Ministry of Justice

The Personal Injury Discount Rate

How it should be set in future

This response is published on 7 September 2017

Ministry of Justice

The Personal Injury Discount Rate

How it should be set in future

Response to consultation carried out by the Ministry of Justice and the Scottish Government.

This information is also available at https://consult.justice.gov.uk/

Contents

Introduction and contact details

This document is the post-consultation report for the consultation paper, 'The Personal Injury Discount Rate: How it should be set in future'.

It will cover:

- the background to the report
- a summary of the responses to the report
- a detailed response to the specific questions raised in the report
- the next steps following this consultation.

Further copies of this report and the consultation paper can be obtained by contacting:

Damages Discount Rate Consultation

3rd Floor
Ministry of Justice
102 Petty France
London SW1H 9AJ

Email: damagesdiscountrate@justice.gov.uk

This report is also available at https://consult.justice.gov.uk/

Alternative format versions of this publication can be requested from the above address.

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

Background

The consultation paper 'The Personal Injury Discount Rate: How it should be set in future' was published on 30 March 2017, jointly by the Ministry of Justice and the Scottish Government. It invited comments on how the personal injury discount rate - the rate taken into account by a court in assessing the size of a lump sum award of damages for future financial loss - should be set in England and Wales, and in Scotland.

The core issues examined in the consultation paper were:

- **What principles should guide how the rate is set?** Are the present principles still fit for purpose? What should the principles be? What investment returns should be taken into account in setting the rate? Should the possibility of a periodical payment order affect the decision as to the relevant investments?
- **How often should the rate be set?** Should this be left open, as now, or would a set pattern of review be better? Would an annual, three year or five year system be better? Should reviews be triggered by degrees of change in investment returns?
- **Who should set the discount rate?** Should the power to do so remain with the Lord Chancellor and her counterparts in Scotland, or would it be better for someone else, possibly an expert panel, to set the rate?

The paper also considered whether sufficient use is being made of periodical payment orders.

The consultation period closed on 11 May and this report summarises the responses, including how the consultation process influenced the proposal consulted upon.

The Impact Assessment accompanying the consultation was updated to take account of evidence provided by stakeholders during the consultation period. The updated Impact Assessment is attached.

A Welsh language version of the summary of responses and the conclusion and next steps can be found at http://www.justice.gov.uk/publications/corporate-reports/moj/2010/welsh-language-scheme

A list of respondents is at Annex A.

The consultation paper was published jointly by the department and the Scottish Government. This response to the consultation is published by the department alone as the law in Scotland on the setting of the discount rate is devolved and decisions as to whether the law should be changed in Scotland are the responsibility of Scottish Ministers.

Summary of responses

1. A total of 135 responses to the consultation paper were received. Of these, the main group of responses (approximately 25%) was received from the insurance industry. Broadly equal numbers of responses were received from solicitors representing claimants, solicitors representing defendants, and barristers. Responses were also received from a range of other bodies, including financial advisers, actuaries, forensic accountants, medical defence organisations, other health service bodies, business and trade organisations, bodies representing the legal profession and the judiciary.

2. The responses were analysed for their perspectives on whether changes are needed to the methodology governing the way in which the discount rate is currently calculated in order to ensure as far as is reasonably possible that the injured person is fully compensated without either over-compensation or under-compensation; whether provisions should be introduced for the rate to be reviewed on a regular basis; whether changes should be made to the current arrangements under which the Lord Chancellor sets the rate; and whether steps should be taken to encourage the greater use of periodical payment orders (PPOs).

3. Most respondents believed that the law on how the discount rate is set is currently flawed in some way, although some took the view that the law itself was not at fault, but rather how it had been applied. In any case, a clear majority of respondents said that the law should be changed in some way, either to alter the methodology used in setting the rate, to provide for regular reviews, or to change the arrangements for who sets the rate.

4. Virtually all respondents who commented agreed that claimants would be highly unlikely to be advised to invest all of their lump sum in one class of asset, and that it was in any event highly impractical and not risk free to invest fully in index linked government securities (ILGS). However, there was a difference of opinion about whether the use of a more diverse mix of investments was truly out of choice, or whether the previous discount rate of 2.5% had led claimants to invest in this way.

5. In relation to the risk profile to be assumed for the purposes of setting the discount rate, there was similarly a split of opinion about whether claimants should be considered as “very risk averse” or “risk free” investors (as now) or as low risk investors (investing in a mixed portfolio balancing low risk investments), although slightly more respondents considered the latter approach more appropriate. Most agreed broadly with the principles for setting the rate which were included in the consultation paper, although many suggested some alterations. A small majority opposed the idea that the general availability of PPOs should be taken into account in the setting of the discount rate, but there was a larger majority against the idea that claimants who opt for a lump sum over a PPO should be subject to a different discount rate.

6. A substantial majority were opposed to the option of setting different rates for different cases. Among those in favour of such an approach, the majority preferred an approach based on the duration of the damages award rather than one based on different heads of loss.

7. The largest group of responses on who should set the rate favoured the Lord Chancellor (or another nominated person) following advice from an independent expert panel. The second largest group favoured the rate being set by an independent panel of experts. Most agreed with the proposal that there should be a trigger for reviewing the rate set in legislation. There were mixed views about whether this should be linked to investment returns, or whether there should be fixed review periods, or a combination of the two. Of those in favour of a trigger linked to changes in investment returns views were split between those who thought that this should be in addition to a fixed review period and those who thought that it should be instead of one.

8. A substantial majority considered that the current law relating to PPOs was satisfactory, and there was very little enthusiasm for changes to create either a presumption or a requirement in favour of PPOs. A small number of suggestions were made for guidance to clarify aspects of the current law.

9. The department is very grateful to everyone who participated in the consultation and has carefully considered the replies.

Responses to specific questions

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

   A large proportion of respondents indicated that they thought the current law was defective in some way. Around half of those who responded to the consultation believed that the methodology for setting the rate was wrong, while around a dozen others did not consider the methodology to be defective, but identified the lack of regular reviews and possible political interference in setting the rate as defects.

   The main arguments of the majority who said they believed that the methodology for setting the rate was flawed included that the current approach does not reflect how claimants actually invest; that Index Linked Government Stock (ILGS) are not used in practice, and that calculating the rate be reference to them has resulted in over-compensation; that market changes since the Wells v Wells case in 1998 make that judgment and its principles out of date; and that the effect on consumers and taxpayers needs to be considered.

   36 respondents said that the law as it stood was not defective, although a further 10 said that they believed the law as it stood was fit for purpose but had been misapplied by the Lord Chancellor. The main arguments from those who believed the law was not defective were that claimants shouldn't be exposed to risk and that a shift away from ILGS in calculating the rate would increase risk and lead to under-compensation.

   A small number of other responses provided general information but did not directly answer the question.

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

There was a mix of evidence and answers in response to this question. Some respondents related their answers to their experience under the previous rate set in 2001, whilst others considered how they thought the current rate (set in March 2017) would work in the future, which by its nature would be hypothetical.

Many responses were ambiguous about what the impact of the discount rate had been, or pointed out that there was a risk of both under and over compensation inherent in the system. Many of these made the point that uncertainty over life expectancy and other unknowable factors such as the extent of future care costs meant that one could never know for certain upfront about whether compensation levels would be accurate.

However, of the responses to this question, 47 took the view that over-compensation was occurring or that this was the greater risk under the current system. Several of these responses pointed to the evidence provided by the Association of British Insurers. They pointed out that even under the previous discount rate, lump sum settlements had been the highest in Europe. Again, the point was made that claimants do not invest solely in ILGS. Respondents also made the case that the choice of lump sums over periodical payment orders (PPOs) indicated that claimants believed they would get a good rate of return through investing a lump sum.

By contrast, 25 respondents took the view that under-compensation was occurring or was the greater risk under the current system. Many of these pointed out that investment returns in recent years have been low, leading to under-compensation. They also believed that claimants were forced into taking investment risks to counter the historically high discount rate, which was unwelcome given their circumstances, and that claimants were forced to compromise as part of their settlement.

