Department of Justice
www.justice-ni.gov.uk

Consultation Questionnaire

The personal injury discount rate:
How should it be set?
A consultation

Responding to the Consultation

Please use this questionnaire to tell us your views on the options.

The closing date for receipt of responses is **5pm on Friday 14 August 2020**.

Please note that it is unlikely that responses to the consultation will be accepted after this date.

Please indicate clearly if you are responding as an individual or on behalf of an organisation.

Please send your response by email to: AToJ.Consultation@justice-ni.x.gsi.gov.uk

Privacy Notice
We intend to publish a summary of responses on our website on completion of the consultation process. Any contact details, which will identify a respondent as a private individual, will be removed prior to publication. All information will be handled in accordance with the General Data Protection Regulation 2018. Respondents should also be aware that the Department's obligations under the Freedom of Information Act 2000 may require that any responses, not subject to specific exemptions under that Act, be disclosed to other parties on request.

Consultee Details	
Please indicate if you are responding as: (*please tick only one option*) [ ] A member of the public [x] On behalf of an organisation [ ] Other……(*please specify*)	
Please enter your details below:	
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Title:	[ ] **Mr** [x] **Ms** [ ] **Mrs** [ ] **Miss** [ ] **Dr** *(please tick as appropriate)*
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Job Title: *(if applicable)*	Governmental & External Relations
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Question 1:

Do you agree that investment decisions by claimants in Northern Ireland are likely to be similar to those made by claimants in other jurisdictions?

If not, please explain.

The fact this question is being asked highlights one of the major failings of the way in which the personal injury discount rate is set elsewhere in the UK. The UK Government and the devolved administrations have no evidence about how claimants are advised to invest their money, or what they do in practice, or what returns those invested funds achieve. This results in defendants being required by law to provide multi-million pound settlements based principally on guesswork, with a policy bias towards over, rather than under-compensation.

The Medical Defence Union does not know what investment decisions are made by claimants in Northern Ireland (or what their investment returns achieve) or anywhere else in the UK, nor does anyone else. The UK Government, and the other Devolved Administrations and their advisers, do not know. In order to determine whether the sums awarded to claimants are fair and reasonable, and do not result in substantial over-compensation, those representing claimants must be required to provide evidence about how their clients are advised to invest their awards, what they do in practice and what returns those investments achieve.

This should happen in the interests of transparency and fairness: policy should not be based on guesswork. There is an additional public interest in making such a requirement because billions of pounds spent on personal injury compensation come from public funds. If awards are inflated as a result of decisions made without appropriate information, there is a direct and adverse impact on public funds spent by public bodies to meet these inflated awards. This will in turn have an impact on the provision and availability of public health and social care for the majority of the public.

For example, money spent on clinical negligence claims is money diverted from the provision of NHS services for all patients. The percentage of claimants treated for free by the NHS and receiving compensation as a result of negligent NHS treatment is disproportionately small in relation to the far larger numbers of patients treated now and in the future by the NHS which funds will have to be diverted to pay claims, rather than providing vital services for patients. This

diversion of funds may impair services and increase the propensity to sue the NHS. It creates a vicious circle.

The MDU does not know what investment decisions are made by claimants in Northern Ireland and nor do we know what investment decisions are made elsewhere in the UK. It is possible that claimants in Northern Ireland are advised in a similar way to those elsewhere in the UK. We have seen no evidence, for example, to suggest that wealth managers anywhere in the UK advise clinical negligence claimants to invest their awards solely in ILGS. Indeed, the methodology that results in negative rates elsewhere in the UK at present is flawed as it would be irrational to advise on an investment strategy that provides absolute certainty of a loss.

No one knows what happens in practice and this should not be left to speculation. Evidence is needed and there are publicly available sources of information about advice available to claimants. Firms that specialise in and derive fees from providing investment advice to claimants should be required to explain their approach on behalf of their clients.

Question 2:

Do you agree that the legal framework for setting the personal injury discount rate in Northern Ireland should be changed so that it is no longer tied to Wells v Wells?

