Ministry of Justice

Damages Act 1996: The Discount Rate

How should it be set?

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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 – How should it be set?

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 – How should it be set?' was published on 1 August 2012. It invited comments on the methodology to be used by the Lord Chancellor and her counterparts in Scotland and Northern Ireland in independently setting the discount rate for personal injury damages in their respective jurisdictions. The consultation was aimed at people and organisations with an interest in personal injury claims and damages in the UK.

In general terms, the discount rate is the rate of return to be expected from the investment of a lump sum award of damages for future loss. The methodology to be used in setting the rate will, in effect, define the types of investments by reference to whose yields, subject to appropriate adjustments, the discount rate is to be set. The overriding aim is to set the rate as accurately as possible so that under-compensation or over-compensation by reason of the accelerated payment of the future losses is avoided so far as possible.

The consultation period closed on 23 October 2012. This summary of responses has been prepared by the Ministry of Justice in connection with its review of 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 and conclusions 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 73 responses to the consultation paper were received. Of these, the main group of responses (approximately one quarter) 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 the methodology which should be used by the Lord Chancellor in setting the discount rate and on the various technical issues related to that exercise on which views were sought.

3. Widely diverging views were expressed by different interest groups, and overall the responses demonstrated very little consensus on the methodology which should be used in setting the rate or on the technical considerations which should be applied to that process.

Responses to specific questions

Question 1. Do you agree that the claimant should be assumed to hold all ILGS until redemption? If not, what alternative assumption would you make? Please give reasons.

63 respondents answered this question. Of these, 28 (44%) agreed with the assumption (seven without reasons), 28 (44%) disagreed, and seven (11%) made comments but did not specify whether they agreed with the assumption or not. Those disagreeing were principally insurers and their representative groups (including the Association of British Insurers (ABI)) and defendant lawyers, with three or fewer from other defendant representative groups, financial and accountancy organisations and the Ogden working party minority response. Those agreeing formed a more disparate group, comprising eight claimant lawyers and legal representative groups, six financial and accountancy organisations, and three or fewer reinsurers, general legal representative bodies, defendant lawyers, judicial groups, claimants and claimant representative groups, and the Ogden working party majority response. Comments only were received from three or fewer defendants and insurance groups; defendant lawyers; and claimant legal and other representative groups (including the Association of Personal Injury Lawyers (APIL)).

24 respondents noted that they were answering on a theoretical basis, stating that they did not agree that ILGS should be used as the basis for setting the discount rate (whether on the assumption that they were held to redemption or otherwise). This point was made by four of the 28 that agreed that ILGS should be assumed to be held to redemption if it were decided to set the rate with reference to ILGS, by 16 of the 27 that disagreed, and by four of those that made comments only. Some used this space to set out arguments for or against the use of ILGS in general as the basis of the methodology for setting the discount rate; these points relate to question 12 (which basis should be used for setting the rate) and as such are not considered here.

The reasons given for assuming the claimant to hold all ILGS until redemption were:

- This is the only basis on which future yields are known in advance and (therefore) upon which claimants are able to avoid market risk (12 respondents)
- This is linked to inflation (six respondents)
- This provides simplicity and avoids the need to take account of complicated factors and/or calculations (four respondents)
- This follows the approach of the House of Lords in Wells v Wells (four respondents)
- Investments can be structured to deal with an inexact fit with claimants' needs (mismatch risk) (three respondents)
- The need for an alternative strategy to deal with very short term needs was recognised by the House of Lords (one respondent)
- ILGS redemption dates are frequent, with a maximum gap of 3 years 8 months between redemption dates (one respondent)
- Many investment products are related to and derived from ILGS so it provides a real baseline (one respondent)
- There is an absence of evidence of claimants experiencing problems when holding ILGS to redemption (one respondent)

The reasons given for **not** assuming the claimant to hold all ILGS until redemption were:

- This is not done, or is unlikely to be done, by claimants in practice (21 respondents)
- ILGS are not available with redemption in every year (or when required) (17 respondents)
- The claimant's needs may change over time from those predicted at the outset (including living longer than expected) (17 respondents)
- Life expectancy can extend beyond the last available gilt redemption date (14 respondents)
- There is a restriction on the amount of gilts that individuals can buy directly (nine respondents)
- The capital sum should be exhausted by the end of the period of loss (seven respondents)
- The value of ILGS drops prior to the redemption date (four respondents)
- The long-term security of ILGS against default is not guaranteed (one respondent)

Question 2. By reference to what ILGS yields should the discount rate be set? Please give reasons.

62 respondents answered this question. Of these, 23 (37%) suggested using historical averages, seven (11%) suggested that reference should be made to likely future returns and four (6%) suggested that current yields should be used, while 25 (40%) made comments but did not express an opinion about which ILGS yields should be referred to in setting the rate. A few respondents suggested alternatives as to the detail (such as either one-year or three-year historic returns), while three respondents suggested using both historic and future returns (plus, in one case, current yields) as the basis.[1]

Those suggesting that reference be made to future returns were principally insurers with three or fewer from defendant lawyers, claimant representatives and some members of the Ogden working party. Those of the opinion that historic data should be used formed a more diverse group, comprising five financial and accountancy organisations, five claimant lawyers and legal representative groups (including APIL), and three or fewer reinsurers, general legal representative bodies, defendant lawyers, judicial groups, claimant representative groups, and some of the Ogden working party. Comments only were received from 14 insurers and their representative groups (including the ABI), four financial and accountancy organisations, and three or fewer defendant lawyers, claimant lawyers and legal representative groups.

However, of the 62 respondents submitting these answers, 25 respondents, comprising defendants, insurers and defendant lawyers, stated that they did not agree that ILGS should be used as the basis for setting the rate. This was noted by three of the 23 stating that past yields should be used, by three of the seven stating that future forecasts should be used, one of the four stating that current yields should be used, one of the three suggesting a combination, and by 17 of the 25 making comments only.

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[1] These are recorded individually under respective categories in the breakdown, below.

Within each of the general approaches, the detailed suggestions received were as follows.

Future returns:

- medium to long term view of likely yields (six respondents, one of whom suggested looking also at yields for the last 20 years)
- average of forward rates (four respondents, two of whom suggested referring also to historic averages)

Current returns:

- Current market conditions (three respondents)
- Average based on the value of all ILGS in issue (two respondents)

Historic returns:

- One year or up to one year (10 respondents)
- Three years (nine respondents)
- Longer than three years (one respondent)
- Five years (one respondent)
- Ten or twenty years (five respondents, one of whom suggested taking a view of the future also)
- Non-specified period (three respondents, two of whom felt that reference should also be made to forward rates)

The reasons given for using future returns include being able to account for foreseeable future volatility in the market; the effect of the recent financial turmoil on recent yields of ILGS; and forecasts issued by the Office for Budget Responsibility which suggest future growth.

The reasons for preferring the use of historic yields differed depending on the period suggested, although a general point was that forecasting is too speculative. Most of those suggesting a three-year historical average referred to the previous approach taken in *Wells v Wells* and by the Lord Chancellor. Those recommending a one-year, or up to one-year, period cited it as providing a near to present yield that would even out any anomalies in the market at the point of calculation; whereas those advocating use of a longer historical average felt that it would take account of several economic cycles, including periods of economic stability, and would better reflect the period of time for which the award was intended to last.

Question 3. What range of ILGS yields should the discount rate be based on and what calculation should be applied to them? Please give reasons.

63 respondents answered this question. Of these, 25 (40%) made a suggestion as to the range of ILGS to be included, 23 (37%) made a suggestion as to the calculation to be applied while 27 (43%) made comments but did not express an opinion about either the range of ILGS yields or the calculation to be used.

Of the comments received about the range of ILGS to include, six respondents suggested including all ILGS on the basis of either simplicity or to reflect the range of claimants' circumstances. These were made by a disparate group comprising three or fewer defendant lawyers, claimant representatives and lawyers, general legal representative bodies, and financial and accountancy organisations.

