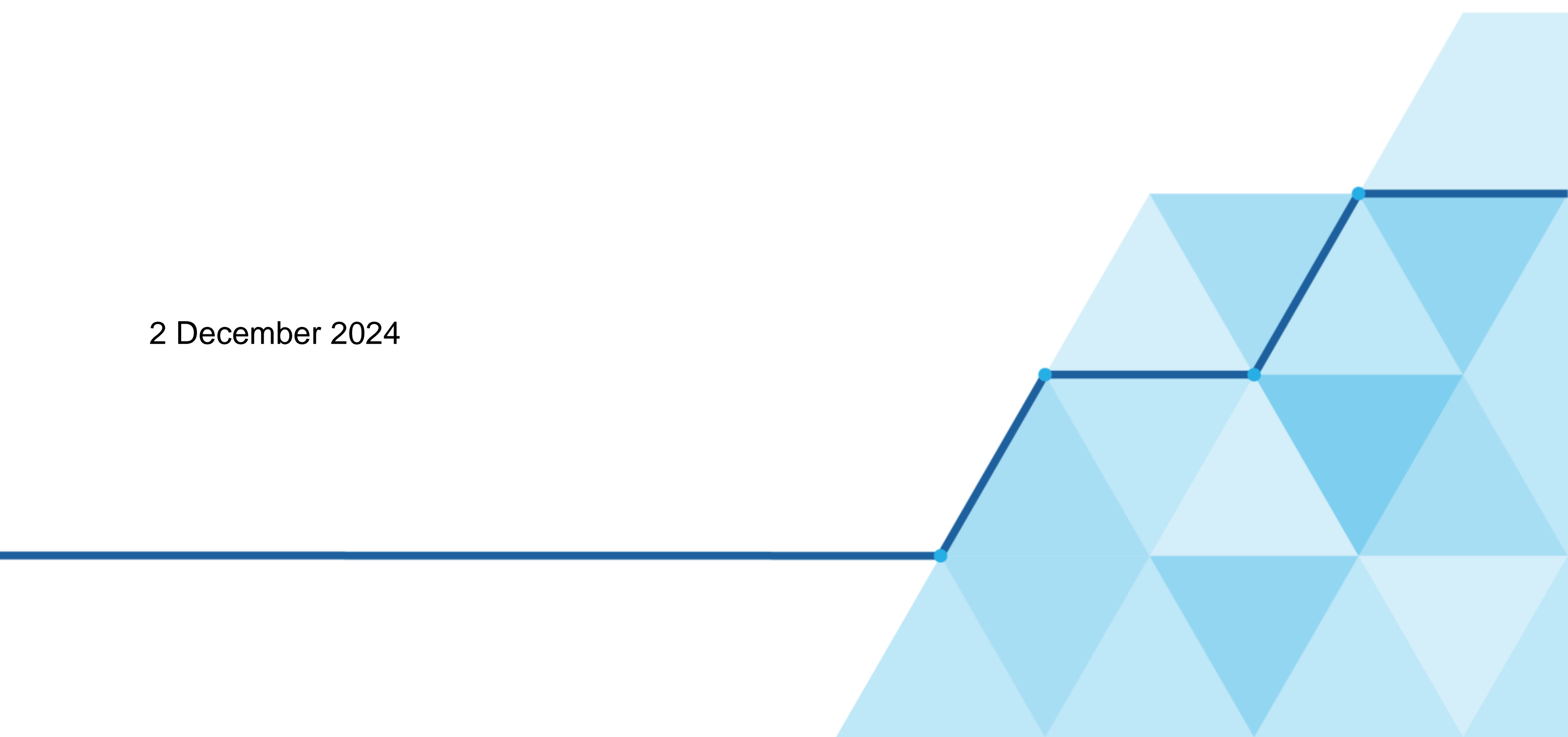
Ministry of Justice

Setting the Personal Injury Discount Rate: A call for evidence

Government Response

2 December 2024



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https://www.gov.uk/government/calls-for-evidence/setting-the-personal-injury-discount-rate/setting-the-personal-injury-discount-rate-a-call-for-evidence

About this Call for Evidence response

To: All stakeholders with an interest in the setting of the personal injury discount rate.

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This report is also available at https://www.gov.uk/government/calls-for-evidence/setting-the-personal-injury-discount-rate

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Background

The Call for Evidence paper 'Setting the Personal Injury Discount Rate: A Call for Evidence' was published on 16 January 2024 and closed on 9 April 2024.

The Lord Chancellor is responsible for setting the discount rate, which is used to determine lump sum damages awards to claimants who suffer a serious personal injury. This will be the first personal injury discount rate (PIDR) review in which an independent Expert Panel, required under provisions in the Civil Liability Act 2018 (CLA 2018), has provided advice to the Lord Chancellor ahead of any new rate being set.

The Expert Panel for this review was appointed by the Lord Chancellor in June 2023, with the Ministry of Justice providing a secretariat function. The Ministry issued this Call for Evidence on behalf of the Expert Panel.

Evidence on the following issues was sought to inform the setting of the discount rate:

- Claimant universe;
- Inflation;
- Investment;
- Taxation;
- Dual or Multiple Rates;
- The availability of Periodical Payment Orders, and
- Any other considerations that should be taken into account in this process.

This report summarises the evidence submitted by respondents to the Call for Evidence. The Ministry is grateful to all those organisations and individuals who have shared their expertise and experience in their submissions.

Responses to this Call for Evidence have been shared with the two statutory consultees to the review – the Expert Panel and HM Treasury – and have been used to inform their advice to the Lord Chancellor. The responses have separately been considered by the Lord Chancellor.

The Ministry of Justice had previously conducted a Call for Evidence between 17 January and 11 April 2023 to explore the pros and cons of adopting a dual/multiple PIDR which was committed to by the then Lord Chancellor in 2019. Data obtained from that Call for Evidence has also informed this review.

An Impact Assessment accompanying the Lord Chancellor's determination of the PIDR, which takes account of evidence provided by stakeholders during the review period, was published on the same date as this Summary of Responses.

A summary of respondents by sector is at Annex A.

Summary of responses

Question 1: Please provide evidence relating to the numbers of claims split by value and length of awards (By length we mean the period damages were awarded for in the damages schedule and therefore the period of time a claimant will invest their award. Preferably split into periods of 10, 20, 30, 40, 50, 60, 70, 80+ years).

1. Only a small number of respondents, generally the sectoral representative bodies, were able to supply the requested data; most respondents were unable to do so. Furthermore, many individual respondents simply drew on the data supplied by their own sectoral representative group in their individual responses, though some respondents also supplied small samples of data based on the experience of their clients. Where more comprehensive data was supplied it covered different time periods, sample sizes and claim amounts, leading to difficulties comparing the data.

2. Financial advisor respondents generally said that they have no centrally recorded information on the number of claims split by value and length of awards, other than anecdotal evidence from their own experience of advising on the financial and investment affairs of their PI clients. Those financial advisors that submitted data were only able to provide data based on limited sample sizes that were too small on which to base any conclusions.

3. Likewise, several compensators provided evidence based on their own direct experience of settling claims. For example, one insurer suggested that their data showed that less than 1 per cent of claimants had an expected investment period of under 10 years, while over 90 per cent had one greater than 20 years and 80 per cent had life expectancies of over 30 years at the date of settlement.

4. The most comprehensive claim data supplied covered the period from the last resetting of the rate in 2019 to the end of 2023. This data, which was supplied by one of the main representative bodies, was for claims worth £250k and above. Among the data supplied was the age distribution of claimants (this was presented in a similar way to the claim duration data requested), claimant gender and claim type (e.g., motor, employer liability, etc.) with some data being provided by both the total cost and the volume of claims. This data also provided information on the proportion of total awards which were subject to the PIDR.

5. This data source suggested that the bulk of claims in terms of volume involved those for claimants aged between 20 and 60 years, with a slight skew towards the higher

end of this range. However, larger claims tended to be more associated with those towards the bottom end (e.g., around 45 per cent of the total value of claims involved those aged between 20 and 39 years).

6. By both claim numbers and claim values, this data source suggested around 70 per cent of claimants were male while around 30 per cent were female. Likewise, over three quarters of claims by both volume and value were associated with road traffic accidents, with public and employer liability claims combined making up the rest (the nature of this data source meant it did not explicitly include claims for clinical negligence injuries). Finally, this data source suggested that the proportion of the award that was subject to the PIDR rose with the total amount of the award, with this proportion increasing from 32 per cent for awards worth a total of between £250-500k to nearly 80 per cent for those worth a total of £5m or more.

