

Chief Minister of Jersey

Cyril Le Marquand House
St Helier, Jersey, JE4 8QT
Tel: +44 (0)1534 440636



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Dear Senator Moore

Draft Damages (Jersey) Law (P.131/2018)

Thank you for your letter of 20 December 2018 regarding this draft Law. I am sorry that I was unable to respond by 7 January; the Christmas and New Year break intervened.

Your letter helpfully sets out five areas of concern which I have responded to below. I have also made some initial remarks which might assist in reaching a shared understanding of the draft Law before moving onto your specific concerns.

Your suggestion that the draft Law ought to be withdrawn, based on the evidence received, perhaps suggests a misunderstanding has arisen regarding the purpose of the proposed Law.

We have lodged a draft Law which, if enacted, will provide certainty in relation to the applicable discount rate and periodic payment orders. The vast majority of other jurisdictions with a comparable approach to assessing damages have a statutory mechanism for setting the discount rate. The absence of such a mechanism results in expensive trials, delays and the possibility of extensive appeals. That is unsatisfactory to claimants, courts, insurers and to the Island as a whole. It would be irresponsible to allow this to continue.

The legislation sets a discount rate from the outset. If it did not, we would simply perpetuate the existing considerable uncertainty. It setting that rate, the draft Law, also provides the Assembly with extensive powers to amend that rate and to deal with the methodology for setting the discount rate in future.

We do not purport to have addressed all the complex and potentially contradictory positions that such legislation generates. Based on the experience of other jurisdictions, that might take years and would not be in the public interest. What we have done is take the best available evidence, as distinct from the many competing opinions, and provided a sound legal basis for setting the discount rate and for the imposition of periodical payment orders.

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 model¹. This is for the Assembly to determine.

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.

There are five specific issues raised in your letter, which are addressed below.

1. Rate assessor

We note the suggestion that an independent assessor should set the discount rate. As you are aware, in Scotland this will be undertaken by the Government Actuary until the point that Scottish Ministers determine otherwise.

As there is no equivalent post-holder in Jersey, the draft Law provides that the rate should be set by the Chief Minister in consultation with the Bailiff. This is consistent with England and Wales, where the rate is set by the Lord Chancellor, thus providing political accountability.

As with many other aspects of the draft Law, there are extensive powers to amend. Article 2 (4) – (5) provides that the Assembly may set out processes related to the determination of the rate, including creating bodies who must be consulted and making provision as to the determining authority. This could be an independent rates assessor or remain a ministerial responsibility.

You will see from Appendix 2 to the Report and Proposition that the discount rate has been set by reference to the best available evidence. No-one who has contributed to the Scrutiny review process has, to date, provided any other independent, credible evidence. They have submitted arguments, largely unsupported by evidence. Should such evidence be available then, of course, it could inform the setting of the discount rate and the draft law.

2. Split discount rate

A number of other jurisdictions have split rates. Hong Kong and Ontario have split rates based on numbers of years, as per the Jersey law. Victoria and Tasmania have split rates based on the type of 'accident' (for example, work place or road traffic). Quebec and British Columbia on type of 'loss' (for example, earnings or care costs).

¹ The discount rate set out in the draft law is based on full compensation model (i.e. claimants receive full compensation for their loss). An economic balance model, as argued for by some medical practitioners who have contributed to the Scrutiny review, takes into account the adverse consequences of a low discount rate on the cost of liability insurance.

The split discount rate set out in the draft legislation is based on expert advice received from the Treasury Department about investment returns. It is acknowledged that in any situation where there is a threshold, people who fall on either side of the threshold could potentially be disadvantaged. Any such disadvantage would need to be balanced alongside those which occur when a single rate is applied to all awards regardless of investment period. The risk of disadvantage is more illusory than real. The lower discount rate is provided to ensure that plaintiffs who invest damages over the short term are not prejudiced by the short investment horizon available to them.

The Assembly may determine that a single rate is preferable. The draft Law provides powers to amend, but these powers may only be enacted once the draft Law is adopted.

