Ministry of Justice
The Personal Injury Discount Rate
How it should be set in the future

Comments on the draft legislation
by the Association of Personal Injury Lawyers

Date 6 October 2017

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 20-year history of working to help injured people gain access to justice they need and deserve. We have over 3,300 members committed to supporting the association's aims and all of which sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, Governments and devolved assemblies across the UK with a view to achieving the association's aims, which are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

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Introduction

1. APIL welcomes the invitation to comment upon the draft legislative clause which aims to give effect to the Government's proposals. Getting the discount rate right is vital to ensure that seriously injured claimants are not under-compensated, leaving them anxious about their futures and risking a reliance in later life upon the State for their care and upkeep. While the Ministry of Justice (MoJ) remains committed to the 100 per cent compensation principle, which we applaud, it must accept that its response and proposed draft legislation will inevitably leave some claimants under-compensated. The issue now is exactly what percentage of claimants will be undercompensated, in order to strike what the MoJ views as the 'correct' balance between claimant and defendant.

2. The Government Actuary's Department (GAD) analysis[1] examines the risk of under-compensation if claimants adopt a typical "low risk" investment strategy, of the kind being proposed by the Ministry of Justice when calculating the new discount rate.

3. According to the GAD modelling, if claimants adopted a typical "low risk" investment strategy:

- They would have a 30 per cent chance of being under-compensated by 5 per cent or more if the discount rate were set at +1 per cent;
- They would have a 19 per cent chance of being under-compensated by 5 per cent or more if the discount rate were set at +0.5 per cent;
- They would have an 11 per cent chance of being under-compensated by 5 per cent or more if the discount rate were set at 0 per cent.

4. Claimants who adopted a typical "low risk" investment strategy under the current -0.75 per cent discount rate would have a 4 per cent chance of being under-compensated by 5 per cent or more.

5. If the Ministry of Justice's proposed new system were applied today, "the rate might be in the region of 0% to 1%". A significant number of claimants would then be under-compensated at rates between 0 – 1 per cent even if, as the proposal

[1] *Personal Injury Discount Rate Analysis, 19 July 2017 by Stephen Humphrey FIA and Andrew Jinks FIA:* https://consult.justice.gov.uk/digital-communications/personal-injury-discount-rate/results/gad-analysis.pdf

assumes, they pursued a "low risk" rather than a "very low risk" investment strategy. If a claimant adopted a "very low risk" investment strategy, then the risks of under-compensation would be even greater.

6. There is no confirmed view, or even a consensus in the financial services industry as to exactly what constitutes a "low risk portfolio." But there are some broad benchmarks to which significant parts of the industry subscribe.[2] We have compared one of those (below) to the portfolios used in the GAD analysis. Whilst it is a very broad brush statement to say that UK Equities are "higher risk" and cash is "lower risk", the table below does give a flavour as to what a low risk portfolio might be. Portfolio A appears to be considered low risk by the MoJ/GAD but Portfolio B could not be considered low risk. In APIL's view, even Portfolio A does not deliver a sufficiently low risk alternative.

7. We suggest that more work is done by the GAD to ensure that the portfolios put forward are genuinely 'low risk' options.

		Portfolio A	Portfolio B	PMIFA Private Investor Indices Conservative Index [3]
Lower risk	Cash	10	5	5
	Bonds/ Fixed Interest	41	24	40
		51	**29**	**45**
Higher risk	UK Equities	13	29	19
	Int Equities	15	28	13.5
	Property	4	5	5
	Hedge Funds	18	8	17.5
		50	**70**	**55**

[2] *Personal Investment Management & Financial Advice Association (PIMFA), formerly the WMA & APFA which merged on 1st June, represents firms that help individuals and families plan for their financial life journeys. At the time of the merger WMA represented 180 wealth management firms and associate members that provided a range of financial solutions including financial advice, portfolio management, as well as investment and execution services. At the time of the merger APFA there were approximately 14,000 adviser firms employing 81,000 people.*

[3] https://www.pimfa.co.uk/private-investor-indices/current-asset-allocation/

8. There is more information on risk and asset classes on the Money Advice Service website, an independent service set up by the government. It explains that "*If you want a low-risk portfolio, you should aim to hold a high proportion of your investments as cash and fixed-interest securities. A higher risk portfolio will have a relatively high proportion in shares…*"[4]

9. The current GAD analysis contains a high level assessment of the investment fees, management charges, adviser fees and taxes which claimants will be required to meet, but more work needs to be done to expand on the calculations completed so far. When these costs and inflation (the inflation risk has not been considered by the GAD) are taken into account, the claimant will be at even greater risk of under-compensation.