7. Another representative group supplied data for a sample of cases worth more than £500k for the period 2022-23. This data included material on size of award (with or without a Periodical Payment Order (PPO) or accommodation costs) and expected duration of claim. This data suggested just under 40 per cent of the claims included were worth a total of £1m or less, with a slightly smaller proportion being for between £1-3m. Of the remaining awards, the bulk were for between £3m-£10m with a small number (around 6 per cent) worth above this figure (i.e., £10m and above). However, when expressed in terms of the value of the awards, these proportions were significantly reversed: in total value terms, claims worth £3m or less comprised around one-third of the total while those worth over this amount accounted for around 70% of total payments.

8. In terms of the expected duration of claims, this data provided ranges in 10-year bands from 1-10 years to 60-70 years based on life expectancy. Within this, the 20-30 and 40-50-year bands were the largest (at about 20 percent each of the 100 awards considered) while the 1-10 and 50–60-year bands were the smallest (both were under 10 per cent of the claims included). When this data was summarised, the mean length of a claim was 36 years while the median was 35.

9. Finally, and given the uneven nature of the available date, some claimants expressed concerns about the volume and quality of the evidence available and the ability of the Lord Chancellor to make a proper evidence-based decision on it.

Question 2: In relation to the evidence you have provided for Question 1 above, please provide details on the split between:

a) The various heads of loss i.e., the value of different components in claimants' damages schedule such as care management and care costs (and how these change over time);

b) The shape of these heads of loss before allowing for inflationary increases i.e., flat, increasing or decreasing; and

c) The term over which these heads of loss are awarded i.e., for life or a fixed period.

10. As with the previous question, many respondents were not able to provide information on heads of loss due to their role in the claims process.

11. Among those respondents who did provide information, various heads of loss were suggested. While individual lists differed, the following were usually included: care and case management; lost future earnings; accommodation; prosthetics, aids and equipment; therapies, transport; deputyship/Court of Protection fees; sundry (e.g., gardening, holidays, DIY). In addition, specific heads of loss were also mentioned for particular types of injury (e.g., amputation, paraplegic/tetraplegic, brain injury, permanent vegetive state).

12. In addition, only a few respondents provided detailed splits of the way in which awards were allocated between different heads of loss. In part, this was because each claimant will be different in terms of their injury (both in terms of its type and severity) and other personal circumstances (e.g., the claimants age and occupation). Likewise, this distribution could be affected by whether a PPO had been made (usually for care and care management costs). However, the main reason given by most respondents for not providing detailed breakdowns was that, and especially where claims were settled outside of court - which accounted for the vast majority of cases - either via negotiation or a joint settlement meeting, settlements were generally agreed on a 'global' basis without detailed schedules of loss being prepared for particular heads. As such, most respondents who did provide evidence stressed that such splits were essentially provisional. However, all agreed that care and case management costs usually represented the largest head of loss.

13. The most comprehensive data on how awards were split between different heads of loss came from the representative body responses referred to in the previous answer. One of these responses broke down the allocation of awards between three broad headings: care costs, loss of earnings and other future losses, and showed how these varied with total award size.

14. This analysis suggested care costs increased with the size of the award and, as was noted above, this was consistent with statements made in several other responses. Hence, of the element of the award which was subject to the PIDR, the care cost element rose from just over 20 per cent for the smallest awards (i.e., those worth between £250-500k) to nearly 60 per cent for the largest (claims worth £5m and above). Conversely, the share allocated to lost earnings fell with the size of the award subject to the PIDR with it comprising around 10 per cent for the largest awards and around 40 per cent for the smallest. Finally, and with the exception of the lowest value awards, the amount allocated to other future losses was broadly stable at around 30 per cent.

15. The other main data source referred to in the previous question, while based on a smaller number of claims, provided a more disaggregated breakdown of awards by heads of loss. After removing accommodation costs, the two main heads of loss were care costs (55 per cent) followed by earnings (17 per cent). Of the remaining heads – medical, aids and equipment, prosthetics, travel and transport, holidays, deputyship and 'other' – each one varied between 3 and 7 per cent of an award.

16. In terms of how these heads of loss were expected to evolve over time, this was mainly seen as being influenced by each claimant's particular circumstances. However, the evidence suggested that most heads were expected to be generally flat or rising slightly, before allowing for inflation, except where deterioration in a claimant's condition was expected. Hence increasing age and severe, or certain types of, injury were seen as leading to care costs rising over time. Future earnings were generally seen to be flat unless there was clear evidence that the claimant would have had career progression in the absence of their injury.

17. Finally, in terms of the period for which a head of loss was awarded, this was generally for life, but where this was not the case, for a fixed period which matched the expected duration of the loss (e.g., lost earnings for the claimant's expected working life). Likewise, the frequency for when a need arose could also vary: some needs, like care, are an annual expense whereas other, like aids and equipment, prosthetics and adapted vehicles, usually involved periodic cycles of replacement.

Question 3: Based on the evidence supplied in 2018/2019, the Government Actuary's advice to the Lord Chancellor assumed the representative claimant invested over a period of 43 years. Does 43 years remain a suitable assumption (please explain the rationale and evidence for your response)?

18. There were two main positions among those respondents who answered this question. One, adopted by a majority of compensators, was to use data on the duration of claims directly to estimate term length. Conversely respondents from the claimant side were more likely (along with some compensators) to cite general demographic data on life expectancies. The result was that compensators argued that the 43 years used previously remained the correct assumption or, indeed, was the *minimum* figure that should be used whereas those on the claimant side suggested that the average term would be shorter. The latter also tended to note that recent estimates of life expectancy had fallen due to the Covid-19 pandemic. In addition, a majority of respondents noted that there was likely to be a reduction in life expectancy for most cases involving severe injury.

19. A small minority of respondents provided evidence that more than half of their clients have a life expectancy of 43 years or above. However, one defendant respondent also highlighted that life expectancies alone do not dictate the whole of a claimant's investment period and that a comprehensive assessment must consider a range of factors, for example, the process of finding, buying, and adapting a home. Other respondents stated that it is common for clients to keep most or all of their

compensation on deposit in the bank often for several years before investing. Another respondent argued that a period of at least 2 years should be deducted to allow a reasonable period for most of the claimant's damages to be invested.

20. Therefore, some respondents suggested that the assumptions underlying any modelling relating to the expected investment period should reflect the real-life behaviour of seriously injured claimants. As a result, and for some respondents on the claimant side, as well as one compensator, it was suggested that the starting point should be a median life expectancy of between 30 and 40 years. However, another claimant respondent presented data which suggested that more than half of their clients were expected to have an investment period of less than 40 years.

21. In summary, a significant minority of respondents agreed that the average life expectancy for all claims remained around 43 years. Some argued that it therefore remains a suitable assumption based on (i) the typical investment period for a lump sum award of damages and (ii) the average period of loss or life expectancy for an individual receiving damages, while others argued for reductions as detailed above.

Question 4: Are there any cohorts of 'alternative representative claimants' that you believe have characteristics which are materially different from the representative claimant defined above, and who should therefore be considered separately when modelling claimant outcomes? Please define the characteristics of these cohort(s).

22. Many respondents either did not identify any alternative representative claimant groups or argued that doing so might be counterproductive. Having said this, various suggestions were made by respondents as to claimant groups whose circumstances might differ significantly from others to potentially warrant more specific analysis.

23. In general, insurers did not believe that there are any cohorts of 'alternative representative claimants' which should be considered separately when modelling claimant outcomes. They suggested identifying the 'representative claimant' necessarily takes the characteristics of all claimants into account, and they were not aware of evidence that any particular types of claimants are routinely under-compensated. Therefore, insurers noted it would not be necessary to, or that there would not be value in, considering any cohorts of 'alternative representative claimants' separately.

24. Insurers also argued that, were such cohorts applied to each claimant, this could increase legal costs and could increase the potential for satellite litigation, due to the need to determine which definition applied. They argued for maintaining the current approach, which serves all representative claimants by considering the broad range of characteristics within the entire claimant population.

25. Many respondents on the claimant side broadly agreed with above. However, some defendant, claimant and financial respondents argued there are cohorts of

‘alternative representative claimants’ who have characteristics that are materially different from the likely representative claimant and should therefore be considered separately when modelling claimant outcomes. These include but are not limited to:

- Claimants with very short life expectancies: this includes individuals who have limited life expectancies due to existing medical conditions or their age at the time of assessment. It was argued that such claimants are likely to invest their damages differently compared to the "representative claimant" due to their limited time horizon. These claimants are often those with significant care needs and a life expectancy of 10-15 years.

- Claimants with very long life expectancies: this group comprises individuals injured in utero or infancy who are otherwise expected to have a normal life expectancy. They would need to invest their damages over a much longer period to ensure funds last throughout their lifespan, and it was argued that this necessitates different investment strategies.

- Claimants without certain significant heads of loss: these are claimants who cannot recover damages for certain significant losses, such as those beyond retirement age who will not receive damages for lost earnings, or those with a substantial loss of earnings but no care needs. It was argued that their investment strategies will differ as they do not have to manage certain types of compensation.