3. Reliance on Government Actuaries Department (GAD) report

We note that some concerns have been expressed about the GAD report. Accepting that there may always be legitimate challenge to the work of expert advisors, there is no more authoritative analysis of investment returns other than that undertaken by the Government Actuary. I note that Scrutiny has not suggested other credible sources based on evidence received.

If it is accepted, as I believe it must be, that the present approach of the Courts to assessing investment returns is incorrect - namely calculating the discount rate by reference to a claimant wholly investing damages in ultra-safe Government bonds which in practice does not happen - then we must act promptly on the best evidence.

As set out above, the Scottish Government Actuary is to act as the independent rate assessor in Scottish law, suggesting high levels of confidence in their Actuary's ability to understand and analyse matters relating to investment returns in personal injury cases. I think we may have similar confidence in the UK Government Actuary.

4. Transitional provisions

We note that some stakeholders believe the draft law may infringe Article 6 of the European Convention on Human Rights (ECHR). This is not accepted. The report and proposition includes the Law Officers' Department's opinion of ECHR compliance. Furthermore, the Law Officers' Department has been in correspondence with the Ministry of Justice who have confirmed that they have no concerns about human rights compatibility.

With regard to concerns that the "*States is changing the goalposts as defendant*", we query the validity of this statement.

A similar '*goalposts*' argument was made when the Lord Chancellor reduced the English discount rate to -0.75% without any transitional arrangements. The High Court rejected that position² stating it was fair for damages to be calculated according to the conditions at the time the calculation is made. Furthermore, Article 6 (1) of our draft law provides the Court powers not to apply the proposed statutory discount rate where the Court believes it may disproportionately interfere with an ongoing case.

² (*ABI*) v *The Lord Chancellor* [2017] EWHC 106 (Admin) paragraph [56]

The draft Law and associated transitional provisions are not some manifestation of self-interest on behalf of the States as a potential defendant. The States has a duty to legislate in the general interests of the Island. Damages paid by the States are ultimately paid by all island residents and businesses.

Furthermore, the States is not the only defendant. Claims also arise out of road traffic accidents, accidents at work or fall to be paid under the public liability insurance of local bodies. The affordability of insurance for individuals, businesses and organisations is a legitimate concern of the States; one which we cannot avoid dealing with simply because in some cases we may also be defendants.

5. Review of periodic payment orders (PPOs)

Article 4 (8) of the draft Law allows for variations to PPOs where there is a material change of circumstance. We recognise, however, that the draft law does not define what those material changes may be and this could result in applications for variations that have little substance. We do not anticipate that the Court would have any difficulty in determining what amounts to "material change of circumstances". However it may take some time to build up a body of case law in relation to this matter. Accordingly we recognise that this potentially creates uncertainty.

Therefore I will be imminently be lodging an amendment to the draft Law. This will provide a regulation making power to enable the Assembly to prescribe the conditions under which a PPO can be varied. This could include, for example, defining a material change or restricting the time between applications or restricting the types of applications. I believe this will address the concerns raised.

In summary, the draft Law is an enabling law which brings us into line with many other jurisdictions. It does three basic things. It provides:

1. a statutory discount rate
2. a statutory basis for periodic payment orders and
3. powers to amend and refine both in accordance with decisions of the Assembly.

The discount rate set in the law is a pragmatic response to the complexity and contradictions that your review so clearly illustrates. It is rate which, once the draft law has passed though Privy Council, our Assembly may reconsider.

To summarise the draft Law should not be withdrawn. To do so, would be irresponsible as it simply serve to expose Jersey to a prolonged period of risk and uncertainty. I do, however, consider that the Scrutiny review process has raised a number of very legitimate points which must be given consideration as we work to shape the future Regulations and am grateful for the work that the Panel has undertaken.

Yours sincerely



Senator John Le Fondré
Chief Minister

Institute of International and Comparative Law, Briefing Note - Discount Rate applying to Quantum in Personal Injury Cases: Comparative Perspectives (2017)

Red: Statutory rate
 Blue: Court set rate
 Green: Simon and Helmot (currently applied by Jersey Courts)
 White: proposed Jersey statutory rate

