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June 2019
FOI_3792

The following information was requested on 28 May 2019:

Can you please provide a copy of your response to the government consultation on the personal injury discount rate, to which the MoJ said you have submitted a response in their own 2017 response to this consultation.

Our Response

Please find the consultation response attached.

This concludes our response to your request.

If you are not satisfied with the service that you have received in response to your information request, it is open to you to make a complaint and request a formal review of our decisions. If you choose to do this, you should write to Tinku Mitra, Head of Corporate and Information Governance for NHS Resolution, within 28 days of your receipt of this reply. Reviews of decisions made in relation to information requests are carried out by a person who was not involved in the original decision-making about the request.

If you are not content with the outcome of your complaint, you may apply directly to the Information Commissioner for a review of the decision. Generally, the Information Commissioner will not make a decision unless you have exhausted the local complaints procedure. The address of the Information Commissioner's Office is:

Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

NHS Resolution

NHS Resolution's reply to the Ministry of Justice Consultation on The Personal Injury Discount Rate: How it should be set in future

NHS Resolution

The Personal Injury Discount Rate - How it should be set in future

This is the response of NHS Resolution (NHSR) to the above consultation. We deal with each question in turn:

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

We do in so far that the Lord Chancellor felt that she was bound by the ruling of the House of Lords in *Wells v Wells* to the effect that a personal injury claimant should be deemed to pursue an investment strategy "without risk", namely Index-Linked Government Stock (ILGS). This is contrary to what occurs in practice, as explained below, and does not reflect reality.

The Damages Act 1996 does not stipulate either risk-free investment or ILGS or that the Lord Chancellor is bound to consider the common law when setting the rate

We agree that claimants should not be pushed to invest in high risk portfolios in order to deliver fair compensation. The method used to calculate the discount rate should reflect a risk profile that is informed by how claimants actually invest their compensation and the returns they are able to achieve. If the discount rate is not set on this basis, there is a risk that claimants are over-compensated at a significant detriment to the entire system, including the increase of taxpayer-funded, scheme contributions made by our members which diverts funds away from front-line patient care.

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

See above. The current approach – i.e. assuming that claimants adopt an investment strategy "without risk" – produces over-compensation based on what we understand to be claimants' actual investment practices.

Most personal injury claimants in receipt of significant sums have expert investment advisors (sometimes arms of the legal firm which acted in their claim). We understand such claimants are advised to invest in low-risk, mixed portfolios of investments rather than ILGS (see response to Q4 and Q5). Claimants will have therefore been over-compensated on cases where their investment risk profile was higher than that of a "without risk", ILGS approach.

This is brought into particular focus with the current -0.75% rate which produces some extraordinary outcomes in terms of multipliers for future loss. For example, using Ogden Table 28, a future period of 50 years attracts a multiplier of 60.71, i.e. almost 11 years' worth of losses over and above the calendar period. If a period of 70 years is taken, the multiplier becomes 92.16, i.e. more than 22 years above the calendar period. As stated above, this represents significant over-compensation based on what we understand to be current actual investment returns for claimants.

Please refer to our response at Q15 which includes a worked example of a catastrophic birth injury claim quantified using both a -0.75% discount rate and a 2.5% discount rate (included as the long term, Hong Kong model). This illustrates the impact of the recent rate change.

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

We do not answer this question because we do not represent claimants.

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

This question is mostly for claimants' advisors to answer, but there is a fair amount of publicly-available material which demonstrates that claimants actually invest in mixed portfolios and not ILGS. For example, in the 2014 Annual Report of the trustees to the vCJD Main Trust, established by the Secretary of State for Health to compensate victims of the disease known as variant Creutzfeldt-Jakob disease, the trustees state that £12 million was invested with Cazenove Capital Management to increase the yield on investments. The report lists the various investments purchased, including Treasury bills, Abbey National bonds, CG Asset Management shares, Majedie Asset Management UK equity fund shares etc. In other words a fund to compensate the victims of personal injury, established on behalf of the government itself, invests in a mixed portfolio.