A further 17 responses explicitly said they didn’t have evidence about under- or over-compensation, or said that more evidence was needed.

3. **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.**

   Respondents from defendant groups said that they couldn't say definitively whether or how claimants were advised to invest lump sum payments because they were not privy to this information due to legal privilege (36), were ambiguous on the point (10), or didn't answer this question (29). However, many of these did take the view that claimants were likely to be receiving financial advice of some kind.

   44 respondents stated that financial advice was sought and given during settlement negotiations. However, a view common to many responses was that during the negotiations this would be limited to advice on the type of settlement (i.e. a lump sum or a PPO) that was appropriate, and that advice on precisely how to invest a lump sum could not be given before a settlement was reached. There were various suggestions about what sorts of advice a claimant would receive during negotiations. It was, for example, suggested that they would be advised to adopt a low risk strategy. In addition, more responses suggested that claimants would be advised to opt for lump sums over PPOs, than the opposite.

   16 respondents expressed the view that financial advice on how to invest was not generally sought during negotiations.

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

   39 responses to this question took the view that in practice claimants were investing in a low- to medium-risk mixed portfolio of assets, with many of these responses from the insurance sector endorsing the evidence provided to the ABI. This evidence suggested claimants were investing in a mixed portfolio comprising a range of assets. A few others pointed out again that no investor would invest in ILGS alone.

   A small number (11) offered some evidence of a lower risk to no risk investment strategy, and a few more again pointed out that claimants had in recent years been forced into higher risk investments than they would have liked at the 2.5% rate. Another seven respondents set out their view that how claimants actually invested was not relevant to how the discount rate should be set.

   A significant proportion of respondents either did not have evidence, did not have access to the relevant information, or did not respond to this question. A few others said that it would depend on the facts of individual cases. Only a very small number suggested that claimants made alternative investments, like property, or alternatively kept the sum in cash.

5. **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?**

   Virtually all respondents who answered this question said they did not believe claimants were advised to invest all of their lump sum in ILGS. A number of other responses discussed investment practice in general terms without answering the question directly.

   The main comments in responses from the perspective of defendants including insurers were based around the idea that claimants would be advised to use a balanced, diversified portfolio which some said was the best way of minimising and managing risk. Other comments referred to deficiencies in ILGS, which were said to be more risky than a mixed portfolio, for example because of market volatility and gaps in their maturity.

   The main argument from a claimant perspective was that claimants were obliged to use a mixed portfolio under the previous discount rate in order to secure adequate returns. The argument again was made that how claimants actually invest is not relevant to setting the discount rate, and that the role of ILGS is simply to provide an appropriate measure of risk, rather than to serve as a presumption about actual investment behaviour of claimants.

6. 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 where this occurs.

The vast majority of responses to this question believed that there were instances where PPOs were not or could not be available, either where respondents had specific first hand knowledge, or, in a small number of cases, on a theoretical basis.

The majority of these responses cited issues surrounding the security of PPO payments. A PPO would not be viable, they said, if a defendant was considered insecure and unable to provide life-long payments to claimants, or if their insurance policies had indemnity limits that were smaller than the ultimate cost of the claimant's award. These included cases involving private medical negligence, foreign compensators, and employers / public liability claims.

Other factors limiting use of PPOs included contributory negligence on the part of the claimant; inappropriateness of a PPO for the claimant's needs; the unpredictable nature of a claimant's future losses; unquantifiable life expectancy; and novel legal cases (such as claims for 'wrongful birth' where PPOs had not yet been used). Some responses stated that defendants and insurance companies were reluctant to offer PPOs. It was also noted that in Scotland a PPO is unavailable unless both parties consent.

Points made by the small number who indicated that there were no instances where PPOs were not or could not be available included that they had never experienced a PPO being denied where it was sought, and that in reality the FSCS ensured 100% compensation in case of defendant insolvency.

7. **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 responses to this question were varied and gave multiple reasons for why claimants choose either a lump sum or a PPO. A common theme was that whatever settlement was reached was made on the basis of independent financial advice given to the claimant.

As reasons for choosing PPOs, 12 respondents indicated that PPOs always came with a lump sum element whilst one said that PPOs were chosen due to lump sums not being available. The other responses generally grouped into the following categories: 30 cited PPOs as a guaranteed payment until the death of the claimant; 24 that PPOs were chosen for high value settlements with significant future care costs; 10 that PPOs are a means of avoiding investment risk; 10 that PPOs were the most suitable for catastrophically injured claimants; nine that PPOs avoided inflation risk; seven that inflation risk is avoided specifically by ASHE-linked payments; seven that PPOs are tax-protected; seven that PPOs are the most appropriate settlement for claimants who lack capacity; and four that PPOs were only available for care and case management and not for other heads of loss.

The rationale for choosing PPOs is that, broadly speaking, they ensure secure annual payment for catastrophically injured claimants until their death. This is especially important for cases involving children, with parents wanting to ensure their children will have adequate care after their own deaths.

Reasons for choosing lump sums generally grouped into the following categories: 33 indicated that lump sums allowed greater flexibility for capital expenditure for costs as and when they arise; 27 that lump sums allowed flexibility specifically to buy accommodation; 22 that lump sums allowed claimants to provide for their dependants through leaving them an inheritance; 15 that lump sums were chosen when a claimant had limited life expectancy in order to maximise the benefit from the settlement; 22 that lump sums allowed practical severance from an ongoing relationship with the compensator; nine that this severance was chosen for psychological reasons; 18 that lump sums offered the claimant more control; 16 that claimants believed they could get better returns on their investment than under a PPO; three that the returns from PPOs ensured they could recover future earnings loss; and 13 that the change to a -0.75% discount rate means that claimants deliberately reject PPOs in favour of more attractive investment returns. 17 responses highlighted that lump sum settlements were reached due to PPOs being unavailable specifically through contributory negligence, whilst 11 cited general unavailability of PPOs through no specific reason.

The overriding argument given for choosing lump sum settlements over PPOs was the increase in perceived financial control on the part of the claimant, with the flexibility to meet costs as and when they arise. To a lesser extent it was argued that lump sums are also chosen due to a belief that the claimant will receive better returns from investments, especially after the change to a -0.75% discount rate. Lump sum settlements are also reached on occasions when a PPO is not available.

8. 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 analysis of this question has been broken down into its three separate parts.

How has the number of PPOs changed over time?

85 responses were received to this question. These broke down into the following categories: decline in PPOs 55, steady number of PPOs 12 and increase in PPOs 18.

Of those who noticed a decline in PPOs, these responses can be further broken down into the following subcategories: 17 noted a decline in PPOs in recent years, but gave no precise reason for this; 16 noted the GIRO working party studies that noted a decline in PPOs since 2012; and 22 referenced the Institute and Faculty of Actuaries annual study that noted that PPOs reached their peak in 2010 – 2012. 10 noted that the number of PPOs awarded was generally steady and a further two noted that PPOs are, as a rule, not available. 19 respondents indicated that PPO settlements were on the increase, although this was generally in reference to medical negligence cases.

What has driven this?

62 responses were received. The answers given were varied, with the same driver identified for opposite outcomes. 17 drew parallels between the decline in PPOs with the decrease in ILGS yields, indicating that claimants were obtaining adequate, or superior, returns on lump sum investments even with a 2.5% discount rate. Three argued that the increase in PPOs from 2009 and their decline since 2012 reflected the duration of the financial crisis and demonstrated that PPOs are desirable in periods of financial instability.

Four respondents argued that the increase in PPO settlements 2009 – 2012 was due to the establishment of ASHE-linked payments following the 2008 Thompstone case, making PPO annual payments realistic, whilst two respondents gave the poor performance of the ASHE-index as a reason for the decline in the number of PPO settlements in recent years. It was also noted that the increase in PPOs between 2009 – 2012 could be attributed to a false spike caused by a backlog of cases in the system following the 2008 Thompstone case.

10 indicated that the reason for the increase of PPOs was the recognition by both insurers and claimants that they were the most appropriate form of settlement, whereas five argued that claimant preference for lump sums was causing the decline in PPO settlements. Factors stated supporting an increase included the removal of concern over managing awards and fears that they will run out, and the fact that PPOs are not taxable.