All of the remaining 19 respondents commenting on the range to be used recommended excluding short-dated ILGS and, in particular, 16 of these suggested that gilts with less than five years until the redemption date should be excluded. This was primarily on the grounds that as ILGS approach their redemption date, the yields tend to be distorted by short-term factors, with other reasons including that claimants would be unlikely to invest in ILGS for short-term needs. These 19 respondents formed a balanced group, incorporating four reinsurers and insurers, four financial and accountancy organisations, four claimant lawyers and legal representative groups, and three or fewer general legal representative bodies, defendant lawyers, and both the majority and minority responses of the Ogden working party.

Of the 23 respondents making a suggestion about the calculation to be applied, the following suggestions were made:

- Simple average (15 respondents)
- Weighted average (five respondents)
- Retain the method used in Wells/2001 (two respondents)
- Rolling average (one respondent)

Comments only were received predominantly from insurers and their representative groups (including the ABI), plus from five defendant lawyers, and three or fewer financial and accountancy organisations and claimant lawyers.

Of the 63 respondents submitting answers, 21, comprising defendants, insurers and defendant lawyers, stated that they did not agree that ILGS should be used as the basis for setting the rate. This was noted by two of the 19 respondents stating that gilts with less than five years to redemption should be excluded, and by 19 of the 27 making comments only.

Question 4. Should any allowance be made for potential differences between RPI inflation and health care costs inflation? Please give reasons.

65 respondents answered this question, with 26 (40%) suggesting that some allowance should be made for potential differences between RPI inflation and health care costs inflation, 34 (52%) recommending that no such allowance be made, and five (8%) making comments without expressing an opinion as to whether any allowance ought to be made. Those stating that allowance should not be made were principally insurers, their representative bodies and defendant lawyers, with three or fewer from accountancy and financial organisations, and claimant lawyers. Of the responses stating that some allowance should be made for the difference between different inflation measures, nine were received from claimant lawyers & their representative bodies, including APIL, MASS and FOCIS, seven from financial and accountancy organisations, four from general legal representative bodies, and three or fewer from claimant representative groups, judicial groups and insurers. Comments only were received from the Ogden Working Party

majority and minority response, and three or fewer defendant lawyers, claimant representatives and financial and accountancy organisations.

The reasons given **for** making some allowance for potential differences in inflation measures were:

- Care (or employment) costs increase faster than RPI (12 respondents, plus noted by one respondent making comments only)
- The methodology should aim for the principle of full compensation (10 respondents, plus noted by one respondent making comments only)
- Specific heads or elements of damages awards could have different inflation measures or rates applied (nine respondents, plus noted by two of those making comments only)
- Care costs are likely to be the main element of an award for damages in personal injury claims (five respondents, plus two making comments only)
- Periodical Payments Orders (PPOs) are not always available or are not available in Scotland (three respondents)
- New treatments may have a higher cost (two respondents)

The reasons given **for not** making some allowance for potential differences in inflation measures were:

- PPOs can protect against health care costs (30 respondents)
- The difference between the two inflation indices is reducing (14 respondents)
- This has not been considered previously when setting the discount rate (13 respondents)
- This would introduce an additional complication (nine respondents)
- RPI provides a reasonable balance (six respondents)
- ASHE is a survey rather than a true index (three respondents)
- Doing so may discourage use of PPOs (one respondent)
- NHS care can be used if there is a shortfall (one respondent)
- The Consumer Prices Index should be used (one respondent)

Question 5. What considerations should be applied to the rounding up or down of the discount rate? Please explain your reasons.

Question 6. Should the rounding of the discount rate be restricted to one half per cent? If not, what degree of rounding would be appropriate? Please give reasons.

Many of the respondents dealt with these two questions together and so the responses are considered together here. 63 respondents answered these questions. Of these, 24 (38%) suggested that the rate should be rounded to the nearest fraction of a percent, 17 (27%) suggested that the rate should be rounded up, five (8%) suggested that it be rounded down, while 17 (27%) indicated no preference.

The 24 respondents suggesting that the rate be rounded to the nearest fraction of a percent formed a diverse group, comprising seven reinsurers and insurers, six financial and accountancy organisations, and three or fewer claimant lawyers and their representative bodies (including APIL), general legal representative bodies, defendant lawyers, claimant representative groups and the Ogden Working Party majority and minority responses. The 17 suggesting that the rate be rounded up were predominantly insurers, their representative bodies, defendant lawyers and three or fewer financial and accountancy organisations and general legal representative bodies. The five respondents suggesting that the rate be rounded down comprised three or fewer claimant lawyers and financial and accountancy organisations.

With regard to whether the rounding of the rate should be restricted to half a percent, 34 (54%) respondents agreed that rounding ought to be to half a percent, although amongst these some of the respondents advocating rounding *up* to half a percent expressed it in terms of *at least* or *possibly further*. 16 (25%) respondents suggested that rounding ought to be to a quarter-percent, three (5%) suggested rounding to 0.1%, while one respondent recommended rounding to the nearest one (whole) percent. In addition, two respondents suggested that there ought to be no rounding and a further two respondents agreed that there should be some rounding but did not specify to which degree. Comments only were made by five respondents.

The reasons given for restricting the rounding to half a percent were mainly that this would allow use of the Ogden tables (without revision) and, related to this, that it would provide simplicity and clarity. The Ogden working party stated that it could produce amended tables in smaller increments, but some respondents citing this reason saw benefit in being able to avoid this additional task. Almost half of the respondents in this group considered that this degree of rounding would allow for a broad-brush approach and would enable the rate set to last for a long time. The reasons put forward by those advocating a narrower degree of rounding (to 0.25% or 0.1%) were primarily that this would provide greater accuracy and therefore greater fairness or avoidance of under-compensation or over-compensation. A further reason given was that it would reduce the impact of any change (whereas altering the rate by a further 0.25%, say, would make a substantial difference in real terms).

Relatively few respondents commented further on the considerations that should be applied to the rounding up or down of the discount rate. Almost all of those who did make comments did so in support of recommendations to round upwards. Nine respondents suggested that the effect on defendants ought to be considered as part of the rounding, while three or fewer suggested that consideration be given to current low levels of ILGS, market conditions and inflation.

Question 7. What allowance should be made for investment expenses and tax? Please give reasons.

65 respondents answered this question, 30 commenting on both investment expenses and tax, seven commenting only on investment expenses and 22 commenting only on tax. Six respondents made comments but did not express any opinion as to whether or how these aspects ought to be allowed for.

Of the 37 respondents commenting on investment expenses, 27 (73%) suggested that **no** allowance should be made for investment expenses, with three further respondents suggesting that the investment costs would be small and need not be allowed for. These respondents comprised 13 insurers, reinsurers and defendants; five financial and accountancy organisations, five defendant lawyers, and three or fewer claimant lawyers, general legal representative bodies, judicial groups, and the Ogden Working Party majority and minority responses. The remaining suggestions were that some allowance ought to be made, to a greater or lesser degree of accuracy, with three or fewer respondents recommending: 0.05%, 0.1%, 0.5%, 1.5%, ‘modest costs’, or an unspecified amount. These suggestions were received from four financial and accountancy organisations and three or fewer insurers, defendant lawyers and claimant lawyers. Most respondents cited the reason that if the claimant were being assumed to hold ILGS to redemption, there would be very little or no investment advice required.

Of the 45 respondents commenting on what allowance should be made for tax when setting the rate, 10 (22%) respondents stated that **no** allowance should be made. Of those recommending that some allowance should be made, 11 (24%) did not specify an amount, 14 (31%) suggested the basic rate of tax, while three or fewer specified: 0.05%, 0.09%, 0.2%, 10%, 15%, 20%, or 25% (some expressing it as the adjustment to make to the discount rate and others expressing it as the rate of tax to be allowed for).

Question 8. Do you agree that setting the discount rate on the basis of the expected return from a mixed portfolio of assets is in principle consistent with the decision of the House of Lords in **Wells v Wells*****? Please give reasons.***

65 respondents answered this question. Of these, 34 (52%) agreed (one without reasons), 23 (35%) disagreed, and eight (12%) made comments but did not specify whether they agreed that basing the discount rate on a mixed portfolio is in principle consistent with *Wells v Wells* or not. Those agreeing were predominantly insurers, reinsurers and their representative groups (including the ABI) and defendant lawyers, with three or fewer from other defendant representative groups, claimant lawyers, general legal representative bodies, and financial and accountancy organisations. Those disagreeing were comprised mostly of claimant lawyers and legal representative groups (including APIL), and financial and accountancy organisations but with three or fewer from general legal representative bodies, defendant lawyers (one of whom did not consider Wells v Wells to apply), judicial groups, claimants and claimant representative groups, and the Ogden working party (majority response). Comments only were submitted by three or fewer financial and accountancy organisations, insurers and defendant lawyers, and the Ogden working party (minority response).

