

RAC response to the MoJ personal injury discount rate consultation

This response has been written by Nicholas Lyes, RAC Public Affairs Manager, on behalf of RAC Motoring Services

About the RAC

With more than eight million members, the RAC is the oldest and one of the UK's most progressive motoring organisations, providing services for both private and business motorists. As such, it is committed to making driving easier, safer, more affordable and more enjoyable for all road users.

The RAC, which employs more than 1,500 patrols, provides roadside assistance across the entire UK road network and as a result has significant insight into how the country's road networks are managed and maintained. The RAC is also a leading insurance broker and works with a range of insurers and other partners to provide competitively priced insurance and have over 600k customers.

The RAC is separate from the RAC Foundation which is a transport policy and research organisation which explores the economic, mobility, safety and environmental issues relating to roads and their users.

In September 2016, the RAC published its latest [Report on Motoring](#). One of the key concerns of motorists is the continuing rise in the cost of motor insurance.

The RAC website can be found at www.rac.co.uk.

RAC Response

Questions:

Q1: Do you consider that the present law on setting the discount rate is defective? If so, please give reasons.

Yes. The RAC believes that the current setting is defective for the following reasons:

1. Length of time between changes: The current rate, which was amended in 2017 to -0.75% was the first change to the discount rate since 2001, almost 16 years ago. The RAC believes this is an unacceptable period of time considering the massive changes to the state of the economy in this period and the pronounced change to the rate had an immediate impact upon overall insurance premium rates for consumers.
2. Notice period: The recent change also came with very little notice, meaning that the insurance sector was unable to make provisions for such a change. This has resulted in increased premium costs to negate the impact upon the sector.
3. Setting the rate: The RAC believes that the Government should look to an independent body to set the rate. Such a move could be similar to the setting of the Bank of England's central rate, where a committee deliberates on the appropriate rate after taking into consideration the economic conditions to set the rate, following dialogue with the insurance industry.
4. The basis for setting the current rate is also flawed. At present it is calculated based on the average return on Index-Linked Government Stock (Government Bonds) over three years. We believe this is not an accurate reflection of how customers would invest.

Q2: Please provide evidence as to how the application of the discount rate creates under or over-compensation and the reasons it does so.

The RAC believes underwriters of motor insurance would be best place to provide evidence to this question. The RAC's role within the market is that of a broker.

Q3: Please provide evidence as to how during settlement negotiations claimants are advised to invest lump sum awards of damages and the reasons for doing so.

The RAC believes there would be other stakeholders better placed to respond to this question.

Q4: Please provide evidence of how claimants actually invest their compensation and their reasons for doing so.

The RAC believes there would be other stakeholders better placed to respond to this question.

Q5: Are claimants or other investors routinely advised to invest 100% of their capital in ILGS or any other asset class? Please explain your answer. What risks would this strategy involve and could these be addressed by pursuing a more diverse investment strategy?

The RAC believes there would be other stakeholders better placed to respond to this question.

Q6: Are there cases where PPOs are not and could not be made available? Are there cases where a PPO could be available but a PPO is offered and refused or sought and refused? Please provide evidence of the reasons for this and the cases when this occurs.

The RAC believes there would be other stakeholders better placed to respond to this question.

Q7: Please provide evidence as to the reasons why claimants choose either a lump sum or a PPO, including where both a lump sum and a PPO are included in a settlement.

The RAC cannot provide any statistical evidence here, although we would expect that the type of payment claimants choose to accept may be down to their own personal financial situation.

Q8: How has the number of PPOs changed over time? What has driven this? What types of claims are most likely to settle via a PPO?

The RAC believes there would be other stakeholders better placed to respond to this question.

Q9: Do claimants receive investment advice about lump sums, PPOs and combinations of the two? If so, is the advice adequate? If not, how do you think the situation could be improved? Please provide evidence in support of your views.

The RAC is not in a position to answer this question

Q10: Do you consider that the present law on how the discount rate is set should be changed? If so, please say how and give reasons.

Yes.