Please explain.

Yes. The 1998 decision in the case of *Wells v Wells* was made in a different financial climate and based on economic assumptions that have long since ceased to be relevant. In addition to the changes in the financial and economic climate that have since taken place, there have been many changes in personal injury law that have had a substantial and detrimental financial impact, for example, in clinical negligence where the MDU's experience is that claims inflation has been running around 10% for several years. Setting the discount rate is not just a legal decision and its impact financially, and especially on the public purse, cannot be ignored. The current law is not fit for purpose and needs a fundamental change. In *Wells v Wells* the House of Lords concluded that the financial impact on society was not a matter for them. It is a matter for government.

The premise that the current law provides full compensation (no more nor less) is a fiction and requires urgent change. The assessment of damages can never be exact. No investment is without risk and, furthermore, damages are often reduced for litigation risk and factors such as contributory negligence.

We do not know what level of compensation the law provides in practice as there is no evidence. For example, no robust evidence has been provided to substantiate the assumption that those providing investment advice to claimants advise investment only in 'low-risk' financial instruments and specifically in index linked government stocks. Nor has there been any robust evidence provided to substantiate the assumption that personal injury claimants actually do invest in ILGS. The law currently disregards actual claimant investment behaviour and it should not. Further, there is very little information about what happens to compensation awards and how they are spent. The decision maker who sets the discount rate must be in possession of all this information because it is the only way to ascertain the extent to which claimants' awards provide under or over-compensation. Currently the law allows a rate to be set based on unsubstantiated guesswork with no evidence that it bears any relation to what happens in practice.

If the law is changed we do not believe the law should allow a decision maker, such as the Department of Justice, to be in a position to make a financial decision that has already profoundly and adversely affected the funding of essential public and private services elsewhere in the UK without a requirement to seek advice and input from other the Government departments. The MDU only has direct experience of the adverse impact on NHS funding, but the adverse effect of such the recent dramatic decreases in the PIDRs in England, Wales and Scotland will have been experienced far more widely in the public and private sectors. For example, it has had an adverse impact on insurance and on business more widely, such as on the ability of small business to continue to trade if the insurances they hold become insufficient and they do not have sufficient funds to pay the difference between their policy limit and a post-discount rate settlement. The law should include a safeguard that, in addition to a requirement to seek and take into account advice from an expert panel, major decisions with wide-ranging effects must be made with input from all Government departments and bodies affected, and proper account taken of those contributions.

Question 3:

Which of the following frameworks for setting the personal injury discount rate in Northern Ireland should be adopted?

a) the framework used in England and Wales

b) the framework used in Scotland

c) another framework (please describe).

Please give reasons for your answer.

There are significant faults in the frameworks currently used in England and Wales, and Scotland that we have outlined above. Principally this is because the decisions on setting the discount rate are not based on evidence of claimant behaviour and the returns they achieve from investing their awards. The decision makers are not required to and do not take account of all relevant factors, such as the fact that an adverse economic climate affects all stakeholders (not just claimants), and the impact of a disastrously low discount rate on public service funding. They are not required to consult other Government bodies, for example, so they cannot take into account any factors other than the presumed impact of the PIDR on claimants.

The MDU advocates that the Northern Ireland Department of Justice develops a new and different framework with a robust base of evidence of the investment behaviour and outcomes achieved by claimants in Northern Ireland (and elsewhere in the UK if appropriate). It must also take into account the prevailing economic climate which increases the risk for all investors, claimants and defendants, and affects their returns in the same way as it limits or reduces the availability of public funds. Any economic or other financial changes that affect the returns that claimants may be expected to achieve on investment equally affect the ability of defendants to pay damages awards that continue to rise in a manner that bears no relation to the financial reality experienced by the rest of society.

It is important to ensure that those who are damaged by negligence are compensated appropriately, but they are relatively few in number compared to the general population. Claimants must be compensated, but their interests must be balanced against those of the majority whose access to public services may be adversely affected by the need for public services to fund

inflated compensation awards and for consumers to pay inflated prices that need to reflect reduced discount rates.