10. By way of example, in the 2017 JPIL article, "*The Discount Rate, What Next?*"[5] the author calculates the various costs which need to be taken into account. Under the 2.5 per cent discount rate, with inflation between two per cent and three per cent per annum, charges at between one and two per cent per annum and income tax, then the required rate of return had to be between 6.9 per cent per annum and 12.5 per cent per annum. This shows how much investment risk claimants had to take to counteract the unrealistic discount rate of 2.5 per cent.

11. Under a modified discount rate of 0 per cent, we calculate that the claimant will continue to have to take investment risks to attain a rate of return between 3.75 per cent per annum and 8.33 per cent per annum, (depending on taxation, management costs, inflation etc), neither of which would be considered by the FCA to be low risk rates of return.[6]

12. In *Helmot*[7] a two-tier approach to a discount rate was established applying a lower rate for earnings related losses to take into account the fact that earnings usually rise faster than prices. For example, NHS Resolution assumes that the differential between the Retail Price Index (RPI) and ASHE 6115 (a wage inflation index that measures the rate of change care workers earnings) +1 per cent.[8] Care

[4] https://www.moneyadviceservice.org.uk/en/articles/asset-classes-explained
[5] *The Discount Rate, what's next?* by Edward Tomlinson, 2017 JPIL Issue 2
[6] FCA Conduct of Business Sourcebook, Pt 13 Annex 2 Projections 2.2
[7] *Simon v Helmot* [2012] UKPC 5
[8] NHS Resolution Annual Report and Accounts 2016-17, page 144

costs are a very large part of many large claims and so a failure to take this into account will be problematic for seriously injured claimants.

13. For the many claimants who settle their care claim by way of an appropriately linked periodical payment, the risk is not as acute, but there are claims where defendant insurers will not want to provide a periodical payment or claimants are reluctant to accept a PPO as part of their award.[9]

14. Because of this reluctance on both sides, we are disappointed that the Ministry of Justice has not done more in its response so far to encourage a bigger take up of periodical payment orders (PPOs). We appreciate that legislation may not be the method by which to do this, but we would like to see PPOs becoming adopted as the default position for the most appropriate heads of claim. We are interested in taking part in a discussion with the MoJ as to how both defendant and claimant representatives can be encouraged to offer and accept appropriate PPOs as part of their overall settlements.

APIL's comments on Annex A - draft clause: discount rate

A. Assumed rate of return on investment of damages

a. Sub clause **1(1)(2)** allows party to the proceedings to seek an alternative discount rate if 'more appropriate.' The test should be tougher to deter opportunistic applications by either side, and encourage applications only where the circumstances are special or exceptional. There is case law which ensures that it is not easy to persuade the court to use a different rate – rightly in our view – to deter opportunism along with the inevitable costs and delays which follow such applications.

b. **At 1(1)(3)** the clause reads: "An order under subsection (1) may prescribe different rates of return for different classes of case." We are unsure as to what is meant by different class of case.

c. Presumably this is intended to refer to separate heads of damage, where it has always been possible to ask the court to use its discretion

[9] There will always be claims where a periodical payment is not "reasonably secure" or cannot be awarded or sanctioned by the Courts for all the reasons outlined in our original response to consultation, 10 May 2017 https://www.apil.org.uk/files/pdf/ConsultationDocuments/3412.pdf.

in the Damages Act to apply different rates (see *Simon v Helmot*, and less successfully in *Warriner v Warriner*, *Cooke v United Bristol Health Care*).

d. If different classes of case are to be considered for different rates of return, we would expect to see some criteria as to their selection for consideration and the reasons for application of a different rate. Whether this criteria and reasoning is to be explained by the Lord Chancellor in his or her reasons for amending the discount rate at the relevant time (see our comments below about this) or elsewhere, there should be a provision for it in this clause.
We presume, however, that 'class' is intended to refer to 'heads of damage' and in which case, that power is contained within the Damages Act. We recommend that the use of the wording 'class of case' is amended to use the words 'heads of damage' instead. This wording is generally understood to cover special (not general) damages, rather than 'classes of case' which tend to refer to categories of claim (clinical negligence, employers' liability claims etc).