- Claimants with significant shortfalls in award due to contributory negligence: it was argued that claimants facing a considerable deduction for contributory negligence will need to stretch their awarded damages to cover their needs, influencing their investment approach differently than the "representative claimant."

- Claimants with significant pre-existing conditions: this includes claimants with pre-existing conditions unrelated to the negligence claim, such as those with learning disabilities living in sheltered accommodation. It was argued that their pre-existing conditions will impact how they need to invest and manage their damages.

Question 5: Where available please provide evidence or data on actual mortality experience relative to claimant life expectancy when awards are granted.

26. Claimant and defendant respondents both highlighted that The Civil Liability Act 2018, Part 2, Section 4(2)(b) and (c), restricts the Lord Chancellor to setting the discount rate based on losses occurring within the period for which damages are awarded. This means that no damages are provided for losses beyond a claimant’s life expectancy as determined at the time of the award. However, it was generally

understood that there is always a risk that a claimant may outlive their projected life expectancy.

27. Both claimant and defendant respondents noted there is no routine collection of data comparing actual mortality to the life expectancy estimates used in awards, and that gathering reliable data of this nature would require a long-term, well-funded research initiative. Furthermore, insurer respondents said that, as most claims are settled on a lump sum basis with no further interaction with the compensator, they had no useful information on actual mortality experience that would be relevant to setting the discount rate. However, insurer respondents believed that there is no reason to suggest that there is a significant discrepancy, of either bias, between the life expectancies assumed when awards are granted, and actual mortality experience.

28. Some compensator respondents were able to provide data on actual mortality experience, relative to claimant life expectancy when awards were granted, in relation to cases where the settlement involved a PPO. This is because where a PPO has been awarded the compensator retains contact with the claimant for the entire length of their award, unlike non-PPO settlements which are made on a full and final basis, with no subsequent contact between compensator and claimant.

29. However, responses from a few insurers indicated that they have only a small portfolio of PPO claims, and that these small datasets did not contain evidence of claimants living beyond the projected life expectancy.

30. Several respondents, mainly financial advisors, referred to the use of the Ogden tables, based on average life expectancies. They said we can assume that approximately half of all claimants will live longer than predicted, and that this leads to specialist investment advisers routinely recommend strategies that account for the possibility of extended longevity. Their argument was that prudent investment advice is necessary to manage this longevity risk, which should be factored into the portfolio composition.

31. Some respondents also noted, however, that where a particular injury was associated with a reduction in life expectancy at the time of settlement, that this was considered when determining the expected term of the award.

Question 6: Please provide evidence of the rates of inflation which apply to claimants' damages overall and split by different heads of loss (including any projections of damages inflation produced for other purposes – such as reserving at an insurance company).

32. Most respondents did not answer this question and, of those that did, some discussed specific inflation *measures* whereas others also mentioned likely inflation *rates*. Many agreed that different inflation measures were used in the calculations of

future losses for different parts of the award, although it was also suggested that, in practice, a composite measure was used for the award as a whole. Overall, most respondents suggested that longer-term measures of inflation were to be preferred.

33. Several responses included a critique of various inflation measures, especially RPI (which, whilst it was still used for some heads of loss, was seen as an unsuitable measure and not a 'national statistic'). However, a majority of responses agreed that two inflation measures were relevant to determine damage inflation: ASHE or AWE for those losses which were expected to rise with earnings, and CPI for those losses which normally rise with consumer prices. Therefore, the overall rate of damage inflation would reflect the composition of the individual's lump sum.

34. In terms of losses cited as expected to rise with earnings, these included lost future income and care and case management (although there were some differences over whether national or regional trends were relevant), various forms of therapy and the costs associated with the Court of Protection and deputyship (as this could require employing someone to act on the claimant's behalf). Of the heads which rose with consumer prices, these were held to include aids and equipment, assistive technologies and transport. Some claimant representatives also argued that prosthetics would rise at a rate higher than both because obsolescence would mean obtaining direct replacements would become harder and more expensive over time.

35. In terms of the split of awards by the appropriate inflation measure, some responses on the compensator side (but not all) suggested that this would be around half and half for awards which did not include a PPO (i.e., 50 per cent earnings-related and 50 per cent consumer price related). The evidence submitted by one respondent suggested that other than for the smallest awards, the share likely to be subject to earnings inflation would be a *minimum* of around 70 per cent due to the share of care costs and future lost earnings in the total award.

36. On the claimant side, the main data submitted suggested that the earnings-related share could be around, or above, 80 per cent, in part due to the inclusion of Court of Protection costs. However, the description of some of the heads of loss meant it was unclear which type of inflation measure would be appropriate. This response also suggested that, where a PPO was not present, the earnings-related share could rise to over 90 per cent, falling to around the low 60 per cents where a PPO was made.

37. While insurers cited research suggesting real wage growth was likely to run at 1.25 per cent in future years, some claimant respondents suggested that earnings growth could be as high as 2 per cent per annum. Questions were also raised about whether recent trends in both earnings and price inflation were representative of longer-term trends due to the impact of Covid-19, the UK's exit from the European Union and the ongoing war in Ukraine. Overall respondents accepted there was significant uncertainty in this area.

38. Finally, in terms of damage inflation rates, there were a variety of rates suggested. Some insurers suggested that CPI+0.6 per cent would be an appropriate rate of damage inflation to apply to all claimant costs (although this appeared to be based on the 50:50 split described above) while other respondents suggested a figure of

CPI+1 per cent which was similar to the rate used in 2019. One claimant lawyer respondent suggested that CPI+1 per cent is the minimum inflation rate that should be used for claimants' long term needs for specialist goods and services while longer term and larger claimants could potentially face a rate of damage inflation of around CPI+1.25 per cent per annum.

Question 7: Please provide evidence of whether these rates of inflation are linked to defined inflationary measures such as RPI, CPI, CPIH, AWE, ASHE 6115 (or other); and what the reasons for such linkages are.

39. Many claimant, defendant, and insurer respondents suggested that there is a well-established practice, established in case law, for linking future care and case management losses to wage inflation. They suggested care and case management should be linked to ASHE 6115 as this reflected wage-related inflation that is specifically related to the care sector. Likewise, ASHE 6115 is also recognised and accepted by the courts for indexing carers' wages in PPOs. The indices used in PPOs are based on expert advice and have also been scrutinised by legal teams and the courts. It was believed that this ensures the chosen indices accurately reflect the inflationary pressures relevant to the specific types of costs incurred by claimants.

40. In terms of the claimant's lost future earnings, some claimant, defendant, and insurer respondents suggested these should be indexed to AWE (i.e., a general measure of changes in average earnings). Conversely, other respondents suggested that one option, which may be more difficult to implement in practice, would be to use the ASHE category that most closely matched the claimant's profession or grade, as this would be closer to the earnings inflation relevant to that specific claimant.

41. Many respondents viewed CPI as appropriate for heads of loss related to price inflation when setting discount rates. As with responses to Q6, several respondents suggested that CPI was a more appropriate benchmark compared to RPI, particularly for general damages and other heads of loss, although there was also evidence that RPI was still used in some cases. Respondents also stated that RPI has been criticised for its inaccuracies and is no longer regarded as a reliable measure of inflation. As it has lost its status as a National Statistic and is generally discouraged for use, it was suggested CPI and CPIH are preferred as they are seen as more accurate representations of the general cost of living.

42. However, one respondent suggested CPI data may not accurately predict future expenses related to ongoing medical treatment, rehabilitation, and other long-term needs resulting from personal injury. This is because they noted medical and care costs often rise faster than general inflation rates captured by CPI.

Question 8: Is the 2019 position that the representative claimant's damages are inflated at a rate of CPI+1% (as shown in paragraph 28 above) on average still a suitable assumption and if not, how would you change it (please provide evidence/reasoning for your response)?

43. Several respondents dealt with this issue in their responses to questions 6 and 7. Some respondents, however, used their response to this question to raise factors relating to the last five years which might impact on the rate of damage inflation.

44. For example, one financial sector respondent stated that, while austerity measures had a role in limiting wage growth in the care sector, there had been a sharp rise in inflation since 2022. Some respondents recognised the role of the war in Ukraine as a major factor here. Likewise, other respondents recommended a damage inflation rate higher than CPI+1% for care costs to reflect the higher wage growth in the care sector and the increasing difficulty in recruiting and retaining carers. The role of Covid-19 and the UK's exit from the European Union were also mentioned.