Several IFAs offer similar portfolios for accident victims including Prospect Wealth Management, whose "low volatility portfolio" has produced an average gross return of 5.9% per annum since 2006; and their product consisting of 100% bonds has returned 6.3% gross since 2006. Both of these returns would almost certainly equate to at least 2.5% net once fees and other deductions are subtracted.

We also note the recent case of *Buckley v The Public Guardian (2013)* which made mention of how monies should be managed on behalf of individuals without mental capacity. It was made clear that the level of care required by the attorney managing the investments should be seen as similar to that of trustees whose duties are set out in the Trustee Act 2000. Section 4 requires trustees to have regard to 'standard investment criteria' which are:

1. The suitability of the investments; and
2. The need to diversify the investments in so far as it is appropriate in the circumstances.

As to claimants' reasons, perhaps a good analogy would be pensions where people invest to achieve a balance between supporting a lifestyle and not running out of cash before death.

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

Again this question is mostly for claimants' advisors to answer, but once more there is relevant publicly-available information. For example, on the website of the Nestor Partnership (www.nestor.co.uk), Jennifer Stone, an expert who appears in personal injury claims and whose firm has £500M of claimant monies under management, states that she never invests directly in ILGS for her clients. Richard Cropper, a prominent IFA who appears frequently in litigated claims as an advisor to personal injury claimants, stated during a seminar in Manchester in April 2017 that claimants do not invest in ILGS.

Were claimants to undertake such investment, the main risk at present would be a negative return. A further, but nevertheless important risk is that there are only 27 different ILGS currently extant, the longest dated ending in 2068. There are therefore many individual years between 2017 and 2068 during which no ILGS matures. ILGS are impractical for claimants who have a need to meet regular bills (for example for care, case management, physiotherapy etc.).

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

NHS Resolution, being government-backed, is able to offer PPOs in all suitable claims. However, the Damages Act stipulates that a PPO must be "reasonably secure" and there are some indemnifiers who are unable to comply with that requirement. This applies, for example, to certain Lloyd's syndicates and to those Medical Defence Organisations without suitable arrangements in place.

As we have mentioned, some claimant law firms have investment arms and that gives rise to a potential conflict of interest on the question of PPO v lump sum. In other words, the larger the lump sum, the higher will be the fees for investment advice charged by the firm.

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

Claimants' advisors are best placed to answer this question.

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

NHS Resolution has more PPOs on its books than any other indemnifier in the country. This is partly because we are government-backed, and partly due to the fact that we have a higher percentage of maximum severity claims in our portfolio than insurers owing to the prevalence of brain-damaged baby cases.

Beneath is a table showing the number of PPOs we have concluded in each financial year since 2007/8. The final year is 2015/16 rather than 2016/17 because some cases provisionally settled on a PPO basis during that year have yet to receive court approval.

From the table it will be seen that the numbers were relatively consistent between 2008/9 and 2010/11, followed by a jump in 2011/12, followed by reasonable consistency thereafter. We believe the peak in 2011/12 was a statistical "blip". There is relative consistency in the numbers since 2012/13 because, on average, we have received approximately the same number of brain-damaged baby claims for a decade or more.

Virtually all of our cerebral palsy cases are settled via a PPO. So too are the most serious claims involving both children and adults. These are, almost without exception, cases with a value well in excess of £1M. We have settled a few claims involving patients aged in excess of 70 years on a PPO basis.

Number of PPOs by settlement year 2007/08 to 2015/16 as at 31/03/2017

Settlement Year	No. of Claims
2007/08	84
2008/09	134
2009/10	130
2010/11	139
2011/12	191
2012/13	158
2013/14	164
2014/15	180
2015/16	180
Total	**1,360**

9. Do claimants receive investment advice about lump sums, PPOs and combinations of the two? If so, is the advice adequate? If not, how do you

think the situation could be improved? Please provide evidence in support of your views.

We do not have direct evidence concerning such advice and are therefore not able to fully respond to this question. However, as stated above, we are aware that claimants receive investment advice from appropriately regulated, expert investment advisors who, sometimes, are associated with the legal firm that acted for them on their claim.

