Ministry of Justice

Damages Act 1996: The Discount Rate

Review of the Legal Framework

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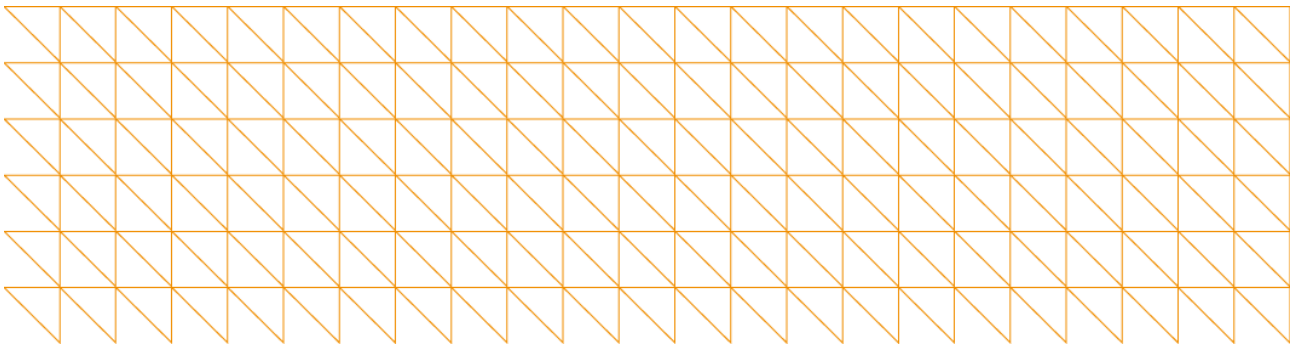

Ministry of Justice

Damages Act 1996: The Discount Rate

Review of the Legal Framework

Response to consultation carried out by the Ministry of Justice.

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, Damages Act 1996: The Discount Rate – Review of the Legal Framework.

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.

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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 'Damages Act 1996: The Discount Rate – Review of the Legal Framework' was published on 12 February 2013. It invited comments on the legal parameters governing the setting of the discount rate under section 1 of the Damages Act 1996. The consultation was aimed at people and organisations with an interest in personal injury claims and damages in the UK.

The purpose of the consultation was to examine two main issues:

First, whether the legal parameters governing the way in which the discount rate is currently calculated produce a rate that is as 'right' as it ought reasonably to be so that the person injured is fully compensated but not over-compensated or under-compensated.

Secondly, given the potential problems with the long term accuracy of lump sum awards, whether there is a case for encouraging the use of periodical payments.

The consultation period closed on 7 May 2013 and this report summarises the responses. This summary of responses has been prepared by the Ministry of Justice in connection with its review of the law relating to the discount rate in England and Wales. The department is responsible for the content of the summary and any views expressed.

A Welsh language translation of the summary section will be published at http://www.justice.gov.uk/publications/corporate-reports/moj/2010/welsh-language-scheme

A list of respondents is at Annex A.

Summary of responses

1. A total of 66 responses to the consultation paper were received. Of these, the main group of responses (approximately 30%) were from representatives of the insurance industry. Broadly similar numbers of responses were received from defendant and claimant solicitors, financial and accountancy organisations, and general legal bodies and practitioners. Other responses received were from defendant organisations, charities, judicial bodies, and members of the public.

2. The responses were analysed for their perspectives on whether the legal parameters governing the way in which the discount rate is currently calculated are effective in ensuring as far as is reasonably possible that the injured person is fully compensated without either over-compensation or under-compensation; and on whether the use of periodical payments could usefully be encouraged further than is the case under the current law.

3. On the first issue widely diverging views were expressed by different interest groups, and overall the responses demonstrated very little consensus on whether the current legal parameters were appropriate. On the second issue, there was only limited support for the greater encouragement of periodical payments in England and Wales for a variety of reasons.

Responses to specific questions

Q1. Do you agree that the general principles of accuracy; transparency and simplicity and stability should be used to assess the appropriateness of proposed solutions? If not, please give reasons.

A total of 60 responses were received to this question. 54 (90%) respondents agreed (30 with comments, 24 without comments), three (5%) respondents disagreed (one of whom stated the answer 'no' had been given in order to add comments) and three (5%) made comments only.

'Accuracy', while agreed to as being a guiding principle, was interpreted in varying ways. Six respondents (including academics, financial and accountancy organisations and claimant lawyers) agreed to accuracy on the basis of greater precision in the calculation, and most of those that did so recommended basing the discount rate on ILGS as "investments which provide cash flows that accurately replicate the claimant's losses". Conversely, one respondent suggested that to ensure accuracy the Lord Chancellor should set the discount rate on how claimants actually invest their damages, referring to a mixed portfolio. Primarily, though, accuracy was promoted in terms of neither under- nor over-compensating the claimant, with 15 respondents (mostly insurers and defendants, including ABI and NHSLA) placing the emphasis on a broad brush approach with the rate not necessarily based on any particular investments. In a similar vein to this, three further respondents suggested 'fairness' as an additional principle, including the Ogden Working Party and the Civil Justice Council. Accuracy was acknowledged to be difficult to achieve by respondents representing most points of view.

Not many substantive comments were received with regard to the principle of transparency and simplicity beyond general support for it, although a few respondents noted that transparency did not require simplicity. There were also a couple of suggestions that simplicity would result in less litigation about the application of the discount rate.

Two main points were made with regard to the principle of 'stability'. On the one hand, eight respondents (comprising insurers, defendant lawyers, a claimant lawyer and the Ogden Working Party) argued that stability includes certainty in terms of less frequent changes to the rate, five of them noting that this would avoid delays in settling litigation. On the other hand, nine respondents (formed of financial and accountancy organisations, claimant lawyers, an academic and the Civil Justice Council) cautioned that 'stability' should not prevent the rate from being updated when economic circumstances required it.

Some respondents suggested additional principles. As noted above, three respondents suggested 'fairness'. 12 respondents (including one who did not agree with the three principles as proposed in the consultation paper) argued that the affordability of awards or the effect on society and/or defendants ought to be a guiding principle. This suggestion was made by insurers, their representative groups and defendants (including ABI, MIB and NHSLA) plus defendant lawyers and their representative group, FOIL. Six respondents, including financial and accountancy organisations, defendant lawyers, an insurer and the Ogden Working Party suggested ease of use as an additional principle. One respondent suggested relevant and realistic as guiding principles, recommending that account be taken of what investments are available and how claimants actually invest

(similarly to the one respondent who recommended this approach in relation to the interpretation of accuracy). Finally, APIL proposed that one of the most important principles is that the claimant's award should be safe from risk when invested, to secure the claimant's finances for the future.

Q2. Do you agree that accuracy is the most important of these three general principles? If not, please give reasons.

59 respondents answered this question, with 34 respondents (58%) disagreeing compared to 21 respondents (36%) agreeing that accuracy is the most important of the three principles. A further four respondents (7%) made comments only. Of those that disagreed, most felt that accuracy was of equal importance to one or both of the other principles, whilst a smaller number considered that another principle was most important.