45. Some insurer respondents contested the 2019 position that the representative claimant's damages should be inflated at a rate of CPI+1%. They mentioned the Government Actuary's Department's (GAD) use of long-term data dating back to 1970 in arriving at this figure, which included periods of varying earnings growth. They questioned this historic approach on the basis that recent trends show lower wage inflation, meaning that forecasts, rather than past trends, were more relevant for future earnings predictions. As GAD had assumed that earnings inflation would exceed CPI by 2% per annum on the above basis, leading to the CPI+1% assumption, insurer respondents stated that more recent data suggest an earnings inflation assumption of 1.25% is more appropriate, implying that CPI+1% might be too high. These respondents also suggested that an excessive focus on short-term economic factors, which could be more volatile, may lead to over-compensation, and that were current high inflation to normalise this may lead to inappropriate assumptions on earning inflation.

46. As noted above, one insurer respondent referred to research which they had commissioned which suggested a lower rate (between CPI+0.5% to CPI+0.6%) might be more appropriate for damage inflation. On this basis, they argued that the 2019 assumption of CPI+1% had been overly prudent. However, as was also noted above, this analysis was based on the 2019 GAD assumption that earnings-related and price-related heads of loss comprised 50 per cent each of a lump sum award although their own evidence on this issue, and that submitted by other respondents, suggested that the earnings inflation related heads were dominant.

47. Conversely, claimant respondents, some insurers and financial advisors stated the specialist nature of disability aids and equipment, and the increasing costs of bespoke assistive technologies could mean that in future years even CPI+1.5%

might be an underestimate, suggesting that a higher rate of damage inflation such as CPI+2% might be necessary to accurately reflect future costs changes.

48. In summary, there was a clear disagreement between claimant and defendant respondents on whether CPI+1% remains a suitable assumption for inflating the representative claimant's damages.

Question 9: What asset classes should be included in a "low risk" portfolio, and are there any asset classes that are not generally available and/or suitable for personal injury claimants (please provide reasoning and/or evidence in support of your views)?

49. Many respondents from across sectors stated that the asset classes used previously, as shown in Table 1 of the Call for Evidence, remain appropriate.

50. The following asset classes were stated as appropriate for a "low risk" portfolio by most respondents from across sectors. A large minority of respondents split these into low and high risk components of an overall "low risk" portfolio, while others referred to matching and growth components.

- Low risk components (matching):
    i. cash and cash equivalents
    ii. index-linked gilts
    iii. bonds
- High risk components (growth):
    i. global equity indices e.g., S&P 500
    ii. equities
    iii. alternatives

51. Some respondents suggested appropriate alternative assets might include:

- property
- infrastructure
- private equity
- hedge funds
- commodities

52. The following asset classes were stated as not suitable for personal injury claimants by a small minority of respondents from across sectors, in some cases just one

respondent: complex financial instruments e.g., derivatives, hedge funds, collectible assets, Venture Capital Trusts (VCT), Enterprise Investment scheme (EIS), alternatives, while others included them.

53. Many responses to this question from across sectors referred to cash reserves, often in addition to comments on a "low risk" portfolio. Many respondents stated that cash would only be held to cover immediate needs and that the rest of the lump sum would be held in a "low risk" portfolio. Of those respondents who stated the size of a cash reserve held by claimants, the responses were in the range of 2 to 5 years' worth of damage payments, except for one claimant lawyer that stated this cash reserve to be 30% of the award. It was stated that these cash reserves would be held throughout the length of the award.

54. One insurer stated that pension funds in drawdown, those drawing money from their pension, may have similar investment strategies to personal injury claimants. This suggested that both would need to maintain the value of funds, keep sufficient liquidity to cover short term needs, and estimate the life expectancy of the beneficiary.

Question 10: Please provide any evidence you may have on how low-risk claimants who receive lump sum damages awards are both advised to invest and actually invest over the length of their award (including changes over this time). Information should be provided on:

a) The split between growth and matching assets, as well as specific asset classes;

b) The prevalence of active, passive or semi-passive investment approaches and their resulting impact;

c) Consideration of liquidity risk and/or the prevalence of matching cashflow approaches with the aim of meeting the claimant's income needs as they fall due e.g., through purchase of 'matching bonds' or annuities to provide a more known income stream; and

d) The prevalence of risk management strategies as a claimant's investment horizon changes.

55. A small minority of respondents from across sectors provided small datasets showing their clients tended to have a similar investment approach to the *cautious* portfolio in Table 1. It is important to note the size of the datasets means that they may not be representative.

56. A significant minority of respondents from across sectors, including many defendant lawyers and insurers, stated that most claimants tended to have a similar investment approach to the *less cautious* portfolio in Table 1. A different minority of a similar

size, of respondents from across sectors including many claimant lawyers, stated that most claimants tended to have a similar investment approach to the *cautious* portfolio in Table 1.

57. Some respondents from across sectors stated that claimants with longer investment horizons, due to longer life expectancy, would accept higher risks, and receive higher returns. One respondent stated their support of a dual rate due to this risk and return difference.

58. Of the respondents who provided data most stated that an allocation to cash to meet immediate claimant needs of 2 to 5 years' worth of damages payments may be appropriate, depending on claimant circumstances.

59. Some respondents from across sectors suggested that allocations to cash and lower risk assets would increase as a claimants' investment horizon reduced.

60. A significant minority of respondents from across sectors, including defendant lawyers, stated that largely passive approaches were most appropriate. While a different minority of a similar size, of respondents from across sectors including claimant lawyers, stated that largely active and semi-passive approaches were most appropriate.

Question 11: Do you believe the investment strategy that was assumed to be adopted by the representative claimant in the 2019 Government Actuary's analysis (as described in paragraphs 33 to 36 and Table 1 above), remains appropriate? If not, how would you change it for a current view of the representative claimant or alternative representative claimants?

61. Some respondents from across sectors stated that most claimants tended to have a similar investment approach to the *cautious* portfolio in Table 1. As with the data provided in response to Question 10, it is important to note the size of the datasets means that it may not be representative.

62. Other respondents, also from across sectors, including a majority of defendant lawyers and insurers, stated that most claimants tended to have a similar investment approach to the *less cautious* portfolio in Table 1.

63. Some respondents from across sectors suggested that the strategy for the representative claimant in the 2019 Government Actuary's analysis remains appropriate.

Question 12: To what extent has the way claimants are advised to, and actually, invest been affected by recent changes in economic conditions (e.g., high interest and inflation rates)?

64. Many respondents from across sectors did not answer this question.

65. Some respondents from across sectors, including defendant lawyers, stated that long term investment strategies would be minimally affected, and that most claimants would therefore not be affected.

66. A significant minority of respondents noted potential impacts on claimants' investments due to recent changes in economic conditions. These responses did not extend to the effects on advice received, and actual investments made, by claimants.

67. A small minority of respondents noted that the rise in interest rates will lead to increased use of cash deposits which now provide a greater return with low risk.

Question 13: Please provide evidence which demonstrates how the following circumstances and/or characteristics affect claimant investment behaviours in practice:

a) Size or length of award (including the effect of any interactions between these two variables);

b) Availability of other income, including PPOs;

c) Existence and requirements of financial dependants (e.g., spouse, civil partner, children); and

d) Other factors or characteristics you deem relevant.

68. Many respondents from across sectors did not answer this question.

69. Some respondents from across sectors stated that longer award periods, or the availability of other income, allow greater risk to be taken in investment approach. However, respondents also noted that longer awards require more thinking about how the claimant's condition may change over time, due to the potential variability in claimant needs, and the effect on investment approach.

70. There were varied assessments of claimants' reactions to individual circumstances. For instance, some respondents argued that the existence of dependants may mean that claimants wish to leave an inheritance and take more risk, while other respondents state that claimants may wish to protect dependants' current standard of living, and so invest more cautiously.

Question 14: How have historical changes to the PIDR which impact the size of the award, affected how low-risk claimants have been advised to or actually invest their award (please provide evidence and/or reasoning in support of your answer)?

71. Many respondents from across sectors did not answer this question.

72. Of those of who did answer, most respondents from across sectors, including defendant lawyers, stated that little or no change was observed or expected.

73. Some respondents from across sectors stated that a lower PIDR may lead to claimants investing in lower risk portfolios. This was suggested as being due to larger award sizes reducing the required investment risk to meet claimant needs over time.

Question 15: To what extent do environmental, social and governance (ESG) considerations shape claimants' investment advice and approaches (please provide evidence to support your view)?

74. Only a subset of respondents answered this question, as most stated they did not have direct knowledge of the content of investment advice. In general, these respondents suggested that, while investor awareness of ESG considerations had risen in recent years, there was limited evidence that it had a significant impact on investment decisions.

75. Given the above caveat, the respondents who answered this question suggested that the impact of ESG considerations would: vary between individual claimants and their circumstances; to the extent they do influence behaviour, would be more likely to relate to the choice of investment manager (i.e., to those who could demonstrate that such considerations were more central to their work than those who could not) and not to particular investment products; and that investment managers who focused on these issues might have slightly higher fees compared to those who did not or require higher rates of return to achieve the same level of compensation. However, the evidence suggested that, and some respondents also stated more explicitly, ESG considerations were unlikely to be material for setting the PIDR.

