Motor Accident Solicitors Society (MASS): Written evidence submitted to the House of Commons' Justice Select Committee on its pre-legislative scrutiny into the draft Personal Injury Discount Rate legislation

1. MASS is a Society of solicitors acting for the victims of motor accidents, including those involving personal injury (PI) MASS has 120 solicitor firm Members, representing approximately 2000 claims handlers. We estimate that member firms conduct in the region of 400,000 PI motor accident claims annually on behalf of the victims of those accidents. The Society's membership is spread throughout the United Kingdom.

Objective of legislation

2. MASS strongly believes that the principal of the Law of damages and what is best for the accident victim should remain the central focus for the Government when considering how the discount rate should be set in the future. This issue has been considered a number of times and the arguments were thoroughly rehearsed by the House of Lords in *Wells v Wells* [1999] 1AC 345 which remains common law. We believe that the general process that has derived since this case has, and continues to work well and therefore there is no justification to depart from it.

3. We continue to agree with Lord Hope's comments in *Wells v Wells* that the principle purpose of the discount rate is to ensure that the 100% compensation principle prevails. To preserve, in so far as possible, this principle, the discount rate should be set with regard to the best representation of the risk-free rate of return; namely ILGS held to redemption. To do otherwise, would expose the injured claimant to an unacceptable level of risk and certainly a risk that is greater than was originally envisaged in *Wells v Wells.*

4. Those innocent people who are unfortunate enough to suffer severe and life changing injuries deserve to have their compensation awards set at an appropriate level adjusted for the current economic environment. These seriously injured people are financially dependent upon the compensation which they must live on for a lifetime. If the lump sum received is less than is necessary to cover daily expenses due to not being able to work or care costs or for ongoing treatment, this can cause severe anguish and hardship. The adjustment set by the previous Lord Chancellor should free these people from the fear that the money will dry up whilst they are alive. This draft legislation makes that far less certain.

Fairness of legislation

5. This is a very complex area where specialist advice is essential. It would be wholly inappropriate to force injured claimants, who by the very fact that they have claims for future losses are likely to be disabled, to carry the additional burden of seeking periodical investment advice to ensure they have enough income on which to cater for their essential care needs and day to day living. It would be especially onerous for those with a brain injury, which falls short of incapacity, those in severe pain, or those with communication difficulties or psychological injury such as PTSD. We believe that to impose such a burden on injured individuals would be fundamentally wrong and effectively amount to discrimination against the disabled.

6. Conversely, were the discount rate to be set with regard to a mixed portfolio of assets, allowance would need to be made for investment costs as another head of damage. This would not only lead to an increase in awards of damages, it would also introduce considerable uncertainty and possibly satellite litigation around the issue of how much should be allowed for the costs of managing portfolios. The appropriate level of investment costs will depend on the amount of time an IFA needs to spend with an injured claimant. Some individuals, for example those with reduced cognitive function, those with communication difficulties, psychological injuries or severe pain, will need more time/advice than others.

7. It is important to remember that whilst a mixed asset portfolio provides the claimant with a potential opportunity to achieve a higher return than a portfolio of ILGS, it also carries the risk of capital losses, in real terms. If the 100% compensation principle is not retained, then more

people are likely to run out of money and the state will be forced to provide health and care needs, due to the defendant's negligence. Consequently, we believe that in order to best meet the 100% compensation principle, the no risk profile should be maintained.

8. MASS believes that all personal injury victims, no matter what their level of injury should be placed at the centre of any policy and law change, with this being especially poignant for the more seriously injured. Victims who have been injured through no fault of their own, must receive the care, attention and justice they are rightly entitled too.

9. For the more complex injuries where significant awards of compensation are given, we believe that it should be left to the individuals, their lawyers and expert to ascertain what is the most appropriate methodology for them and their circumstances when considering how they obtain their award and in what form. It may also depend on their individual needs, be it accommodation or specific equipment or care needs and loss of earnings. Both lump sum awards and periodical payment orders (PPOs) will be suitable for various areas and individual circumstances and therefore the lawyers, experts and the individual victim should have the flexibility to choose which method is most suitable to meet their needs for the duration that is required.