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

Yes. What is needed is not a fundamental overhaul of the Damages Act because, as we stated in response to question 1, this does not require either an assumption that claimants invest in wholly secure products, in general terms, or in ILGS specifically. Rather, what is required in our view is a move away from the (*Wells v Wells*) assumption that claimants invest in "no risk" products. The law should be based on realism, namely the risk profile that claimants are willing to accept to achieve an appropriate return which we understand to be a mixed portfolio of low risk investments.

It might be sensible, in cases where an arm of government (such as the NHS) is the defendant, for the government itself to provide claimants with an investment product which guarantees a rate of return of inflation or above, thus removing the perceived need for a highly conservative (currently negative) discount rate in such cases with consequent savings to public funds.

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

As stated above, we believe that particular regard should be had to actual returns claimants are likely to receive on investments. As indicated in our response to questions 1 and 2, a move away from the ruling in *Wells v Wells* to one that is based on reality will achieve a fair balance between claimants and defendants.

However we think that there is a further important consideration which needs to be taken into account, namely that the government has to make a value judgment on risk sharing as between claimant and defendant. In other words it must ultimately be a matter for the government, rather than lawyers or actuaries, to decide where the balance should lie.

12. Do you consider that for the purposes of setting the discount rate the assumed investment risk profile of the claimant should be assumed to be:

a) Very risk averse or "risk free" (*Wells v Wells)*
b) Low risk (a mixed portfolio balancing low risk investments)

c) An ordinary prudent investor
d) Other

Please give reasons.

Our view is that (b) is likely to be the most appropriate categorization although as noted in response to Q15 a one size fits all approach may not be appropriate. For the reasons we have previously explained, (a) is inappropriate as it does not reflect what is taking place in reality.

Our understanding is that, based on professional advice, personal injury claimants usually invest in a mixed portfolio balancing low risk investments. Consequently, we take the view that it is entirely fair and appropriate to use this assumption if a one size fits all approach is considered appropriate.

13. **Should the availability of Periodical Payment Orders affect the discount rate? If so, please give reasons.**

    In particular:
    - **Should refusal to take a PPO be taken as grounds for assuming a higher risk appetite? If so, how big a difference should this make to the discount rate?**
    - **Should this assumption apply in cases where a secure PPO is not available?**

Yes – we think it should. A PPO from a "reasonably secure" compensator is either completely, or almost entirely, risk free for the claimant as they are protected against both inflation and life expectancy issues. That being so, any claimant opting not to take a PPO from such a defendant or seeking to capitalise losses which are suitable for annual payments, should be deemed willing to have accepted a higher risk profile than "low" (as per question 12). Deciding upon how big a difference this should make to the discount rate is problematical and would no doubt require evidence from IFAs and economists. However, as a general proposition we think that a claimant not opting for a secure PPO should be deemed at least "an ordinary prudent investor" in accordance with the categorization in question 12.

We do not think this assumption should apply in cases where a secure PPO is not available, because that would not be fair to the claimant. It is not the fault of the claimant that a particular indemnifier is not "reasonably secure".

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

Yes. This question is very similar to Q.13. Please see our answer above.

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

A single discount rate that fairly reflected reality would be a much simpler and transparent framework to allow claimants and defendants both to calculate claims effectively. Without a guiding framework different rates would add to complexity, increase legal costs and give fuel to satellite litigation. The Damages Act already allows judges to award a different rate from that laid down by the Lord Chancellor if it would be "more appropriate". As the consultation document records on page 9, this power has only been exercised once since the Act came into force, and even that ruling was overturned on appeal. This demonstrates that there is a distinct lack of appetite by both claimants and defendants alike for seeking to apply a different rate.

However, we can see merit in a framework that better reflects the degree of risk a claimant can reasonably be expected to bear when determining the appropriate rate. If one accepts, as we propose in our response to Q 12, that claimants should not be regarded as very risk averse then it would be only fair to recognise that a one size fits all approach may not be the most appropriate. It is common practice in setting investment approaches to reflect the trade-off between the prospects of higher returns over the longer term for some classes of assets with the greater volatility in values that can arise in such assets in the short term. So in constructing pension portfolios for example, as mentioned in our response to Q 4, it is common to vary asset mixes to become more conservative when the funds are likely to be needed in the short term and conversely for greater risk to be taken when increased returns are preferable and funds are unlikely to be required in the short term. Any such approach would need to balance the need to match as closely as is practical the appropriate discount rate to the claimants proposed use of the invested funds without creating a system that was overly complex to administer.