The need the put in place a methodology that will set a discount rate to provide a level of compensation that is appropriate but proportionate when considered in the context of the needs of society in the round is even more important at a time when public services have been devastated financially and otherwise by the Covid-19 pandemic.

The NI Department of Justice needs to design a new framework that will prevent the setting of a low discount rate that has the effect of trebling and even quadrupling current compensation awards so that spending on compensation by public bodies becomes disproportionate to their overall budget. Such a framework should also rule out any retrospective effect. Any new discount rate should only apply to compensation awards relating to incidents that took place after the change in rate.

This is particularly important with clinical negligence claims which are 'long tail' because it is not immediately apparent there may have been negligence. Clinical negligence claims are generally not notified until 3-5 years after the incident and can be notified 10, 20, 30 years or longer. Because they are often clinically complex, some claims then take 3 years or more after notification to reach a settlement. This is in part because it takes time for the extent of the damage to become apparent, especially in young persons. Also, issues such as causation are seldom straightforward. For example, it is often difficult to identify harm that may be a result of negligence and to separate it from damage that occurred as a result of the natural course of the original condition, or from a patient's other pre-existing and complicating conditions.

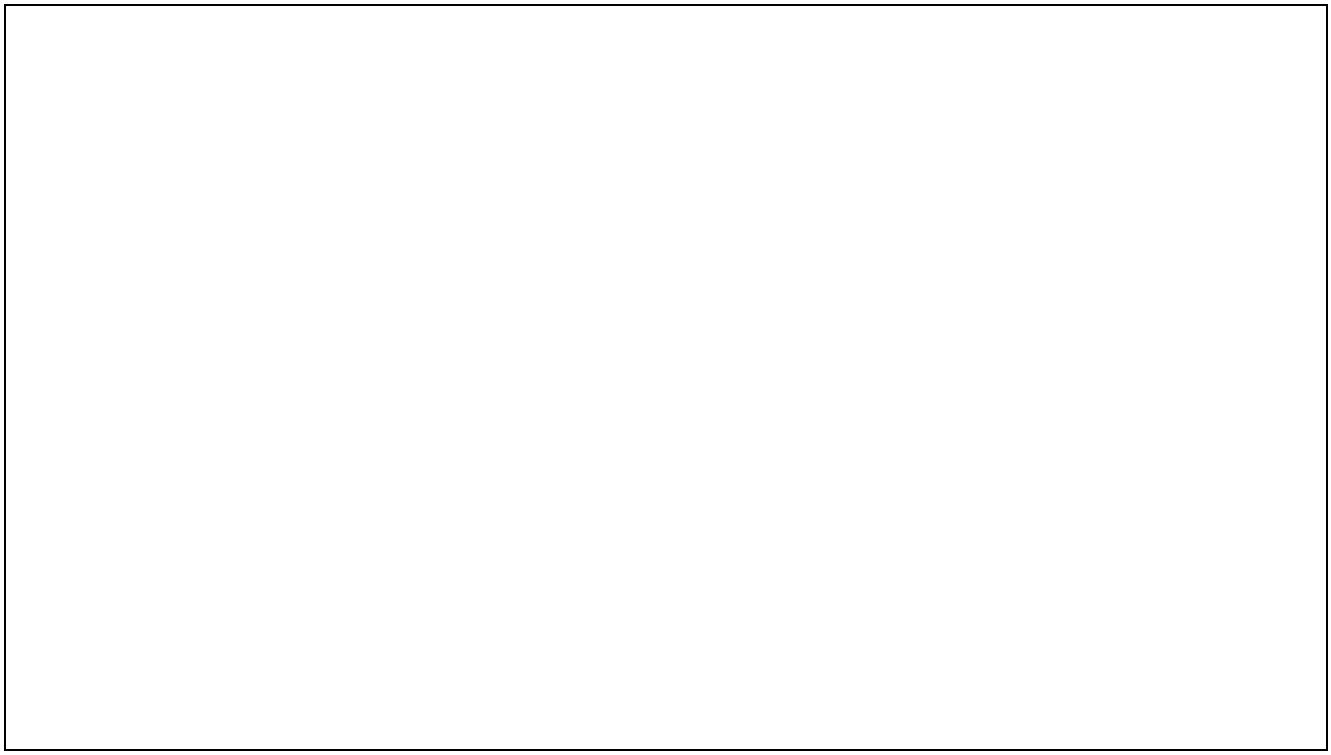
The long-tail nature of clinical negligence claims means that the medical defence organisations, principal indemnifiers in Northern Ireland for the primary care and independent sectors, need to provide indemnity on an occurrence basis. As long as MDU members pay annual subscriptions during membership they are entitled to seek indemnity with clinical negligence claims arising from an incident while they were a member, no matter when the claim is notified and irrespective of whether they are still in practice or have long retired or died. The MDU provides indemnity on an occurrence basis and any legislative change with retrospective effect, which they usually have, is punitive in that it could not have been foreseen.