10 argued that the change to a -0.75% discount rate has acted as a driver for a decline in PPOs, as claimants were opting for lump sums on the basis that they can receive more than 100% compensation. However, this was also noted as a driver for an increase in PPOs on the basis that insurers are now more prepared to offer PPOs as lump sum settlements are too expensive with a -0.75% discount rate.

Of those who argued that the number of PPOs have remained the same, eight attributed this to ongoing reluctance by insurers to offer PPOs, whilst one suggested that the number of PPO settlements was steady due to a steady number of brain-damaged baby cases.

What types of claims are most likely to settle by PPO?

72 responses were received to this question. 65 indicated that catastrophically injured claimants needing to ensure a high level of lifelong care would choose PPOs; four that all claimants would settle for PPOs when the compensator was secure and there was no contributory negligence; and two that claimants would always choose a lump sum in all but the most serious of cases. Broadly speaking, these responses reflected the rationale that severely injured claimants will opt for PPOs, whereas less seriously injured claimants will choose a lump sum.

9. 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.

There were 110 responses to this question, of which a small number included multiple statements. The responses broadly grouped into four groups: yes (77); qualified yes (27); unable to confirm (seven); and no (two).

77 responses stated that claimants always, or almost always, received independent financial advice that covered all the options available. The "qualified yes" responses were made up of 16 who stated that financial advice was always sought for high value (>£1m) cases which would normally include a PPO (and perforce a lump sum settlement, as cases with a PPO element almost always also include a lump sum); six who stated that advice was sometimes sought, but not to all claimants due either to the settlement being of lesser financial value or the lack of provision; and five that in cases involving the Court of Protection the deputy would receive financial advice on behalf of the claimant.

The "unable to confirm" category broke down into those who believe that claimants should receive financial advice but cannot confirm they do, and those who believe advice is available but are unsure if claimants are directed to obtain it.

The issue of funding for ongoing financial investment advice was also raised. The cost of this advice is not included in settlements, and it was said that this poses a potential barrier for claimants in seeking advice.

10. 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.

Arguments used in support of the differing perspectives on this question were similar to those used in response to question 1.

Overall, 95 answered yes, believing that the present law should be changed, whilst 27 said no. Those saying they believed there should be a change in the law split into a number of categories: roughly two thirds of these responses were critical of the current methodology for setting the rate and proposed moving from a rate based on ILGS and the principles set out in Wells v Wells. 22 responses focused on changes to the regularity with which the rate is set and other issues around who sets it and the need for transparency and the avoidance of conflicts of interest, while a small number argued for changes in both areas. Several proposed that the rate should be varied by heads of loss, with a different rate set for earnings related inflation.

There were a small number of responses which did not directly answer the question, with some of these suggesting that the setting of the discount rate was a political decision for the Government to take.

11. 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 consultation paper set out a series of principles it proposed should be used to guide how the discount rate is set. These were:

- The discount rate should be the rate that in the reasonable opinion of the setter is (a) consistent with the returns expected from the investment strategy implied by the appropriate risk profile of the claimant (see below) and (b) satisfies the following:
  - the lump sum payable after the application of the discount rate plus the assumed income expected to be earned should represent the full loss, neither more nor less, caused by the wrongful injury;
  - the losses and costs assessed by the court to flow from the injury should be met on time; and
  - the capital and the income assumed to be earned from the award must be exhausted at the end of the period for which the award is made.
- Due regard should be given for the following factors:
  - actual returns that claimants are likely to receive on investments; and
  - availability of a PPO in respect of some or all of the loss.

A substantial majority of those that replied to this question agreed broadly with these principles, although many suggested changes and additions to them. Additional principles proposed by members of the insurance industry included full compensation (neither over nor under); no tie to any particular investment model or index (particularly ILGS); and allowing for the reality that claimants invest in a low-risk mixed portfolio and had the option to choose PPOs for some future losses in order to avoid risk. They also suggested that a consultation process should be provided for, and that factors such as the current and future economic environment, investment options and advice available to claimants, and how claimants actually invest should be taken into account. Many pointed out that setting the rate was not an exact science and that all claimant investors would be taking on some risk.

15 responses disagreed with the principles. These were for varying reasons, but usually because they considered that they ran the risk of undercompensating claimants by departing from the present law. A further 12 respondents repeated their belief that the current law should not be changed.

25 people did not reply to this question and the remainder were either neutral or thought this was a matter for the Government to decide.

12. 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).

(c) An ordinary prudent investor

(d) Other.

Please give reasons.

Most respondents to this question expressed a preference for either Option (b) (52 respondents) or Option (a) (41 respondents) as the assumed investment risk profile of a personal injury claimant. Those supporting Option (b) generally made arguments around flexibility and investing in a mixed portfolio of assets as the best way of managing risk. They also referred to the fact they believed this was closest to actual claimant investment behaviour.

For those supporting option (a), the vulnerability of personal injury claimants, and their need for full compensation without exposure to risk were the paramount considerations.

A smaller number of respondents (17) expressed a preference for Option (c) on the basis that personal injury claimants should not be exempt from the real world of investment risk and should be assumed to have the investment risk profile of an ordinary prudent investor. A few other options were suggested, such as a short-term risk free approach moving to a low risk after 15 years; and a mixture of medium and low risk investments. Emphasis was placed on the need for a strong evidence base to ensure that any change is based on an informed and wide-ranging assessment of claimant risk appetite.

13. 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?**

There was a small majority against the idea of the availability of PPOs affecting the discount rate (65 saying no, as opposed to 51 saying yes). The main arguments against were based around the view that claimants may have a range of valid reasons for rejecting a PPO such as that PPOs were not always available or suitable, and should not be penalised for doing so. The view was also expressed that creating such an assumption could fuel satellite litigation over whether a claimant's decision in refusing a PPO was reasonable or not.

From the other perspective, the main view was that lump sums offer investment opportunities, and if a PPO was not chosen when offered, it was fair to assume the claimant had a higher risk appetite. Some responses also pointed out that PPOs remove mortality risk. However, a significant number of responses in favour of the proposal emphasised that the availability of PPOs should only be taken into account in general terms in setting the discount rate, but should not be a factor in individual cases. There was little support for any assumption applying in cases where a secure PPO was not available.

14. 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.

69 respondents were not in favour of the proposal, whilst 49 agreed with it.

Responses to this question deployed similar arguments to those in answers to question 13, with those from a claimant perspective arguing that it would be unfair to penalise claimants in situations where there may be valid reasons for rejecting a PPO, and those from a defendant perspective arguing that it would be fair to assume a higher risk appetite where a PPO was rejected.

15. 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.

Most were opposed to different rates being set for different cases (80 saying no, and 38 yes).

However, of those saying no, 12 indicated that the option of a dual rate based on duration (such as the Ontario model) merited further consideration. The main arguments against more than one rate were 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.

Of those saying yes, 23 favoured a duration-based model and 12 a head of loss based model, with three other suggestions (for public services claims; where PPOs are not available; and in exceptional circumstances).

16. 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.

In accordance with responses to Q15, most respondents (62) did not reply to this question as they were opposed to more than one rate. Of those who did respond, the majority simply reiterated their belief that there should be different categories (34). A further 10 didn't provide a direct answer to the question or didn't know.

15 responses said that no special factors should be taken into account, or that the courts should consider these on a case by case basis.

Of those that did make suggestions, three thought that earnings related heads of damage should be linked with earnings growth, while three others thought that predictions over the medium to long period should be based on past investment performance.

Three respondents opposed claimants being able to choose a lump sum to meet short term losses and PPOs to meet longer term losses.

17. 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.

The great majority of responses (96) supported the court retaining its existing power, with most emphasising that (as now) this should only be used in exceptional circumstances.

The only specific suggestion (from eight responses) on when the power should be used was in cases involving claimants who would go on to live and receive care abroad, who would be subject to different social and economic factors.

23 responses did not favour retention of a power. The main argument from these was that this would create uncertainty, inconsistency and delay and the potential for strategic behaviour and satellite litigation.