17 respondents rejected the premise of the question, stating that they did not accept the Lord Chancellor to be bound by the decision of the House of Lords in *Wells v Wells* in setting the discount rate (regardless of whether setting the rate on the basis of a mixed portfolio of investments would in principle be consistent with it). This point was made by 13 of the 34 that agreed that setting the rate on such a basis would be consistent with *Wells v Wells*, by one of the 23 that disagreed, and by three of those that made comments only. Some used this space to set out arguments for or against the use of ILGS or a mixed portfolio of investments in general as the basis of the methodology for setting the discount rate; these points relate to question 12 (which basis should be used for setting the rate) and as such are not considered here.

The responses to this question were more nuanced with different reasons presented in slightly different ways, for example while one shared view was that a sufficiently low risk portfolio could be compiled which would be consistent with *Wells v Wells*, there were differences of opinion about what type of investments such a portfolio could contain in order to be sufficiently low risk. However, the common points raised were broadly as follows.

Setting the discount rate on the basis of the expected return from a mixed portfolio of assets **is** in principle consistent with the decision of the House of Lords in *Wells v Wells* because:

- The principle in *Wells v Wells* to follow is simply that of full compensation (18 respondents)
- It should be assumed that a claimant who rejects a Periodical Payment Order accepts a higher risk than that allowed for in *Wells v Wells* (17 respondents)
- The House of Lords' argument is flawed or outdated as ILGS are not "risk free" (14 respondents)
- The Lord Chancellor interpreted *Wells v Wells* widely or did not seem restricted by it in 2001 (11 respondents)
- A mixed portfolio can still provide a low risk investment (nine respondents, some of which indicated that a mixed portfolio would only be consistent if it was low risk)
- "Risk-averse" does not mean "no risk" (five respondents)
- The court's requirement to ignore what the claimant before it will actually do does not apply to the Lord Chancellor who can consider claimant behaviour generally (three respondents)
- The House of Lords' choice to ignore alternatives (such as structured settlements) does not apply to the Lord Chancellor (two respondents)

Setting the discount rate on the basis of the expected return from a mixed portfolio of assets **is not** in principle consistent with the decision of the House of Lords in *Wells v Wells* because:

- Investment outside of ILGS introduces an unacceptable risk; the House of Lords stated investment should be risk free (16 respondents)
- There is no portfolio available that can provide the necessary degree of certainty and a higher return (five respondents)
- The House of Lords explicitly rejected having regard to the actual assets in which a claimant might invest (three respondents)

Question 9. If option 2 is adopted, what should the mixed portfolio of assets on which the calculation of the discount rate is to be based contain? Please indicate the type and proportions of assets to be included and give reasons for your choice.

50 respondents answered this question, of which 26 (52%) gave an opinion on the basis on which to calculate the discount rate. Of these, 15 respondents (comprising 11 insurers and their representative groups, and three or fewer defendant lawyers, and financial and accounting organisations) suggested that the type and proportions of assets to be included in a mixed portfolio should be 30/35% equity and 65/70% cash. A further seven

respondents (mainly insurers and reinsurers, with three or fewer defendant lawyers and financial and accountancy organisations) recommended a mix of cash and equity but did not specify proportions. Two respondents recommended a broad-brush approach with no single mix of assets forming the basis for the rate, while two further respondents recommended referring to fund indicators rather than particular investment products. Many respondents commented that the longer the period of time which the award or investment was intended to cover, the greater the proportion of equities should or could be included.

The remaining 24 (48%) respondents made comments only and did not express an opinion as to the contents of the mixed portfolio of assets on which the calculation of the discount rate could be based. This group comprised seven claimant lawyers and their representative groups (including APIL, FOCIS and MASS), five financial and accountancy organisations, five insurers and reinsurers, and three or fewer defendant lawyers, general legal representative bodies, claimant representatives and judicial groups.

Of the 50 respondents answering this question, 14 of them (including 12 of those making comments only) commented that they did not agree that a mixed portfolio should be the basis on which to set the discount rate.

Question 10. Assuming the return on the portfolio you have identified is broadly to be the basis on which the discount rate is to be calculated, what range of data should be included in the calculation? Please consider whether the data should be historic and whether any averages should be simple or weighted.

Responses were received from 56 respondents to this question, 33 (59%) providing an opinion as to the range of data to be included in the calculation, 13 (23%) making comments only, and 10 (18%) respondents stating that they felt unable to answer the question.

Regarding the range of data to be included, 26 (46%) respondents – predominantly insurers and their representative bodies – put forward a view as to whether historic data should be used. 11 thought that the rate should be based on historical data only (one specified data from the last three to five years and three specified data from the last 10 years or more); Five respondents suggested using future forecasts only; and 10 recommended using a combination of historic, anticipated and/or current rates of return.

Just 10 (18%) respondents commented on the weighting to apply in the calculation based on a mixed portfolio. Of these, seven recommended weighting according to the proportion of assets in the assumed portfolio, two recommended taking a simple average, and one suggested weighting in favour of longer periods of historic data.

21 respondents also made recommendations as to the potential source of data. In particular 16 respondents, all insurers and defendant lawyers, suggested using the evidence of asset managers and advisors as to returns actually achieved for cautious investors and those predicted, with the majority cautioning against a finely and precisely calculated rate and in favour of a broad-brush approach. Four respondents recommended referring to specific published indices, such as the Barclays Equity Gilt Study or the Financial Services Authority projection rates.

Of the 13 respondents making comments only, seven stated that they did not agree that the discount rate should be based on a mixed portfolio. These were mainly claimant lawyers and their representative groups (including APIL and FOCIS) with three or fewer from financial and accountancy organisations.

Question 11. Should any other factors, such as allowances for inflation, tax or investment expenses, be taken into account and if so, how? Please give reasons.

Responses to this question were received from 64 respondents. 55 (86%) made suggestions as to whether inflation, tax and/or investment expenses ought to be taken into account, six (9%) made comments only (including the Ogden Working Party majority response), and three (5%) respondents stated that they felt unable to answer the question.

With regard to inflation, 25 respondents felt that some allowance should be made for inflation, although 20 of these did not specify to what degree, while the remaining five recommended allowing for inflation at between 2% and 3%, based mainly on CPI and/or RPI. Five respondents stated that no account should be taken of inflation and a further two respondents commented that no account should be taken if the portfolio or index selected for the basis of the calculation already accounts for it.

Those suggesting that some allowance for inflation should be made comprised nine insurers, eight financial and accountancy organisations, and three or fewer claimant lawyers and their representative groups (including APIL), judicial groups, defendant lawyers, and the Ogden Working Party minority response. Those that considered no account should be taken of inflation comprised three or fewer claimant and defendant lawyers, insurers and financial and accountancy organisations.

In relation to tax, 36 respondents considered that some allowance should be made for taxation, although 27 did not specify at what rate or to what degree. One respondent specified 20% while eight more stated that the allowance made should be based on the basic rate of tax. Of the 36 respondents recommending that some allowance for tax be made, 13 were insurers and their representative bodies (including ABI and MIB), 10 were from accountancy and financial organisations, six were defendant lawyers, four were claimant lawyers and their representative group (including APIL) and three or fewer were judicial groups and claimant representatives plus the Ogden Working Party minority response. 13 respondents considered that no allowance should be made for tax, four of them on the basis that damages awards should be tax exempt. These respondents were almost all insurers, and defendant lawyers and their representative groups (including FOIL).

Finally, in terms of whether an allowance should be made for investment expenses, 27 respondents considered that some allowance should be made for investment expenses for a discount rate based on a mixed portfolio, all but one of whom did not specify the amount to allow. These respondents formed a diverse group, comprising seven financial and accountancy organisations, five insurers, five claimant lawyers and their representative groups (including APIL), four defendant lawyers and three or fewer judicial groups, general legal representative groups, claimant representative bodies, and the Ogden Working Party minority response. 18 respondents stated that no allowance should be made, four of whom considered that it should be recoverable as a separate head of damages. These respondents were predominantly insurers and defendant lawyers, with three or fewer claimant lawyers and general legal representative groups.

