Discount rate review 2019: full terms of reference for the first review		Comments
Terms of reference issued by the Lord Chancellor to the Government Actuary on 19 March 2019 ToR_GA.PDF	**Terms of reference issued by the Lord Chancellor to the Treasury on 19 March 2019** ToR_HMT__002_.PDF	
Introduction The Damages Act 1996 ("the Act") requires the Lord Chancellor to start a review of the personal injury discount rate ("the rate") within 90 days of the amendments made to the Act by the Civil Liability Act 2018 coming into force. This occurred on 20 December 2018. The review of the rate must start on or before 19 March 2019. The Act provides that the Lord Chancellor must review the rate and determine whether it should be (a) changed to a different rate, or (b) kept unchanged. The Act requires the Lord Chancellor in conducting the review to consult the Government Actuary and HM Treasury. This paper sets out the terms and content of the Lord Chancellor's statutory consultation with the Government Actuary.	Introduction The Damages Act 1996 ("the Act") requires the Lord Chancellor to start a review the personal injury discount rate ("the rate") within 90 days of the amendments made to the Act by the Civil Liability Act 2018 coming into force. This occurred on 20 December 2018. The review of the rate must start on or before 19 March 2019. The Act provides that the Lord Chancellor must review the rate and determine whether it should be (a) changed to a different rate, or (b) kept unchanged. The Act requires the Lord Chancellor in conducting the review to consult the Government Actuary and the Treasury. This paper sets out the terms and content of the Lord Chancellor's statutory consultation with the Treasury.	None, other than the introductions do not refer to the requirement that the rate review must be concluded no later than 140 days from 19 March 2019, ie on or by **5 August 2019**.
Background The rate is the rate of return prescribed by the Lord Chancellor by order from time to time under the Act or, as is the case at present, deemed to be prescribed under section 10(3) of the Civil Liability Act 2018. The court is required to take the rate into account 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 rate of return to be set by the Lord Chancellor is the Lord Chancellor's estimate of the rate of return that a recipient of relevant damages could reasonably be expected to achieve if the recipient invested the relevant damages for the purpose of securing that— (a) the relevant damages would meet the losses and costs for which they are awarded;	Background The rate is the rate of return prescribed by the Lord Chancellor by order from time to time under the Act or, as is the case at present, deemed to be prescribed under section 10(3) of the Civil Liability Act 2018. The court is required to take the rate into account 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 rate of return to be set by the Lord Chancellor is the Lord Chancellor's estimate of the rate of return that a recipient of relevant damages could reasonably be expected to achieve if the recipient invested the relevant damages for the purpose of securing that— (a) the relevant damages would meet the losses and costs for which they are awarded;	The first paragraph summarises the amendments to the Damages Act 1996 made by the 2018 Act. This paraphrases 4(2) of schedule A1 to the 1996 Act which was inserted by s10 of the 2018 Act.

(b) the relevant damages would meet those losses and costs at the time or times when they fall to be met by the relevant damages; and (c) the relevant damages would be exhausted at the end of the period 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 met by the relevant damages; and (c) the relevant damages would be exhausted at the end of the period for which they are awarded	
In determining the rate, the Lord Chancellor must have regard to the actual returns available to investors and the actual investments made by investors of relevant damages. The Lord Chancellor is also to assume that the investor is properly advised.	In determining the rate, the Lord Chancellor must have regard to the actual returns available to investors and the actual investments made by investors of relevant damages. The Lord Chancellor is also to assume that the investor is properly advised.	These passages paraphrase 4(5) and 4(3)(b) of the schedule.
The practice to date has been to set a single rate for all cases, but the Lord Chancellor's order may prescribe different rates of return for different classes of case.	The practice to date has been to set a single rate for all cases, but the Lord Chancellor's order may prescribe different rates of return for different classes of case.	Single rates were set in 2001 and in 2017 although the power to set different rates for different classes of case has always been available at s1(3) of the Damages Act.
The Act requires that:	The Act requires that:	
• The Lord Chancellor must determine the rate within 140 days of the review commencing.	• The Lord Chancellor must determine the rate within 140 days of the review commencing.	The time limits are set out at paragraph 2 of the schedule.
• The consultation of the Government Actuary must start within the period of 20 days beginning with the day on which the 140-day review period starts.	• The consultation of the Government Actuary must start within the period of 20 days beginning with the day on which the 140-day review period starts.	
• In making his assessment of what the rate should be the Lord Chancellor may make assumptions but is required to assume that: o the recipient is properly advised on the investments; o the damages are awarded as a lump sum; and o the recipient of the relevant damages invests the relevant damages in a diversified portfolio of investments using an approach that involves (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.	• In making his assessment of what the rate should be the Lord Chancellor may make assumptions but is required to assume that: o the recipient is properly advised on the investments; o the damages are awarded as a lump sum; and o the recipient of the relevant damages invests the relevant damages in a diversified portfolio of investments using an approach that involves (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.	These requirements are set out 4(2) and 4(3) of the schedule. **The diversified portfolio assumption and the description of investment risk appetite form the new investment risk assumption that is key to the approach in the 2018 Act. It is designed to break the link between the personal injury discount rate and ILGS yields. It is provided for at 4(3)(c) and (d) of the schedule.**
• In making his assessment of what the rate should be, the Lord Chancellor may take other factors into account but must: o have regard to the actual returns that are	• In making his assessment of what the rate should be, the Lord Chancellor may take other factors into account but must: o have regard to the actual returns that are	