76. Claimant and defendant respondents have acknowledged their limited access to information or data to this question and suggested that financial advisors are more suited to answer. However, claimant respondents noted ESG considerations are always discussed with their clients; yet decisions about investment are driven primarily by need and so such considerations rarely shape the approach taken or are a significant factor in the investment of claimants' damages.

77. Financial advisors suggested ESG considerations increasingly shape claimants' investment advice and approaches as investment managers have now taken ESG considerations seriously and included them in their central investment propositions. As a result, even funds, portfolios, or services not explicitly marketed as ethical or ESG investments often incorporate ESG considerations naturally. However, they understand personal injury claimants may be conscious of ESG considerations but do not always prefer specific ESG funds. They concluded that the extent of ESG considerations varies based on individual preferences and the practical need to balance ethical considerations with financial performance and cost.

78. This sector stated personal injury claimants are generally content with investment managers who can demonstrate that ESG is a key consideration in their central investment proposition. This is demonstrated in discussions about ESG preferences which occur with the individual claimant or a professional appointed on their behalf. For example, if a claimant has ethical, religious, or ESG preferences, these are considered in the investment advice and approach, which might involve avoiding certain assets or asset classes and ensuring a well-diversified portfolio. However, financial advisors understand the primary implication for claimants with ESG preferences is the typically higher fund costs associated with ethical or ESG investments, as it places a greater burden on the claimant's capital to provide sufficient growth to justify the additional costs.

79. Insurer respondents referred to commissioned evidence to support their view that, while ESG factors are becoming more integrated into mainstream investment strategies, their influence on the specific context of personal injury compensation investments is limited.

Question 16: Please provide any evidence available on the type and level expenses faced by claimants, assuming a low-risk investment portfolio is adopted. Respondents may wish to follow the grouping at paragraph 39 above and should add any other investment related expenses they believe are relevant. Answers should, where possible, highlight any differences in expenses due to the:

a) Size of claimant award;

b) Adoption of a passive or active investment approach; and

c) Claimant time horizon (and how this changes over time).

80. There was a general acceptance among respondents that the higher the award size the lower the percentage investment management fees, due to economies of scale. Thus, financial advisor fees and platform fees as a percentage of the fund size could be expected to fall as the absolute amount under management increased.

81. Respondents noted that the adoption of a passive approach would lead to lower costs than an active approach, but there was debate as to which strategy is most appropriate and most often used in practice. Claimant representatives and a financial respondent suggested active management strategies are necessary to offset loses that would hit passive management portfolios due to market falls. However, this response suggests that such an active strategy would raise the overall rate of return on the investment and so could be expected to pay for itself.

82. Likewise, other claimant representatives argued that fees incurred are in the region of 1.5% and above. This was suggested as being the result of an active, or semi-active investment approach, which it was argued was necessary due to the situation

of claimants (e.g., many claimants face uncertainty about the progression of their condition). One respondent stated that they advised claimants to be prepared to pay higher management fees as they might require specialist investment advice.

83. Some defendant representatives argued that higher investment returns largely offset any fees paid and therefore the 0.25% to 1% range is appropriate (with an emphasis on the lower end of this range), although no data was provided to support this. Likewise, it was also suggested that the typical fund size was one where investment management fees would be minimised but, again, no supporting evidence was supplied. Insurers state that passive management approaches are most appropriate, but with active management approach any fees are paid for by higher returns.

84. There were few comments on time horizon and no clear conclusion from those responses, although one respondent argued that awards for longer periods may require more active management to protect against market volatility over time.

Question 17: Do the expense groupings, values and approach assumed in the 2019 analysis, as set out in Table 2 above, remain suitable for the representative claimant (or alternative representative claimants)? If not, what do you deem appropriate? Please provide evidence and/or rationale to support your answer.

85. Several respondents provided evidence in relation to this question although there were noticeable differences in that provided by claimant and compensator representatives.

86. Overall, respondents agreed with the expense types identified by GAD – financial advisor, investment management and other/platform fees - however claimant representatives contested the assumption of a passive management strategy and therefore the appropriateness of the charges associated with this approach.

87. The suggested values for adviser fees were generally in line with those given in Table 2 of the CfE document. There was also general agreement that claimants would require a significant degree of advisor support. Thus, one respondent on the compensator side quoted evidence that 'the nature of a representative claimant's circumstances is such that a comprehensive ongoing service from a regulated advisor is required. This service would involve regular updates on the claimant's financial position, cashflow planning and investment strategy advice as a minimum, with the cost of such advice put at typically around 0.5 per cent of the fund size.

88. It was also suggested, and evidence was provided in support, that the level of the financial advisor fee would decline with the size of the award under management. However, evidence was also provided that VAT would be payable on such fees, although this might depend on the precise relationship between advisor and client. Thus, where payable, VAT would raise the typical financial advisor fee noted above from 0.5 per cent to 0.6 per cent per annum.

89. The evidence concerning the likely levels for platform fees were generally in line with Table 2 (i.e., 0.1-0.3 per cent of the fund size depending on the size of the sum under management with larger sums incurring lower costs). However, there were disagreements concerning the costs of fund management and especially discretionary fund management for where an active management approach was deemed necessary. Thus, some claimant lawyers suggested that discretionary fund management raises expenses above the level in Table 2, with these adding around 0.5-0.7% compared to a passive approach.

90. However, other respondents submitted evidence that suggested, assuming a passive management approach was appropriate, that the costs of fund management could be low and possibly slightly lower than the figures used in 2019. Thus, one insurance respondent cited evidence from an investment advisor that passive fund management fees could now be as low as between 0.1-0.15% of the fund under management. It was noted that VAT would not normally be payable on the fees paid for fund management.

91. Some respondents also mentioned other, relatively minor, fees. These included Stamp Duty Reserve Tax and dealing costs, although the magnitudes involved were generally not large and would also be dependent on the investment management approach used. One insurer also raised the potential costs to claimants of obtaining appropriate tax advice.

92. In summary, and while responses from both sides broadly agreed with the figures in Table 2, there was a clear divide in responses to this question. While there was not unanimity on either side, compensators tended to argue for figures at, or even somewhat below, the lower end of those provided in Table 2, in part because they suggested many fees would ‘pay for themselves’ and because the size of the fund under management would be where these fees were likely to be at a minimum level.

93. Conversely, several respondents on the claimant side took the opposite view, mainly because they did not agree that passive fund management was appropriate. Hence some respondents gave estimates for total investment charges as typically ranging between 1.5 - 2% for an active approach. However, some disputed the fees for even a passive approach. For example, one financial respondent stated that a fees and tax allowance of 0.75%, as assumed in the 2019 analysis, was at the low end of the combined potential range of 0.6% to 1.7%. They instead suggested a figure at the higher end of this range, although this figure included an element of active fund management.

Question 18: What types and rates of taxation typically apply to claimants on their investment returns, and how does the distribution of these vary by size, length of award and remaining claimant time horizon? Please consider a current view of the representative claimant or alternative representative claimants.

94. A number of respondents provided evidence in response to this question. As with investment management fees, there were clear divides between the respondents depending on whether they were represented claimants or compensators. Likewise, while several illustrative calculations were provided, there was little, or no, data provided to justify many of the claims made on tax.

95. All of those who responded argued that taxation will be different based on an individual's circumstances and that any tax liability would reduce over time as the fund is depleted. In general, there was also broad agreement on the types of tax (Income Tax and Capital Gains Tax (CGT)) to which claimants might be liable and the allowances they would be able to claim. Tax allowances mentioned include ISAs (Individual Savings Accounts), annual CGT allowances and exemptions, and income tax personal allowances.

96. However, there were major disagreements between respondents concerning how much tax claimants would be likely to pay. Thus, some respondents on the compensator side suggested the typical claimant would pay little, or no, tax assuming they had been suitably advised (although little evidence was provided in support of this claim, and it was in tension with the claim that the size of the awards would be such that investment management fees would be minimised). Several insurers and defendant lawyers also stated that claimants would typically seek to limit their exposure to tax as much as possible by making full use of their tax allowances and tax efficient investments (e.g., offshore bonds). Finally, some respondents on the compensator side argued that there have been no major tax changes since 2019.

97. Conversely many respondents on the claimant side argued that tax remained a significant factor and had become more important due to recent changes. Thus, while not disputing that claimants would seek to minimise their tax exposure, several such respondents noted that CGT allowances have decreased recently (and were set to fall further), leading to higher tax impacts on claimants. Likewise, Income Tax thresholds have been frozen (and are expected to remain so for several years) which, given inflation, would have the effect of pulling more of a claimant's income into taxation.