For example, when the discount rate for England & Wales dropped to -0.75% in March 2017 the MDU was paying claims on behalf of members from incidents that happened 10, 20 or more years

ago, when the subscriptions they paid could never be expected to fund awards that rose, for example, from £8.4m to £17.5m as a result of that 3.25% discount rate drop. Doctors, and especially NHS GPs could not afford to fund negligence awards of that size. The position for GPs in Northern Ireland would be appreciably worse if the methodology were changed and facilitated the introduction of a discount rate of -1.75% (the rate that is currently mooted), as there are fewer GPs to provide a far smaller pool than their English or Welsh counterparts to absorb the necessarily dramatic increases in indemnity subscriptions.

It will be clear from our comments above that we do not recommend Northern Ireland adopts either the English and Welsh, or the Scottish framework. In practice the discount rate of -0.25% as set according to the methodology prescribed in the Civil Liability Act 2018 is preferable to that of -0.75% adopted using the current methodology in Scotland under the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 because the rate applied in England and Wales does not inflate awards to the same extent as the rate in Scotland does. However the legislation in both jurisdictions has been applied to set rates on the assumption the PIDR provides for over-compensation and we have outlined above the public policy reasons why we believe this is inappropriate and may be unaffordable in Northern Ireland.

As an alternative we suggest the Department of Justice considers a methodology that would allow for a split rate such as those that currently apply in Hong Kong and Jersey and which are set to recognise the benefits to the claimant of long term investments. In Hong Kong the rate is set at 2.5% (where the loss is expected for more than 10 years), at 1% (for loss between 5 - 10 years) and minus 0.5% (for loss fewer than 5 years). In Jersey there is a 0.5% rate for losses up to 20 year and 1.8% for losses for more than 20 years. The ability to set rates that recognise the benefit to the claimant of being able to achieve higher rates of return through longer term investments has a basis in fact and an element of fairness to both parties that is absent in the English and Welsh, and Scottish legislation.



Question 4:

Do you agree that adopting the England and Wales model would mean that setting the rate should be a decision for the Department of Justice; and adopting the Scottish model would mean that it should be a decision for the Government Actuary?