Schedule A1

B. Periodic reviews of the rate of return (Schedule A1, 1)

a. We are pleased to see that the Schedule contains periodic reviews of the rate of return, to take place at least every three years. We would expect to see in this schedule a provision that the Lord Chancellor must give reasons for the decisions made when he or she decides to review the rate of return.

b. In our version of the draft sub paragraph 1(5) we have included a new sub paragraph: "***The Lord Chancellor must give reasons for the decisions made on the matters mentioned in sub-paragraph (4).***"

C. Determining the rate of return on the first review (Schedule A1, 2)

a. Sub paragraph 2(4) provides that the Lord Chancellor must consult the Government Actuary and the Treasury when conducting the first review of the rate of return.

b. It has not been explained why there will be no expert panel appointed for the first review. Assuming the reasonable time frames (as there are

for subsequent reviews) are adhered to, there should be a panel constituted for this first rate review.

- **c.** We take the view that this is arguably the most important review for years (as it will take place under the new method of calculation) and for that reason it is vital that it sets the rate as accurately as possible. To do that, the panel is, in our view, vital: as is already acknowledged to be for future reviews.
- **d.** The Government committed "to create a fairer and better framework for the setting of the discount rate" in its consultation response and the review must be seen as being entirely independent of any pressures being applied by the Treasury and/or the interested industries. A lack of expert panel input at this juncture is not the best way to achieve that independence.
- **e.** Additionally, we would expect to see in this schedule a provision that the Lord Chancellor must give reasons for the decision made when he or she determines the rate of return in each and every review. For this reason we have inserted a new sub paragraph **2(9): "*The Lord Chancellor must give reasons for the decisions made on the matters mentioned in sub-paragraph (2) and (4).*"**

D. Determining the rate of return on later reviews (Schedule A1, 3)

- **a.** For reasons already set out above, we would expect to see in this schedule a provision that the Lord Chancellor must give reasons for the decision made when he or she determines the rate of return in each subsequent review. For this reason we have inserted a new sub paragraph 3(8): "***The Lord Chancellor must give reasons for the decisions made on the matters mentioned in sub-paragraph (2) and*** "

E. Determining the rate of return (Schedule A1, 4)

- **a.** A mechanism which links the expert panel report and the Lord Chancellor's final decision on the discount rate at each review is missing from sub paragraph 4.

- **b.** For this reason we have inserted suggested additional wording into 4(2) as follows:

"The Lord Chancellor must make the rate determination, ***having taken into account the response of the expert panel,*** on the basis that the rate of return should be the rate that, [in the opinion of the Lord Chancellor], a recipient of relevant damages could reasonably be expected to achieve if he or she invested the relevant damages for the purpose of securing that—

c. In our tracked changes for this sub paragraph we have also deleted the words 'in the opinion of the Lord Chancellor' but we can see that this wording may be necessary in order to ensure there is political accountability for the decision taken.

d. Additionally, we have amended sub paragraph 4(3)(d)(ii) because the drafting appears to render its meaning opaque. We are unsure as to whether the sub paragraph, as originally drafted, means that the recipient of the relevant damages has different investment aims or whether it means that the aims of the recipient of different from those of the ordinary investor. A suggested amendment is shown in the tracked changes in the accompanying amended version of the full clause, using the words 'low risk' which are easily understandable and which the Lord Chancellor has already used when describing these changes.

e. For these reasons we have amended it as follows:

"(d) the assumption that the relevant damages are invested using an approach that involves a low financial risk.

f. Sub paragraph **4(4)** should, in our view, be deleted. It gives the LC unfettered discretion. The Lord Chancellor has an inevitable conflict when deciding the discount rate as it is a defendant in many high value claims. That conflict cannot be removed by the solution proposed by the Government, but the Lord Chancellor should be constrained where possible, in the light of that conflict.

g. Sub paragraph **4(5)** as currently drafted does give some concern that in addition to the advice given by the expert panel, the Lord Chancellor may take into account anecdotal evidence on investment behaviour. We take the view that both **4(5)(a)**and **(b)** are unnecessary additions and could safely be deleted.