98. Where respondents produced tax calculations, these generally supported the fees and tax allowances used in 2019 (although the estimates of the tax drag given by claimant-related respondents tended to be slightly lower as the cautious portfolio from Table 1 was used to calculate returns). For example, one such respondent calculated an annual tax drag of 0.22% of the portfolio value of £1,000,000; and 0.66% of the portfolio value of £3,000,000 with several others agreeing with these figures. There was also evidence submitted that the level of tax drag was likely to increase quite sharply with the size of an award. In general, for those compensator respondents who accepted tax was likely to be an issue, the estimates of the tax drag were quite similar.

99. One insurer representative argued that tax and interest rate assumptions need to take a long-term view, suggesting the current interest rate regime is 'high' and that tax allowances will be adjusted in the future. However, one respondent (an independent economist) took the opposite view, arguing that the long run tax trend will be increasing due to factors such a demographic change leading to higher levels of public spending.

Question 19: How might your answer to Question 18 change if a claimant had other annual taxable income of at least an amount to meet the threshold for personal income tax, or other reasonable level of taxable income? Please support this with any evidence or data on what other taxable income claimants typically have.

100. Most respondents focused their responses on tax on question 18 rather than on this one. As a result, there were only a few responses to this question. These responses generally acknowledged that, where claimants have income in addition to that from their award and their invested award was already liable for tax, this would lead to a higher level of taxation as a larger proportion of income and gains would be taxable.

101. One response outlines an example where a £1 million award initially incurs a £591.50 tax liability. However, with a pension of £15,000 per year, tax liability would increase to £3,066.50 plus CGT impact due to moving beyond the basic bate of tax.

102. One response also suggested that claimants with awards at the lower end of the damages range are far more likely to have additional income sources, undermining the assumption of lower rates of taxation on investment of damages funds.

Question 20: Do you consider that the 2019 deduction for taxation of between 0.0% and 0.5% per annum (based on the initial award value) remains suitable in regard to the representative claimant or alternative representative claimants (please provide evidence and/or reasoning to support your position)?

103. As some respondents, especially on the compensator side, did not consider tax to be relevant based on their answers to the previous question, they did not comment further on whether the suggested tax deduction in 2019 remained appropriate.

104. Some claimant lawyer respondents disagreed that the 2019 deduction remains suitable as they argued claimants will have tax liability of anywhere between 0.2% and over 1%, with greater impact on higher value awards. Conversely some responses from defendant lawyers and insurers agree with the 2019 tax deduction as they argue most claimants will not be paying tax and can make use of options for minimising their tax liability.

105. One financial responder agreed with the deduction for low and medium awards, but not awards over £3million. They suggested that for these awards there is a tax

liability of 0.66% resulting in an additional tax burden of £4,800, which compounded over a 43-year period becomes more significant.

106. There was little or no data provided to justify claims on tax.

Question 21: In 2019, a total deduction for tax and investment management expenses over the term of the award of 0.75 per cent was applied (derived from a range of 0%-0.5% based on the initial award value for tax and 0.6%-1.2% for investment management expenses. Do you think this total deduction and how its elements are combined remain appropriate (please provide evidence and/or reasoning to support your answer)?

107. Given the responses to the previous questions on taxation and investment management fees, there were clear differences by respondent type concerning the total deduction to be made for these expenses.

108. Thus, some insurers and some other compensator representatives argued that the existing 0.75% deduction was either adequate or represented 'over-prudence'. Some of those who expressed the latter view suggested the deduction should be reduced to 0.5%. Conversely claimant-side respondents argued the opposite and suggested that deductions of 1.6-1.7% were the norm, with some suggesting a total deduction of 2.5% might be appropriate in some cases. The reasons for these differences appeared to be the role of discretionary fund management and the claimant's likely tax liability.

Question 22: How much additional complexity or difficulty would implementing a dual rate by duration approach add to the litigation process?

Please provide evidence to quantify this either by time to settlements, additional legal costs and/or any other relevant factors.

109. While there were no specific questions asking whether a dual or multi rate should be implemented, a significant number of the respondents took the opportunity to state their general position on the issue. The vast majority of these respondents stated opposition to a dual/multiple PIDR, and there was negligible support for it.

110. Both claimant and defendant respondents found it difficult to quantify exactly how much further complexity would be added via the adoption of a dual rate by duration. However, the near consensus was that any dual/multiple approach by duration would add further complexity and add difficulty to the settlement and litigation processes.

111. Both claimant and defendant respondents considered that it would be difficult to give exact estimates about the additional time and/or costs involved until the process of implementation was being undertaken. However, there was a near consensus that it would increase costs.

112. While among those who favoured such a system it remained the preferred option, several respondents cited the Ontario system as serving as a cautionary example, illustrating the potential uncertainties and inefficiencies inherent in a dual rate system by duration. It was suggested a dual rate by duration would necessitate the involvement of accountants and economists to perform accurate calculations, mirroring the experience in Ontario where fluctuating short-term rates led to annual recalculations. The necessity of annual reviews for the short-term rate would require repeated recalculations throughout the litigation process causing further uncertainty as well as increased delays, strategic behaviour, and additional costs.

113. Various categories of respondent (claimant representative, defendants, and insurers) raised the concern that any introduction of a discount rate by duration would likely lead to further costs because of potential increased litigation. For example, it would make it harder to predict final settlement amounts due to the unpredictability of future discount rates. This could lead to extended negotiations and discourage early settlements. As a result, additional court hearings would be required to resolve disputes over applicable periods of loss, further delaying case resolutions. Respondents also have suggested this would lead to the increased likelihood of satellite litigation over the application of different rates in various scenarios, increasing both the duration and cost of litigation.

114. A range of respondents, including insurers, claimants, and defendants, also noted the potentially detrimental behavioural impact of implementing this approach, particularly the potential for parties attempting to 'game the system'. Parties might attempt to concentrate losses in the initial lower-rate period or dispute the timing of losses to benefit from a more favourable rate, requiring additional evidence and increasing the time and cost of settlements.

115. Respondents suggested a discount rate by duration would add layers of complexity, requiring multiple rates for different periods (short-term and long-term). Each claim item would need to be recalculated at the switchover point, increasing the risk of errors, and requiring expert intervention to ensure accuracy. Some claimant firms believe more time will be spent drafting Schedules and explaining these to claimants, therefore also increasing their costs.

116. For example, a defendant respondent estimated that each additional month in the lifecycle of a claim incurs significant costs. A traumatic brain injury (TBI) claim could see costs increase by £15,771 for just a three-month delay. Over a nine-month delay, costs for all TBI claims could rise by approximately £4.5 million.

117. A few respondents were sympathetic to the intention that a discount rate by duration would aim to address inflation and economic cycles, however they argued

the frequent changes in rates could destabilise the compensation process and detract from the principle of full compensation.

118. Many respondents expected that implementing this system would require significant updates to IT systems, retraining of legal professionals, and familiarisation with new tables and guidelines. This is believed to require a lead-in period of 3-6 months that would be necessary for these changes, involving substantial costs and operational adjustments as courts would require extensive training to operate under the new system. This could potentially cause significant confusion and delays during the transition period as the court system would face increased workloads due to the more complex nature of claims.

Question 23: Should a dual rate mechanism be implemented, different asset returns would be assumed for the short and long-term. Under this mechanism, what changes to the following characteristics of the representative claimant (or alternative representative claimants) would apply: a) Investment period; b) Damage inflation; c) Investment portfolio; and d) Tax and Expenses assumptions

Investment period

119. Claimant respondents suggested that, while the overall investment term for the claimant does not change, the differentiation between short-term and long-term rates would introduce complexity in determining the appropriate duration for the short-term rate. This determination is believed to be challenging and would require ongoing review. It is expected that a client would invest in lower risk solutions in the short-term order to retain surety of money over the short-term period.

120. If the short-term is considered 0-10 years, respondents suggest it requires more frequent reviews to align with economic cycles. This period's investments would likely be in cash solutions or lower-risk assets such as fixed interest due to their liquidity and low risk.

121. However, insurers believed the investment period for the representative claimant would not be impacted by the implementation of a dual rate mechanism. This is because the investment period is tied to life expectancy, which remains constant regardless of the discount rate mechanism in place.

Damage Inflation

122. The majority of respondents suggested it is difficult to predict inflation over the short-term due to the unpredictability of crises which influence inflation or how long the impact of some recessionary economic cycles can last. For example, one respondent highlighted the recent sharp inflation changes from 2-3% to 10-11%, therefore predicting inflation accurately over short periods is seen as particularly challenging and requiring constant adjustments.

123. However, respondents argued damage inflation is not influenced by the type of discount rate mechanism implemented. It is emphasised that all discount rates, whether short-term or long-term, should avoid accounting for temporary inflationary pressures, such as those currently experienced in the UK. Instead, they should be based on long-term forecasts to maintain consistency and accuracy. For example. predictions of the Bank of England.