The RAC believes there should be:

- i) An annual review of the approach to setting discount rates so that changes are more frequent and gradual.
- ii) The creation of an independent body to set the rate that takes in representations from relevant stakeholders (including insurers, claimant solicitors, public bodies impacted (e.g. health service)).

Q11: If you think the law should be changed, do you agree with the suggested principles for setting the rate and that they will lead to full compensation (not under or over compensation)? Please give reasons.

The RAC believes the suggested principles are appropriate. It is important to strike the balance between the risk profile of the individual and the ability to be able to cover them for the full loss.

Q12: Do you consider that for the purposes of setting the discount rate the assumed investment risk profile of the claimant should be assumed to be: (a) Very risk averse or “risk free” (Wells v Wells) (b) Low risk (a mixed portfolio balancing low risk investments). The Discount Rate Consultation Paper 39 (c) An ordinary prudent investor (d) Other. Please give reasons.

The RAC believes this decision should be based upon evidence of the average claimant portfolio? It would perhaps be more appropriate to set the discount rate on the assumed profile as being ‘low risk’. This provides the best balance.

Q13: Should the availability of Periodical Payment Orders affect the discount rate? If so, please give reasons. In particular: • Should refusal to take a PPO be taken as grounds for assuming a higher risk appetite? If so, how big a difference should this make to the discount rate? • Should this assumption apply in cases where a secure PPO is not available?

The RAC believes that the Government should exercise caution here. A willingness to take a lump sum payment may have other attractions to the claimant, namely the capacity to spend the money as well as investing it.

Q14: Do you agree that the discount rate should be set on the basis that claimants who opt for a lump sum over a PPO should be assumed to be willing to take some risk? If so, how much risk do you think the claimant should be deemed to have accepted? Please also indicate if you consider that any such assumption should apply even if a secure PPO is not available. Please give reasons.

The RAC believes that there may be factors, other than the willingness to accept more risk that may be behind the decision to accept a lump sum over a PPO. Certainly where PPO is not available, the claimant will have no choice but to accept a lump sum payment. Perhaps the Government should compare evidence between those who have the choice to receive a lump sum payment and PPO against those who only receive lump sum payments.

Q15: Do you consider that different rates should be set for different cases? Please give reasons. If so please indicate the categories that you think should be created.

The RAC believes that allowing courts to set different rates may be a more practicable solution, though we would question whether or not the claimant would be well enough informed of the consequences of their choice where PPO is available. Also, as outlined in the document, setting more than one rate means that different degrees of investment risk may be assumed in relation to different parts of the award, which may reduce the difference between the risk appetites assumed in the setting of the rates and the actual risk appetites of claimants.

We have concerns additionally that the increased complexity of setting different rates may also not lead to reductions of premiums for the consumer.

Q16: Please also indicate in relation to the categories you have chosen whether there are any special factors that should be taken into account in setting the rate for that category.

The RAC believes that timescale the compensation is designed to cover is also important to take into account. For example, a 20 year old with injuries that require support for over 40 years has a different requirement to someone who is around 60 years old. For the former, the rate should probably reflect average returns over the likely time period support is required

Q17: Should the court retain a power to apply a different rate from the specified rate if persuaded by one of the parties that it would be more appropriate to do so? Please give reasons.

As the proscribed powers have only been used on one occasion (Warriner vs Warriner) the RAC questions whether there is enough capacity in the legal system. There is a risk that such a move could slow down the legal processes overall.

However, it is appropriate that the Court should retain the power to apply a different rate in certain cases.

Q18: If the court should have power to apply a different rate, what principles should apply to its exercise?

The RAC believes this should be down to the individual set of circumstances.

Q19: Do you consider that there are any specific points of methodology that should be mandatory? Please give details and reasons for your choice.

The RAC believes this should be down to the individual set of circumstances.

Q20: Do you agree that the law should be changed so that the discount rate has to be reviewed on occasions specified in legislation rather than leaving the timing of the review to the rate setter? If not, please give reasons.

The current timing arrangement does not give sufficient stability to insurance providers, to be able to plan ahead for scheduled changes. The RAC believes that it would be beneficial to consumers in the longer term that the rate is reviewed on specified occasions as we feel this provides a more stable regime under which to operate.