available to investors; o have regard to the actual investments made by investors of relevant damages; and o make appropriate allowances for taxation, inflation and investment management costs. • In deciding what response to give to the Lord Chancellor, the Government Actuary and the Treasury must take into account the duties imposed on the Lord Chancellor in relation to the determination of the rate. In preparation for the review the Ministry of Justice published ***Setting the Personal Injury Discount Rate*** *A call for Evidence* on 6 December 2018. The period for responses to the Call for Evidence ended on 30 January 2019. Following commitments made by the MoJ in March 2018 in its response to the report of the Justice Select Committee on the draft personal injury discount rate clause published in September 2017, the MoJ has also commissioned the Government Actuary's Department ("GAD") to carry out further research and analysis based on the results published in GAD's July 2017 report *Ministry of Justice Personal Injury Discount Rate Analysis*. This report was intended "to analyse outcomes for claimants in receipt of a lump sum award of damages for future financial loss under different illustrative PI discount rates which, based on information gathered during the [March 2017] consultation, reflect the way that claimants invest their award and the way in which they are advised to invest their award by their investment advisers." The replies received to the Call for Evidence and the results of GAD's further research and analysis will be provided to the Government Actuary to assist him in preparing his response to the Lord Chancellor.	available to investors; o have regard to the actual investments made by investors of relevant damages; and o make appropriate allowances for taxation, inflation and investment management costs. • In deciding what response to give to the Lord Chancellor, the Government Actuary and the Treasury must take into account the duties imposed on the Lord Chancellor in relation to the determination of the rate. In preparation for the review the Ministry of Justice published ***Setting the Personal Injury Discount Rate*** *A call for Evidence* on 6 December 2018. The period for responses to the Call for Evidence ended on 12 February 2019. Following commitments made by the department in March 2018 in its response to the report of the Justice Select Committee on the draft personal injury discount rate clause published in September 2017, the department has also commissioned the Government Actuary's Department ("GAD") to carry out further research and analysis based on the results published in GAD's July 2017 report *Ministry of Justice Personal Injury Discount Rate Analysis*. This report was intended "to analyse outcomes for claimants in receipt of a lump sum award of damages for future financial loss under different illustrative PI discount rates which, based on information gathered during the [March 2017] consultation, reflect the way that claimants invest their award and the way in which they are advised to invest their award by their investment advisers." The replies received to the Call for Evidence and the results of GAD's further research and analysis will be provided to the Treasury to assist in the preparation of its response to the Lord Chancellor as soon as practicable after the start of the review.	The bullet points are lifted from 4(5) of the schedule. It is important to note that the language is permissive (ie *"have regard to … make appropriate allowances"*) rather than prescriptive. This paragraph is lifted from 2(8) of the schedule.