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

There were 97 responses to this question. The great majority of those who responded thought that the existing principles should remain in place. 39 indicated that the court should only use its discretion in exceptional cases, although a small number questioned whether it would be possible to define that. 19 more generally agreed that the existing principles under the Damages Act, the 100% principle and the current approach should remain. Some responses pointed out that in practice the courts don't use the existing discretionary power.

The main specific suggestion was for the courts to use the discretion where the claimant would live and receive care outside the UK.

In framing the terms to describe the circumstances in which the courts should exercise a discretion to depart from the standard rate, other respondents used general phrases such as "in the interests of justice", "in the interests of fairness", and "where reasonable to do so", while seven suggested it would all turn on the facts of individual cases, and five thought the court should rely on expert advice. Four respondents indicated that they didn't believe the courts should have any such power.

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

The consultation document set out some of the specific technical questions that would need to be considered by the rate setter in coming to a final rate. These included how long a period was appropriate to consider the performance of any indexed financial product to produce an average, and whether and how to round a rate. It was suggested this could take account of a claimant's costs, such as tax and financial management fees.

A number of respondents answered this question by referring to broader principles about how the rate should be set. Of those that answered the question (95 in total) around half did engage with the questions about mandatory methodological principles. Of these responses roughly a third, from insurers, gave a roughly identical response to the Association for British Insurers, which stressed the need for a simple and transparent method.

14 respondents either did not believe any parts of the methodology should be mandatory, thought it was too early to say or did not believe they had expertise in the area. 11 responses thought that the existing principles derived from *Wells v Wells* should be retained.

Most of the small number of respondents that covered the issue preferred RPI to be used as the basis of calculating inflation over CPI. Some responses (primarily from insurers) preferred rounding of the rate to the nearest 0.5% rather than 0.25%. The larger figure was thought to help fix a discount rate for a longer time period without needing to adjust it for small fluctuations in investment returns.

Most respondents that considered methodology agreed that tax should continue be considered in setting the discount rate. Some suggested that investment management costs should also be considered. Responses from insurers indicated that the tax rate used should be the basic rate. A small number of responses, however, thought that investment management costs should not be included in setting the rate but could be considered by the court in deciding awards of damages and costs between the parties.

20. 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.

Most responses agreed that the rate should be reviewed on occasions specified in legislation, with 95 saying yes and 18 saying no.

The main arguments in favour from both claimant and defendant perspectives related to the greater certainty that this would bring and the need to avoid another lengthy period without the rate being reset. One response pointed out that regular reviews would not necessarily lead to a change to the rate on every occasion.

The main arguments against were that awareness of a review being imminent could affect litigation behaviour by either claimants or defendants depending on whether it was anticipated that the rate would go up or down, and that this would be likely to lead to delays in settlements when a review was approaching.

21. 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.

Of those that supported fixed dates, the breakdown between the range of periods suggested in the consultation paper was as follows:

One year – 28; two years – 4; three years (including between one and three) – 17; five years (including between three and five) – 22; 10 years – two. Two supported less than one year – (quarterly or biannually).

The main arguments used in supporting a particular fixed period revolved around the need for certainty and predictability; the need to avoid dramatic shifts in the rate; and the need to minimise scope for adverse litigation behaviour and delays in settlement. Few responses distinguished between whether the period should be a fixed one or a minimum one.

21 responses (primarily from insurers) took the view that in the event of a single rate being adopted, this should only be triggered by shifts in investment returns and not at fixed dates. Some taking this position referred to the likelihood of fixed dates fuelling unhelpful litigation behaviour and "gaming" of the system.

The bulk of the responses supporting this position suggested that if a split rate based on duration were adopted, the short term rate should be reviewed annually, but the long term rate should only be reviewed at much longer intervals. A number of these responses proposed five years for this.

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

There were 103 responses to this question, including 20 which were either unsure, or didn't respond directly.

Of those who provided substantive responses the main group (35 responses, primarily from insurers) preferred an announcement in the period between April and November, to come into effect on 1 January so as to avoid the reporting season leading up to the end of the financial year. A number thought that October would be the best time for such an announcement, although one person thought the beginning of the calendar year should be avoided.

14 responses considered that the announcement should be made in December to coincide with the annual review of the ASHE index which had a bearing on PPOs. Three suggested that it should coincide with budget announcements by the Chancellor of the Exchequer. For public sector budgeting the financial mid-year (end of September) was supported.

Small numbers of responses suggested other dates throughout the year, of which the main one was the second quarter of the calendar year (nine respondents).

13 responses thought that the timing didn't matter, while some – including some that offered no firm view – considered that this would be dependent on the frequency of reviews. Some responses focused on the period between announcement and implementation with suggestions of between one and three months being made.

23. 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?

75 responses were in favour of the rate being reviewed at intervals determined by the movement of relevant investment returns and 43 were opposed to this. However, there was a strong view that the mechanism for a rate trigger would depend on the methodology chosen by government.

Of those who were in favour, 29 said this should be in addition to timed reviews and 32 that it should be instead of them. 14 did not express a preference. The main argument against a combination of reviews based on fixed periods and movements of investment returns reflected the response to Q21 (i.e. that fixed dates would be likely to fuel unhelpful litigation behaviour). Those supporting a combined approach considered that this would ensure that reviews could take place whenever this was appropriate.

The main argument among those opposed was that this would create more uncertainty and be less predictable than regular fixed date reviews.

Of those in favour, most were general as to what the trigger should be – specific suggestions included either a 0.5% or 1% shift in ILGS yields (over either a quarter/half year or year), a 25 BPS deviation in ILGS yields, and 15% movement on five year bond yields.

24. 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.

65 responses were in favour of a power to set new triggers for when the rate should be reviewed, with 42 opposed to this.

The main arguments in favour focused on the need for flexibility, though some emphasised that the power should only be used in exceptional circumstances. Some responses stressed the need for caution in defining the scope of such a power and for any review of the triggers to be subject to consultation and Parliamentary approval. A number of responses indicated that the existing power in the 1996 Act would be sufficient.

The main arguments against a power to set new triggers were that this would cause uncertainty and that there would be no need for such provisions if a predictable and objective review system was put in place.

25. 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.

A large majority of responses (99) were opposed to any transitional provisions.

The general view was that such provisions would create complications and uncertainty and would be inequitable in the context of the 100% principle. Other comments were that regular reviews would avoid the “cliff edge” problems of the recent change in the rate, and so transitional provisions wouldn’t be necessary. Some insurers considered that while transitional provisions would not be appropriate with a single rate, there might be a need to consider them in the event of a dual rate.

Of those who did support them (13) some focused on the notice period for any change in the rate (one, two or three months being suggested), while another suggestion was for a new rate to apply only to new causes of action or to new proceedings.

26. 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.**

Responses to this question were divided as follows (although with some responses there was a blurring between options, particularly between B and C):

Option A – 36; Option B – 17; Option C – 48; Option D – 9; Option E – 12.

The two options with most support were thus Option C (the Lord Chancellor and counterparts in Scotland or another nominated person following advice from an independent expert panel) and Option A (a panel of independent experts)

Arguments in favour of option A focused around the need for independence and to avoid possible conflicts of interest which might arise in relation to the setting of the rate within Government. Arguments for Option C focused around the need for the rate setter to be publicly and politically accountable. Certain insurers suggested that a panel might not be needed in the event of a dual rate being adopted.

Suggestions about the membership of the expert panel included the Government Actuary, accountants, senior judiciary, actuaries, wealth managers, independent financial advisers, economists, the Bank of England, and academics. A few responses also suggested including claimant and defendant lawyers and NHS providers, but a larger number emphasised the need for the panel to be independent of any interest groups supporting either claimants or defendants. A number suggested that the panel should have an obligation to consult before reaching a decision.

Of those proposing Option E, seven responses suggested that the rate should be set by the Government Actuary (two as chair of a small panel), one suggested the Bank of England, one the Ogden Working Party and two favoured the use of a set formula.