Accordingly, we can see some merit in the Ontario system. That would allow long-term losses to be subject to a rate reflecting the long-term performance of an appropriate group of investments, whilst enabling reasonable adjustments to be made to shorter term losses which reflect more closely the actual performance of investments in the recent past. If, as a matter of policy, the basis upon which claimants are assumed to invest in the short term should be considered different to the basis upon which claimants are assumed to invest in the long term, the Ontario model appears to better balance the interests of both claimants and defendants. However, there would be practical challenges in introducing such a system which could lead to additional legal costs and increase scope for disputation.

We have estimated how the different approaches referred to in the consultation paper would impact a 'typical' catastrophic birth injury claim where the claimant is aged 10 at settlement with an estimated life expectancy of 55. This involved applying the following discount rates:

- -0.75% based on the current rate;
- 2.5% based on the long term, Hong Kong discount rate; and
- 0% applied to the first 15 years of future losses with 2.5% applied thereafter as per the Ontario model.

PPs in this case have been assumed to apply as follows:

- £105,000 pa – age 10 – 13
- £165,000 pa – age 13 – 19
- £240,000 pa – ages 19 – 40 (Ontario subdivided into 19 – 25 and 25+)

We have shown the lump sum equivalent values by capitalising the PP elements with reference to the applicable discount rates and then the relevant amounts excluding the PP element.

Type of Loss	Current UK -0.75% DR	Hong Kong Model	Ontario Model
General Damages (including interest)	£300,000	£300,000	£300,000
Past Losses	£250,000	£250,000	£250,000
Future Losses	£15,964,000	£8,080,000	£9,502,000
Lump sum equivalent value	**£16,514,000**	**£8,630,000**	**£10,052,000**
Lump Sum breakdown with Care and Case Management paid by PP	**£4,539,000 + PP**	**£2,888,000 + PP**	**£3,076,000 plus PP**

We have also undertaken the same analysis for a catastrophically injured adult claimant with a short life expectancy of 4 years. This involved applying the following discount rates:

- 2.5% discount rate based on the previous discount rate
- -0.75% based on the current rate;
- -0.5% based on the short term, Hong Kong discount rate; and
- 0% for all future losses as they fall within the first 15 years of loss as per the Ontario model.

Head of Loss	With 2.5% discount	With -0.75% discount	Hong Kong model	Ontario Model
General Damages (including interest)	£150,000	£150,000	£150,000	£150,000
Past Losses	£150,000	£150,000	£150,000	£150,000
Future Losses	£843,300	£886,140	£884,450	£876,000
Lump sum equivalent valuation	£1,143,890	£1,186,140	£1,184,450	£1,176,000
Lump Sum if PPO of £150k pa for Care and Case Management	£572,000 plus PP	£577,000 plus PP	£577,000 plus PP	£576,000 plus PP

These case samples provide a high level illustration of the impact on two generic scenarios. They demonstrate that:

- The different approaches have a minimal impact on claims without significant future loss claims;
- The different approaches have a significant impact on large loss claims with extensive future losses;
- The Ontario birth injury example appears to better balance the interests of both claimants and defendants by avoiding the grossly excessive lump sums

that are currently applicable on cases with a long life expectancy at the same time as protecting a claimant in the initial years; and

- The impact of discount rate variations can be dampened through the use of periodical payments.

We appreciate that these case samples are limited and that numerous other scenarios could be illustrated. They also fail to take into account the numerous other complexities that are associated with settling claims including; the management of evidential disputes, taking into account litigation risk etc.

It is important to note that any such approach in the UK would need to be informed by expert opinion and evidence regarding the appropriate time horizons, relevant rates of return and appropriate control mechanisms to mitigate against swings in the 'short-term' rate.

We would of course be willing to support government with further data analysis/modeling of specific options, if required.

