken a different approach, by allowing recipients of periodical payment orders to apply to the court for a variation where there has been "a material change of circumstances since the order was made" (Article 4(8))⁴⁷. There is no limit on how many times an Order can be varied.
101. As originally lodged, the draft law left the determination of what constituted a material change of circumstances to the courts to decide upon and gave a power to the Royal Court to set the Rules with respect to varying PPOs.
102. However, in response to some of the evidence we received (set out below), the Chief Minister has lodged [an amendment](#) to the draft law to enable the States to make Regulations to govern how a PPO may be varied.
103. BCR Law were concerned that a lack of a "significant and complex statutory framework,"⁴⁸ as exists in England, may undermine the PPO appeal process and result in further litigation.
104. In a public hearing, the managing Partner of BCR Law told us:

"...you just simply have never-ending litigation potentially with all of its associated costs, experts and so forth. I think that the flexibility, which is suggested by reviews, is helpful, but that it needs to be carefully structured so that it needs to be much clearer as to what would trigger the ability to come back for a review."⁴⁹
105. The ABI argue that a series of controls should be placed on PPO Appeals, including the "requirement that the variation be limited to the chance of specific circumstances"⁵⁰ and a "restriction of such circumstances to the chance of a serious medical condition."⁵¹
106. ABI also argue that, Article 4(8) to 4(10) of the draft law lacks the "necessary clarity"⁵² to control the use of variable orders, and "introduces an unwelcome element of uncertainty by reference to just a material change of circumstances."⁵³ They argue that this detail should be set out in the draft law, rather than left to the Rules of Court made by the Superior Number of the Royal Court.
107. **FINDING 10 – The Draft Damages Law does not limit the number of times a Periodical Payment Order can be reviewed. Some stakeholders highlighted the lack of clarity around the grounds on which a PPO can be reviewed.**
108. **RECOMMENDATION 4 – The Chief Minister should bring forward Regulations within 3 months to set out the grounds and process by which a Periodical Payment Order can be reviewed.**
109. Hempsons have voiced scepticism over the use of PPOs in the Damages Law. Because most claims are covered by medical defence organisations who are unable to use PPOs,

⁴⁷ [P131/2018 p61](#)

⁴⁸ [BCR Law submission, p29](#)

⁴⁹ [Public Hearing with BCR Law, 17 December 2018, p5](#)

⁵⁰ [ABI submission, p8](#)

⁵¹ [ABI submission, p8](#)

⁵² [ABI submission, p9](#)

⁵³ [ABI submission, p9](#)

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- they see the action as one only relevant to where “the indemnifier is the state”⁵⁴ and placing statutory powers within the courts for PPOs will have “minimal impact.”⁵⁵
110. Hempsons further believe that the use of PPOs results in a “supporting bureaucracy that can calculate the annual inflation of the annuity in accordance with a relevant index. Such a system may be considered disproportionately expensive given the very small number of potential recipients on the island.”⁵⁶
 111. BCR Law point to the absence of legislation setting out the tax treatment of both PPOs and lump sum awards.⁵⁷
 112. Reference to tax status of awards is limited to a note on p19 of the proposition that the specific grant of an award in Jersey is considered as a tax free event⁵⁸ and a power in the draft law at Article 3 to make regulations to provide for the exemption from taxation of investment returns on lump sum awards.⁵⁹
 113. **RECOMMENDATION 5 – Revenue Jersey should publish and maintain guidance on the tax treatment of damages awards (both lump sum awards and Periodical Payment Orders).**

Transitional Provisions

114. The Damages Law includes transitional arrangements for pre-existing cases. Where there is ongoing litigation that has not concluded before the law comes into effect, the report which accompanies the draft law notes that the introduction of statutory provisions for PPO’s is not problematic, because it does not change the claimant’s right to full compensation.⁶⁰
115. The statutory discount rate would be applicable to existing cases, which the report to the draft law recognises could “give rise to objections”.⁶¹ The draft law therefore gives the Court the power not to apply the statutory discount rate where it disproportionately interferes with ongoing litigation.⁶²
116. BCR Law describes the transitional provisions as “extraordinary,”⁶³ arguing that, if enacted they would “create a power to retrospectively impose the new statutory discount rates on existing cases prior to judgment and, even more extraordinarily, even on appeal. Further, they would create a power to retrospectively impose PPO’s on existing cases, even on appeal.”⁶⁴
117. Article 6 of the draft law states that the Discount Rate will apply to a court order of damages “made on or after the commencement date unless the court considers that to

⁵⁴ [Hempsons submission, p7](#)

⁵⁵ [Hempsons submission, p7](#)

⁵⁶ [Hempsons submission, p7](#)

⁵⁷ [BCR Law submission, p35](#)

⁵⁸ [P131/2018 p19](#)

⁵⁹ [P131/2018 p60](#)

⁶⁰ [P131/2018, p9](#)

⁶¹ [P131/2018, p9](#)

⁶² [P131/2018, p9](#)

⁶³ [BCR Law submission, p35](#)

⁶⁴ [BCR Law submission, p35](#)

do so would breach the rights of a party to the action under Article 6 of the European Convention on Human Rights.”⁶⁵