In particular, 13 respondents felt that accuracy was of equal importance to both of the other two general principles. These comprised six insurers and defendants (including MIB & NHSNSS), six defendant lawyers and their representative groups (including FOIL) and a financial & accountancy organisation. A further group of 11 respondents considered that accuracy was of equal importance to stability (encompassing certainty). This group was formed mostly of insurers, reinsurers and their representative groups (including ABI) plus a defendant lawyer and a general legal representative body. There was also one respondent who rated accuracy as of equal importance to simplicity.

As to those respondents who considered some other principle to be most important, the suggestions received were as follows: stability/certainty is most important (three respondents); simplicity is most important (one respondent); stability and simplicity are more important than accuracy (one respondent); transparency is most important (one respondent); and fairness to both parties is most important (one respondent).

Comments that accuracy is difficult to achieve were received from seven of those who disagreed, along with six of those who agreed. Two from this latter group added that this would be so unless ILGS were used as the basis for the rate.

Q3. Are there any other issues relating to the setting of the discount rate and the possible encouragement of the use of periodical payments that you would wish to draw to our attention? Please give reasons.

55 respondents made comments here which covered a range of issues but which can broadly be grouped into themes. The key points made were:

<u>Periodical Payment Orders</u>

14 respondents explained that these are capital intensive for payers, particularly under Solvency II.

Four respondents were critical of the use of ASHE 6115, mostly due to the lack of any investment vehicle providing an annuity linked to ASHE while one respondent cited a lack of transparency in the way the index is compiled.

Two respondents complained about the limited opportunity to review the basis of a PPO.

One respondent suggested encouraging use of PPOs via the judiciary.

One respondent suggested that the creation of an insurer of last resort (such as the MIB or former Policyholders Protection Board) would greatly facilitate the uptake of PPOs.

Claimant investments

Six respondents argued that there must be an assumption of minimal investment risk to claimants.

Four respondents considered that evidence was required of whether claimants were currently under- or over-compensated.

One respondent commented that the choice of investment advisor and their charges will affect the return achieved.

Discount Rate

Q4. Do you consider that the legal parameters governing the setting of the discount rate should be changed? Please give reasons.

59 respondents answered this question, of whom 35 (59%) considered that the legal parameters should be changed, 21 (36%) considered that they should **not** be changed, and of whom a further three (5%) made comments only without stating a view either way.

Those who considered that the legal parameters should change were predominantly insurers, reinsurers, and defendants (including ABI, MIB, and the NHSLA) with nine defendant lawyers and three or fewer from financial & accountancy organisations, judicial groups and general legal representative bodies.

The 21 respondents who did not consider that the legal parameters should be changed were comprised of 7 claimant lawyers and their representative groups (including APIL & FOCIS), 7 financial and accountancy organisations and three or fewer general legal representative bodies, judicial groups, academics, members of the public, insurers, and defendant lawyers. Those making comments only were academics and general legal representative groups (including the Ogden Working Party).

Those advocating a change to the legal parameters generally supported their choice with views on what ought to be taken into account when setting the rate or on what restrictions ought to be removed, without much in the way of deeper reasoning as to why these views were held. As such, these largely overlapped with the responses to question 5 (below). The views put forward were:

- Consideration should be had to what claimants do with their awards (25 respondents)
- The Lord Chancellor should not be bound by the decision of *Wells v Wells* (19 respondents)
- The availability of Periodical Payment Orders should be taken into account (15 respondents)
- Claimants are not a special category of investor (11 respondents)
- The Lord Chancellor should take account of the effect on tax payers and those who pay insurance premiums (four respondents, one of whom made comments only)
- The statutory consultation should include other stakeholders (one respondent)

The following reasons were given by respondents who did not consider that the legal parameters should be changed:

- ILGS had been recommended by the Courts and/or the Law Commission and/or the Ogden Working Party (seven respondents)
- Claimants are risk averse (five respondents)
- ILGS is the only method that provides 100% compensation (three respondents)
- Claimants only invest in non-ILGS assets because the discount rate is outdated (three respondents)
- It is possible to change the assumptions used for setting the rate under the current law (three respondents)
- Evidence must be seen of claimants not investing cautiously (two respondents)
- The parameters set by *Wells* support the Court's general approach to compensation (one respondent)
- The current law is fair as between claimants and defendants (one respondent)
- Using non-ILGS assets is too subjective (one respondent)
- Requiring riskier investment by claimants may result in greater fall-back on state support (one respondent)

Q5. If you consider that the legal parameters governing the setting of the discount rate should be changed, what do you think they should be? Please give reasons and define any terms used.

Although only 35 respondents had stated, in response to question 4, that they considered the legal parameters of the rate should be changed, 48 respondents answered this question. Of these, 36 (75%) respondents made suggestions as to what the parameters should be while 12 (25%) made comments only (10 of whom stated that the parameters should not be changed).

Those making suggestions comprised 19 insurers, reinsurers and defendants, 10 defendant lawyers and their representative groups, five financial and accountancy organisations and three or fewer general legal representative bodies and judicial groups.

As noted above, there was some overlap with the responses given under question 4, with respondents suggesting that the Lord Chancellor take account of actual investments made by claimants (16 respondents), the availability of periodical payment orders (15 respondents), the respective interests of claimants and defendants (10 respondents), and the impact on society (nine respondents). Some respondents made suggestions as to the type and/or nature of investment on which to base the rate, in particular that: it should not be required to be of low risk or without risk (eight respondents); it should be a mixed portfolio for an ordinary prudent investor (eight respondents); it should be a mixed portfolio for a cautious investor (three respondents); it should be based on an average three-year return (one respondent); and it should use an average earnings index for some heads of damage (one respondent). Two respondents also suggested that the Lord Chancellor should consult a wider range of stakeholders.

Q6. If you consider that the legal parameters governing the setting of the discount rate should be changed, what investments do you think the hypothetical claimant should be deemed to make for the purposes of calculating the rate of return? Please indicate the types and proportions of assets that should be included in the hypothetical claimant's portfolio of investments. Please give reasons.

Similarly to the previous question, 44 respondents answered this question but 11 of them stated that they did not consider that the legal parameters should change. This latter group comprised 7 claimant lawyers and their representative groups (including APIL and FOCIS), and three or fewer financial and accountancy organisations and academics. The remainder of those responding were mostly insurers, reinsurers and defendants plus eight defendant lawyers and three or fewer financial and accountancy organisations, general legal bodies and judicial groups.

A variety of approaches were taken to answering this question. Some respondents made comments at a very general level such that 19 respondents suggested looking at the investments made by claimants and seven respondents asserted that the hypothetical portfolio should reflect that of an ordinary prudent investor. 13 respondents recommended that the rate be set using a broad brush approach and that it not be tied to any particular set of investments, principally since investors are unlikely to retain the same asset mix over time.

11 respondents (including nine of those who advocated a broad brush approach) referred to reports, particularly those of Mark Quilter, Charles Stanley Ltd, PKF, and Oxford Economics, which set out examples of portfolio composition and returns at specified levels of risk. Four respondents noted specific low risk but high return deposit accounts or structured products and/or cited portfolios offered or held by particular investment managers as examples of the type of assets that could be included. A few respondents suggested that reference be made to indices such as those issued by the Association of Private Client Investment Managers and Stockbrokers (APCIMS) or to FCA projection rates (and the assumptions underlying them).