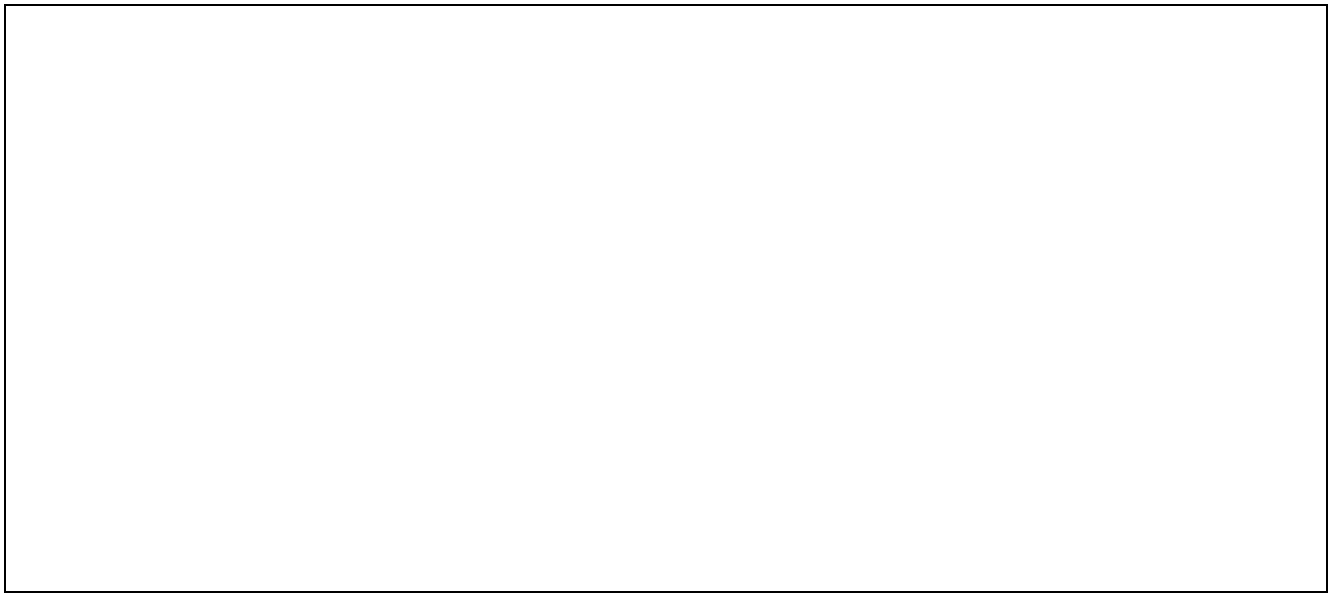
Please give reasons for your answer.

While we agree with the statement above, we do not support the current position in Scotland.

The decision to set the discount rate is not just a legal one. It is a financial decision because there are many parties materially affected such as defendants providing public services. There is a need to consider and weigh in the balance additional costs to public services and other services (such as insurance which is also heavily affected) which need to be borne by taxpayers and citizens more widely.

Given the potential for the discount rate to have a damaging effect on public service, it is also a public policy decision. Such decisions are better made by individuals who can be held accountable publicly and that would suggest Ministers, who are accountable to Parliament, rather than the GAD which cannot be held publicly accountable to the same extent.

Those who make such decisions must be required to be transparent about the process and to provide a detailed rationale and be capable of being held publicly accountable. We do not believe a process that relies on the GAD alone to make such an important policy decision has all these necessary safeguards.



Question 5:

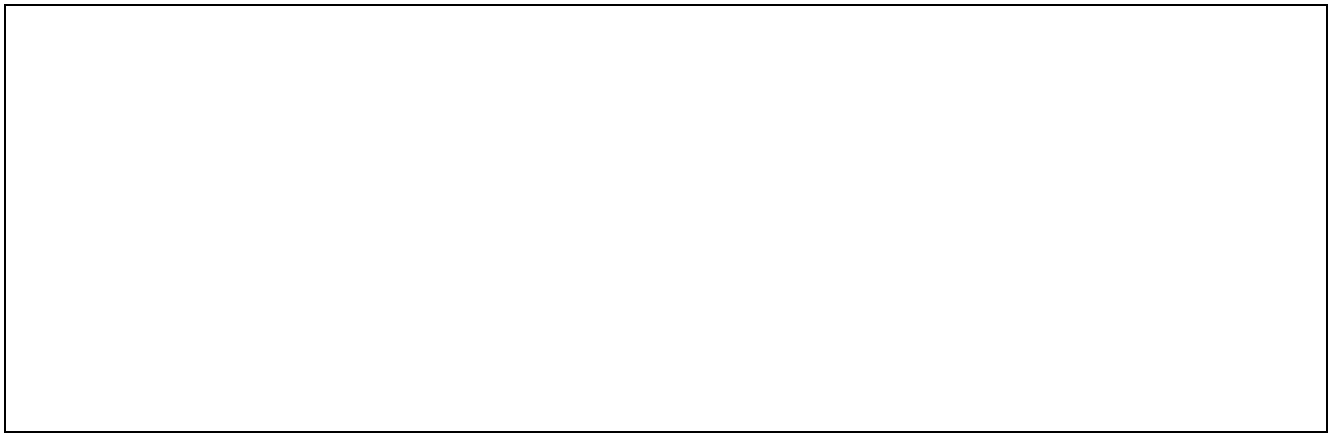
Should the person or body responsible for setting the rate in Northern Ireland be required to consult any other person or body?