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

Most responses considered the current law to be satisfactory and not in need of change (85 saying this as opposed to 20 indicating the contrary). Few responses went into further detail. As a consequence most also answered no to Questions 28 to 30.

Among those arguing that change was needed, a number indicated that Scottish law should be brought in line with that in England and Wales by giving the courts a power to order PPOs.

Responses favouring a presumption or requirement in favour of PPOs are reported under the following questions, as are suggestions for mainly non-legislative or procedural changes.

28. 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?

Reflecting responses to Q27, 83 responses to this question indicated that no clarification to the current law on PPOs was needed, with 25 responses saying clarification was needed.

Of those saying yes, suggestions for guidance included (from a number of insurers) giving the claimant the final say on the form of award if this was agreed between the parties rather than the court; providing for the Motor Insurance Bureau to be considered reasonably secure for the purposes of PPOs (this is currently the case via case law); adjusting Part 36 of the Civil Procedure Rules in relation to PPO offers to ensure that the benefits of the respective forms of award could be clearly and fairly assessed in determining whether or not an offer in the form of a PPO would "beat" an offer in the form of a lump sum for the purposes of determining costs; and enabling PPOs to be used for accommodation needs by indexing them to the rates charged for mortgages.

Amendments to the Civil Procedure Rules and Practice Directions were also proposed to require PPOs to be considered as part of the negotiation process in claims over £1 million, to avoid the situation where a claimant who would like a PPO but is not offered one having to go to court to try to persuade the court to order one. It was also suggested that variation of PPOs should be possible in a wider range of circumstances, and that the Government should offer a financial product to enable claimants to purchase property without the need for a large lump sum, allowing the PPO to include repayments for a mortgaged purchase instead.

29. 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?

99 responses indicated that there should not be any presumption in favour of a PPO and 10 indicated that there should.

The main arguments against a presumption were around the many valid reasons claimants might have not to want PPOs, the need for this to be a matter of claimant choice, and potential difficulties in trying to administer and enforce the outcome of any presumption or requirement.

Comments from those in favour of a presumption were limited, but one response from a health service body indicated that having a secure stream of future index-linked income must be in the best interests of the vast majority of claimants, and that therefore there should be an onus on a claimant who does not wish to receive a PPO to persuade the judge accordingly. This response did not support specific criteria on which the presumption could be rebutted, but other responses argued that in order to rebut the presumption the claimant should have to provide evidence of his or her reasons for refusing a PPO and details of the alternative proposed investments, or that rebuttal should only be possible in cases of contributory negligence or where there was no suitable index for the particular head of loss.

30. 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?

103 responses were opposed to a requirement for the court to order a PPO, with only eight responses supporting such a requirement. Arguments against a requirement largely reflected those in relation to Q29.

Those in favour didn't generally say anything further, though one said the claimant should have liberty to apply to the court for reconsideration of the requirement if conditions changed, one said a requirement should be subject to the court's discretion, and a third that it should apply only if the defendant consented.

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

Substantive comments were received from 54 of those responding to this question. In addition, 21 responses considered that the cost of providing PPOs could not be reduced.

The main area identified as a cost driver for PPOs (predominantly in responses from the insurance industry) was the regulatory requirements established under the EU Solvency II Directive in relation to the capital requirements, risk margins and matching adjustment eligibility that must be adopted by insurers in reserving for PPOs. A number of responses suggested that steps should be taken to change these requirements, or that other steps be taken to make them less onerous. However, concern was expressed that it would not be appropriate to weaken regulatory standards.

Other responses from insurers and defendant solicitors indicated that difficulties arose because of the use of the ASHE 6115 index in relation to annual payments for future care and case management. Reference was also made to the lack of suitable annuity products, and the need for Government to look at options for incentivising the development of such products.

A number of responses from both defendant and claimant perspectives floated the option of introducing a scheme to pool the costs of PPOs and manage the investment and longevity risks associated with them. It was suggested that this could either be funded by Government or by a levy on insurers. Alternatively it was suggested that Government bonds could be issued to insurers funding PPOs at better than market value, or that a tax exemption might be given on assets used to fund PPOs.

One response indicated that the drafting of orders was too complicated, and that costs could be made by including the machinery for indexing awards in the civil procedure rules so that it does not have to be done from scratch each time.

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

There were 57 substantive responses to this question.

Some responses reiterated the benefits of proposals for change made in relation to question 31 (e.g. on regulatory requirements and indexing of PPOs), which it was said would help insurers operate with more capital efficiency. The need for a competitive and profitable market was identified to support insurers and policyholders and avoid increased premiums for consumers and businesses. It was said by a number of insurers that changes in relation to PPOs without parallel changes to the related regulatory requirements would lead to an increase in premiums more generally, although one response questioned whether changing the current requirements might lead to other costs to society as a whole. Proposals for a pooling scheme were also referred to again.

A number of responses considered the balance between PPOs and lump sums more generally, with on the one hand concern being expressed at the potential costs arising from the increased longevity and market risks inherent in the current system on PPOs, and on the other the benefit for claimants from the more regular use of PPOs and the consequent incentive for defendants to include them in negotiations. It was said that more PPOs would lead to fewer cases where funds were exhausted and recourse had to State support, and that a presumption in favour of PPOs could lead to faster settlements.

Other responses ranged more widely than the discussion on PPOs and referred to other aspects of the consultation paper. A number of responses focused on the cost of investment advice. It was suggested that if a mixed portfolio approach to calculating the discount rate were adopted, allowance should be made for the cost of investment advice, but that while this would increase awards it might also add another factor over which litigants might argue. It was also recommended that claimants should receive independent financial advice before reaching settlements and that such reports should be disclosable.

Other suggestions were for real earnings growth to be allowed for in lump sum calculations; for different discount rates to be applied to different heads of loss; for double recovery in relation to the costs of private medical care to be avoided to allow better cash management and certainty for the NHS; and for more regular reviews to take place so that reviews could not be avoided.

It was also suggested that the key benefit that should arise from changes to a more regular, transparent, independent rate review should be a less volatile impact, and therefore a more incremental impact on NHS finances, allowing for better planning and budgeting. The need for more consideration of the cost of proposals to consumers and businesses was identified, especially in relation to limits on indemnity coverage. One respondent suggested that the Government should provide funding to local government to cover the additional cost arising from the recent change to the discount rate.

33. 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.

There were 83 substantive responses to this question.

The majority of responses indicated that it was too soon to reach an informed view on the effects of the recent rate change because of the very short period of time that had elapsed since it came into effect on 20 March 2017. One response said that it would take several months for any reliable data to emerge.

With that caveat, the main division in responses was between those (primarily from an insurer or defendant perspective) who considered that the reduction in the rate was likely to make claimants more attracted to lump sums and less likely to accept PPOs, and those (primarily from a claimant perspective) who considered that there was unlikely to be any significant change in claimant behaviour because of the benefits of PPOs, in particular in relation to future care and case management costs. A number of responses approached the question from a different angle and suggested that PPOs might become more attractive to defendants and insurers, but that a change in attitudes was unlikely in the absence of measures to make PPOs more difficult to avoid.

Within this general context, particular points that were made included the following:

- While evidence was limited, initial signs were that PPOs were still being used for future care and case management, and the certainty that they provided in meeting those costs was likely to continue to be a significant factor in their use.
- However, in so far as there was any existing appetite for their use in relation to other heads of loss, this might diminish further.
- PPOs were likely to remain attractive in cases involving minors with catastrophic injuries, those without legal capacity, and cases involving short or disputed life expectancy. However it was also suggested that claimants with capacity would be significantly less likely to opt for a PPO.
- One response referred to a case where a claimant had switched from negotiating a PPO to seeking a lump sum following the recent rate change.
- The knock-on effect of the rate change on the Roberts v Johnstone calculation in respect of accommodation costs had still to be considered by the courts, but one response referred anecdotally to a case where a claimant had not sought to argue this point because of the lump sum “windfall” received through the rate change.

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

36 responses agreed with the impact assessment. 38 disagreed. 17 didn't know, or were ambiguous about whether they agreed with the impact assessment. 44 respondents didn't answer the question.