h. Following on from our comments above, we suggest that **4(5)(c)** should read:

> "***make such allowances for taxation, inflation and investment management costs based on recommendations made by*** *[the Government Actuary Department in respect of the first review and]* ***the expert panel*** *[in respect of the second and subsequent reviews]* ***as the Lord Chancellor thinks appropriate****.*

i. In the GAD analysis at 1.12 it states:

> *"1.12 The appropriate allowance for expenses and tax is likely to depend on a number of factors and assumptions and will require a degree of judgement. As such further work is likely to be needed to determine the reasonable allowance for expenses and tax. That said, based on an initial high level assessment, we believe that a deduction of around 0.5% pa is likely to be reasonable. Due to the further work required, the current analysis presents the results without adjusting for expenses and tax."*

j. We do not believe that a high level assessment is enough and that further work must be done on this to ascertain the correct deduction. We believe a reduction of 0.5 per cent is on the low end of the spectrum.

k. We propose deletion of sub paragraph at **4(6)** as it allows the Lord Chancellor unfettered discretion not only to disregard the evidence supplied by both the expert panel and the Treasury (which undermines their advisory capabilities) but to take into account other factors not listed which may skew the decision made.

F. Expert panel (Schedule A1, 5)

a. We would be interested to know the status of the expert panel. Is it a Non-Departmental Public Body, Working Group or an Expert Committee? Will the Lord Chancellor publish the terms of reference for the expert panel?

b. Sub paragraph 5(7) in this section does not refer to potential conflicts of interest which may be held by prospective expert panel members. We have inserted the words "***or a conflict of interest***" here.

c. At sub paragraph 5(9)(c) we have added "***has a financial interest in the outcome of the Lord Chancellor's review.***"

d. This insertion, and the new 5(9)(c) are additional safeguards to ensure that the panel is comprised of individuals who are seen to be as impartial as possible in this decision-making process.

G. Interpretation (Schedule A1, 8)

a. We assume that the terminology of 'no rate' in these sub paragraphs deals with the circumstances where there is no change in the discount rate following a review. Could this, in conjunction with the use of 'class of case' in 8(2)(c), for example, be an attempt to deal with the effects of *Roberts v Johnson*, for example? The use of the terminology of 'class of case' suggests that there could be different rates for say, clinical negligence or road traffic claims, for example. We understand that this is not the Ministry of Justice's intention and we would recommend alternative wording to avoid confusion. 'heads of damage' is less confusing that 'class of case' which could be mis-understood and mis-applied.

Draft Clause

1 Assumed rate of return on investment of damages

(1) Before section 1 of the Damages Act 1996 (assumed rate of return on investment of damages) insert—

"A1 Assumed rate of return on investment of damages: England and Wales

(1) In determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury the court must, subject to and in accordance with rules of court made for the purposes of this section, take into account such rate of return (if any) as may from time to time be prescribed by an order made by the Lord Chancellor.

(2) Subsection (1) does not however prevent the court taking a different rate of return into account if any party to the proceedings shows that there are special circumstances ~~it is more appropriate~~ in the case in question.

The test should be tougher here. **1(2)** There is case law under the current law which makes it very difficult to persuade the Courts to decide on a different rate, for good reason. See Sir Michael Turner's comments at paragraph 7 of Flora v Wakom (Heathrow) Ltd [2005] EWHC 2822 (QB).

(3) An order under subsection (1) may prescribe different rates of return for different classes of case.

We are unsure as to what is meant by different class of case in **1(3)**. Presumably this is intended to refer to separate heads of damage, where it has always been possible to ask the court to use its discretion in the Damages Act to apply different rates (see *Simon v Helmot*, and less successfully in *Warriner v Warriner*, *Cooke v United Bristol Health Care*). We think 'class' has different connotations for most lawyers and the wording should be amended to read 'different heads of damage' which will be better understood and less likely to be misapplied.

(4) Schedule A1 (which makes provision about determining the rate of return to be prescribed by an order under subsection (1)) has effect.

(5) An order under this section is to be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament."

(2) Before the Schedule to the Damages Act 1996 insert—

"SCHEDULE A1

ASSUMED RATE OF RETURN ON INVESTMENT OF DAMAGES: ENGLAND AND WALES

Periodic reviews of the rate of return

1(1) The Lord Chancellor must review the rate of return periodically in accordance with this paragraph.