Investment Portfolio

124. A switched dual rate model was discussed by respondents as having the potential to better reflect real-world investment practices. Financial respondents typically recommended a diversified portfolio suited to the client's risk tolerance.

125. Short term: the majority of respondents, including defendant lawyers and insurers, believe losses will need to include readily accessible cash reserves and maintain a suitably diverse range of assets and an appropriate asset allocation to minimise the risk to the claimant and require frequent adjustments to reflect the economic cycle.

126. A short-term investment portfolio, which is considered between 0-10 years by many respondents, would likely result in the investment portfolio and returns mirroring those available from cash solutions and lower risk assets such as fixed interest. This could be to reflect the immediate economic cycle. However, respondents did suggest this could be incredibly variable.

127. Long term: some respondents said that portfolios should be appropriately diverse with limited risk but within that, a claimant can have a far higher allocation of equities and still maintain a lower level of risk. For example, claimants could invest in higher-risk assets, such as equities, aiming for better returns. However, towards the end of a claimant’s life or investment horizon, they would need to shift back to low-risk investments to mitigate the risk of downturns affecting their remaining capital. This is supported by financial modelling and expert evidence suggesting that a diversified approach aligns with achieving optimal returns over different periods.

128. Some respondents suggested there is a need for multiple switchovers between investment types (from low risk to high risk and back to low risk), which adds complexity and may be impractical to manage.

Tax and Expenses assumptions

129. Respondents suggested the tax and expenses assumptions would not differ significantly between a single rate and a switched dual rate mechanism.

130. Respondents believed future tax rates to be unpredictable. For example, recent trends, such as freezes in personal allowances and reductions in capital gains and dividend allowances, have resulted in higher tax liabilities for many. This uncertainty complicates financial planning for claimants.

131. Some respondents suggested that tax and management expenses would be less for short-term investment portfolios, which were likely to be lower risk. However, others noted that long-term investments could see their tax expenses mitigated using tax wrappers.

132. Some respondents, from different sectors, believed there would be no changes to the characteristics of the representative claimant as the discount rate is used by lawyers and judges to calculate future losses. They argued that retention of the current characteristics of the representative claimant would ensure consistency, fairness, and predictability in calculating damages awards for personal injury claimants as changes could undermine the integrity and reliability of the discount rate framework.

133. For example, one claimant respondent stated there are numerous other factors which influence the overall damages agreed by settlement or awarded by court. They argued that assumptions adopted in settling the discount rate do not address all the risks the claimant is exposed to nor are those assumptions likely to be accurate for each case.

134. A majority of respondents, particularly insurers, used this question to argue a dual approach by duration would provide parties to claims involving PIDR with more certainty than an approach involving Heads of Loss. However, they used this question to emphasise a dual rate mechanism would introduce significant complexity in managing investments and calculating damages.

Question 24: Should a discount rate by heads of loss be implemented, different damage inflation assumptions would be assumed for different heads of loss. Under this mechanism, what changes to the following characteristics of the representative claimant (or alternative representative claimants) would apply:

a) Investment period (under the single rate methodology, 43 years was previously assumed);

b) Investment portfolio (under the single rate methodology, a 57.5% allocation to matching assets and 42.5% allocation to growth assets was previously assumed. Please refer to Table 1 for full details); and c) Tax and Expenses assumptions (under the single rate methodology, a range of 0%-0.5% based on the initial award value for the former and 0.6%-1.2% for the latter, with a total modelled assumption of 0.75% was previously assumed).

135. The majority of respondents who answered this question indicated that a discount rate by heads of loss was unlikely to have significant impact on the assumed characteristics of the representative claimant. Many took the opportunity to express their opposition to a dual rate by heads of loss, highlighting the lack of evidence for the benefits of this approach and the unnecessary complexity it would entail.

Investment period:

136. Claimant, insurer, and defendant respondents suggested that the assumed investment period under a discount rate by heads of loss approach would largely remain similar to the single rate methodology, as the investment period corresponds to the life expectancy of the claimant (with the exception of loss of future earnings which would typically extend only until retirement age).

Investment Portfolio:

137. It was suggested by some respondents, including financial advisors, defendant, and claimant lawyers, that under a dual rate approach the investment portfolio would need to be adjusted and therefore tailored to the specific inflation rates associated with different heads of loss.

138. However, some insurer respondents stated that the investment portfolio with a heads of loss approach should remain consistent with the requirement of the Civil Liability Act 2018 for the Lord Chancellor to have regard to the actual investments made by investors of relevant damages when setting the PIDR.

Tax and Expenses Assumptions:

139. Various respondents suggested these assumptions are not expected to differ significantly under a heads of loss approach compared to a single rate methodology.

140. It is noted by these respondents, the overall tax liability for claimants could increase if different heads of loss require separate investment management. However, given the cautious nature of the investments assumed for claimants, the overall management expenses are suggested to likely to remain similar to the single rate methodology. This could be because of the use of tax-efficient investment strategies (such as tax wrappers) that will continue to mitigate income and capital gains tax risks over the long term.

141. The following additional points were also made by respondents:

- A heads of loss model was considered by many respondents to be unworkable as there is insufficient evidence from jurisdictions who have implemented it to support this approach.
- However, it was noted that claimant respondents did argue strongly against making a change, because it is considered that a single rate is adequate in ensuring that claimants who have been seriously injured receive appropriate compensation and have their needs met.
- A discount rate by heads of loss is argued to have a disadvantage when compared to a rate by duration relating to compensation for shorter term claimants. A heads of loss model does not account for shorter term economic factors which may affect the returns available for shorter term claimants. Therefore, claimants are less likely to be compensated fairly.

- Like Question 23, many respondents believe there would be no changes needed on the characterises of the representative claimant beyond the points mentioned on the different options for claimants regarding short- and long-term discount rates.

- There were also respondents from various sectors who did not provide an answer to this question or did not answer all parts of this question as they strongly oppose the use of a discount rate by heads of loss.

Question 25: How much additional complexity or difficulty would this approach add to the litigation process, and would this be greater/lesser/about the same as if a dual rate by duration were implemented?

Please provide evidence to quantify this either by time to settlement, additional legal costs and/or any other relevant factors.

142. A heads of loss model was considered by many respondents to be unworkable in practice due to the complexity of this approach. It was also frequently argued that there is insufficient evidence of benefits to justify this approach.

143. Financial respondents suggested this approach would result in greater disagreements between claimant and defendant parties as any move to a dual/multiple rate system is believed to have a greater risk of satellite litigation (and gaming) due to how the different rates might apply in unusual circumstances. It is believed by many respondents, including insurers, that parties may argue for more advantageous discount rates for specific heads of loss. Both claimants and defendants suggested that there would be more litigation, increased costs, and longer settlement times. It was therefore suggested that a dual/multiple rate could be detrimental to the existing issue of court backlogs.

144. It was also suggested that the specific application of different discount rates to various heads of loss may lead to more disputes about which rates are applicable by many respondents. For example, financial respondents suggested it would necessitate a review and possible revision of existing case law, particularly cases that rely on a single discount rate. This legal overhaul is believed to lead to further delays on top of existing ones as courts and legal practitioners adapt to the new system. They have also suggested there would be the requirement for extensive training and updates to systems means that the initial phase of implementing a multiple rate approach would be resource-intensive, both in terms of time and financial investment.

145. Claimant respondents have highlighted the likelihood of disputes over categorising heads of loss and determining applicable discount rates increasing. This could result

in longer claims lifecycles, more uncertainty, and delays in settlement discussions in comparison to a dual rate by duration which is seen as less complex.

146. All sectors of respondents agreed that any shift to a dual rate or multiple rates would require significant additional expert input, from both actuaries and forensic accountants, in respect of making any necessary changes. They suggested this would likely lead to an increased reliance on financial and legal professionals, adding to the overall legal costs, prolonging the litigation process, and introducing substantial complexity.

147. Some noted that cases are generally settled without exact figures being allocated to different heads of loss, and that often negotiations take a pragmatic and proportionate approach by taking damages in the round. Therefore, if asked for their view on the split and the appropriate indices attributable to each, claimant and defendant representatives would likely provide a different set of suggested heads of loss resulting in disagreement, adding complexity to negotiations.

148. There was, in addition, discussion from both claimants and defendants about an inadequate rationale for a heads of loss based approach. Insurers, claimant, and defendant respondents discussed the issue of how suitable heads of loss would be identified (although there was some preference for an 'earnings-based' approach to heads of loss), and the question of inflation and inflationary indices. Disputes about which indices should measure care and earnings is believed to add another layer of complexity and delay, and respondents noted the impact of such a delay compensation for vulnerable claimants, on their financial stability and access to justice.