Question 12. Should the Lord Chancellor and his counterparts in Scotland and Northern Ireland set the discount rate under section 1 of the Damages Act 1996:

a. by retaining an ILGS based approach but changing some or all of the detailed criteria used (option 1);

b. by moving away from an ILGS based approach to a mixed portfolio of investments based approach (option 2); or

c. by reference to some other approach? If so please give details.

Please give reasons for your choice.

66 respondents answered this question. Of these, 24 (36%) chose option 1 (two without reasons), 29 (44%) chose option 2 (one without reasons), seven (11%) chose another approach (referred to here as option 3) (one without reasons), while six (9%) made comments but did not express a choice between the options.

Some of the reasons given for moving to a mixed portfolio approach were similar to those given under question 8 (that a mixed portfolio approach is in principle consistent with *Wells v Wells*). There was also a cross-over between those choosing option 2 (mixed portfolio approach) and option 3 (some other approach), with many of the same reasons being given for both. The difference between them was not so much in the reasoning as in the conclusion to be drawn from it, with five of those choosing option 3 arguing that the rate should not be changed at all, while others made this same point (that the rate should not be changed) but did not state any choice between the three options leaving their points as comments only. The only alternative approach put forward under option 3 was that the parties in each case should agree a rate (and that the Lord Chancellor should not set a rate at all).

The respondents who thought the Lord Chancellor should set the rate by retaining an ILGS based approach (option 1) comprised eight claimant lawyers and legal representative groups (including APIL), eight financial and accountancy organisations, and three or fewer general legal representative bodies, judicial groups, claimant representative groups, defendant lawyers, and the Ogden working party majority response.

The 29 respondents who thought the rate should be set by moving to a mixed portfolio of investments based approach (option 2) were predominantly insurers and reinsurers and their representative groups and defendant lawyers, with three or fewer from other defendant representative groups, financial and accountancy organisations, claimant lawyers, general legal representative bodies and the Ogden Working Party minority response.

Respondents who thought that the rate should be set by reference to some other approach (option 3) (including that it should not be changed) were mainly insurers or their representatives (including ABI), with three or fewer claimant and defendant lawyers.

Comments alone were received mostly from insurers, with three or fewer from financial and accountancy organisations and defendant lawyers.

There were two main reasons given for choosing option 1, with a few respondents suggesting different or additional reasons. These were:

- ILGS is the only (or the nearest to a) risk-free form of investment (18 respondents)
- This was the approach taken in *Wells v Wells* (six respondents)
- ILGS represents a baseline for the market as other investment products are linked to ILGS (two respondents)
- Retaining a methodology based on ILGS provides consistency (one respondent)
- Claimants would probably invest in ILGS if the discount rate were correct (one respondent)
- Seeking investment advice is difficult for injured investors (one respondent)
- Future yields are known in advance (one respondent)
- Lower investment management costs (one respondent)

The reasons given for choosing an option other than one based on ILGS were:

- The discount rate should not be based on one investment model and/or a rigid calculation (19 respondents: 10 – option 2; five – option 3; four – comments only)
- If claimants want risk-free investment they can opt for PPOs (18 respondents: nine – option 2; four – option 3; five – comments only)
- claimants invest in mixed portfolios in practice (17 respondents: 15 – option 2; two – comments only)
- The effect on defendants should be taken into account (11 respondents: two – option 2; five – option 3; four – comments only)
- The rate should be set following the same approach and principles as in 2001 (nine respondents: one – option 2; five – option 3; three – comments only)
- ILGS are not entirely without risk and/or *Wells v Wells* allows for some risk (seven respondents: all option 2)
- ILGS rates are artificially low at the moment (five respondents: all option 2)
- Any change should be delayed (awaiting a decision to be made on CPI/RPI; until the economy stabilises) (three respondents: two – option 2; one – comments only)
- The rate should be decided on a case by case basis (one respondent – option 3)

Question 13. Do you agree that one prescribed discount rate is sufficient? If not, please specify what classes of cases should be affected by different rates and what the differences should be in the ways that the different rates are to be set. Please give reasons.

66 respondents answered this question, of which 42 (64%) agreed that one rate is sufficient, 19 (29%) disagreed, and five (8%) made comments only. Those agreeing were predominantly insurers, reinsurers and their representative groups (including ABI and MIB), and defendant lawyers and their representative groups (including FOIL), plus four

financial and accountancy organisations and three or fewer claimant lawyers and judicial groups. The respondents who disagreed that one rate is sufficient consisted of eight claimant lawyers and their representative groups (including APIL and FOCIS), six financial and accountancy organisations, and three or fewer general legal representative bodies, claimant representative groups and the Ogden Working Party majority response. Comments only were received from three or fewer financial and accountancy organisations, general legal representative bodies, claimant representative and judicial groups and the Ogden Working Party minority response.

The reasons given by those advocating a single rate were:

- This would provide greater simplicity, transparency, and/or efficiency (34 respondents)
- PPOs are available for earnings-related costs such as the claimant's future loss of earnings and carers' wages (5 respondents, plus 1 making comments only who noted that if PPOs were available in Scotland it would reduce the risks involved in having a single rate)
- Differences would be averaged out

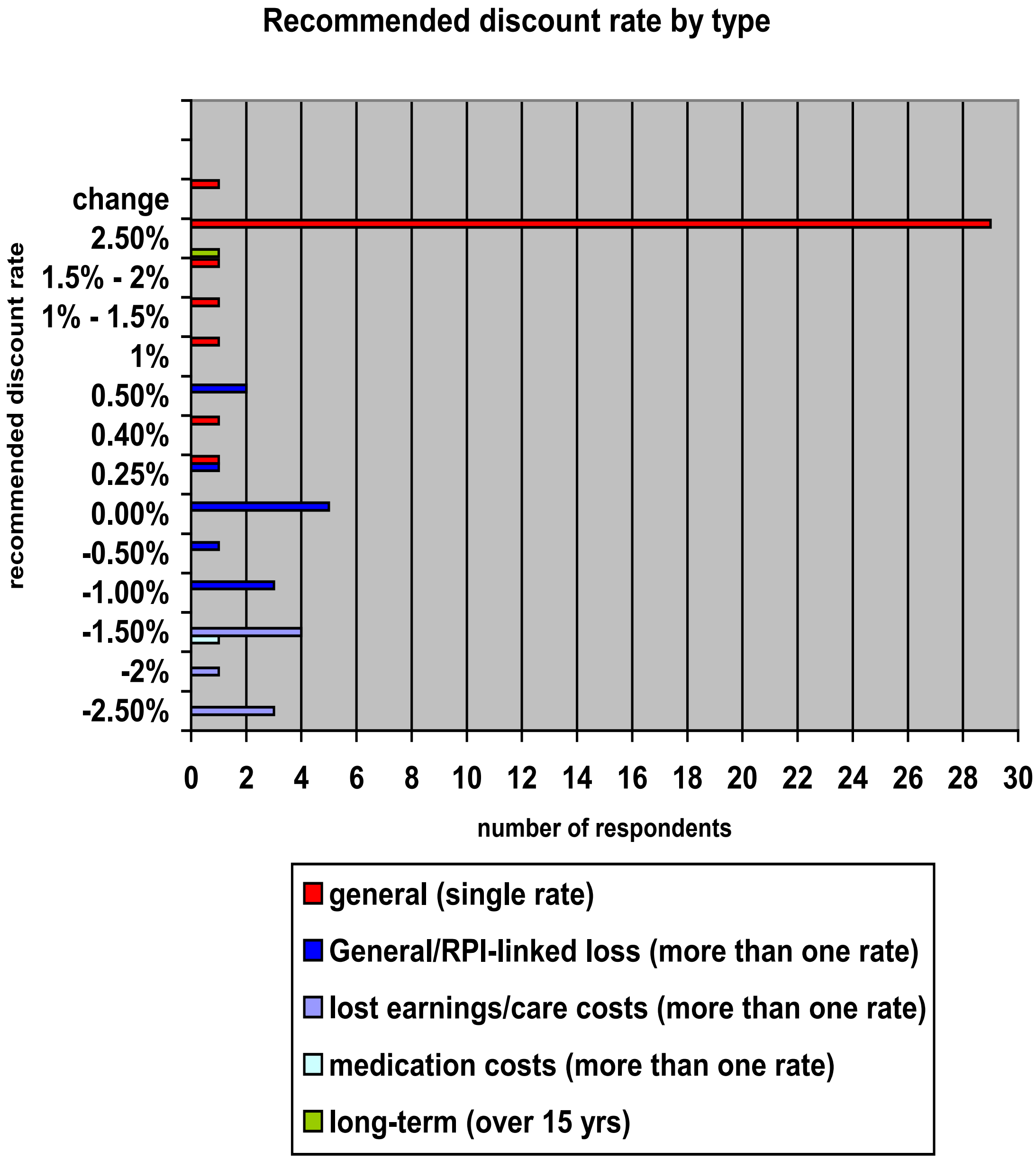
Of those respondents recommending different rates, almost all suggested different rates to apply to different types of loss. In particular, 14 respondents recommended a separate rate for damages linked to loss of earnings with a further three respondents specifying a rate linked to care costs. One respondent who favoured a single rate for reasons of simplicity did suggest that a separate rate for loss of earnings would be logical, in view of the fact that this loss could be met by a PPO, while three of those only making comments did in principle consider that there should be a separate rate for health care costs with the proviso of some limiting criteria. In conjunction with the recommendation for an earnings or care cost based rate, 10 respondents specified that there should be a price-related discount rate (based on RPI, for example) with a further four respondents suggesting a non-earnings based rate. Two of the respondents recommending multiple rates also referred to accommodation costs as a potential consideration, in particular citing the effects of *Roberts v Johnstone* ([1989] QB 878). This point was also raised by one respondent making comments only.