Most of the examples of portfolios put forward included a combination of cash, bonds and/or gilts with equities. A small minority provided finer detail as to the types of bonds or equities to be assumed. Regarding the proportions in which such assets should be held, suggestions ranged from 25% to 99% gilts with 75% to 1% equities. Most fell within the range of 40% to 75% gilts and 60% to 25% equities.

Q7. Do you consider that the availability of periodical payments should affect the level at which the discount rate is set? Please give reasons and indicate what effect you think it should have.

58 respondents answered this question with 24 (41%) considering that the availability of periodical payments *should* affect the discount rate, 29 (50%) considering that it should *not* affect it, and five (9%) respondents making comments only. Comments in favour were received from 15 insurers, reinsurers and their representative groups (including ABI and MIB), 7 defendant lawyers and representative groups (including FOIL) and three or fewer judicial groups and academics. The 29 comments against were received from seven financial & accountancy organisations, six claimant lawyers; six reinsurers, insurers and defendants (including NHSLA), and three or fewer defendant lawyers, general legal representative bodies, judicial groups, members of public and the Ogden Working Party.

Thirteen of those who answered 'yes', plus three of those who answered 'no' and one respondent who had made comments only, argued that periodical payments remove the need for the discount rate to protect those with the lowest risk appetite; claimants accepting a lump sum award should be assumed to reject very low risk investments and therefore should be treated as ordinary prudent investors. The three respondents answering 'no' that made this point, considered that although the availability of periodical payments supported the use of a mixed portfolio in the methodology for setting the rate, periodical payments and lump sum awards should otherwise be offered as equivalent alternatives for a claimant. A further seven respondents who answered 'yes' made the same point – that periodical payments remove the need for the discount rate to protect those with the lowest risk appetite – but concluded that the rate should therefore be set with reference to how claimants actually invest their awards.

One respondent (who answered 'no') suggested that the discount rate be increased in order to encourage greater use of periodical payment orders. One other respondent (who made comments only) also suggested that the discount rate could be increased to incentivise take up, but only in respect of damages for which periodical payments were actually available as an alternative. Three respondents suggested that the discount rate should account for wage inflation (particularly in respect of carers' wages) in order to ensure parity with periodical payments.

The reasons given by respondents for asserting that the availability of periodical payments should *not* affect the setting of the discount rate were: periodical payments are not always available or appropriate (13 respondents); there should be neutrality in that neither compensation method should be manipulated to make the other more favourable (11 respondents); the discount rate should be set to achieve full compensation (eight respondents); and, the discount rate should be set on *Wells* principles (one respondent).

Q8. Should the court have power to depart from the prescribed rate and, if so, should the terms on which it may do so be expressly defined? Please specify the terms and give reasons.

A total of 55 respondents answered this question. Of these, 33 (60%) considered that the court should have power to depart from the prescribed rate, while 10 (18%) thought that it should not do so, and 12 (22%) made comments only without expressing a view either way. Of the 33 respondents who thought the court should have such a power, 10 considered that the terms on which it may depart from the rate should be expressly defined whereas 18 respondents thought that the terms should not be so defined. The remaining five did not comment on whether it ought to be expressly defined.

The 10 respondents who answered 'no' to this question were all insurers, defendants and defendant lawyers plus one claimant lawyer. The reasons given by respondents for not granting power to the courts to depart from the prescribed rate were that:

- it would go against (some or all of) the principles of accuracy, transparency, simplicity and stability (five respondents)
- it would create satellite litigation (four respondents)
- the court hasn't used its existing power (one respondent)

The 33 respondents who answered 'yes' to the first part of this question were drawn from a diverse group, comprising 11 insurers, reinsurers and defendants, five claimant lawyers, seven financial and accountancy organisations, four general legal representative bodies and three or fewer defendant lawyers, academics and judicial groups.

The reasons and comments given by those advocating a power to depart from the prescribed rate largely mirrored the comments made by those who did not state a position either way. The points made were:

- The general rate should be departed from rarely in order to promote stability and certainty (five respondents answering yes; two respondents making comments only).
- A power to depart from the rate will mean the general rate does not have to be changed to allow for exceptional circumstances (one respondent answering yes; two respondents making comments only) and will allow unforeseen circumstances to be dealt with (one respondent answering yes)

Similarly, there was a commonality between the two groups in relation to the comments made about whether and how any power should be defined, with the large majority recommending a continuation of the status quo:

- The existing power for the court to depart from the rate should be retained (23 respondents answering yes; 10 respondents making comments only)
- The power should not be defined other than that it is to be exercised in exceptional cases or special circumstances (23 respondents answering yes; six respondents making comments only)
- The court should explain its reasons for any decision to depart from the prescribed rate (three respondents answering yes; four respondents making comments only)
- Guidance should be produced for the judiciary on how or when the court should depart from the prescribed rate (three respondents making comments only)
- To limit any power by expressly defining it would lead to lengthy and costly negotiations (one respondent answering yes)
- Power to depart from the prescribed rate should be allowed when there is evidence of a significant difference in the rate of inflation that applies to a particular head of damage (one respondent answering yes)

Q9. Should the power to prescribe different rates be available for:

a. Different classes of case?

b. Different periods of time over which damages are paid?

c. Different head of damages?

d. Cases where periodical payment orders are available and where they are not?

and, if so, for which classes, periods or heads would you specify different rates? Please give reasons.

A total of 58 responses were received to this question although not all respondents answered every part of it. The majority of respondents did not agree that the power to prescribe different rates should be available for the reasons suggested in *a* to *d*. 31

respondents (53%) answered 'no' to all four parts of the question whereas only two respondents (3%) answered 'yes' to all of them. The breakdown for each of the individual parts demonstrates a similar pattern, with option c drawing the largest response in favour:

a. *different classes of cases* – yes: three; no: 47
b. *different periods of time over which damages are paid* – yes: six; no: 43
c. *different heads of damages* – yes: 15; no: 34
d. *cases where periodical payment orders are available and where they are not* – yes: four; no: 44

Those answering no argued in general that a single rate provides simplicity and certainty (28 respondents), that more rates would create additional disputes and the need for more evidence (10 respondents), and that the court can prescribe another rate if necessary (10 respondents). Specifically, in relation to option b one respondent commented that a delay in litigation could affect the loss to which different rates apply and also that there is no automatic link between the duration of loss and the return available. In relation to b and c, three respondents considered that periodical payments were available to adjust for these matters. In relation to c, one respondent stated that inflation in respect of earnings is expected to slow. With regard to option d, one respondent suggested that PPOs are available in all but a very small number of cases.