(2) A review of the rate of return must be started within the 90 day period following commencement.

(3) A review of the rate of return must be started within the 3 year period following the last review.

(4) It is for the Lord Chancellor to decide—

(a) when, within the 90 day period following commencement, a review under sub-paragraph (2) is to be started;

(b) when, within the 3 year period following the last review, a review under subparagraph (3) is to be started.

(5) The Lord Chancellor must give reasons for the decisions made on the matters mentioned in sub-paragraph (4).

(6~~5~~) In this paragraph—

"90 day period following commencement" means the period of 90 days beginning with the day on which this paragraph comes into force;

"3 year period following the last review" means the period of three years beginning with the day on which the last review under this paragraph (whether under sub-paragraph (2) or (3)) is concluded.

(~~6~~7) For the purposes of this paragraph a review is concluded on the day when the Lord Chancellor makes a determination under paragraph 2 or 3 (as the case may be) as a result of the review.

Determining the rate of return on the first review

2 (1) This paragraph applies whenever the Lord Chancellor is required by paragraph 1(2) to conduct a review of the rate of return.

(2) The Lord Chancellor must review the rate of return and determine whether it should be—

(a) changed to a different rate, or

(b) kept unchanged.

(3) The Lord Chancellor must conduct that review and make that determination within the 180 day review period.

(4) In conducting the review, the Lord Chancellor must consult—

(a) the Government Actuary, and

(b) the Treasury.

It is not clear why there is no expert panel for the first review. If there are reasonable time frames (as there are for subsequent reviews) why should a panel not be constituted for this first rate? We take the view that this is the most important review for years and it is vital that it sets the rate as accurately as possible. To do that, the panel is vital – as is already acknowledged for future reviews. Second, the review must be seen as being entirely independent of any pressures being applied by the Treasury and/or the interested industries. A lack of expert panel input does not seem to be the best way to achieve that independence.

(5) The Government Actuary must respond to the consultation within the period of 90 days beginning with the day on which the Government Actuary's response to the consultation is requested.

(6) The exercise of the power of the Lord Chancellor under this paragraph to determine whether the rate of return should be changed or kept unchanged is subject to paragraph 4.

(7) When deciding what response to give to the Lord Chancellor under this paragraph, the Government Actuary and the Treasury must take into account the duties imposed on the Lord Chancellor by paragraph 4.

(8) During any period when the office of Government Actuary is vacant, a reference in this paragraph to the Government Actuary is to be read as a reference to the Deputy Government Actuary.

(9) The Lord Chancellor must give reasons for the decisions made on the matters mentioned in sub-paragraph (2) and (4).

(10~~9~~) In this paragraph "180 day review period" means the period of 180 days beginning with the day which the Lord Chancellor decides (under paragraph 1) to be the day on which the review is to start.

Determining the rate of return on later reviews

3(1) This paragraph applies whenever the Lord Chancellor is required by paragraph 1(3) to conduct a review of the rate of return.

(2) The Lord Chancellor must review the rate of return and determine whether it should be—

(a) changed to a different rate, or

(b) kept unchanged.

(3) The Lord Chancellor must conduct that review and make that determination within the 180 day review period.

(4) In conducting the review, the Lord Chancellor must consult—

(a) the expert panel established for the review, and

(b) the Treasury.

(5) The expert panel must respond to the consultation within the period of 90 days beginning with the day on which their response to the consultation is requested.

(6) The exercise of the power of the Lord Chancellor under this paragraph to determine whether the rate of return should be changed or kept unchanged is subject to paragraph 4.

(7) When deciding what response to give to the Lord Chancellor under this paragraph, the expert panel and the Treasury must take into account the duties imposed on the Lord Chancellor by paragraph 4.

(8) The Lord Chancellor must give reasons for the decisions made on the matters mentioned in sub-paragraph (2) and .

(9~~8~~) In this paragraph “180 day review period” means the period of 180 days beginning with the day which the Lord Chancellor decides (under paragraph 1) to be the day on which the review is to start.

Determining the rate of return

4(1) The Lord Chancellor must comply with this paragraph when determining under paragraph 2 or 3 whether the rate of return should be changed or kept unchanged (“the rate determination”).