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

See our response to Q15

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

Yes. The over-riding objective of the Civil Procedure Rules is that cases should be dealt with justly and at proportionate cost. There may be circumstances where it would be just to apply a different rate. We give an example in our next answer. To remove this option – albeit one which has been exercised very rarely over the past 20 years – would arguably be contrary to the over-riding objective.

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

One potential example is a case where the claimant is permanently resident abroad, where different investment returns may apply. Consequently it might be fair, just and reasonable to apply a different discount rate. However we would strongly advocate that exceptions are kept to a minimum, to prevent an explosion of litigation on this point. The fact that there have been so few challenges on this issue since the Damages Act was implemented suggests that the current wording is effective in curbing unnecessary challenges, and that the existing wording should be retained.

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

On the basis that this question relates to methodology for setting the discount rate, our suggestions are as follows:

- Reality – i.e. the returns claimants receive on their actual rather than theoretical investments.
- Short-term blips in rates of return should be ignored.
- We agree with the present Lord Chancellor that rounding to the nearest 0.25% is appropriate, for the reasons she gives in her statement.
- Model portfolios, as used by actuaries, could usefully be made the basis of relevant calculations.

Consideration should also be given to the review currently being undertaken by H M Treasury on the discount rate methodology used to value liabilities, as reported in the minutes of the Financial Reporting Advisory Board meeting on 16th March 2017. This review is scheduled to conclude in the autumn, with a new methodology in place by November 2017. It would be very desirable for the Ministry of Justice to discuss this review with HM Treasury, to ensure consistent consideration of the issues.

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

There is a balance to be struck between conflicting objectives of ensuring that the rate is not out of line with the principles on which it is based and not creating opportunities for arbitrage or gaming the system by claimants and their representatives.

The fact that the discount rate did not change for 16 years, and then altered by 3.25 percentage points was a serious blow for defendants, causing massive changes to their financial standing. The government has set aside an extra £1.2 billion this year to meet the expected costs to the public sector of this change. The Chancellor of the Exchequer, in his Budget statement, referred to a figure of £5.9 billion over three years. Insurers and other indemnifiers were also very significantly affected.

There is merit in more frequent reviews which keep the discount rate at a more appropriate level. However, there are disadvantages in specifying a time period within which reviews must be undertaken. A risk attached to this is that, if reviews are to take place at a set time each year, negotiations on individual claims will be hampered in the preceding months because both sides will try to predict what the outcome of the review might be, and amend their behaviour accordingly

However, it is our view that the most sensible way to approach the challenge set out in the first paragraph of this question's response is to have annual reviews of the rate, based on an algorithm-type approach, as explained in our response to Q23.

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

Please see the final paragraph of our answer to Q.20.

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

As noted in our answer to question 20 we think that an annual review should take place at a specific time in the year

Please bear in mind that, as a an organisation with an open caseload of around 30,000 claims, funded ultimately by Parliament, and a material component of the Department of Health accounts group, NHS Resolution has to ensure that any changes affecting our budgetary requirements are factored in and planned for, and that any uncertainties arising from such changes do not adversely affect our ability to produce unqualified accounts. For the production of statutory accounts, the considerations for the different timings are as follows:

- An announcement of a rate change prior to 31 March with an implementation date prior to a summer parliamentary recess date – a material effect from a change in PIDR would likely require significant work to prepare calculations for the disclosure of the effect of the rate change, either as a disclosure or a revaluation of liabilities as an 'adjusting event'.
- An announcement of a rate change with an implementation date prior to 31 March – with proper signalling, this is something that could be managed, as with the recent change. However, there was a significant amount of work that needed to be undertaken over a period of months from the first signal given in December 2016.
- An announcement after the 31 March with an implementation date before the end of the next 31 March date would require some disclosure as a 'non-adjusting event' but the requirements to provide quantitative analysis if this is not possible, would be less onerous on public sector organisations.
- Operationally though, implementation during the accounts preparation period between April and June would be challenging

From a budgetary perspective, the key issues are:

- Any in year changes would require sufficient notification to enable cost estimates to be prepared for the parliamentary estimates process, where Spring Supply in December/January is the last opportunity for budgets to be updated, on the assumption that HMT would adjust estimates up (or potentially, down) for discount rate changes.
- Any changes in advance of Spring Supply would need agreement on how the in year effects would be funded i.e. provision of cash, budgetary cover, which may require additional Supplementary Estimates.