10. The principles set out in *Wells v Wells* remain a sound and stable approach to the law and have worked without difficulty. The discount rate has not reflected investment trends and rates generally, has provided a windfall to insurers, and has lagged to the detriment of Claimants, particularly those severely injured.

11. Changes in litigation practice will not produce a benefit to litigants. Investors actions are vastly different for those who are disabled. Even marginal adjustment to rates will vastly affect sums available to those who depend on it for care. It is essential to protect those who are vulnerable, and to differentiate from those who are merely investing and chancing the market. Injured Claimants, particularly those severely injured, cannot be expected to gamble what are often specifically tailored heads of claim, required for specific needs. Sums negotiated or ordered are not additional sums given as a windfall. The normal investment risk profile of Claimants should remain as risk free.

12. The circumstances around investment will vary on a case by case basis. However, Claimants are largely concerned to take larger risks, knowing that minimum level capital sums will be required for care. Advice will of course vary greatly depending on age, mental and physical limitation. The decision to settle a claim by way of PPOs and/or lump sum is done on a case by case basis, including taking into account litigation risks.

13. Solicitors are not authorised to provide investment advice, so independent advice will always be required by an appropriate financial expert who will always balance a large capital sum following an award or settlement of damages against a needs-based income. From experience, it is usually advised that investment is spread, particularly with regard to sums and risks.

14. The current law relating to PPOs works well in numerous and diverse cases. PPOs are always relevant for case management and Deputyship costs and where appropriate, negotiated or ordered, should always be available. Insurers have been reluctant to consider PPOs for other heads of loss, but with the present discount rate, insurers have been keen to revisit this. PPOs certainly do have their place, and are utilised often. A lump sum will be required often for accommodation, adaptation and necessary aids and equipment. Experience has shown that there are more PPOs in operation of late, particularly to address care needs, and the costs of a Professional Deputy.

Impact of legislation

15. MASS as an organisation is not in a position to provide analytical and statistical evidence on the impact of the draft legislation.

16. However, on the more general question of whether there will be a reduction in insurance premiums and whether the Government is right to assume that insurance companies will pass

on the saving, it is very clear that the insurance sector has a poor history of passing cost savings to consumers.

17. Ahead of the so-called Jackson reforms implemented by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the insurance industry promised to return savings to consumers by cutting motor insurance premiums. Whilst claims and costs have fallen, motor insurance premiums quickly returned to pre-LASPO reform levels. The insurance industry did not maintain all the promised cost savings to consumers and premiums are now at near record high levels.

18. There will always be another excuse for increasing motor insurance premiums – increases in the Insurance Premium Tax, motor insurance fraud, claimant legal costs, higher repair costs etc. The government has acknowledged that there is no mechanism by which insurance companies can be compelled to return savings to consumers through reduced premiums, which MASS finds extremely concerning.

19. Very few individual firms have ever made any commitment to return any savings to consumers. Only three insurance companies (equating to around 20% of the market out of over 300 ABI members) have promised to pass on any savings to consumers resulting from the Government's proposed whiplash reforms. This is unlikely to be any different in relation to the discount rate. The ABI had declared an average premium increase of £50-75 relating to the previously adjusted Discount Rate. This is very unlikely ever to be realised under the proposed discount rate mechanism.

Process proposed by legislation

20. The proposed review period of three years is in our view too short, and as stated previously, would require too regular financial assistance and advice to some of the most severely injured accident victims. We would prefer a longer period, perhaps for a fixed period of 5 years, but this should ideally be a matter for experts to consider. The key issue is that those relying on damages are paid regularly and that there is a degree of certainty about the long term financial stability of investments.

21. The discount rate should be considered by a panel of appropriately qualified experts. Panels for the Ogden Committee and Judicial College for General damages have worked well in the past.

October 2017