If so, who, and why?

Yes. In order to advise the Department of Justice, there should be an expert panel created (which might reasonably include the Government Actuary).

Any legislation should mandate the Department of Justice to take the panel's advice into account and to demonstrate in a transparent way how the advice influences the decision and to provide a rationale. This would provide a safeguard against any concern that the Department would succumb to pressure from external influence and, more important, provide the Department with advice from experts from a range of relevant fields who must be chosen for their knowledge and expertise.

It is illogical for the law to disregard the financial effect the discount rate has on public services, such as healthcare, and on other defendants when it substantially inflates the cost of the services they provide to consumers and the rest of society. The setting of the discount rate must take equal account of the effect on all parties. We believe any new legislation should also mandate the Department to consult with and take proper account of the contributions of all relevant Government departments.



Question 6:

Should there be a requirement in Northern Ireland to review the personal injury discount rate on a regular basis?

Question 7:

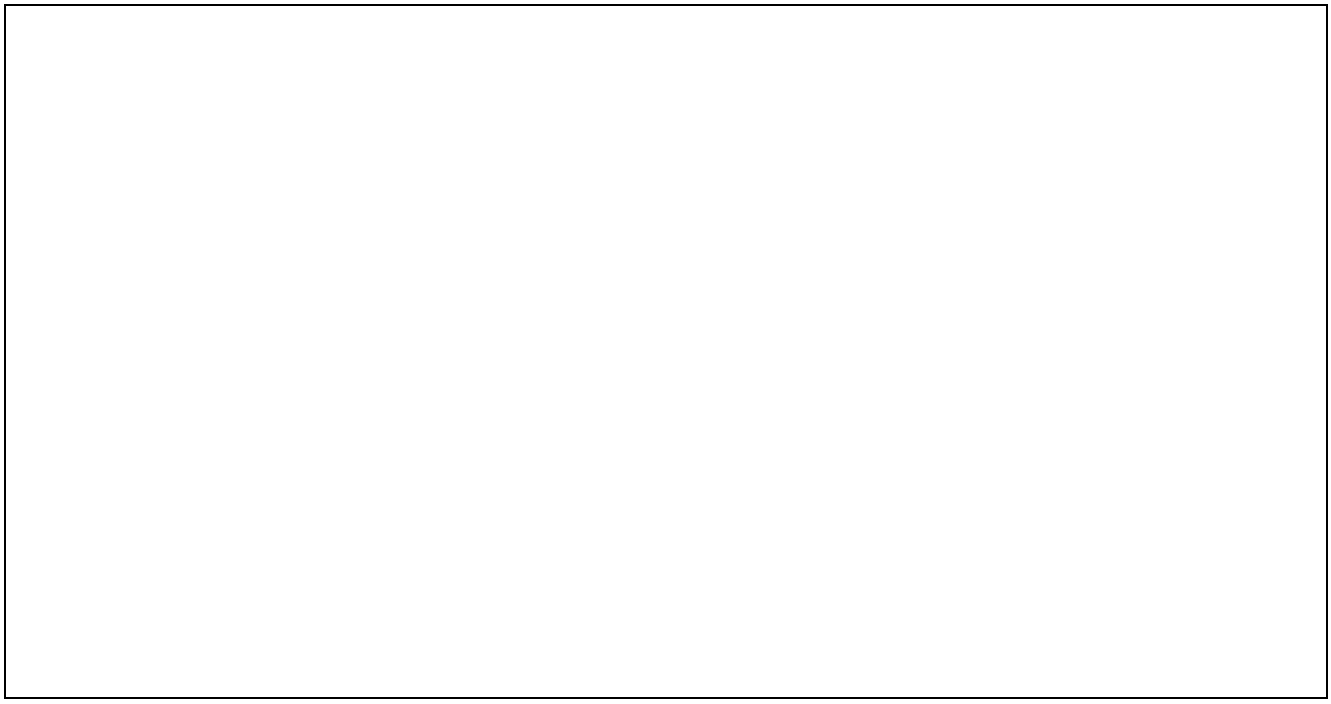
If so, how often should the rate be reviewed?