Those answering yes to some or all parts did not make general statements other than one respondent who considered that the court already has the power to depart from the rate for any of these reasons, nor were many suggestions received as to the details of when different rate should be specified. However, the following points were made in relation to particular aspects. Regarding option b, two respondents saw merit in the Ontario model, having different rates for losses of more or less than 15 years from the award, while a further respondent suggested a different rate for claimants with a life expectancy of less than 10 years on the basis that this does not allow for long term investments. Another respondent supported option b for the reason that very long dated ILGS are not available. With regard to option c, 12 respondents argued that different rates should be available for future losses that are prone to different levels of inflation, in particular earnings and price inflation. Two respondents suggested that this should be allowed when no periodical payments were available. One respondent considered that there should be different rates for earnings and price related losses in order to follow the approach adopted for periodical payments. In response to option d, one respondent commented that it would need to be established early in proceedings whether a periodical payment would be available.

Q10. If you consider that the legal base for setting the rate should be changed, what methodology should be used to set the rate, including:

a. What quantitative and qualitative data should be used (e.g. historic or forward looking, specific indices)?

b. What assumptions should be made (e.g. asset mix, weighting of assets)

c. How should inflation be taken into account?

d. What allowances should be made for tax, administration or management expenses and investment expenses?

Please give reasons.

47 respondents answered this question, of whom 12 (26%) stated that the legal base should not be changed and seven (15%) stated that a broad brush approach should be taken. The answers given to the specific parts of this question comprise a fairly even spread of different ideas without any stark opposing views being taken. Many of the responses mirrored those given under question 6.

In response to part *a* (what quantitative and qualitative data should be used), 32 comments were received with 22 of them containing suggestions for the range of data to be taken into account and 16 recommending a particular model or index for reference. The suggestions as to the range of data to be used were: forecasts only (seven respondents), forecasts plus historic data (seven respondents), historic long-term data (four respondents), historic short-term data (one respondent), current data (one respondent) and distinctly *not* forecasts (one respondent). The models or indices recommended were: the FCA lower projection rate (of 1.5%) (six respondents), examples cited in the Oxford Economics report and/or Charles Stanley report (four respondents), models favoured by the Court of Protection and/or the Office of the Public Guardian for its clients (three respondents), Credit Suisse Global Investment Returns Sourcebook (two respondents) and examples cited in the response and reports put forward by ABI (one respondent).

In relation to part *b* (what assumptions should be made) 24 respondents made comments, seven of which included a recommendation to seek the views of investment advisors on the detail to be assumed for a mixed basket of assets. 20 of the responses included suggestions for the assumptions to be made, although these varied in terms of the level of detail provided, with seven simply suggesting a prudent or moderate mix of low-risk assets, one noting that there should be a reasonable proportion of equities, and five commenting that the level of assumed risk should be decided before determining the asset mix to be assumed. Six respondents proposed a mix of 25% to 35% equities with 75% to 70% gilts; two respondents suggested a mixed portfolio containing ILGS and other investments; one respondent suggested 50% equities; one respondent suggested a mix of 70% equities and 30% gilts; and one respondent suggested 10% to 75% equities and 90% to 25% gilts.

In response to the question of how inflation should be taken into account, 20 comments were received. One respondent simply stated that it should be taken into account, while two others considered that it should *not* be taken into account. One respondent suggested that inflation be taken into account *after* an allowance had been made for tax and investment expenses, while yet another respondent suggested that it ought to be allowed on heads of damage that were particularly prone to inflation. Other respondents suggested measures of inflation to use as follows: CPI (two respondents); RPI (three respondents); CPI and/or RPI (two respondents); RPI plus ASHE 6115 (one respondent); 2% Government/Bank of England target (two respondents); OBR projection (one respondent); some (other) unspecified measure (three respondents).

30 respondents made comments in relation to part *d* although not all of these commented on every aspect (tax, administration or management expenses, *and* investment expenses). With regard to tax, five respondents proposed that claimants' damages awards be exempt from income tax (meaning that no allowance need be made) and one respondent considered that it should be factored in at the award stage, while five respondents considered simply that tax ought to be allowed for in the calculation of the discount rate, with a further 15 respondents making suggestions as to the allowance to be made:

- Allowance should be made at the basic rate of tax (seven respondents)
- An allowance for tax should be calculated before allowing for inflation and/or investment costs (four respondents)
- The tax allowance should be much higher than that used under the present rate (one respondent)
- The approach in *Wells* ought to be adopted (one respondent)
- The allowance for tax should reflect the reality of any notional portfolio (one respondent)

With regard to administration or management expenses, one respondent considered that it should be accounted for as part of the main award. Seven respondents simply agreed that some allowance ought to be made, one of whom argued that it should be made clear in the Lord Chancellor's statement and another of whom commented that it was likely to be significant. A further 12 respondents made the following suggestions as to the allowance to be made for such expenses:

- Full allowance should be made (at 1.5% to 2%) (four respondents)
- Reference should be made to the Portfolio expense ration (TER) of 0.25% (three respondents)
- An allowance of no more than 1% should be made for fund management (one respondent)
- A nominal allowance should be made (one respondent)
- Administration costs should be set or capped by the court (one respondent)
- The allowance for investment expenses should be made before allowing for inflation (one respondent)

In relation to investment expenses, two respondents considered that this should be allowed as part of the main award, one of whom also suggested that the amount ought to be capped. Six respondents stated that allowance should *not* be made for investment expenses, one of them giving the reason that these are deducted from the net yield on the returns of the portfolio, while another of them suggested that TER could be used if allowance were to be made. Seven respondents simply agreed that some allowance ought to be made for investment expenses and/or advice. A further three respondents argued that full allowance be made while another respondent suggested that the allowance should reflect the reality of any notional portfolio, although no indication was provided in either case of what this might in fact be.

Periodical Payments

Q11. Do you consider that the present level of usage of periodical payments is appropriate and that no change is necessary? Please give reasons.

A total of 62 responses were received to this question. 38 (61%) respondents considered that the level of usage is appropriate (three without comments), 11 (18%) respondents disagreed (one without comments) and eight (13%) respondents made comments only. Of those who disagreed and made comments, four respondents thought that periodical

payments were not used enough, and one thought that they were used too much. Five respondents did not make clear whether they thought the existing level of usage was too high or too low.

Some indications were given as to the present level of usage of periodical payments, particularly by defendants and insurers who stated the number of periodical payment orders that they were involved with or the proportion of cases which were settled by periodical payments. Research by Swiss Re and the IFoA was also referenced. Taken together, these suggest that periodical payments are predominantly used in the most severe cases of personal injury (at a rate of 80% for claims above £4–5 million), with the current number of periodical payment orders somewhere in the low thousands.

Only two reasons were given to justify the view that the present level of usage is not appropriate: in respect of them being used too much, the long term affordability to defendants (particularly NHS and MIB) was cited by one respondent, whereas another respondent considered that they should be used more since they offer security.

The vast majority of comments were in support of the proposal that the level of usage of periodical payments is appropriate, and were made predominantly by insurers and their representative groups, defendants and defendant lawyers. These were:

- Claimants choose (flexible) lump sums *(17 respondents)*
- The court can order a periodical payment order if need be (where a claimant lacks capacity) *(14 respondents)*
- If a claimant seeks a periodical payment order, the court will make one *(11 respondents)*
- Take up varies according to the level of injury and value of claim *(10 respondents)*
- Claimants (or those acting on their behalf) receive various types of advice about the available options *(nine respondents)*
- Periodical payment orders are more common where the claimant is unable to decide for himself or herself *(five respondents)*
- Take up has increased since the change to basing increases on ASHE 6115 occurred *(two respondents)*.