While these suggestions related to different types of loss, three respondents recommended different rates based on the duration of the loss being compensated, along the lines of the Ontario model (where a different rate applies after 15 years).

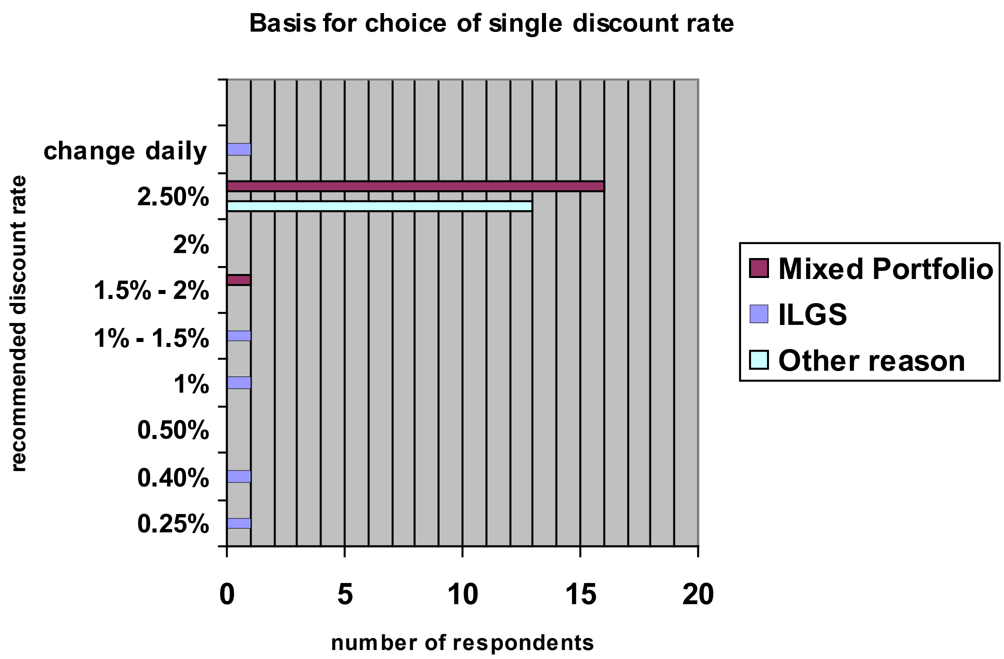
Question 14. What discount rate or rates do you consider would be appropriate now? Please indicate the basis for your decision.

Responses were received from 64 respondents, with 48 (75%) suggesting a rate or rates, 10 (16%) making comments only and six (9%) stating that they did not feel able to answer the question. A broad range of rates was suggested by the 48 respondents that did make a recommendation. 34 respondents suggested a single rate, ranging from 0.25% to 2.5%. A further respondent suggested a single rate to be calculated daily. Suggestions from respondents who recommended two, or in one case three, separate rates were in the range of -2.5% to -1.5% for health-care or earnings-related loss (eight respondents), -1.5% for medication costs (one respondent) and -1% to 2.5% for losses expected to increase in line with RPI or any loss besides those related to earnings or healthcare (12 respondents). Four of the respondents advocating two rates specified one rate only and then suggested making an allowance to produce another rate for earnings-related loss. A further recommendation for two rates, based on the duration of the loss being compensated, suggested 2.5% after 15 years, with a lower (unspecified) rate before that.

The breakdown of these responses is set out in the chart below. The chart shows 57 responses since seven of the 48 respondents suggested two rates and one suggested three rates which are each shown separately.



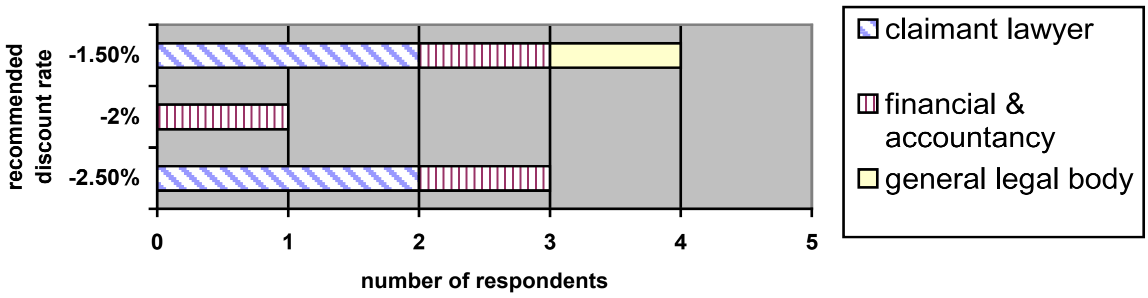
Only a small number of respondents included detailed calculations to support their suggestions. However, most of those suggesting a particular rate or rates gave reasons in general terms, demonstrating that Option 1, Option 2 or some other approach formed the basis for the suggestion. Of the 35 respondents recommending a single rate, five based their suggestions on ILGS yields, 17 on the return from a mixed portfolio, and 13 suggested 2.5% on the basis that the current rate should not be changed. The following chart shows the breakdown of the basis for each rate suggested.



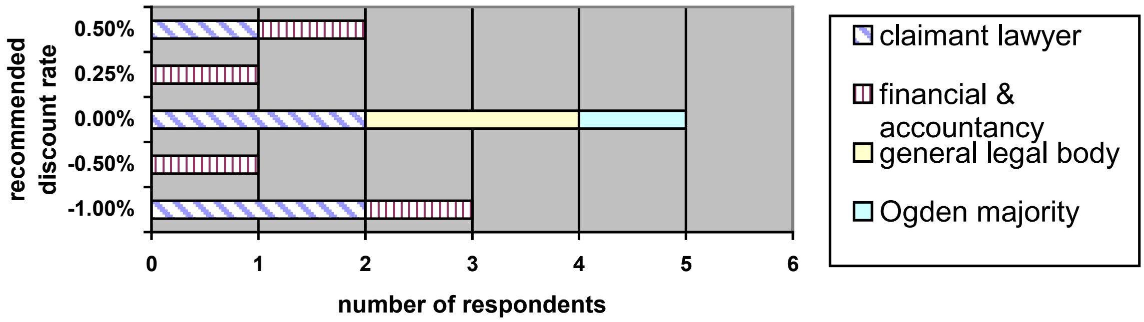
All of the respondents recommending different rates for different types of loss based their suggestions on ILGS yields, with an adjustment for earnings relative to RPI inflation. The one respondent recommending a long-term rate suggested that this would not be linked to ILGS.