The Government Actuary's role The Government Actuary's role in relation to carrying out the first review is advisory. The Lord Chancellor is not required to follow the advice of the Government Actuary. The purpose of the Government Actuary's response to the Lord Chancellor's consultation is to provide advice to the Lord Chancellor on matters he needs to consider to make a reasoned and informed decision on the setting of the rate. The matters on which the Lord Chancellor is seeking the advice of the Government Actuary are specified below under Terms of Consultation. The Government Actuary is to act independently in the preparation of his response to the Lord Chancellor's request.	The Treasury's role The Treasury's role in relation to carrying out the first review is advisory. The Lord Chancellor is not required to follow the advice of the Treasury. The purpose of the Treasury's response to the Lord Chancellor's consultation is to provide advice to the Lord Chancellor on matters relevant to the setting of the rate. The matters on which the Lord Chancellor is seeking the advice of the Treasury are specified below under Terms of Consultation.	The decision is the Lord Chancellor's alone. Although he is not required to follow the advice of either of the statutory consultees, he is obliged to give reasons for his decision and it may be subject to judicial review. The difference in the language used indicates that the GA's advisory role in setting the rate is much more specific and detailed whereas that of the Treasury is more of a macro-level analysis of the economic background against which the rate will be determined.
The Government Actuary will take into account the responses to the Call for Evidence and the further research and analysis carried out by GAD in considering the Lord Chancellor's request, but is entitled to decide what other evidence, including oral evidence, to consider in the course of preparing his response to the Lord Chancellor's consultation and what weight to give to the evidence that he considers. He may also draw conclusions from his own experience. The Government Actuary must respond to the Lord Chancellor's consultation within 80 days of the Lord Chancellor requesting his response (beginning with the day of the request). The Government Actuary's role as a statutory consultee ends on the delivery of his response to the Lord Chancellor's request to the Lord Chancellor.	The Treasury will consider the responses to the Call for Evidence and the further research and analysis carried out by GAD in considering the Lord Chancellor's request, but is entitled to decide what other evidence, including oral evidence, to consider while preparing its response to the Lord Chancellor's consultation and what weight to give to the evidence that it considers. It may also draw conclusions from its own experience.	It is possible that the reference to oral evidence indicates that GAD and Treasury may hold private meetings and conversations as part of preparing their advice.
Acting as a statutory consultee will not restrict or inhibit the ability of the Government Actuary and GAD to provide advice to the Lord Chancellor and his department outside the scope of the statutory consultation at any time, including during the statutory consultation period.	Acting as a statutory consultee will not restrict or inhibit the ability of the Treasury to provide advice to the Lord Chancellor and his department outside the scope of the statutory consultation at any time, including during the statutory consultation period.	

<u>Reporting</u> The Government Actuary will provide a written report to the Lord Chancellor in response to the Lord Chancellor's request. The report must contain a reasonable explanation of the advice provided. All conclusions set out in the response must be presented in such a way as to make clear the reasoning and evidence on which they are based. The format of the report is to be agreed between the Government Actuary and the Lord Chancellor prior to completion. The Government Actuary must provide his report within 80 days of the date on which the response is requested.	<u>Reporting</u> The Lord Chancellor will consult the Treasury no later than 20 days of the commencement of the review (beginning with the day on which the review starts). The Treasury will provide a written response to the Lord Chancellor in response to the Lord Chancellor's request no later than 80 days of the Lord Chancellor's consultation (beginning with the day on which the request is made). The response must contain a reasonable explanation of the advice provided. All conclusions set out in the response must be presented in such a way as to make clear the reasoning and evidence on which they are based. The format of the response is to be agreed between the Treasury and the Lord Chancellor prior to completion.	The requirements that the Lord Chancellor starts consultation in the first 20 days of the review - schedule 2(5) - and that the consultee responds within 80 days thereof - 2(6) - actually apply only to the involvement of the Government Actuary rather than the Treasury. Although there are no time limits whatsoever in the Act in connection with consulting Treasury, it would appear that both consultations are likely to run to the timescale set out with regard to the Government Actuary. **The Lord Chancellor is not obliged to release the full text of the advice provided by either of the statutory consultees**. He is obliged to publish something, however, with paragraph 5 of the schedule providing that he "*must … publish such information as the Lord Chancellor thinks appropriate about … the response of the Government Actuary or the Deputy Government Actuary (as the case may be)*".
<u>Publishing of information</u> The Government Actuary's report to the Lord Chancellor will remain confidential until the review is concluded. The Government Actuary's report will be published when the Lord Chancellor announces the outcome of the first review. The Government Actuary's report may be redacted, if necessary, to comply with the requirements of the Data Protection Act 2018.	<u>Publishing of information</u> The Treasury's response to the Lord Chancellor will remain confidential until the review is concluded. The Treasury's response will be published when the Lord Chancellor announces the outcome of the first review. The Treasury's response may be redacted, if necessary, to comply with the requirements of the Data Protection Act 2018.	These statements, ie that the report and the response *"will be published"*, appear to go beyond the obligation at paragraph 5 of the schedule. As noted above, that is merely to publish *"such information"* about them as the Lord Chancellor *"thinks appropriate."*
<u>Managing conflicts of interest</u> The Government Actuary leads a non-ministerial department, providing expert actuarial advice to government. As members of the Institute and Faculty of Actuaries, the Government Actuary and GAD's actuarial staff are subject to professional guidance and requirements which, amongst other things, requires that conflicts between clients are appropriately identified and managed. GAD has provided the Ministry of Justice, and other relevant clients, with information on controls and procedures that GAD has implemented in order		These passages set out the governance around the consultation with the Government Actuary and clarify that it is GAD's operating practice to charge for the activity involved. [That is not new in this field - GAD levies a charge for the actuarial analysis necessary from time to time to update the Ogden Tables.]