Further comments were received but these related to later questions, specifically Q12 (measures to increase use) and Q14 (reasons for not being used more).

Q.12. If not, please indicate the measures that you think should be taken to increase their use. Please give reasons.

We received comments from 34 respondents on this question. Of these, however, 16 stated that they *did* consider that the level of usage of periodical payment orders was appropriate (or already too high, in one case) and that no measures should be taken. Two such respondents suggested that increasing the discount rate could encourage greater take up by claimants but that they did not advocate this approach.

The remaining 18 respondents proposed a variety of measures with no real consensus view between them, although there were a few common themes as follows.

Court-based requirement

- Create a judicial presumption in favour of PPOs *(four respondents)*
- Introduce some sort of compulsion *(three respondents)*
- Give the Court the express power to order the Defendant's insurer to purchase the closest-matching available annuity from a secure life insurer, and also be liable to meet (albeit unsecured) any difference *(one respondent)*
- Introduce procedure to apply for a ruling as to whether PPOs have to be offered or accepted, with cost consequences for the losing party *(one respondent)*

Financial and/or insurance industry intervention

- Introduce State or industry-backed guarantee scheme to increase use *(three respondents)*
- Remove policy limits in compulsory insurance for third party injuries *(two respondents)*
- Address reinsurer hostility to PPOs *(one respondent)*

Changes to periodical payment order regime

- Make PPOs more flexible by granting the ability to review past agreements in light of new information *(one respondent)*
- Remove link to ASHE index *(one respondent)*
- Courts should award all costs of getting investment advice associated with getting PPOs or lump sums *(one respondent)*
- Amend or remove rule 41.7 of Practice Direction 41B [factors to be taken into account] *(one respondent)*

Alternative incentives and encouragement

- Lord Chancellor could encourage defendants to make PPO offers in cases other than very high value claims *(one respondent)*
- Reduce the discount rate to encourage take up by defendants *(one respondent)*
- Training for judges on exercising powers *(one respondent)*

Four respondents also recommended that Scotland be brought in line with the rest of the UK (two Scottish general legal bodies making this point only).

Q.13 Do you consider that claimants and defendants are sufficiently informed about the availability of periodical payments and how they operate? Please give reasons.

From a total of 58 respondents answering this question, 47 (81%) considered that parties are sufficiently informed about periodical payments. Seven (12%) respondents disagreed with this view while a further four (7%) respondents made comments only.

Those agreeing comprised a large number of insurers, defendants, their lawyers and representative groups (including ABI, MIB and NHSLA) but also included claimant lawyers

and their representative groups (including APIL and FOCIS) as well as academic, judicial and general legal representatives. The respondents who disagreed or made comments only similarly came from a range of groups.

The following reasons were given in support of the view that claimants and defendants are sufficiently informed about the availability of periodical payments and how they operate:

- Claimants are represented by specialist lawyers and financial advisors (in, or especially in, larger claims or catastrophic injury claims) *(16 respondents (of which 12 added the clarification))*
- All insurers are aware as much work has been done by the industry *(13 respondents)*
- Courts check the appropriateness of decisions for protected claimants *(11 respondents)*
- The CPR requirements mean that parties must be aware of PPOs *(nine respondents)*
- Lawyers are under a professional duty (of care) *(four respondents)*
- All parties can access appropriate advice *(three respondents)*
- Government Departments (as defendants) are aware *(one respondent)*

We received the following points from respondents who did not consider that parties were sufficiently informed and from those who made comments only:

- PPOs are not considered or not advised on in lower value claims *(four respondents)*
- Claimants are not always advised about all options *(two respondents)*
- Claimants are routinely advised that PPOs are not available in practice from defendants save in higher value claims *(one respondent)*
- There is a preference for lump sums so further engagement is needed *(one respondent)*
- PPOs are difficult for solicitors to understand *(one respondent)*

We also received these suggestions for increasing the extent to which claimants or defendants are informed about periodical payments.

- Make it mandatory for lawyers to advise on all options (two respondents who did not consider that parties were sufficiently informed)
- There could be a further question on court Direction Questionnaires asking parties to confirm whether this form of order had been considered (two respondents who considered that parties were sufficiently informed)
- Claimants could receive prescribed information on the benefits and risks of PPOs and lump sums (one respondent who did not consider that parties were sufficiently informed)
- An independent guide to periodical payments could be developed by the Ministry of Justice and/or The Law Society (one respondent who made comments only)

Q14. Why are periodical payment orders not used in a larger proportion of cases? Are there, for example, types of cases where periodical payment orders are not appropriate? Or are there particular costs, obstacles, risks or circumstances which limit the use of periodical payment orders?

We received 56 responses to this question with a range of suggestions from a mix of respondent types. The points made are summarised below.

Types of cases where periodical payment orders are not appropriate:

- In cases where there is contributory negligence or litigation risk, claimants need the flexibility to use their award for priority areas and need to invest to make up the shortfall *(33 respondents)*
- The administration costs in smaller value cases are disproportionate *(two respondents)*
- Wrongful birth claims are not suitable for PPOs *(one respondent)*
- PPOs are not necessary for claims where life expectancy is not in dispute *(one respondent)*

Insurer limitations:

- Policy limits may prevent the use of PPOs *(23 respondents)*
- Not all defendants and insurers are willing or able to provide long-term security *(20 respondents)*
- Linking PPOs to ASHE 6115 makes it difficult for insurers to purchase an annuity to meet annual indexed payments *(six respondents)*
- Re-insurers discourage insurers from taking up PPOs *(four respondents)*
- insurers benefit from the finality of a lump sum payment *(two respondents)*
- Insurers and reinsurers are concerned about the capital requirements of PPOs *(two respondents)*

Claimant cost issues

- Where defendants do not offer a PPO, the Part 36 lump sum offer is accepted due to the costs consequences if a PPO is no better *(eight respondents)*
- Capital is needed to make up the deficiencies in the *Roberts v Johnstone* approach *(eight respondents)*
- For claimants living overseas, payments in GBP are inconvenient and/or are not linked to a relevant index *(eight respondents)*
- the amount and timing of future costs, or the need to amend them, are difficult to predict in advance *(six respondents)*

Claimant other factors:

- Cannot spend flexibly with fixed payments *(28 respondents)*
- A desire to cut all links with the defendant *(17 respondents)*

- A desire to leave money to the claimant's estate *(nine respondents)*
- PPOs are not considered in lower-value cases *(two respondents)*
- Defendants and/or courts do not agree to PPOs *(two respondents)*
- Future loss of earnings where life expectancy is shortened will be less under a PPO *(one respondent)*

Q.15. Where periodical payments are used in conjunction with a lump sum, what determines the balance between the lump sum and the periodical payment elements of the overall award of damages?

We received 47 substantive responses to this question. 34 respondents answered by specifying the heads of damage typically awarded by a lump sum on the one hand or by periodical payments on the other. 38 respondents (including 25 of those who had indicated a split by head of damage) sought to explain the drivers behind this division or behind departures from the usual approach.