The following breakdown of responses by respondent type shows a strong divide; insurers and defendant lawyers were the only respondent type to advocate a rate of 2.5% and did not suggest any other rate. Suggestions for other rates were fairly evenly spread between claimant lawyers and financial and accountancy organisations, with the latter group suggesting a slightly higher rate than others of 2% at the top end of the range. Claimant lawyers, general legal bodies, and the Ogden Working Party majority response mostly put forward suggestions for multiple rates, while financial and accountancy organisations were evenly split between suggesting multiple or single rates. This is consistent with the responses received under question 13.

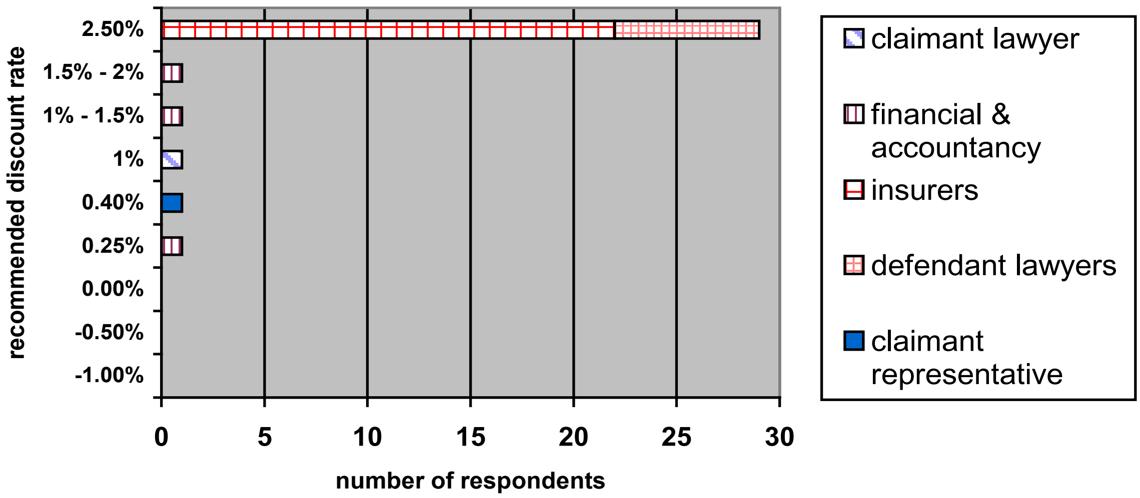
Lost earnings/care costs (more than one rate) by respondent type



General/RPI-linked loss (more than one rate) by respondent type



General loss (single rate) by respondent type



Question 15. Do you agree with the impact assessment at Appendix B? If not, please explain why.

A total of 53 respondents answered this question. 26 (49%) agreed, 12 (23%) disagreed and 15 (28%) made comments only. Of the 26 who agreed, 10 did not make any substantive comment, while one of those disagreeing did not make any comments.

Those who agreed with the impact assessment formed a fairly even mix of insurers (including the MIB), financial and accountancy organisations, and claimant lawyers (including FOCIS) plus three or fewer defendant lawyers and general legal representative bodies. The respondents who disagreed comprised five insurers with three or fewer defendant lawyers (including FOIL), claimant lawyers (including APIL) and claimant representative groups.

There were several comments from respondents challenging a range of assumptions or conclusions in the impact assessment. Some of these were made by respondents who had indicated overall agreement with the assessment while others had stated general disagreement. In some instances the same comment was made both by those who agreed overall and those who disagreed overall. Where this was most prevalent, respondents tended to come from a similar perspective, such as the insurance industry and the defendant legal profession.

In summary, the comments received were:

Impacts on claimants:

- In relation to the statement at paragraph 1.5 (citing cerebral palsy claims of over £1m as an example that awards can be very large), in fact serious injury claims of £1m are considered modest and claims of £10m are not unknown (two respondents).
- Stating that larger damages awards will take the form of an 'increased transfer payment from defendants to claimants' is too simplistic and does not acknowledge that, where adequate insurance is not in place, homes and businesses will be put at risk (one respondent)
- Some claimants will receive smaller damages if the discount rate is reduced, depending upon the age and life expectancy of the claimant and how the damages are to be spent (one respondent)
- The benefits to claimants should be the same under both options since investment income should be the same (one respondent)
- The assumption that claimants are risk averse if true would suggest that claimants would opt for a risk free periodical payment order. As the majority of claimants opt for lump sum awards this suggests that they are not risk averse (one respondent who agreed overall)

Impacts on the insurance industry and UK economy

- The impact assessment should have considered the impact on the UK of an increased (insurance premium) cost for business and households (15 respondents, four of whom disagreed overall).
- It is lawful to take the wider public interest into consideration (11 respondents, one of whom had disagreed in general)

- Higher lump sum payments would not generate increased levels of business for insurers; it is very unlikely that a change will result in the writing of more policies (two respondents)
- The assumption that insurance premiums would rise following a reduction in the discount rate is too simplistic (two respondents, both of whom agreed overall)
- Costs can be quantified, in particular by applying a given discount rate to awards of known claims and calculating the difference in value (one respondent)

<u>Private health care usage</u>

- A lower discount rate (and thus larger damages awards) would not increase the use of private healthcare, primarily for the reason that the NHS is chosen for the care package and level of specialist care it can provide to severely injured claimants (nine respondents, three of whom agreed overall).
- No assumption can be made about whether a claimant would choose private care or NHS care; it is a private matter for the claimant how the award is spent (two respondents)
- Whether the use of private healthcare increases is irrelevant (two respondents, one of whom agreed overall)
- The assumption that an increase in the level of damages and the use of private healthcare would lead to savings for the NHS should also take into account the extra cost to the NHS in paying out increased damages awards (five respondents) (in fact, the impact assessment does include this point under the section on costs to main affected groups – see, for example, paragraph 2.34).

<u>Behavioural impacts</u>

- A higher claim cost would not increase defendant attempts to avoid accidents, mainly because existing costs already provide this incentive or because the primary motivation in not causing accidents is the care of patients (nine defendants, three of whom agreed overall)

<u>Other points</u>

- There might be additional costs for the Ministry of Justice and HMCTS, for example if defendants bring more cases to court to decide whether a periodical payment order should be made, or if larger claims reduce the incentive to settle (two respondents, one of whom agreed overall)
- The rural proofing test does not take into account that an increase in insurance premiums will have a disproportionate effect on the rural community and its small firms due to existing hardship in rural areas (two respondents)
- It is not appropriate to assume, at para 2.61, that if either of the two options outlined in the consultation is adopted the discount rate will be reduced (one respondent)
- The next review of the personal injury discount rate should not be deferred until 2017, although different opinions were given as to an alternative time-frame or trigger (three respondents, one of whom agreed overall)

- If you interpret defendants as the premium paying and taxpaying members of society, whose costs are likely to rise if payments do, then the assumption that "increased transfer payments from defendants are assumed to be valued by society neutrally" is far from correct (one respondent)

In addition to comments specifically challenging assumptions or conclusions in the impact assessment, some respondents suggested a number of additional impacts that had not been mentioned in the impact assessment. These were:

- A reduction in the discount rate would reduce the market for periodical payments, since increased lump sums would become more attractive to claimants (10 respondents, five of whom agreed overall)
- Larger awards would increase the number of claims that exceed insurance policy indemnity limits, with a risk that defendants become personally liable and that claimants do not receive the whole award (three respondents)
- There is a risk that if the discount rate is not set correctly, the claimant's award will run out (two respondents, one of whom agreed overall)
- Increased insurance premiums will cause higher incidences of non-insurance (one respondent)
- An increase in the size of awards could increase the incentive for insurers to challenge bogus claims (one respondent who agreed overall)

Three respondents, who agreed overall, suggested that the impact assessment should have considered the costs and benefits of no change, in particular the existing cost to claimants if the current discount rate is too high. This, though, would require the use of an anticipated result under one of the options as a benchmark against which to assess the continuation of the present situation. The impact assessment instead considered the do nothing option against the present position and as such the costs and benefits were stated as necessarily zero. However, any costs of continuing the current situation as compared to either of the options can be taken as the inverse of the benefits listed under each of the options.

Question 16. Please provide evidence of the investments typically made by claimants with their lump sums and the expected and actual duration of awards of damages for personal injuries.