to ensure that the Government Actuary will not be influenced, nor appear to be influenced, by private interests of any clients of GAD, or any other bodies, in responding to the Lord Chancellor's consultation. Support Support for the Government Actuary in preparing his response to the Lord Chancellor's consultation will be provided by GAD. GAD charges fees to recover costs and fees. These fees and other reasonable expenses incurred by GAD in supporting the Government Actuary's response will be charged to the Ministry of Justice.		
Terms of consultation The Lord Chancellor requests the advice of the Government Actuary on the matters that should be taken into account in the setting of the rate.	Terms of consultation The Lord Chancellor requests the advice of the Treasury on the matters that should be taken into account in the setting of the rate in accordance with the Act generally. In this context, the Lord Chancellor suggests that the Treasury may want to consider: • the portfolios for consideration in the setting of the rate. • the relevant economic and financial forecasts for the UK economy as a whole over the short, medium and long term. • the rates of inflation that, in the opinion of the Treasury, are to be expected in the short, medium and long terms for (i) prices and earnings generally; and (ii) on the cost of care and treatment. • whether, in the opinion of the Treasury, there is reason to change from a single rate to multiple rates, by reference to the duration of the award. • any other matters that the Treasury considers relevant to the setting of the rate.	The wording *"in accordance with the Act generally"* and the relatively concise TOR for the Treasury, limited to just four specific bullet points (the fifth is a catch-all provision), emphasise the more macroeconomic level of its involvement. Nevertheless, it is asked to advise on portfolios, ie notional investment portfolios in which a claimant receiving lump sum damages for future loss might reasonably be expected to invest. The references to the short, medium and long terms are followed by a specific question on whether the multiple rates, split by duration of the award, should be set. Although this is not at all an indication that multiple or split rates will be set, it shows that there will be a detailed analysis of the possibility. The present (-0.75%) discount rate is associated with retail prices inflation via its connection with ILGS yields. – RPI, which is no longer generally used as a national statistic, is around 2.5% – The latest (February 2019) ONS data reports consumer prices inflation (CPI) at 1.8%. – Earnings inflation, reported in ASHE in October 2018, was 3.5% nationally across all job types. – There is no single index for care and treatment inflation.
[terms of GAD consultation, continued]		

The Lord Chancellor acknowledges that the circumstances of claimant investors of relevant damages are likely to vary considerably: for example, in relation to the nature and duration of their injuries, their attitudes to risk, and the size of their awards – as well as in the sums they may need to pay in investment management costs and tax. The Lord Chancellor therefore considers that the setting of the rate requires a significant degree of aggregation of circumstances and approximation of outcomes; and that the possible characteristics and approaches of claimants will have to be considered in the round. It may therefore be relevant for the Lord Chancellor when deciding the permissible range of rates and where within that range to set the rate to understand the effect of setting the rate at a particular level on different types of claimants facing different circumstances and making different decisions. The Lord Chancellor appreciates that in providing advice on matters relevant to the setting of the rate the Government Actuary will face similar challenges and need to make assumptions as to the circumstances of claimants to present his advice. The Government Actuary is asked to disclose assumptions made in the preparation of his advice. ***General considerations*** To help the Lord Chancellor determine the rate, the Government Actuary is asked to provide advice on how the return that it is reasonable to expect the claimant envisaged by the Act to achieve might vary due to: • The range of <u>portfolios</u> that could satisfy the assumptions that the Lord Chancellor is required to make under the Act. • The range of <u>periods</u> over which claimants might be required to invest their award. • The different rates of <u>inflation</u> with which claimants' damages might inflate. • The potential range of costs that claimants might be expected to meet in maintaining their portfolio in terms of <u>investment management expenses, advice</u> and <u>tax</u>. Further details on each of these areas is described further		This text is a recognition that the Lord Chancellor needs to examine matters fairly broadly and set a discount rate that applies to a wide range of claims and circumstances. The bullet point TOR here are more specific than those delivered to the Treasury. Further detail on each of the underlined words (the underlining is not in the original) is provided in later passages of the GA's TOR.