Of those that disagreed with the Impact Assessment, this was largely because of the premise of the options set out. There was a roughly equal split amongst those who thought that the impact assessment failed to pay enough attention to the impact on defendants (or needed to focus more on the impact on the insurance and health sectors), and those who thought the assessment downplayed the risks to claimants. It was also suggested that the assessment failed to recognise impacts on the health sector affecting medical defence organisations providing professional indemnity cover to GPs, and the effect on professional indemnity premiums, as well as the impact on the NHS and welfare system in the event of awards running out early. One response from an insurer indicated that the cost to the consumer of the change in the discount rate to minus 0.75% was estimated to be between £50 and £75 on every policy with higher increases for younger and older drivers.

A few others argued that the reforms to whiplash claims should have been factored in, whilst a number of respondents said they disagreed that insurance premiums would be likely to go down as a result of insurers passing any savings from a higher rate on to policyholders.

35. 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?

A substantial number did not answer this question or did not provide a clear or substantive answer. 42 respondents indicated that the equalities statement contained in the consultation paper correctly identified the extent and effects of the proposals on those with protected characteristics under the 2010 Act; 21 did not agree.

Of the latter group, most (largely made up of claimant representatives) considered that the statement did not adequately reflect the impact on the disabled and the vulnerable, who would be the group primarily affected by any change to the methodology for setting the rate. Responses pointed to the likely decrease in compensation that would result from such a change, and also referred to the additional burden and stress that would be caused by the need to make more complex and crucial investment decisions, particularly to those with brain injuries falling short of legal incapacity and those with other communications and psychological difficulties.

One response from a claimant lawyers' organisation indicated that any change from a "risk-free" investment approach would affect the compensation received by people with other protected characteristics. Another suggested that any change in methodology would need to be supported by evidence relating to awards to claimants with long term disabilities who have settled claims over the last 30 years to assess whether their compensation had lasted or would last as predicted.

Several responses from an insurer and defendant perspective acknowledged that the proposals had an impact on disabled people, but stated that this was because by its very nature the discount rate would affect this group as typically it is only used in more serious cases where lasting disability and impairment has been suffered as a result of the injury. They considered that because of this the point should not be taken into account in any equality impact assessment or that if it were all claimants should be considered equally. However, one response indicated that in the clinical negligence sphere claimants are often disabled and/or elderly before they receive the treatment from which a claim arises.

A small number of responses also referred to the need for the Ogden Tables to be updated in relation to the assumptions currently made concerning life expectancy and other contingencies in order to avoid the possibility that these could disadvantage disabled people. From another perspective, one response argued that the application of the current Tables in relation to claims for disadvantage in the labour market in cases involving claimants with less serious injuries who qualified as disabled had led to disproportionately high awards for this head of loss, which would be even greater under a minus 0.75% discount rate.

36. 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?

In line with responses to Question 35 the great majority of respondents did not reply to this question.

Around 10 responses referred to the impact this would have on disabled people and other vulnerable groups. As noted under Q35, points raised included whether the Ogden Tables should be updated and the need for evidence on past cases involving claimants with long term disabilities.

Conclusion and next steps

1. This part of the response to the consultation sets out how the consultation has influenced the Government's conclusions on how the discount rate should be set in the future and what is to happen next.

2. Following the announcement of the change of rate and proposed consultation on 27 February the then Lord Chancellor said:

   The Government will review the framework under which I have set the rate today to ensure that it remains fit for purpose in the future. I will bring forward a consultation before Easter that will consider options for reform including: whether the rate should in future be set by an independent body; whether more frequent reviews would improve predictability and certainty for all parties; and whether the methodology – which in effect assumes that claimants would invest only in index-linked gilts – is appropriate for the future. Following the consultation, which will consider whether there is a better or fairer framework for claimants and defendants, the Government will bring forward any necessary legislation at an early stage.

3. The Government now intends to deliver on the commitment to create a fairer and better framework for the setting of the discount rate.

4. In preparing its proposals the Government has carefully considered the replies to the consultation. The Government has also taken into account the results of research commissioned by the department from the Government Actuary's Department ("GAD") and the British Institute of International and Comparative Law ("BIICL") as well as other evidence, including in particular responses to questionnaires issued to members of the Wealth Management Association, the Personal Finance Society and the Association of Professional Financial Advisers about the investments that personal injury claimants would be advised to make.

5. The GAD research analysed the impacts of setting the discount rate using different risk appetites and investment strategies. This involved simulation modelling of various scenarios.

6. The BIICL research examined the issue of the discount rate applying to quantum in personal injury cases from a comparative law perspective. It focused on the following jurisdictions: Australian States, Canadian Provinces, France, Germany, Hong Kong, Ireland, Spain, South Africa. The BIICL research shows that there are a wide variety of rates and approaches to its setting in the jurisdictions considered, but all give effect to the principle of full compensation and, where relevant, give the claimant the benefit of a defensive investment strategy. BIICL noted a broad range of rates from 6% in the Australian State of Victoria for motor vehicle and workplace accident victims, to 3.5% in Spain. No jurisdiction with a single discount rate had a negative rate as is currently the case in the UK. The reports of the GAD and BIICL research are being published alongside this response.

7. The starting point of the law of damages is that claimants should be compensated in full for the losses they have suffered because of the injury caused by the defendant. This was not at issue in the consultation and the consultation replies do not give rise to any reason to re-consider this proposition. The objective of applying a discount rate will therefore continue to be to support a 100% compensation rule so that claimants receive full compensation for the loss caused by the wrongful injury neither more nor less.

8. They reveal a general dissatisfaction with various aspects of the present law for a range of reasons but no strong consensus across the different interest groups as to how the law should specifically be reformed other than in a small number of limited areas, such as the need for more frequent reviews in the future than occurred in the past and the desirability of retaining the present balance between lump sum awards and PPOs.

9. **On how the rate should be set**, the consultation responses were divided as to the investment risk appetite that should be assumed in the setting of the rate (claimant interests generally favouring the present very low risk level and defendants a higher, but still low risk level). There was, however, general agreement that claimants should be treated as more risk averse than ordinary prudent investors. Subject to this difference of opinion there was wide support for the general principles proposed for the setting of the rate.[1] It is also clear, taking the responses and the results of other research together, that claimants invest in low risk diversified portfolios not in "very low risk" investments, such as ILGs alone.

10. Based on the evidence and analysis, which is explained in the Impact Assessment, we believe the assumptions made by the present law on the setting of the discount rate as to how claimants invest are unrealistic and, as it stands, the rate may produce significantly larger awards than provide 100% compensation. The unrealistic assumptions currently being used are having a significant effect on taxpayers through the additional cost of personal injury settlements paid by the National Health Service and other public sector bodies; and businesses and individual consumers through insurance premiums that are higher because awards of damages may be providing more than 100% compensation.

---

[1] Paragraph 36 of the Consultation Paper proposed the following general principles:

"The general principles for setting the rate might be as follows:

The discount rate should be the rate that in the reasonable opinion of the setter is (a) consistent with the returns expected from the investment strategy implied by the appropriate risk profile of the claimant (see below) and (b) satisfies the following:

- the lump sum payable after the application of the discount rate plus the assumed income expected to be earned should represent the full loss, neither more nor less, caused by the wrongful injury;
- the losses and costs assessed by the court to flow from the injury should be met on time; and
- the capital and the income assumed to be earned from the award must be exhausted at the end of the period for which the award is made.

Due regard should be given for the following factors:

- actual returns that claimants are likely to receive on investments; and
- availability of a PPO in respect of some or all of the loss."

11. **On when the rate should be reviewed** there was general agreement that reviews should occur more frequently than previously and with greater predictability, but there were a range of views on what the appropriate period should be and whether it should be fixed. The Government accepts the view that the present system is not sufficiently structured to provide predictability and certainty and intends to introduce time limits within which reviews must be held. Although there was support for both longer and shorter periods, the Government considers that a requirement of a review at least every three years represents a reasonable compromise.