(2) The Lord Chancellor must make the rate determination, having taken into account the response of the expert panel, on the basis that the rate of return should be the rate that~~, in the opinion of the Lord Chancellor~~, a recipient of relevant damages could reasonably be expected to achieve if he or she invested the relevant damages for the purpose of securing that—

Comment on the tracked changes
We are concerned that there is no mechanism in this clause (4(2) which provides for a link between the expert panel report and the Lord Chancellor’s final decision on the discount rate at each review.

(a) the relevant damages would meet the losses and costs for which they are awarded;

(b) the relevant damages would meet those losses and costs at the time or times when they fall to be compensated; and

(c) the relevant damages would be exhausted at the end of the period for which they are awarded.

(3) In making the rate determination as required by sub-paragraph (2), the Lord Chancellor must make the following assumptions—

(a) the assumption that the relevant damages are payable in a lump sum (rather than under a periodic payments order);

(b) the assumption that the recipient of the relevant damages is properly advised on the investment of the relevant damages;

(c) the assumption that the recipient of the relevant damages invests the relevant damages in a diversified portfolio of investments;

(d) the assumption that the relevant damages are invested using an approach that involves a low financial risk. —

(i) more risk than a very low level of risk, but

(ii) less risk than would ordinarily be accepted by a prudent and properly advised individual investor who has different financial aims.

Comment on the tracked changes 4(3)(d)(ii) This clause's meaning is opaque. Does it mean that the recipient of the relevant damages has different investment aims or does it mean that the aims are different from those of an ordinary investor? We would prefer the latter. A suggested amendment is shown in the tracking, using the words 'low risk' which are easily understandable, simplify the clause and are words which the Lord Chancellor has already used when describing these changes.

(4) That does not limit the assumptions which the Lord Chancellor may make.

Comment on tracked changes 4(4) This clause should be deleted. It gives the Lord Chancellor unfettered discretion. The Lord Chancellor has an inevitable conflict when deciding the discount rate as it is a defendant in many high value claims. That conflict cannot be removed by the solution proposed by the Government, but the Lord Chancellor should be constrained where possible, in the light of that conflict.

(5) In making the rate determination as required by sub-paragraph (2), the Lord Chancellor must—

(a) have regard to the actual returns that are available to investors;

(b) have regard to the actual investments made by investors of relevant damages;
and

As currently drafted these two sub paras **4(5)(a) and (b)** give some concern that in addition to the advice given by the expert panel, the Lord Chancellor may take into account anecdotal evidence on investment behaviour. We take the view that both are unnecessary.

(c) make such allowances for taxation, inflation and investment management costs based on recommendations made by [the Government Actuary Department in respect of the first review and] the expert panel [in respect of the second and subsequent reviews] as the Lord Chancellor thinks appropriate.

(6) That does not limit the factors which may inform the Lord Chancellor when making the rate determination.

Clause 4(6) should be deleted. It gives the LC unfettered discretion to not only disregard the evidence supplied by both the expert panel and the Treasury, which undermines their advisory capabilities, but to take into account other factors not listed in the whole of this draft clause. We are concerned that additional factors (which are inevitably unpredictable) may skew the decision made.

(7) The Lord Chancellor must give reasons for the decisions made on the matters mentioned in sub-paragraph (5)~~(c)~~ and .

(8) In this paragraph "relevant damages" means a sum awarded as damages for future pecuniary loss in an action for personal injury.

Expert panel

We are interested to find out the status of the expert panel. Is it a NDP, Working Group, or an Expert Committee? Will the Lord Chancellor publish the terms of reference for the expert panel?

5(1) For each review of a rate of return, the Lord Chancellor is to establish a panel (referred to in this Schedule as an "expert panel") consisting of—

(a) the Government Actuary, who is to chair the panel; and

(b) four other members appointed by the Lord Chancellor.

(2) The Lord Chancellor must exercise the power to appoint the appointed members to secure that—

(a) one appointed member has experience as an actuary;

(b) one appointed member has experience of managing investments;

(c) one appointed member has experience as an economist;

(d) one appointed member has experience in consumer matters as relating to investments.

(3) An expert panel established for a review of a rate of return ceases to exist once it has responded to the consultation relating to the review.

(4) A person may be a member of more than one expert panel at any one time.

(5) A person may not become an appointed member if he or she is ineligible for membership.