118. BCR further argues that “any attempt to impose such a regime on current cases where evidence has been heard will almost certainly be unlawful – particularly where a Minister of the States is the defendant. Where cases have litigated already, but not yet reached trial, the Human Rights issues are more complex, but it is certainly strongly arguable that the sort of peremptory imposition (without reasonable notice period) envisaged by the draft law is also contrary to ECHR principles.”⁶⁶
119. The Human Rights Notes in Appendix 1 of P131/2018 consider the application of the discount rate and PPOs in respect of ongoing cases and outline a scenario and the relevant parts of the ECHR.
120. BCR believes it is “frankly, unbelievable that those proposing the draft law genuinely consider that such a proposal is ECHR compliant.”⁶⁷
121. The Notes ultimately conclude that “the draft law is compatible with the [Human Rights \(Jersey\) Law 2000](#) in respect of bringing the changes to the discount rate in immediately”. Similarly, the Notes conclude that PPOs do not alter the principle of ‘full compensation’ on any view and that therefore there are “no concerns” as to creating a statutory basis for PPOs.⁶⁸
122. **FINDING 11 – One of the purposes of the draft Damages Law is to minimise the time given to legal argument regarding compensation, however this is unlikely to be seen in cases which are already active.**

⁶⁵ [P131/2018, p55](#)

⁶⁶ [BCR Law submission, p35](#)

⁶⁷ [BCR Law submission, p35](#)

⁶⁸ [P131/2018, p12](#)

Appendix

Corporate Services Scrutiny Panel

Senator Kristina Moore - Chairman



Deputy Steve Ahier, St. Helier No. 3 – Vice Chairman



Deputy Jess Perchard, St. Saviour No. 3



Connétable Karen Shenton-Stone, St. Martin



Connétable Richard Vibert, St. Peter



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Terms of Reference

1. What changes are being proposed to compensation payments in personal injury cases in Jersey?
2. Why are the changes contained in the draft Damages Law necessary?
3. What problems (potential and actual) are there for doctors in obtaining medical indemnity insurance in Jersey (and Guernsey)?
 - a. What is the wider context that any such problems are set against?
 - b. What would be the impact on members of the public accessing healthcare in Jersey and Guernsey if concerns around doctors' indemnity insurance are not resolved?
 - c. Will the draft Damages Law resolve the problems identified, either partly or fully?
4. What impact will the draft Damages Law have on recipients of damages awards in Jersey in the future?
5. What will be the impact of introducing a statutory discount rate for damages awards?
 - a. What discount rates have been set with regards to damages awards up until now?
6. What will be the impact of putting into statute the power of the court to make periodic payment orders for damages awards?

Public Hearings

The Panel held three public hearings as part of the review:

- Public Hearing with the Chief Minister on the [5th November 2018](#);
- Public Hearing with Hempsons and the Chairman of the Jersey Primary Care Body on [12th November 2018](#); and
- Public Hearing with BCR Law on [17th December 2018](#).

Transcripts for the public hearings can be accessed via the States Assembly [website](#).

Webcasts for the public hearings can be accessed via the [States Assembly webcast site](#).

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Evidence Considered

The Panel received evidence from a number of public stakeholders. A full list can be found below, with links to their submissions. All submissions were published on our [website](#):

- [The Association of British Insurers](#) – November 2018
- [BCR Law](#) – November 2018
- [DAC Beachcroft](#) – November 2018
- [Dr Jilesh Chohan](#) – November 2018
- [Mr Chris Daykin](#) – November 2018
- [Dr Bryony Perchard](#) – November 2018
- [The Forum of Insurance Lawyers](#) – November 2018
- [Hempsons](#) – November 2018
- [The Insurance Corporation of the Channel Islands Limited](#) – November 2018
- [The Institute and Faculty of Actuaries](#) – November 2018
- [LV= General Insurance](#) – November 2018
- [RSA Insurance Group](#) – November 2018
- [Stewart's Law](#) – November 2018
- [Chief Minister](#) – January 2019

Glossary

Damages – An award, typically of money, to be paid to a person as compensation for loss or injury.

Damages Law – The proposed draft law under consideration by the Panel.

Discount Rate – The amount which, including any interest or other investment return, would provide the exact amount needed by a claimant to pay for care costs and compensate for loss of earnings without under compensating or over compensating the claimant.

ECHR – The European Convention of Human Rights; an international convention to protect human rights and political freedoms in Europe.

Article 6 – Establishes the right to a fair trial and a set of minimum rights if trialled.

GAD Report – Refers to a 2017 report by the UK Government's Actuary Department for the Ministry of Justice, as part of its review of how the discount rate in the UK was set.

Human Rights (Jersey) Law 2000 – Includes in Jersey law certain rights and freedoms which are guaranteed under the European Convention on Human Rights.

Investment Return (Return on Investment) – Measures the gain or loss generated on an investment relative to the amount of money invested.

Lump Sum Award – A single payment of money, as opposed to a series of payments made over time.

Periodical Payment Order – An order made by a court for an award of damages to be paid periodically, instead of a lump sum. The court must be satisfied that the continuity of payment is reasonably secure, and reflects the principle of full compensation.

Portfolio – A collection of assets owned by an individual or an institution to pay for, in the case of the Damages Law, care costs, whilst compensating for loss of earnings without under compensating or over compensating the claimant.

Risk – The probability or likelihood of occurrence of losses relative to the expected return on any particular investment.

Split Rate – Refers to a situation where the percentage discount rate is differentiated according to set criteria (e.g. a time limit)

Stepped Rates – Where two discount rates are applied to a single rate.

Transitional Provisions – These set out how the draft law will come into effect, particularly with regard to ongoing cases. Referred to in this report regarding existing cases that have not concluded, but whose compensation will be dictated by the Damages Law.



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