Please give reasons for your answer.

We believe the PIDR should be reviewed on a regular basis and, in keeping with England and Wales, and Scotland, this should be five years.

Given the often complex nature of clinical negligence claims, a review period of less than five years would be too short. The complexity stems from many factors including the sometimes differing views of expert witnesses on what constitutes reasonable care and the fact that most cases involve difficult causation issues such as the extent to which harm would have been suffered in any event (in the absence of any negligence) due to the underlying injury or disease process. This is quite different from the situation in most personal injury claims, such as for road traffic injuries.

The vast majority of clinical negligence cases are settled without a court hearing. A review period less than five years may introduce an incentive for one of the parties to delay settlement if a more advantageous discount rate were expected to take effect in the near future. For example, a three-year review period could even see three different discount rates within a period of just over three years. Delay in settlement runs contrary to the public interest in resolving claims as swiftly as possible and generally means increased legal costs. We recommend the review period should be at least five years to help to reduce the effect of the litigation practice of trying to game the system.



Question 8:

Do you agree with the outcome of the screening exercises and regulatory impact assessment?

If not, please explain why.

We have explained above the deleterious effect on public services, and especially NHS funding of a low discount rate. We have also explained about the effect on the MDU's GP members in England and Wales where state indemnity had to be introduced as all GPs would have been unable to afford a subscription that reflected the true cost of the 3.25% reduction in the discount rate. The effect on the wider NHS was equally profound. In his Chair's report in the NHS Resolution (which runs the Clinical Negligence Scheme for Trusts in England) Annual Report for the financial year ending 31 March 2017, Ian Dilks noted that the drop in the discount rate: '… added £4.7 billion, approximately 7.5%, to our claims provisions at March 2017 but will have a proportionally bigger impact on the claim payments we will make in 2017/18'.

It is unarguable that a reduction in the discount rate will have a profound and adverse effect on NHS funding and that may in turn affect the ability of the NHS to provide services to all patients. No mention was made of this in the screening exercise which suggested, for example, it would have a positive effect on access to healthcare and on all sectors of the population who need access to NHS care. No evidence was provided to substantiate such claims and they do not seem a logical conclusion in the face of the evidence of the concerning financial effect of a -0.75% (and currently -0.25%) discount rate on the NHS and on GPs in England and Wales.

A dramatic increase of £millions in the cost of compensation awards inevitably has an impact on NHS funding and, in Northern Ireland, would be likely to adversely affect the availability of and access to NHS services by the public. The law may be strictly about providing compensation to claimants, but a change in methodology provides an opportunity to take account of other relevant considerations when setting a discount rate. These must include the effect on public and other services, especially given the ongoing financial effect of the Covid-19 pandemic. The budget for the NHS in Northern Ireland is not infinite and the disastrous impact on NHS finances of a potential discount rate of -1.75%, on top of the financial impact (still ongoing) of the Covid-19 pandemic, must be fully acknowledged and modelled appropriately in any impact assessment.