12. **As to who should set the rate**, there was support for introducing more independent expertise and transparency into the process for the setting of the rate, but whilst some respondents favoured an independent panel setting the rate, defendants argued for political control of the final decision albeit with advice from an independent panel. The Government acknowledges the general support for an independent expert panel to be involved in the process of setting the rate. However, the Government also accepts the importance of providing clear political accountability for a decision, which whilst only exercisable within the constraints of the law, has important financial and fiscal consequences.

13. There is clearly a need for a fairer and better framework for the setting of the discount rate. The Government intends to make the following changes to the law:

    a. The rate is to be set by reference to expected rates of return on a low risk diversified portfolio of investments rather than very low risk investments as at present; and in assessing those rates the actual investment practices of claimants and the investments available to them should be considered. This will make the rate more realistic.

    b. The principles for the setting of the discount rate should be set out in statute.

    c. The rate is initially to be reviewed promptly after the legislation comes into force and, thereafter, at least every three years, with that period being re-set when the rate is changed. Reviews will be completed within 180 days of starting. This will avoid overlong delays between reviews, which will make changes in the rate more predictable and manageable.

    d. The rate is to be set by the Lord Chancellor with advice from an independent expert panel (other than on the initial review which would be by the Lord Chancellor with advice from the Government Actuary). HM Treasury will, as at present, also be a statutory consultee for all reviews. The panel will be chaired by the Government Actuary and include four other members having experience as an actuary, an investment manager and an economist and, finally, experience in consumer investment affairs.

    e. It will continue to be possible to set different rates for different types of cases, including by reference to the length of the award.

    f. No changes are proposed to the law relating to PPOs.

14. Under the new law the discount rate will reflect the rate of return to be expected on a low risk diversified portfolio. There will probably be a range of portfolios and rates of return that might be used in the setting of the rate. It will be for the Lord Chancellor to apply the legal principles set out in the legislation and on that basis to decide where in the range of low risk the rate should be set.

15. The key legal principle will be that the rate should be the rate that, in the reasonable opinion of the Lord Chancellor, a properly advised recipient of a lump sum of damages for future financial loss could be expected to achieve if he or she invested the lump sum in a diversified low risk portfolio with the aim of securing that (a) the lump sum and the income from it would meet the losses and costs for which they are awarded when are expected to fall; and (b) the relevant damages would be exhausted at the end of the period for which they are awarded. In this exercise the Lord Chancellor must consider the investments available and actual investments made by claimants; and must make such allowances for taxation, inflation and investment management costs as the Lord Chancellor thinks appropriate.

16. The Government is publishing draft clauses embodying these conclusions for further views, following consideration of the response to this pre-legislative scrutiny intends to introduce legislation to enact these proposed changes to the law into Parliament as soon as parliamentary time permits. Once enacted the changes will be brought into force in the usual way on a date to be specified by the Lord Chancellor, who will initiate a review of the rate (which will be the last rate under the previous law) within 90 days. This review will be completed within 180 days of the beginning of the review. A new rate will then be set if a change is considered by the Lord Chancellor to be appropriate. The new rate will come into force on a date to be fixed by the Lord Chancellor.

Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

https://www.gov.uk/government/publications/consultation-principles-guidance

Welsh Language Impact Test

The policy proposals do not affect the delivery of Ministry of Justice services in Wales. A Welsh language version of the summary of responses and the conclusion and next steps will be available at: http://www.justice.gov.uk/publications/corporate-reports/moj/2010/welsh-language-scheme.

Equalities

As the summary of individual responses shows, approximately two-thirds of those who responded to the questions in the consultation paper relating to the initial assessment of equalities impacts agreed with its contents.

Of those that didn't, a number argued that the assessment did not give sufficient weight to the impact on people with a disability, although there were differing perspectives from different interest groups as to whether and how such impacts should be taken into account. Reference was also made to the impact on people with other protected characteristics such as the young; the old; the infirm; and women (in relation to birth negligence and other pregnancy and maternity issues).

These responses have been taken into account in further development of the Equalities Statement following the consultation.

A copy of the Equalities Statement is at Annex B.

Annex A – List of respondents

ACMCA Ltd

Admiral

Advantage Insurance (AICL)

Ageas

AIG Europe

Aioi Nissay Dowa Insurance Europe

Grahame Aldous QC

Allianz UK

Anonymous

Ashtons

Association of British Insurers

Association of Personal Injury Lawyers

Atherton Godfrey

Aviva

Axa

Bar Council

Barratts

Berrymans Lace Mawer (BLM)

Bevan Britten

Gerard Boyle QC

Bill Braithwaite QC

Brit Insurance

British Insurance Brokers' Association

BTO

Capsicum Re

Capsticks

Carpenters Ltd

CCR Re

Chartered Insurance Institute

Civil Justice Council

Clyde & Co

Confederation of British Insurers

Confederation of Passenger Transport

Quentin Croft

DAC Beachcroft

Ranald Davidson

Neil Davy

Chris Daykin

John De Bono QC

Direct Line Group

DWF

Esure

Faculty of Advocates

First Central Insurance Management

First Group

Fletchers

Forum of Complex Injury Solicitors (FOCIS)

Forum of Insurance Lawyers (FOIL)

Forum of Scottish Claims Managers

Frenkel Topping

Jonathan Fuggle and Drina Panic

Gibraltar Financial Services Commission

Gibraltar Insurance Association

Hugh Gregory

Timothy Hartley

Hempsons

Hill Dickenson

Hilton Sharp and Clarke

David Hinton

Hodge Jones & Allen

Simon Hogan

Rowland Hogg

Hugh James Solicitors

IM Asset Management

Institute and Faculty of Actuaries

International Underwriting Association

Irwin Mitchell

Christopher Johnston QC

Kennedys

Keoghs
Heidi Knight
William Latimer-Sayer QC
Law Society
Law Society of Scotland
Lees
Leigh Day
Liberty Specialty Markets
Lloyds
Lloyd Market Association
Local Government Association
LV Insurance
Managing General Agents' Association (MGAA)
Marcuson Consulting Ltd
Frances McClenaghan
Martin McLeish
Medical and Dental Defence Union of Scotland
Medical Defence Union
Medical Protection Society
Medical-Solicitors
Richard John Meggitt
Richard Menzies
Motor Accident Solicitors' Society (MASS)
Motor Insurance Bureau
Nestor Financial Group
NFU Mutual
NHS Resolution
Richard Partridge
PCS
Pen Underwriting Ltd
Penningtons Manches LLP
Personal Finance Society
Personal Financial Planning Ltd
Personal Injuries Bar Association (PIBA)
Plexus Law
Eloise Power

Lucy Powis
Warren Priest
Prudential Regulation Authority
Qatar Reinsurance
QBE European Operations
RAC
Royds Withy King
RSA
Sabre Insurance Co
SCOR Global
Serjeants Inn Chambers
Minesh Shah
Skyfire Insurance
Slater & Gordon
Society of Clinical Injury Lawyers (SCIL)
Stagecoach Group PLC
Stewarts Law
Swiss Re
Thomas Cook
Thompsons
Tilney
Tokio Millenium Re
Ward Hadaway
James Watson QC
Weightmans LLP
Welsh Government
Welsh Risk Pool Services
Working Group on Compensation for Pension Loss in Employment Tribunals
Amanda Yip QC
Zurich Insurance

Annex B – Equalities Statement

Equality Statement – The Personal Injury Discount Rate: How it should be set in future

Introduction

This Equality Statement considers the impact on groups and individuals with protected characteristics in relation to the Government's announced measures on how to set the Personal Injury Discount Rate ("the rate") in the future. It represents our analysis of the likely impacts from the proposals following consultation with stakeholders.

Policy objective

The policy objective is to revise the principles for setting the rate to produce an award that is fair between claimant and defendant in providing 100% compensation, neither more nor less, for the wrongful injury. The consultation response sets out a policy for how, when and by whom the rate for claims in England and Wales should be set.

Equality duties

Section 149 of the Equality Act 2010 ("the Act") requires Ministers and the Department, when exercising their functions, to have 'due regard' to the need to:

a) eliminate unlawful discrimination, harassment, victimisation and any other conduct prohibited by the Act;
b) advance equality of opportunity between people who share a relevant protected characteristic and those who do not share it; and
c) foster good relations between people who share a relevant protected characteristic and those who do not share it.