We received substantive responses from 44 respondents, of whom four (9%) stated that they were involved in investing claimant funds, three (7%) stated that they were witness to or were otherwise aware of claimant investment preferences, 19 (43%) stated that they were not in a position to know how claimants invested, and 18 (41%) did not mention their level of knowledge.

With regard to evidence of the investments typically made by claimants most of those who responded referred to a commissioned report or generally advertised funds of financial institutions. In particular, we were referred by 14 respondents to the report of Mark Quilter of Charles Stanley & Co, appended to the ABI response. We were also referred to the investment funds CF 7 IM Personal Injury Fund run by Seven Investment Management Limited and EFA New Horizon Growth Fund. Additionally, some respondents suggested seeking information from Nestor Partnership, IM Asset Management Limited, Investec Wealth and Investment, Fensham Howes, the Court of Protection and Court Funds Office.

A small number of respondents commented directly on what investments were made by claimants and the factors that influenced claimants' choices. All of these either had direct involvement in investing claimant awards or claimed to be aware of claimant preferences. Four respondents asserted that claimants typically held most or all of their award in cash and/or bonds and/or property. Points made by individual respondents were that claimants invest for growth over the longer term; investments are not just set up for income generation; the types of investment chosen depend on a claimant's life expectancy; and the investments chosen depend on whether a deputy or trustee, as opposed to the claimant, is making the decision.

With regard to the expected and actual duration of awards, we received just three comments in relation to average life expectancy of claimants. Two of these were that brain injury does not affect life expectancy and that current life expectancy figures from the ONS are age 89 for men and 93 for women. One insurer responded that of their claims settled on a PPO basis, the average life expectancy of claimants was 44.5 years at settlement (in the range seven years to 73 years).

In addition, one respondent confirmed that awards did last for the required period but this was in part due to claimants cutting their coats according to their cloth and also by claiming state benefits as a supplement where entitled.

Question 17. Please indicate whether you consider that these investments [cited in Q16] carry the appropriate degree of risk for a personal injury claimant reliant on the money to be produced by the award.

47 respondents provided substantive comments in response to this question, 19 (40%) of whom had not answered question 16.

11 respondents (comprising seven financial & accountancy organisations, APIL, one claimant lawyer, a general legal representative body and the Ogden Working Party majority response) stated that they did *not* consider the investments typically made by claimants to carry an appropriate degree of risk. This was on the basis that meeting the current discount rate required claimants to take considerable risk, making them vulnerable to volatile returns, or else there was a risk of under-compensation from appropriately cautious investments (one respondent noted that earnings related inflation was not met by RPI linked investments).

16 respondents (13 insurers and their representative groups – including ABI and MIB – two defendant lawyers and a financial and accountancy organisation) stated that a mixed portfolio *did* carry an appropriate degree of risk. Seven respondents stated this in terms of a low risk mixed portfolio having a better risk-return ratio than ILGS alone (when looking at how much excess return is received for the extra volatility) and argued that ILGS is not a risk-free asset in itself.

12 of these 16, plus a further nine respondents, considered that the option of periodical payment orders provided an alternative if claimants wanted to avoid risk. These 21 respondents stated that the 'no risk' methodology in *Wells v Wells* was no longer relevant due to the availability of PPOs, which offer a no risk option for claimants as the risk falls

on defendants. They maintained that it is a sound inflation proof option as future losses are tracked to real costs, and that claimants who take a lump sum rather than a PPO are voluntarily accepting a degree of risk for the reward that they expect to receive in the form of better investment returns.

Three respondents commented that what is appropriate depends on each individual claimant.

A number of other suggestions and comments were made as follows:

- Claimants should not be forced to take risks that they do not want to take (four respondents)
- The State should offer a low risk guaranteed-return savings product to vulnerable investors (one respondent)
- Current investments are likely to produce a better return than ILGS (five respondents)

Question 18. Do you consider that investing in ILGS alone is relatively a less cost-effective way to protect claimants against future cost inflation than investing in a low risk mixed portfolio of investments? Please give evidence to support your conclusion.

44 respondents made substantive comments in response to this question, of whom 31 (70%) *did* consider it to be relatively less cost-effective and 11 (25%) did *not* consider it to be so, while two (5%) respondents made comments from both points of view.

The 31 respondents who considered that investing in ILGS is relatively a less cost-effective way to protect against future cost inflation were mainly insurers, reinsurers and representative bodies, including ABI and MIB, plus six defendant lawyers (including their representative body, FOIL) and five financial and accountancy organisations. Those who disagreed with this view comprised four financial and accountancy organisations plus three or fewer respondents from the categories of claimant lawyers (including APIL), general legal representative bodies, claimant representatives and the Ogden Working Party majority response. The two respondents that made comments both for and against the suggestion that investing in ILGS alone is relatively a less cost-effective way to protect against future cost inflation were both claimant lawyers.

Four respondents stated that they agreed with the proposition without giving any supporting evidence or referring only to the consultation paper. From the responses that did provide further comment, the following points were made in support of the view that investment in ILGS is less cost-effective than a mixed portfolio at protecting against future cost inflation:

- Claimants seek maximum returns from low-risk mixed portfolios (13 respondents)
- It is not prudent to invest in a single type of investment (five respondents)
- ILGS cannot provide flexibility as needs or circumstances change (three respondents)
- In practice, the restricted availability of ILGS makes it difficult to hold them to redemption (four respondents)

- ILGS does not provide protection against earnings or other non-RPI linked costs (four respondents)
- Rates of return are lower for ILGS than for a mixed portfolio which carries the same or a lower risk profile (four respondents)
- Cannot invest solely in ILGS and achieve full compensation without exposure to risk (unspecified type of risk) (one respondent)
- The investment costs of managing a mixed portfolio are small (one respondent)

The following reasoning was given to recommend ILGS as the most cost-effective way of protecting against future cost inflation:

- Only ILGS fully protects against price inflation (nine respondents)
- Only ILGS provides certainty in terms of knowing at the outset what the return will be (five respondents)
- A mixed portfolio carries investment advice and management costs (four respondents)
- ILGS has the lowest possible investment risk (three respondents)
- If the risk of investing in equities materialises and results in loss, there are costs to the State in providing a fall back (one respondent)

Question 19. Do you agree that the choice of the method of setting the discount rate will not have any direct effect on small firms? If not, please give details.

46 respondents answered this question. Of these, 29 (63%) did not agree that the choice of the method of setting the discount rate will not have any direct effect on small firms. However, 15 (33%) agreed that the choice of the method of setting the rate will have no direct effect on small firms. A further two respondents (4%) did not express a strong view either way but made general comments about the possible effect on small firms.

Those respondents arguing that the choice of the method of setting the discount rate will have a direct effect on small firms included 17 insurers and their representative groups; six defendant lawyers and their representative groups; a general legal respondent; a charity; a public sector body; a claimant representative; and an expert witness. The group of respondents who agreed that the method of setting the rate would not impact on small businesses was made up of five claimant lawyers and their representative groups; four defendant lawyers and their representative groups; two general legal respondents; an accountant; an actuarial expert; a financial consultant; and a business group.

Only one of those respondents who agreed that the method of setting the rate would not impact small businesses advanced an argument in support of their position. This was that a change to the rate would affect all businesses large and small whichever method for setting the rate was used. However, those who argued that the method for setting the rate would affect small businesses expressed the view that a method which was likely to reduce the discount rate more significantly would impose larger burdens on small businesses in the shape of higher insurance premiums. These respondents also argued that this disproportionately disadvantaged small companies as they were less able to absorb the cost of higher premiums within their usual business expenditure.

The two respondents who did not express a strong opinion either way were made up of an insurer, and a trade union. One argued that the impact on small business may be contingent on whether or not a new discount rate would apply retrospectively and the other expressed the view that whilst there would be increased costs for all defendants it was hard to quantify the extent of any specific impact on small businesses.

Question 20. Do you agree that the discount rate must apply in cases involving small firms in the same way that it does in other cases? If not, please give details.

49 respondents answered this question. All 49 (100%) agreed that the discount rate must apply in cases involving small firms in the same way that it does in other cases. Those who responded to this question included 17 insurers and their representative groups; nine defendant lawyers and their representative groups; eight claimant lawyers and their representative groups; six general legal respondents; two independent financial advisors; two business groups; an actuarial expert; an accountant; a charity; a trade union; a public sector organisation and an expert witness.