There was general consensus that periodical payment orders are used in respect of future care and case management costs (25 and 17 respondents respectively). One respondent stated in general terms that periodical payment orders are intended to be used for future loss of earning capacity as well as care costs, and seven respondents noted that periodical payments were used for future loss of earnings in very few cases.

Lump sum payments were stated as covering: General damages for pain, suffering and loss of amenity (10 respondents); Past loss to date of settlement or trial (16 respondents); and future losses (24). Future losses were broken down into one or more of the following elements: accommodation purchase or alteration costs (nine respondents); future loss of earnings (six respondents); medical equipment or expenses (six respondents); deputyship costs (one respondent); or simply stated as any future losses not covered by the periodical payment order (12 respondents).

There was broad agreement among the 38 respondents who suggested factors that determine the balance between the lump sum and periodical payment elements. The vast majority (79%) pointed to it being a matter of the claimant's choice, based on his or her capital (especially accommodation) needs, the desire to build in a contingency fund and the flexibility afforded by a lump sum. Of these respondents, nine also noted that claimants balanced this with the reassurance provided by periodical payments while a further four suggested that the defendant's offer or the ease of settling a lump sum payment were a factor. A small minority (three respondents) considered that the factor determining the balance between the amount of the award paid by lump sum and by periodical payments was the nature of the case and the heads of damages applicable. Two additional respondents cited a list of circumstances that should be taken into account when deciding an allocation, specifically: cost of property purchase, life expectancy, existing assets, family circumstances, income need, and attitude towards risk.

Q.16. Do you consider that there would be merit in reviewing the existing approach to periodical payments in Scotland? If so, please give reasons.

A total of 34 responses were received to this question. 17 (50%) respondents stated that they agreed there would be merit in reviewing the approach in Scotland. Comments only were received from 16 respondents, of whom 13 (38%) displayed general support for adopting the approach of England and Wales in Scotland, and one supported it in limited circumstances. Five respondents noted that they had replied to the Scottish Government's consultation "Civil Law of Damages: Issues in Personal Injury" and three stated that they agreed with the analysis of Lord Stewart in *D's Parent and Guardian v Greater Glasgow Health Board* [2011] COSH 99.

The reasons given for supporting a review of the existing approach (and for Scotland adopting the same approach as England and Wales) were:

- Fairness: claimants should have the same choice and protection as those in England and Wales *(15 respondents, seven of whom had made comments only)*
- Scotland should follow England and Wales *(nine respondents, six of whom had made comments only)*
- In setting the discount rate there would be parity of policy considerations across jurisdictions with the same economic conditions (i.e. claimants have a risk-free option in periodical payments) *(six respondents, one of whom made comments only)*
- Periodical payments support the 100% compensation principle *(two respondents)*

One respondent who supported reviewing the approach in Scotland suggested that periodical payments should be made compulsory in some circumstances. Another respondent (who made comments only) considered that courts should be able to recommend PPOs in cases of catastrophic injury where the claimant lacks capacity.

Two respondents (one of whom considered there should be a review) expressed concern about the potential impact of carrying large PPO reserves.

Impacts

Q17. Do you agree with the impact assessment that accompanies this consultation paper? If not, please give reasons.

A total of 45 respondents answered this question. 14 (31%) stated that they agreed with the impact assessment (seven of whom made comments), 14 (31%) stated that they disagreed (10 of whom added comments), and 17 (38%) provided comments only.

There was no strong divide between those agreeing or disagreeing based on respondent type. Half of the respondents who agreed with the impact assessment were insurers and defendants while the remaining seven respondents comprised three or fewer defendant lawyers (including FOIL), general legal representative groups and financial and accounting organisations. The 14 respondents who stated that they did not agree with the impact assessment comprised five claimant lawyers and their representative groups (including FOCIS), four financial and accounting organisations, and three or fewer insurers, defendant lawyer representatives, general legal representative groups, academics, and members of public. The respondents who provided comments without

stating overall agreement or disagreement were predominantly insurers and defendants (including ABI, NHSLA and MIB) with the remaining four respondents comprising defendant and claimant lawyers (including APIL) plus the Civil Justice Council.

Respondents made the following types of comments: suggestions of additional impacts that had not been considered; expansion on points made in the impact assessment; challenges to assumptions or statements made in the impact assessment; and challenges to the general approach taken within the impact assessment. These are set out in turn below.

Additional impacts

- An increase in the use of PPOs would affect insurers' requirements to hold capital reserves, especially under Insolvency II *(10 respondents)*
- An increase in the use of PPOs (with Insolvency II) increases the exposure insurers have to the investment market *(seven respondents)*
- Claiming higher fund management costs from insurers would lead to an increase in the cost of insurance premiums *(one respondent)*
- The increase in PPOs has increased re-insurance costs for insurers *(one respondent)*

Expanded points

- A reason for the NHS having more PPOs is due to protected nature of the claimants *(seven respondents)*
- A reason for the NHS having more PPOs is due to its ability to use future tax reserves *(five respondents)*
- The respondent is aware of claimant funds running out or being likely to do so *(five respondents)*

Challenges to assumptions

- PPOs and lump sums are not equivalent, principally due to differences in mortality risk, inflation indexation and tax treatment *(12 respondents)*
- If awards increase in value, insurance limits may not be sufficient to cover the full amount *(eight respondents)*
- Reducing the discount rate will not address over-compensation *(six respondents)*
- Higher risk investments are no guarantee of a higher return *(four respondents)*
- A mixed portfolio is significantly more risky than holding ILGS *(four respondents)*
- Lump sums do not include investment costs *(two respondents)*
- Claimants are not currently over compensated *(two respondents)*
- A lower discount rate may mean some claimants receive a smaller award, depending on age, life expectancy and how the damages are to be spent *(one respondent)*

Challenges to general approach

- The Lord Chancellor should research what claimants do with their awards before reviewing the rate *(10 respondents)* or should have a fully researched evidence base *(two respondents)*
- The impact assessment should consider the impact of there being no change to the discount rate (following a change in the parameters) *(three respondents)*
- The impact assessment should consider the impact of a change to the rate under the current law *(two respondents)*
- The impact assessment should consider the concept of full compensation *(one respondent)*
- The rationale should be to reduce litigation costs and foster settlement *(one respondent)*

Q18 Do you have any information regarding: the effect of the current discount rate on the size of awards of damages and as to the likely effect of a change in the rate on the size of awards in the future; on whether awards made under the present law turn out to be inadequate; on the reasons why periodical payments are used; the effect of periodical payments on the overall long term total cost of awards; or on any other issues relevant to the assessment of the impact of the proposals under consideration?

If so, please could you provide details.

We received 38 substantive responses to this question; most responses addressed one or two of the issues listed in the question, with only two respondents providing comments on all points. The majority of information was provided in the form of observational comments rather than quantified or analytical data. The comments made in respect of each issue are summarised below.