- NHS Resolution collects funds from its members in order to pay for the administration and settlement of claims. The planning cycle for the following financial year involves discussion with Department of Health on the value of the total collect from the NHS in order to agree the level of funding for the largest indemnity scheme, the Clinical Negligence Scheme for Trusts (CNST), to be made available via NHS allocations and prices for provider activities. This takes place during June to August. NHS Resolution then goes on to set contribution levels for individual members of our schemes by the end of October. Any changes for subsequent financial years would need to be notified by August for us to build in requirements into the NHS planning process and to enable DH to consider any effects on the overall financial plan for the group.

In summary, there would be a short window during July and August for an announcement (with sufficient lead time before implementation to allow for planning and preparation) that would be preferable for us to be in a position to prepare for any change to a discount rate in year and for the subsequent year.

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

Q20 indicates our preference for a regular review process which should be directly informed by an algorithmic assessment of material movement in relevant investment returns. However, we feel that minor changes to the discount rate should be avoided because of the costs of administering the change and the risk that parties would game the system in an attempt to either delay resolution or aggressively accelerate it in anticipation of a favourable movement in the rate.

As to what the degree of deviation should be, we think that is best left to determination by a panel of experts, but would suggest a minimum, cumulative deviation in the movement of relevant investment returns of 0.5%. Otherwise, the situation we have described in the previous paragraph would likely occur.

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

See above.

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

No – it would be both inequitable, and increase complexity, for different cases to have different rates applied to them. Our view is that an immediate transition would be preferable, so long as there was sufficient lead time for preparation and planning.

That will inevitably produce winners and losers, but is preferable to transitional provisions because those in themselves could result in gaming by parties to litigation.

26. Do you consider that the discount rate should be set by:

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

The question of setting the rate needs to be distinguished from that of updating. It is our view (as above) that there should be an algorithmic approach to updating the discount rate(s) supported by a methodology such as a model portfolio. This should enable a continuously-updated, objective measure of the 'right' rate.

In terms of who determines the relevant algorithm/approach this should ultimately be government, informed by expert advice.

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

In our view there should be a presumption that where a secure PPO is on offer, this should be deemed to be an appropriate form of compensation for future losses which can be annualized. The present law is satisfactory, in most respects, however, when a judge comes to determine whether a PPO should be awarded or not, he or she will currently have chief regard to the views of the claimant's advisors. This should be changed.

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

No – subject to our above answer.

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

Yes, as above – we believe that if a secure PPO is available it should indeed be awarded by the Court. Having a secure stream of future income, which is index-linked, must be in the best interests of the vast majority of claimants. If any particular claimant does not wish to receive monies via a PPO, the onus should be on him or her to persuade the judge accordingly. We do not think it would be appropriate to lay down specific criteria as to the grounds upon which the proposed presumption could be rebutted, because individual circumstances will differ significantly, so the judge should have discretion in determining if it is reasonable that a lump sum should be awarded.

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

Yes, but subject to some judicial discretion. This is very similar to the above question. Please see our answer to Q.29.

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

We leave insurers to answer this question because they have difficulties in providing PPOs which NHS Resolution does not, as we are government-backed. Our PPOs are all paid for, ultimately, by taxation. We do not have to meet the fees of brokers, investment companies and the like because of our means of funding, and therefore it is difficult to know how the cost of providing NHS Resolution PPOs could be reduced.

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

We pass on this question by virtue of our answer to Q.31

33. Please provide any evidence you may have as to the use or expected use of PPOs in the light of the change in the rate and more generally.

Following the introduction of the new discount rate in March 2017, our experience is that claimants' advisors remain willing to agree PPOs in high-value claims for care and case management. In that sense, perhaps unexpectedly, the position remains similar to that occurring prior to the change. However, claimants' advisors are less willing than they were previously to agree PPOs for other heads of loss such as earnings, Court of Protection charges etc.

As we are only just over a month on from the change, this is necessarily a very early assessment and the position may alter over the coming months.

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

We do.

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

Yes – we do.

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

Not applicable.