In carrying out this duty Ministers and the department must pay "due regard" to the nine "protected characteristics" set out in the Act under the Public Sector Equality Duty (PSED), namely: race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.

Equality considerations

As part of the consultation (https://consult.justice.gov.uk/digital-communications/personal-injury-discount-rate/supporting_documents/discountrateconsultationpaper.pdf) we asked respondents if we had correctly identified the range and extent of effects of the proposals on those with protected characteristics.

On the basis of the available evidence - including the consultation responses set out in detail under Question 35 above - consideration has been given to the impact of the proposed changes against the statutory obligations under the Act. These are outlined below.

Direct discrimination

The revisions to the principles for setting the rate to provide neither more nor less than 100% compensation will apply equally to all claimants and defendants. The proposals will also not result in people being treated less favourably because of any protected characteristic and therefore our assessment is that they are not directly discriminatory within the meaning of the Act.

Indirect discrimination

Overall, we do not consider that these reforms will amount to indirect discrimination within the meaning of the Act, since the resulting changes to the setting of the rate are unlikely to result in anyone sharing a protected characteristic being put at a particular disadvantage. We have used the limited available data and evidence to support this in our analysis below. However, since the Government does not collect comprehensive information about personal injury claimants in relation to protected characteristics, this limits our understanding of the potential equality impacts of the proposals.

Overall, the proposed changes will result in the rate initially being reviewed promptly after the legislation comes into force and, thereafter, at least every three years, with that period being re-set when the rate is changed. Reviews will be completed within 180 days of starting. The methodology to be applied in reviewing the rate will be changed to assume a low risk claimant investment profile instead of a very low risk profile. We consider below how these specific proposals being taken forward may be relevant to indirect discrimination.

What principles should guide how the rate is set?

The discount rate applies to lump sum awards of damages for future pecuniary loss: typically, loss of future earnings and costs of future care. The rate is in essence a rate of return on investments assumed to be made by claimants as a single class. For these purposes under the present law claimants are not differentiated. There is one rate for all claimants save that the court may depart from that rate when persuaded another rate is more appropriate. In practice the court seems never to have done so.

The rate is set by reference to assumed investments. The ability to make these investments is not limited by, or specific to, any protected characteristics - even child claimants and claimants lacking mental capacity have representatives who will invest on their behalf.

The rate will be higher if set by reference to investments with high returns and lower if set by reference to investments with low returns. A higher rate will translate into a smaller lump sum award and vice versa.

Many seriously injured personal injury victims will have physical and mental disabilities as a result of the injury. Disabled persons are therefore likely to be more highly represented in the population of claimants than among the general population. Among the most seriously long term injured and in receipt of the largest awards the proportion of very young children injured at birth and young men injured in road accidents is likely to be higher than the proportion of babies and young men in the general population. Claimants with the protected characteristics of disability (physical and psychological health injuries), age (younger) and sex (men) are therefore likely to be more affected by the choice of a particular methodology for the setting of the rate than others without these protected characteristics.

Defendants would be likely to benefit if the discount rate were to be higher in future compared to the rate that has been set under the current law. If the rate decreased relative to the current level, the opposite would be true in that claimants would be likely to benefit. As we have mentioned the interests of defendants are usually represented by their insurers. The protected characteristics of defendants are not in practice relevant to the setting of the discount rate. Insurers will not have any protected characteristics since they are, by definition, business entities.

How often should the rate be set?

The rate is set at present by the Lord Chancellor from time to time. The consultation paper asked whether the rate should have to be reviewed at specified points in time defined by length, movements in returns on investments or otherwise. This led to the proposal for the rate to be changed at least every three years, which may lead to the rate being a more accurate rate relative to the changes in the returns on investments. The changes, if any, will, however, affect all persons equally, irrespective of their protected characteristics, so we do not expect any particular disadvantage in relation to them, even though we recognise that some claimants with protected characteristics are likely to be over-represented.

Who should set the discount rate?

The rate is at present set by the Lord Chancellor after consulting HM Treasury and the Government Actuary. The paper asked whether the rate should be set by an expert panel, with or without government intervention; whether there should be an advisory expert panel; or whether the rate should be set by the Lord Chancellor or some other designated person. The resulting proposal is that the rate should continue to be set by the Lord Chancellor subject to consultation with HM Treasury and to evidence and advice being provided by an expert panel chaired by the Government Actuary. Changing the law in this respect will affect all persons equally, irrespective of their protected characteristics, so we do not expect any particular disadvantage in relation to them.

Overall, as mentioned above, on the basis of the available limited data, we do not consider that the over-representation of claimants with disabilities, male claimants, or young claimants is likely to result in any suffering of a particular disadvantage from the proposals for people with these protected characteristics. If, however, there were to be any difference in treatment between those sharing a protected characteristic and those who do not that did result in a particular disadvantage, the Government's assessment is that the proposals represent a proportionate means of achieving the legitimate aims of the policy to revise the principles for setting the rate to produce an award that provides 100% compensation (no more, no less).

Discrimination arising from disability and a duty to make reasonable adjustments

We will continue to make sure that reasonable adjustments are made to ensure access to justice for claimants with disabilities. As mentioned earlier, the characteristics of claimants who register a personal injury claim in relation to disability are not centrally recorded. We also consider it likely that claimants pursuing a personal injury claim are more likely as a result of the relevant injury to have a physical or psychological disability when compared to the general population.

The Government is also working with the relevant interested parties to ensure that users who have difficulty engaging with digital services are provided with appropriate support designed to prevent them from being excluded, and enable them to secure access to justice.

Harassment and victimisation

The Government does not consider there to be a risk of harassment of victimisation to those with protected characteristics as a result of the implementation of these proposals.

Advancing equality of opportunity

Consideration has been given to how these proposals affect the duty to have due regard to the need to advance equality of opportunity; by removing or minimising disadvantages suffered by people due to their protected characteristics; by taking steps to meet the needs of people with protected characteristics where those needs might be different to those without protected characteristics; and by encouraging people with protected characteristics to participate in public life.

We do not consider that the proposed changes provide any particularly significant opportunities to advance equality of opportunity. The reforms allow for an appropriate level of compensation to be paid to all claimants with injuries that cause future financial loss through the application and regular review of the rate under a suitable methodology, involving the setting up and use of an independent expert panel of advisers. All of these measures will continue to help ensure the needs of claimants are met, including those with physical and psychological disabilities from personal injury.

The Government will work with key stakeholders from across the personal injury sector, including interested advice agencies, to develop a system that will provide the necessary support for claimants pursuing a PI claim as a litigant in person. This will include greater use of assisted digital support measures, the use of which help ensure access to justice is maintained for all claimants.

Fostering good relations

The Government considers that it is unlikely that there will be a particular impact on fostering good relations between people with protected characteristics and those without protected characteristics from these proposals.

Conclusion

The reforms are likely to produce a relatively higher discount rate than the present law. The proposals will therefore be likely to reduce the amount of compensation that claimants receive unless they can demonstrate that a different rate should apply (scope for which is preserved in the proposals). Many of the recipients of the awards of damages will have a physical or psychological disability, albeit most of them would not have had such disabilities before their injuries. Also, certain injuries are more likely to affect some parts of the population more than others (e.g. road accidents and young male drivers). Overall, however, the reforms will result in damages awards that are fair between claimants and defendants in providing 100% compensation, neither more nor less, for the wrongful injury.

Having considered the equalities impacts of the proposals for these reforms, we do not consider that they will result in any unlawful direct or indirect discrimination for the reasons mentioned above. There are some areas where the advancement of equality is a likely consequence of the changes; and we will continue to make the necessary reasonable adjustments for claimants with disabilities to maintain access to justice. We therefore continue to consider that the proposed reforms are consistent with the PSED.

As mentioned earlier, the rate will be reviewed at least every three years, which is likely to lead to a more accurate rate that is fair to both claimants and defendants.

Alternative format versions of this report are available on request from damagesdiscountrate@justice.gov.uk.