The effect of the current discount rate on the size of awards of damages and as to the likely effect of a change in the rate on the size of awards in the future

Two (5%) of the 38 respondents commented specifically on the effect of the current discount rate on the size of awards of damages. One respondent noted that the current discount rate has increased damages awards as it has reduced from 4.5% and 3% to 2.5%; the other respondent illustrated how the current discount rate would affect the total award made to a 20 year-old and 40 year-old hypothetical claimant.

Of 13 (38%) responses regarding the likely effect of a *change* in the rate, five provided examples of how the amount of a given award would be affected by the substitution of various lower rates (four illustrative examples and one citing the case of *Helmot v Simon*). In addition, two insurers provided the calculated additional cost of paying out all of their ongoing claims at a 1% or 1.5% lower discount rate respectively, and the NHSLA provided illustrative examples of the additional cost in a particular set of outstanding cases. Other comments received were as follows:

- A lower rate would increase the size of awards while a higher rate would decrease the size of awards *(five respondents)*

- For some claimants a lower rate reduces the size of an award, depending on age, life expectancy and how the damages are to be spent *(one respondent)*
- Most awards do not include an element for future loss and so would not be affected by a change in the discount rate *(one respondent)*
- The application of new heads of damage has increased the size of awards *(two respondents)*
- Changes in the calculation of a multiplicand potentially have a much bigger effect than a change to the discount rate *(one respondent)*

Whether awards made under the present law turn out to be inadequate

Comments on this point were received from 25 (66%) of the respondents answering the question. Views were clearly divided according to respondent type. 17 insurers and defendant lawyers made the following points:

- They did not have any evidence, or there is no evidence, to suggest that awards are inadequate *(15 respondents)*
- The continuing use of lump sums suggests that they are not inadequate *(two respondents)*
- Anecdotal evidence and two reported cases indicate that awards more than meet claimants' needs *(one respondent)*

Eight respondents, comprising financial and accountancy organisations, claimant lawyers and academics made these points:

- They are aware of many claims where the money has run out or there is concern about it running out too soon *(four respondents)*
- The Law Commission's 1994 study of compensation experiences of personal injury victims ("Personal Injury Compensation: How Much is Enough?" Law Com No 225) is still valid *(four respondents)*
- The fear of running out of money frequently leads to a reluctance to spend, resulting in a lower quality of life as a result *(one respondent)*

The reasons why periodical payments are used

Of the 38 responses to this question, 11 (29%) commented on why PPOs are used. The majority of comments focussed on the financial benefits to the claimant. These included: the certainty of future funding (five respondents) – specifically the removal of inflation risk (five respondents) and investment risk (three respondents) and the security of the funder in the case of the NHS (one respondent); exemption from income tax (three respondents); and minimised management charges (two respondents). Other benefits to claimants of using periodical payments, were that the burden of managing the award is removed (one respondent), the annual amount of care required can be ascertained (one respondent), and a settlement can be tailored to an individual (one respondent). One respondent noted a reason other than the benefit to a claimant, namely that that public purse would be protected if the claimant's life were shorter than expected, and in addition the NHSLA noted that periodical payments allowed costs to be smoothed over time.

The effect of periodical payments on the overall long term total cost of awards

This element was addressed by 15 (39%) of the responses to the question. Of these, 13 insurers, defendants and defendant lawyers stated that the effect of periodical payments on the overall long term cost of an award was not known until the PPO came to an end (and that few have done so to date). One of these plus a further insurer stated that periodical payment settlements cost more than lump sum settlements; or are more expensive over time where the claimant lives at least to their predicted life-expectancy. In addition, a financial and accountancy organisation suggested that PPOs are likely to be an escalating future liability in respect of NHS and MIB claims, for which no reserves are held.

In respect of other issues, a few respondents pointed to further sources of research or reiterated general points relating to the effect on the insurance industry that had been made under previous questions.

Q19. Do you consider that a change in the approach to setting the discount rate or any encouragement of the use of periodical payments would affect the behaviour of businesses or voluntary sector organisations? If so, please give reasons.

We received 38 responses to this question. 10 (28%) respondents did not think that a change in the approach to setting the discount rate or encouragement of the use of periodical payments would affect the behaviour of businesses or voluntary sector organisations. One of these respondents provided comments, suggesting an indirect consequence that was also put forward by other respondents answering this question, namely a fall in the take-up of both optional and compulsory insurance following increases in the cost of insurance premiums. 16 (44%) respondents, 12 of whom gave reasons, considered that a change in approach or encouragement to use periodical payments *would* affect the behaviour of such groups, and a further 10 (28%) respondents made comments only.

Three respondents suggested that (insurance) businesses would use any change in the discount rate as an opportunity to reduce outgoings by using PPOs.

The remaining comments suggested changes in behaviour that might flow from an increase in the cost of insurance premiums which might occur following a reduction in the discount rate, in particular:

- The take-up of optional insurance by businesses or voluntary organisations may decrease *(eight respondents, including one who answered 'no')*
- Businesses will increase customer charges to recover the increased cost *(seven respondents)*
- Businesses or voluntary organisations may close as a result of having insufficient insurance cover to pay their liabilities *(six respondents)*
- Businesses or voluntary organisations may reduce the indemnity level of their insurance policies in order to reduce premiums *(five respondents)*
- Voluntary organisations may withdraw from activities requiring insurance *(four respondents)*

- Business or voluntary organisations may break the law by not taking out compulsory insurance *(three respondents, including one who answered 'no')*
- The increased cost of insurance premiums may force businesses or voluntary organisations to close *(three respondents)*

Q20. Do you consider that a change in the approach to setting the discount rate or an encouragement of the use of periodical payments would have any direct effect on small or micro-businesses? Please give reasons.

38 respondents answered this question. Of these, 26 (68%) did believe that a change in the approach to setting the discount rate would have a direct effect on small and micro-businesses, 11 (29%) did not think there would be a direct effect, and one response (3%) from the judiciary indicated that there was likely to be an effect but that they had no evidence on which to base any assessment as to what that effect might be. Those respondents arguing that there would be an effect was made up of 17 insurers and their representative groups; five defendant lawyers and their representative groups; a general legal respondent; an accountant; a public sector body and an actuary. Those responses disagreeing included two claimant lawyers and their representative groups; two defendant lawyers and their representative groups; two general legal respondents; an accountant; an actuarial expert; an academic; a member of the public and an investment firm.

Those who did believe that there would be an effect on small and micro businesses argued that anything which affects the level of damages awards will have an impact on businesses of any size and that this disproportionately impacts on smaller businesses because they are less able to absorb any additional insurance costs in their normal business expenditure. Respondents expressed the view that the two options for small businesses in such situations were to pay higher premiums that may drain resources and prevent business expansion or risk being underinsured and run the risk that a claim against them bankrupts the company.

The main argument put forward by those who did not believe that there would be an effect was that there are many other factors that go into setting insurance premiums and that a change to the discount rate alone would not necessarily mean higher premiums for small and micro businesses. One respondent in particular argued that it would not be in the interests of insurers to raise premiums on small businesses to the point of driving them out of business as that would have the effect of reducing their customer base. It was argued that as an alternative, insurers would raise premiums across their varied portfolios to cover any increase in damages payments due to a change in the discount rate.