149. Respondents of many sectors also stressed that a dual rate or multiple rates would require a lead-in time, allowing for appropriate training to take place, as well as the updating of any relevant calculators, publications, and IT systems which would increase the time to settlement.

150. Many respondents, particularly insurers, argued that if a dual rate was to be adopted, a switched model by duration was preferred. It was argued that a dual approach by duration would provide parties to claims involving PIDR with more certainty than an approach involving heads of loss. A heads of loss approach would involve much greater complexity and difficulty to the litigation process as it would require more extensive revisions to systems, processes, and legal practices.

151. Financial respondents have noted adopting a discount rate by heads of loss would share many of the same complexities as a dual rate by duration approach. This is based on both systems increasing disagreements and necessitating expert evidence, recalculations, and a comprehensive review of current systems and case law.

Question 26: Should a discount rate by heads of loss be implemented, do you believe that the concept of modelling one representative

claimant remains appropriate or is modelling a representative claimant for each head of loss a better approach?

152. All respondents who provided an answer were content that modelling based on a single representative claimant is the best approach. Attempting to model a representative claimant for each head of loss is seen as an unachievable level of precision and extremely complicated. Therefore, it would increase the admin burden on the legal/insurance sectors, prolong litigation and lead to disputes over the appropriate modelling approach for each category of damages.

153. Many also suggested it would require extensive data collection and analysis to account for variations in investment periods, portfolios, tax and expense assumptions, and other factors.

Question 27: Please provide any additional evidence you or your organisation may have on the practical implementation of such a heads of loss rate model.

154. Where responses were provided, respondents generally reiterated points made in response to Question 25, regarding the additional complexity or difficulty would this approach add to the litigation process. Additional concerns generally mirrored those expressed in Question 22 regarding the complexity or difficulty of a dual rate by duration approach. For example, respondents cited the frictions of adapting to the new system, IT costs, the risk of increased satellite litigation, additional costs related to financial calculations and recalculating reserves, the inefficiency of deviating from the approach of other UK nations and crown dependencies, and the general complexity and cost of litigation.

155. There was limited evidence submitted regarding the practical implementation of a heads of loss model, as no claims in England and Wales have been settled on those terms.

Question 28: Please provide evidence and/or data to support what heads of loss should be separately identified in such a model.

156. Where responses addressed the question, the consensus was that it would be overly complex to have more than two separately identified categories of heads of loss, or at least a very low number. Some of these responses suggested that, should this approach be taken, the most efficient distinction would be to separately identify care costs and non-care related costs.

157. A small number suggested differentiating for loss of earnings, case management, deputyship and Court of Protection costs, and several other categories which were suggested by induvial respondents. Respondents occasionally offered suggested on relevant inflationary measures.

158. However, many respondents either did not address the question or answered that they did not support the approach.

Question 29: How readily available are PPOs to claimants in practice and how does this vary by groups of claimants (additional data on groups that are less likely to have a PPO made readily available would be helpful)?

159. A large majority of respondents noted that most non-NHS claimants do not receive PPOs, and some data was provided to support this. While many respondents noted that a higher proportion of NHS claimants do receive a PPO.

160. Most insurers and defendant lawyers stated that PPOs are available for all claimants should they want one and provided data showing that PPOs have been awarded to some claimants.

161. However, some defendant lawyers provided reasons as to why claimants might prefer lump sums instead of a PPO. These included that: claimants can invest and achieve returns with lump sums; claimant needs are difficult to predict year to year which may lead to too little or too much to be received from a PPO each year; or most claimants do not want a continuing relationship with the compensator. Others stated that claimant appetite for PPOs has reduced since the PIDR changed in 2017, as the new rate could be seen as more “favourable” for claimants.

162. Some respondents from across sectors, including defendant lawyers, stated that PPOs are most effective or most common for some claimant cohorts, which contain a small proportion of claimants, including for catastrophic injury where there is significant uncertainty about life expectancy.

163. Some respondents from across sectors, including most claimant lawyers, state that claimants struggle to obtain PPOs from insurers, except for NHS clinical negligence claims. Some claimant lawyers and respondents from other sectors suggested that this is due to insurers’ unwillingness to offer PPOs and suggested PPOs be made more accessible.

164. Some respondents from across sectors, including claimant lawyers, state that PPOs may not be available where there is limited liability coverage, e.g., employers or public liability cases, where a claims value exceeds the coverage value. Of these respondents some stated that unlimited coverage and a fund of last resort should be implemented for these cases, so that PPOs are available for all.

165. Some respondents from across sectors, including defendant lawyers, stated that the availability of PPOs should have no bearing on the process of determining the PIDR.

Question 30: What factors influence the take up of lump sums versus PPOs? This could include the preferences and behaviours of one or more of the parties involved in the settlement process and associated litigation strategies?

166. Many defendant lawyers and insurers state that claimants prefer lump sums over PPOs when the discount rate is set "favourably", and some suggest that claimants would choose PPOs more often were the discount rate set less favourably.

167. Some respondents from across sectors, including defendant lawyers and insurers, provided reasons as to why claimants might prefer lump sums. These included: the likelihood of claimants' investment returns leading to a higher income than a PPO would provide; advice from Independent Financial Advisor; to leave money for dependents; to spend money in alternative ways; age; unpredictability of care costs; desire for closure; or reduced liability substantially below 100% leading to PPO not meeting annual assessed need.

168. Some defendant lawyers and insurers state that PPOs are favourable for claimants who lack capacity, have significant care needs, and uncertain life expectancy, while PPOs are not sought when claimants have dependants.

169. Some insurers state that insurers prefer lump sums due to the cost of holding capital against PPO liability, lack of assets matching ASHE liability, and administrative costs of PPOs.

170. Some respondents from across sectors, including many claimant lawyers, state that insurers do not want to offer PPOs and offer PPOs less often than the body dealing with NHS claims. Some respondents from across sectors stated that this may be due to insurers wanting to close the book on claims, which was suggested to be possible with a lump sum paid as a full and final payment, and not with a PPO. One defendant lawyer suggested that this may be due to capital matching/reserving regulatory requirements and reinsurance difficulties. A respondent noted that some compensators may prefer the lower short-term cashflow requirements associated with PPOs.

Question 31: Please provide any evidence of how the setting of the discount rate may affect persons with protected characteristics.

171. Most respondents noted that persons affected by the discount rate may have protected characteristics for the same reason they are affected by the discount rate.

172. Many respondents noted that all claimants should be treated equally.

173. A respondent suggested that young drivers and young drives of lower socioeconomic status living in rural areas may be disproportionately affected by higher personal motor premiums, which may be affected by the PIDR.

174. A respondent noted that the gender of the representative claimant would affect life expectancy assumptions.

175. A significant minority of respondents did not answer this question.

Conclusion and next steps

176. The evidence gathered from this Call for Evidence has been reviewed by the Ministry of Justice and this response document provides a high-level summary of the submissions provided by stakeholders.

177. Following the conclusion of this Call for Evidence, the responses were made available to the two statutory consultees to the 2024 PIDR Review: the PIDR Expert Panel and HM Treasury. The consultees' advice and the Call for Evidence responses themselves were considered by the Lord Chancellor in reaching her final determination.

178. Questions 22 to 28 of this Call for Evidence were designed to provide additional evidence which would build upon that obtained from the MoJ's 2023 'Exploring the option of a dual/multiple rate' Call for Evidence. Responses to both Calls for Evidence have provided the Lord Chancellor and the consultees to the review with further evidence of the potential benefits and costs of adopting a dual or multiple PIDR. The responses to this Call for Evidence suggest that there is currently minimal support for a dual or multiple rate among any stakeholder groups. It was felt that the impact of the operational complexity of a dual rate system would outweigh the benefits it may offer, especially were it to be implemented within the statutory timelines for this review. This is especially true of a dual rate by heads of loss, which stakeholders strongly suggested would be unworkable in practice.

179. The Lord Chancellor announced her decision in this review and laid a Statutory Instrument to implement the new rate on 2 December 2024.[1] The new rate will be effective from 11 January 2025.

180. Further details regarding this decision, including the Lord Chancellor's Statement of Reasons which explains how this decision was reached, have been published on gov.uk.[2]

181. The advisory report of the Expert Panel, which drew upon the responses to this Call for Evidence in its modelling assumptions and analysis, has also been made available online.[3]

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[1] The Damages (Personal Injury) (England and Wales) Order 2024

[2] https://www.gov.uk/guidance/personal-injury-discount-rate

[3] ibid

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 Cabinet Office Consultation Principles 2018:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles__1_.pdf

Annex A – Summary of respondents by sector

Sector	Respondents	% of total
Insurer	14	36
Lawyers - defendants	6	15
Financial Advisors	3	8
Lawyers – claimants	7	18
Others	9	23
Total	39	

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