There was a group of respondents, comprising mainly of insurers, who argued that the serious potential impact on small businesses was a compelling reason for not altering the discount rate. However, even this group expressed the view that there was no justification for saying that a different rate should apply to small firm defendants as opposed to any other type of defendant, as the use of separate rates would create uncertainty and frictional costs as parties sought to differentiate their individual position to best advantage.

Question 21. Do you agree with the equality impact assessment at Appendix C?

34 respondents answered this question. Of these, 27 (79%) agreed with the equality impact assessment at Appendix C, four (12%) disagreed, and three (9%) made specific comments but did not indicate whether they agreed with the information contained in the equality impact assessment or not. Those respondents agreeing comprised 10 insurers and their representative groups; six defendant lawyers and their representative groups; three claimant lawyers; two independent consultants; two financial institutions; a public sector organisation; a general legal representative; a business and a charity. Those responses disagreeing all came from claimant lawyers and their representative groups and all three of the additional responses came from insurers.

Those that agreed with the equality impact assessment offered little in the way of further explanation of their answers, beyond expressing a general view that the setting of the discount rate was unlikely to have major impacts on those with protected characteristics. Those that disagreed all argued that setting the rate incorrectly could have very significant impacts on those seeking compensation for injuries that have left them with a disability and therefore would negatively affect people with that protected characteristic.

Two of the three additional respondents argued that when assessing potential positive or negative impacts on different genders consideration should be given to the fact that women generally receive larger damages settlements due to their longer life expectancies. The third additional respondent expressed the view that the considerations in the equality impact assessment should be irrelevant in the setting of the discount rate.

Question 22. Do you agree with the equality screening at Appendix D?

23 respondents answered this question. All 23 of these (100%) agreed with the equality screening at Appendix D. This group of respondents comprised eight insurers and their representative groups; five claimant lawyers; four defendant lawyers and their representative groups; two financial institutions; an independent consultant; a general legal representative; a business and a charity. There were no additional comments made on the detail of the equality screening by any of those who responded.

Question 23. Please provide evidence of any ways in which the current discount rate affects people with different protected equality characteristics?

16 respondents answered this question and fell broadly into two categories. 10 respondents (63%) did not feel that in their experience the current discount rate affects people with protected equality characteristics any differently than it affects others. This group was made up of seven insurers; a financial institution; a general legal representative; and a charity. However, six (37%) respondents did argue that there are impacts on people with protected equality characteristics. This group comprised three claimant lawyers; two financial institutions and one defendant lawyer.

Those that indicated that there is no difference in the impacts on people with protected characteristics stated that any allowance in the Ogden tables for different life expectancies between males and females was simply a matter of actuarial practice based on mortality rates rather than a form of inequality. One respondent in this group, a financial institution, argued that if an argument for increasing an award because of a protected equality characteristic does exist, then the best way to achieve this is when agreeing the quantum of damages using the same discount rate as for all other persons.

The majority of those who felt that there are different impacts on people with protected characteristics were primarily concerned about the impacts on people with disabilities. They argued that these people are often in vulnerable positions and are more likely to suffer periods of unemployment. They may therefore feel under more pressure to make high risk investments in order to provide sufficient financial provision. One respondent in particular highlighted the difference between someone who has suffered a mental disability, and may have his or her assets looked after in trust, as against someone who has suffered a physical disability and is attempting to make his or her own financial decisions. However, one claimant lawyer focused more on the possible impacts on members of certain faith groups who may have religious reasons for wanting to avoid certain forms of investment which comprise interest-bearing assets.

Question 24. Do you consider that the choice of how the discount rate should be set will affect people with protected equality characteristics?

26 respondents answered this question. Of these, 15 (58%) expressly did not consider that the way in which the rate was set would affect people with protected characteristics. A further four respondents (15%) expressed the view that there would be an effect, but that this would not be any greater than the effect on any other claimant receiving a damages award. However, seven respondents (27%) argued that there would be an obvious effect on people with protected characteristics, particularly those with disabilities.

Those who did not consider there would be an impact comprised 10 insurers; three defendant lawyers; an independent consultant; and a charity (although the charity did consider there may be a potential impact on people from ethnic minorities for whom English is not a first language if a mixed portfolio approach was pursued as they may need to take more complex legal and financial advice). The majority of these respondents expressed the view that whilst many of the claimants affected by the discount rate are likely to be considered as disabled this is not something which should be taken into account in any equality impact assessment. There were four respondents (two defendant lawyers, a claimant lawyer and a general legal representative) who went slightly further in accepting that there would be an impact on those with protected characteristics, but they strongly argued that this impact would be no greater than on any other claimant.

The seven respondents who believed that there would be an impact were made up of five claimant lawyers and their representatives, a financial institution and a public sector organisation. A number of these argued that any change to the way that the rate is set would obviously affect those with disabilities, as many people receiving personal injury awards to which the new rate will apply will be disabled as a result of their injuries.

Conclusion and next steps

1. In view of the lack of consensus in the responses to this consultation, the then Lord Chancellor (the Rt Hon Chris Grayling MP) decided to appoint an expert panel to provide advice on what the discount rate should be under the present law and how it should be calculated. Subject to appropriate provisions on confidentiality, the consultation responses were made available to the expert panel in the context of that work.

2. The expert panel began its considerations in March 2015 and reported in October 2015, providing further clarification on a number of issues in January 2016. This report has informed further analysis to enable the Lord Chancellor to reach a fully informed decision on what the rate should be.

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 and conclusions to 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 substantial majority of those who responded to the questions in the consultation paper relating to the Equality Impact Assessment agreed with its contents, and considered in general terms that the setting of the discount rate was unlikely to affect people with protected characteristics any differently from others.

A number of responses argued that if the rate were not set on a proper basis there would be a significant impact in certain areas, primarily relating to physical disability. This impact was expressed as focusing on those people who suffered a disability as a result of the injury for which compensation was being sought rather than those with pre-existing disabilities. The only other areas in which possible impacts were identified related to the potential for women to receive larger damages settlements than men due to their longer life expectancies, and for members of certain faith groups to be restricted in their investment choices for religious reasons.

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

Annex A – List of respondents

Action Against Medical Accidents
Admiral Group
Ageas Insurance Ltd
Andrew Aldwinkle
Allianz Insurance PLC
Association of British Insurers
Association of Personal Injury Lawyers
Aviva
AXA Insurance
Bevan Britten
Browne Jacobson
Professor Andrew Burrows QC FBA
Carus Consulting
Commissioner for Older People for Northern Ireland
Council of HM Circuit Judges
DAC Beachcroft
Chris Daykin
Disability Action
esure Group PLC
Faculty of Advocates
Forum of Insurance Lawyers
Forum of Scottish Claims Managers
Frenkel Topping Ltd
Grant Thornton
Greenwoods
Groupama Insurance
Hill Dickinson
Hilton Sharp & Clarke
Hodge Jones & Allen
Rowland Hogg
International Underwriting Association
Andrew Ireland
Irwin Mitchell
Kennedys
Keoghs

Law Society of Scotland
Liverpool Law Society
Lloyds Market Association
Liverpool Victoria
Allan Martin
Harvey McGregor QC
Medical Defence Union
Medical and Dental Defence Union of Scotland
Medical Protection Society
Paul Meins
Motor Insurance Bureau
Morgan Cole
Motor Accident Solicitors' Society
Munich Re
National Accident Helpline
National Health Service Litigation Authority
Nestor Partnership
NFU Mutual
Northern Ireland Judicial Appointments Commission
Office of the Lord Chief Justice of Northern Ireland
Ogden Working Party (majority)
Ogden Working Party (minority)
Personal Financial Planning Ltd
Personal Injury Bar Association
QBE Insurance (Europe) Ltd
Rix & Kay
RSA
Russell Jones & Walker
Senators of the College of Justice, Supreme Courts in Scotland
7 Solicitors LLP
Simpson & Marwick
South Eastern Health and Social Care Trust
Charles Stanley & Co Ltd
Stewarts Law LLP
Swiss Re
Brian White
Amanda Yip QC
Zurich Insurance PLC

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