On balance, the RAC would like to see an annual review to allow for frequent minor adjustments.

Q21: Should those occasions be fixed or minimum periods of time? If so, should the fixed or minimum periods be one, three, five, ten or other (please specify) year periods? Please give reasons.

As specified in our response to Question 20, we believe think an annualised review to allow for frequent minor adjustments.

Q22: When in the year do you think the review should take effect? Please give reasons.

The RAC believes further consultation may be needed on the timing of the review, however if it is yearly, the time of when this takes place during the year is not so important.

Q23: Do you agree that the rate should be reviewed at intervals determined by the movement of relevant investment returns? If so, should this be in addition to timed intervals or instead of them? What do you think the degree of deviation should trigger the review?

The RAC believes this could be a sensible solution as a way to counter large degrees of deviation. Whether these occur in addition to or instead of the timed intervals depends on the frequency of occurrence of the timed intervals, however as specified, our preference is for reviews to take place annually.

Q24: Do you agree that there should be a power to set new triggers for when the rate should be reviewed? If not, please give reasons.

If the rate is reviewed on an annual basis, a new set of triggers would not necessarily be needed.

Q25: Do you consider that there should be transitional provisions when a new rate is commenced? If so, please specify what they should be and give reasons.

The RAC believes that there should be transitional provisions when a new rate is commenced. We believe this is sensible so that a new rate would only effect new causes of action or new proceedings.

Q26: Do you consider that the discount rate should be set by: a) A panel of independent experts? If so, please indicate how the panel should be made up. b) A panel of independent experts subject to agreement of another person? If so, on what terms and whom? Would your answers to the questions above about a panel differ depending on the extent of the discretion given to the panel? If so, please give details c) The Lord Chancellor and her counterparts in Scotland or another nominated person following advice from an independent expert panel? If so, on what terms? d) The Lord Chancellor and her counterparts in Scotland as at present? e) Someone else? If so, please give details.

The RAC believes a panel of independent experts would probably be the most appropriate way forward. This panel should include a selection of members from across the sector, including from the insurance sector, claimant solicitors, key government departments directly impacted (Department of Health for example) as changes to the discount rate will inevitably impact upon consumers.

The RAC takes a neutral position on who should be appointing these members, however appointments should be broad-based and non-political.

Q27: Do you consider that the current law relating to PPOs is satisfactory and does not require change? Please give reasons.

The RAC is not in a position to give an informed response to this question.

Q28: Do you consider that the current law relating to PPOs requires clarification as to when the court should award a PPO? If so, what clarification do you consider necessary and how would you promulgate it?

The RAC is not in a position to give an informed response to this question.

Q29: Do you consider that the current law relating to PPOs should be changed by creating a presumption that if a secure PPO is available it should be awarded by the court? If so, how should the presumption be applied and on what grounds could it be rebutted?

The RAC is not in a position to give an informed response to this question.

Q30: Do you consider that the current law relating to PPOs should be changed by requiring the court to order a PPO if a secure PPO is available? If so, what conditions should apply?

The RAC is not in a position to give an informed response to this question.

Q31: Do you consider that the cost of providing PPOs could be reduced? If so, how.

The RAC is not in a position to give an informed response to this question.

Q32: Please provide details of any costs and benefits that you anticipate would arise as a result of any of the approaches described above.

The RAC is not in a position to give an informed response to this question.

Q33: Please provide any evidence you may have as to the use or expected use of PPOs in the light of the change in the rate and more generally. The Discount Rate Consultation Paper 41 Impact Assessment

The RAC is not in a position to give an informed response to this question.

Q34: Do you agree with the impact assessment that accompanies this consultation paper? If not, please give reasons and evidence to support your conclusions. Equalities Statement

The RAC agrees with the impact assessment

Q35: Do you think we have correctly identified the range and extent of effects of these proposals on those with protected characteristics under the Equality Act 2010?

The RAC believes this is the case

Q36: If not, are you aware of any evidence that we have not considered as part of our equality analysis? Please supply the evidence. What is the effect of this evidence on our proposals?

Not applicable

Please address any comments or further contact to:

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