Q21. Do you consider that a change in the approach to setting the discount rate or an encouragement of the use of periodical payments must apply to small or micro-businesses as it applies to others? If not, please give reasons.

40 respondents answered this question. Of these, 39 (98%) believed that the approach to setting the discount rate or an encouragement of the use of periodical payments must apply to small or micro-businesses as it applies to others. Only one respondent (2%) believed that it was appropriate to take a different approach in regards to small or micro businesses. The group arguing that the approach must apply equally to small and micro

businesses as it does to others was made up of 18 insurers and their representative groups; six defendant lawyers and their representative groups; four claimant lawyers and their representative groups; two general legal respondents; two accountants; two actuaries; a public sector body; an independent financial advisor; an academic; a member of the public and an investment firm. The one response that did consider it appropriate to take a different approach in respect of how the discount rate applies to small and micro-businesses came from a general legal respondent.

Those arguing that the discount rate and any encouragement of the use of periodical payments must apply to small and micro businesses in the same way as it applies to others generally expressed the view that there was no good reason for small and micro businesses to be treated differently. The argument was made that to start creating carve outs in respect of how the rate operates or who it should apply to would be to undermine the general principle that the discount rate exists to ensure full compensation and to avoid claimants being over or under compensated for their loss. The one respondent who took a different view provided no additional reasoning.

Q22. Do you agree with the initial assessment of the equalities impacts of the possible changes under discussion in this consultation paper? If not, please give reasons.

32 respondents answered this question. Of these, 16 (50%) agreed with the initial assessment of the equalities impacts of the possible changes under discussion. 13 respondents (41%) did not agree, and three (9%) argued that the equality impacts should be irrelevant to the setting of the discount rate. The group agreeing with the initial assessment of the equalities impacts was made up of 5 insurers and their representative groups; 5 defendant lawyers and their representative groups; two claimant lawyers and their representative groups; two public sector bodies; an accountant and an investment firm. The group who disagreed included nine insurers and their representative groups general legal respondents; an actuary; a general legal respondent; a member of the public and a response from the judiciary. The three respondents who argued that the equalities impacts were irrelevant to the setting of the discount rate were all insurers.

Those who agreed with the initial assessment of the equalities impacts of the possible changes did not, in general, make additional comments. Although one of the respondents in this category did express the view that when considering responses to this question the Government should have regard to the balance of responses from claimant and defendant interests.

Those who disagreed did so on the grounds that the impacts on two specific equalities groups had not been given sufficient weight in the assessment. Eight of these respondents argued that the assessment did not properly assess the impact that a change to the discount rate would have on young drivers who would be hit with higher premiums, as a high risk group, should the rate be reduced. Three respondents expressed the view that by its very nature the discount rate, and any subsequent change to the rate, would have an impact on many people with disabilities and that thought should be given to treating different classes of insurance differently, for example motor policies provide unlimited coverage, whereas non-motor policies have limited liability and this might affect whether it is better for claimants to accept a discount rate affected lump sum or whether to seek periodical payment options.

The three respondents who argued that the equalities impacts were irrelevant to the setting of the discount rate did so on the basis that the principle underpinning the rate is one of full compensation and to move away from that principle to create exceptions for people with protected characteristics would not be appropriate.

Q23. If you consider that the changes under consideration in this consultation paper in relation to the discount rate or the use of periodical payments will affect people with different protected characteristics please give reasons and provide evidence of any ways in which this will occur?

18 respondents answered this question and made a range of comments. The question was answered by 10 insurers and their representative groups; two claimant lawyers and their representative groups; a defendant lawyer; a general legal respondent; a public sector body; an independent financial adviser; an investment firm; and a response from the judiciary.

A number of the comments, made by the insurance industry, centred on the fact that inevitably, some claimants in a personal injury claim will have protected characteristics, but that this should not be a determining factor in the setting of the discount rate or the use of periodical payments and that if the discount rate is set at the correct level and the principle of full compensation is achieved, the disabled will not be disadvantaged in any event. However, there were other respondents including claimant lawyers who argued that the changes under consideration would adversely affect disabled people who should not be obliged to take risks with funds of damages needed for their ongoing and future care and other needs and that any change which has the effect of giving a person with a disability less than full compensation, for whatever reason, will impact adversely on such a person.

One respondent expressed the view that any increase in the discount rate would probably see protected parties under the Mental Capacity Act continue to take their damages by way of periodical payments as at present, but that if the discount rate is reduced lump sum settlements may be advised in a greater number of cases. However, another respondent argued that there are simply too many variables and too many combinations of possible protected characteristics to make separate discrete solutions for every possible combination a practical solution.

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

No responses were received from Welsh stakeholders that raised particular considerations for Wales or Welsh speakers.

A Welsh language translation of the summary section of this consultation response will be published at http://www.justice.gov.uk/publications/corporate-reports/moj/2010/welsh-language-scheme.

Equalities

As the summary of individual responses shows, a little over half of those who responded to the questions in the consultation paper relating to the initial assessment of equalities impacts agreed with its contents or argued that such considerations should be irrelevant to the parameters for setting the discount rate.

A number of responses 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 how such impacts should be taken into account. Some responses from insurers also argued that the potential impact on young drivers of increased insurance premiums should be taken into account.

These responses have been taken into account in further analysis of the issues raised in the consultation paper.

Annex A – List of respondents

Ageas Insurance Ltd and Groupama Insurance (joint response)
Allianz Insurance PLC
Association of British Insurers
Association of Personal Injury Lawyers
Aviva
AXA Insurance
Browne Jacobson
Capsticks Solicitors LLP
Civil Justice Council
Clyde & Co LLP
Commissioner for Older People for Northern Ireland
Council of HM Circuit Judges
Chris Daykin
Direct Line Group
Disability Action
DWF LLP
Eldon Insurance
esure Group PLC
Faculty of Advocates
Forum of Complex Injury Solicitors
Forum of Insurance Lawyers
Forum of Scottish Claims Managers
Grant Thornton
Greenwoods
Hilton Sharp & Clarke
Rowland Hogg
IM Asset Management Ltd
Institute and Faculty of Actuaries
International Underwriting Association
Irwin Mitchell
Judges of the Court of Session (Scotland)
Kennedys
Keoghs

Kingsley Napley
Law Society of Scotland
Lloyds
Lloyds Market Association
Liverpool Victoria
Medical Defence Union
Medical and Dental Defence Union of Scotland
Medical Protection Society
Morgan Cole
Motor Insurance Bureau
Munich Re
National Health Service Litigation Authority
NHS National Services Scotland
NFU Mutual
Northern Ireland Judicial Appointments Commission
Northern Ireland Legal Services Commission
Northern Ireland Policing Board
Ogden Working Party
Personal Financial Planning Ltd
Personal Injury Bar Association
QBE European Operations
RSA
Fulbahar Begum Ruf
Slater & Gordon (UK) LLP
South Eastern Health and Social Care Trust
Charles Stanley & Co Ltd
Stewarts Law LLP
Swiss Re
Deborah Tompkinson
Victoria Wass
Wheelers Law
Robin de Wilde QC
Zurich Insurance PLC

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