(6) An appointed member ceases to be a member if he or she becomes ineligible for membership.

(7) The Lord Chancellor may end an appointed member's membership of the panel if the Lord Chancellor is satisfied that—

(a) the person is unable or unwilling to take part in the panel's activities on a review conducted under paragraph 1;

(b) it is no longer appropriate for the person to be a member of the panel because of gross misconduct or impropriety or a conflict of interest;

This addition in **5(7)(c)** and the additional sub clause at **(9)(c)** below are additional safeguards to ensure that the panel is comprised of individuals who are seen to be as impartial as possible in this decision-making process.

(c) the person has become bankrupt, a debt relief order (under Part 7A of the Insolvency Act 1986) has been made in respect of the person, the person's estate has been sequestrated or the person has made an arrangement with or granted a trust deed for creditors.

(8) During any period when the office of Government Actuary is vacant the Deputy Government Actuary is to be a member of the panel and is to chair it.

(9) A person is "ineligible for membership" of an expert panel if he or she is—

(a) a Minister of the Crown, or

(b) a person serving in a government department in employment in respect of which remuneration is payable out of money provided by Parliament, or

(c) has a financial interest in the outcome of the Lord Chancellor's review.

See comment **at 5(7)(c)** above which also refers to **9(c)**.

(10) In this paragraph "appointed member" means a person appointed by the Lord Chancellor to be a member of an expert panel.

Proceedings, powers and funding of an expert panel

6(1) The quorum of an expert panel is three members, one of whom must be the Government Actuary (or the Deputy Government Actuary when the office of Government Actuary is vacant).

(2) In the event of a tied vote on any decision, the person chairing the panel is to have a second casting vote.

(3) The panel may—

(a) invite other persons to attend, or to attend and speak at, any meeting of the panel;

(b) when exercising any function, take into account information submitted by, or obtained from, any other person (whether or not the production of the information has been commissioned by the panel).

(4) The Lord Chancellor must make arrangements for an expert panel to be provided with the resources which the Lord Chancellor considers to be appropriate for the panel to exercise its functions.

(5) The Government Actuary's Department, or any other government department, may enter into arrangements made by the Lord Chancellor under sub-paragraph (4).

(6) The Lord Chancellor must make arrangements for the appointed members of an expert panel to be paid any remuneration and expenses which the Lord Chancellor considers to be appropriate.

Application of this Schedule where there are several rates of return

7(1) This paragraph applies if two or more rates of return are prescribed under section A1.

(2) The requirements—

(a) under paragraph 1 for a review to be conducted, and

(b) under paragraph 2 or 3 relating to how a review is conducted, apply separately in relation to each rate of return.

(3) As respects a review relating to a particular rate of return, a reference in this Schedule to the last review conducted under a particular provision is to be read as a reference to the last review relating to that rate of return.

Interpretation

8(1) In this Schedule—

"expert panel" means a panel established in accordance with paragraph 5;

"rate of return" means a rate of return for the purposes of section A1.

(2) A provision of this Schedule that refers to the rate of return being changed is to be read as also referring to—

(a) the existing rate of return being replaced with no rate;

The terminology of 'no rate' in these sub clauses is of interest. Is this a suggestion that the discount rate would be abolished and replaced with no rate?

(b) a rate of return being introduced where there is no existing rate;

(c) the existing rate of return for a particular class of case being replaced with no rate;

What is meant by 'class of case'? We assume it refers to heads of damage. See our comments relating to (1)(3) above and our commentary at pages 7 and 12 above.

(d) a rate of return being introduced for a particular class of case for which there is no existing rate.

(3) A provision of this Schedule that refers to the rate of return being kept unchanged is to be read as also referring to—

(a) the position that there is no rate of return being kept unchanged;

(b) the position that there is no rate of return for a particular class of case being kept unchanged.

(4) A provision of this Schedule that refers to a review of the rate of return is to be read as also referring to—

(a) a review of the position that no rate of return is prescribed;

(b) a review of the position that no rate of return is prescribed for a particular class of case."

(3) Any order made by the Lord Chancellor under section 1(1) of the Damages Act 1996 which relates to England and Wales and is in force immediately before the time when subsection (1) comes into force is to be treated after that time as if made by the Lord Chancellor under section A1(1) of that Act.

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