below. When presenting his advice, the Government Actuary is asked to quantify how the returns that are expected by recipients of relevant damages, and the risk associated with those returns, compare to a range of possible discount rates – such that the Lord Chancellor can make assessments of the probability of claimants earning a return that is over or under the discount rate. When providing his advice, the Government Actuary is asked that the returns on investments are expressed relative to the Consumer Price Index. ***Investment portfolios*** The Lord Chancellor requests advice from the Government Actuary on the content of suitable diversified portfolios for consideration in the setting of the rate (specifying for each portfolio the types and mix of investments included): • These portfolios should illustrate the range of investment risk approaches permitted by the Act. • The Lord Chancellor acknowledges that there is a possibility that not all properly advised claimants will invest in accordance with the advice they have been given. The Lord Chancellor nonetheless considers that it is reasonable to assume that the majority will do so, particularly in relation to the awards paid to the most seriously long-term injured individuals. ***Period of investment / type of claimant*** The Lord Chancellor requests that the Government Actuary should consider in the preparation of his advice an assessment of the effect of the period over which the claimant is required to meet damages. The Government Actuary is asked to demonstrate how the return that it is reasonable to expect the claimant envisaged by the Act to achieve might vary for: • A claimant investing over a short period. • A claimant investing over a long period. ***Inflation*** The Lord Chancellor requests that the Government Actuary should consider in the preparation of his advice an		As regards *"the probability of claimants earning a return that is over or under the discount rate"*, the GA provided the following analysis in 2017 to the Lord Chancellor on the possibility of over or under compensation: *"Under the current PI discount rate (RPI-0.75%), the median level of over-compensation is 35%"*. [https://consult.justice.gov.uk/digital-communications/personal-injury-discount-rate/results/gad-analysis.pdf]

assessment of the effect of the different rates of inflation with which claimants' damages might inflate. The Government Actuary is asked to demonstrate how the return that it is reasonable to expect the claimant envisaged by the Act to achieve might vary fora claimant whose damages inflate in line with the Consumer Price Index as against any other measure of inflation deemed appropriate to consider. ***Investment management expenses and advice*** The Lord Chancellor acknowledges that costs associated with investment management expenses and advice will differ depending on the investment management approach adopted. In general terms, a passive investment approach attracts a lower level of charges than active investment management. However, depending on the period in question and the skill of the manager, an active approach may result in returns, before charges, that are lower or higher than comparative passive, market linked returns. The Lord Chancellor requests advice from the Government Actuary as to what, in the setting of the rate, the effect of adopting a passive approach would be, and how sensitive this effect would be to adopting an active management approach. ***Taxation*** The Lord Chancellor acknowledges that different claimants will pay different amounts of taxation reflecting their individual financial circumstances. Some claimants may have no other financial resource than from their award and be able to use all their personal allowances against the income and capital it produces, others may have significant financial resource. The Lord Chancellor requests advice from the Government Actuary as to the best approach to take in making allowance for the effect of taxation in the setting of the rate and what the effect of taking that approach would be. ***Multiple rates*** The Lord Chancellor requests advice from the Government Actuary on: • How the Government Actuary's advice would change if the Lord Chancellor were to set multiple rates with reference to the duration of the award,		Recent proceedings in the Scottish Parliament indicated that Scottish Ministers had *"early access to any relevant evidence on tasks and investment management costs arising from [the] very recent call for evidence"* and had sought advice from the GAD. Based on that advice, Scottish Ministers amended their legislation to provide that a specific adjustment of 0.75% for tax and investment charges was included in the body of the Bill. That prescriptive is approach to investment changes and tax is very different from the discretion given to the Lord Chancellor on these aspects in England & Wales. As with the TOR for the Treasury, the very specific reference here to multiple rates, split by duration of the award, should

rather than set a single rate. • Relevant considerations that the Lord Chancellor might consider when deciding whether to adopt a single rate or multiple rates. ***Other matters*** The Lord Chancellor also requests advice from the Government Actuary on the following: • Sensitivity analysis –There may be claimants whose circumstances do not match the scenarios or assumptions outlined above. As such, the Lord Chancellor also requests that the Government Actuary consider the sensitivity of the outcomes of these scenarios to the factors that may change from case to case. • Assumptions – Whether there are any further assumptions (beyond those specified in the Act) that the Lord Chancellor should make in the setting of the rate; and what the effect of those assumptions would be? • Factors – Whether there are any further factors (beyond those specified in the Act) by which the Lord Chancellor should be informed in setting the rate; and what the effect of those factors would be? If the Government Actuary considers that there are other matters that he wishes to draw to the attention of the Lord Chancellor, the Lord Chancellor will be pleased to consider them.		be noted.