



Ministry
of Justice

Personal Injury Discount Rate

Equalities Statement for 2019 Review

1. Introduction

1.1 This Equality Statement considers the impact on groups and individuals with protected characteristics in relation to the Government's announcement of the outcome of the Lord Chancellor's 2019 Review for setting the Personal Injury Discount Rate (PIDR). This Review was the first conducted since the Damages Act 1996 was amended by the Civil Liability Act 2018, which changed the methodology for setting the rate.

2. Policy Objective

2.1 The PIDR is an important factor used by the court and litigants in personal injury cases to help calculate the size of lump sum payments of damages to be paid by defendants to claimants to meet a claimant's expected future financial losses. The policy objective is to create a system for the setting of the rate that will achieve 100% compensation, neither more nor less, for the wrongful injuries across a wide spectrum of cases.

2.2 The reforms introduced by the Civil Liability Act require the Lord Chancellor to consider actual returns available to investors; actual investments made by investors of relevant damages; such allowances for tax, inflation and investment management costs as thought appropriate; and any other factors the Lord Chancellor considers relevant. The legislation imposes an assumption that claimants are using a low risk (but not very low risk) investment approach.

3. Equality

3.1 Section 149 of the Equality Act 2010 ("the Act") requires Ministers and the Department, when exercising their functions, to have 'due regard' to the need to:

- eliminate unlawful discrimination, harassment, victimisation and any other conduct prohibited by the Act;
- advance equality of opportunity between different groups (those who share a relevant protected characteristic and those who do not); and
- foster good relations between different groups (those who share a relevant protected characteristic and those who do not).

3.2 In carrying out this duty, Ministers and the Department must pay "due regard" to the nine "protected characteristics" set out in the Act, namely: race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.

4. Equality considerations

- 4.1 The Government has sought information on equality impacts of setting the PIDR in public consultations in 2011, 2013 and 2017, and an Equalities Statement was published in 2018 when the Civil Liability Bill was introduced in Parliament. The Government made a commitment to the Justice Committee in March 2018 that it would keep the Statement under review.
- 4.2 The 2019 Review was informed in part by a Call for Evidence held in December 2018 - January 2019. A summary of responses has been published as a separate document. The Call for Evidence sought specific views (question 14) on how the setting of the rate impacted on people with protected characteristics. Views were also sought on how equality considerations affected the investment behaviour of claimants (question 6e).
- 4.3 Respondents to the Call for Evidence had conflicting views on the equality impacts of the new methodology for personal injury claimants. A small majority (15 of the 25 respondents who addressed the question) felt that there would be no differential impact on claimants with protected characteristics from all claimants, as damages were awarded to take account of injuries sustained and individual circumstances. The other 10 respondents considered that the new methodology would have an adverse effect on certain claimants, with the people with an ongoing disability seen as the main group affected. Others cited were the young and the elderly.
- 4.4 In terms of investment approaches, respondents considered that rather than age, life expectancy was a key influence. People with shorter life expectancy tended towards being the most risk cautious in their investment management. Another aspect was the influence of ethical investment approaches for some religious and cultural groups, with reference made to investment management practices consistent with Islamic principles, though no evidence was provided on what impact this would have on expected investment returns.
- 4.5 It should be borne in mind that there is limited scope for the Lord Chancellor to take into account the impact that the determination of the PIDR would have on particular protected groups when applying the legal tests under the Damages Act 1996. The statutory tests were devised with particular reference to the vulnerabilities of claimants, including their likely dependence on the award to meet future care costs. The task for the Lord Chancellor is to find the rate that is most appropriate, on the basis of the statutory assumptions, to reflect the 100% compensation principle, and it is unlikely to be appropriate to adjust the PIDR to protect particular groups of claimants at the expense of defendants, or vice versa.

5. Direct Discrimination

- 5.1 The revisions to the principles for setting the rate applied in this Review apply equally to all claimants and defendants. The proposals will not result in people being treated less favourably because of any protected characteristic and therefore our assessment is that the proposals are not directly discriminatory within the meaning of the Act.

6. Indirect Discrimination

- 6.1 Overall, we do not consider that these reforms will amount to indirect discrimination within the meaning of the Act, since the resulting changes to the setting of the rate are unlikely to result in anyone with a protected characteristic being put at a

particular disadvantage compared to someone who does not share the protected characteristic. We have used the limited available data and evidence to support this in our analysis. However, since the Government does not collect comprehensive information about personal injury claimants in relation to protected characteristics, and limited information was provided as a result of our Call for Evidence that would enable comparison between different protected groups, this limits our understanding of the potential equality impacts of the proposals.

6.2 The rate will be reviewed at least every five years after this first Review since the legislative changes to methodology. This process will include seeking new evidence and involve a new assessment for each review of the actual or potential impact of the setting of the rate on claimants with protected characteristics and equality considerations.

6.3 The PIDR applies to lump sum awards of damages for future pecuniary loss: typically, loss of future earnings and costs of future care. The rate is in essence a rate of return on investments assumed to be made by claimants as a single class. For these purposes under the present law claimants are not differentiated. The court has regard to the rate in calculating the award of damages for future loss. At present, there is one rate for all claimants, save that the court may depart from that rate when persuaded another rate is more appropriate. In practice the court seems never to have done so.

Claimants with longer life expectancy may on average be younger than claimants with shorter life expectancy. Older claimants may therefore be more vulnerable to short term fluctuations in investment returns (with less time to recoup any losses), while younger claimants may be more vulnerable to uncertainty over their future care needs. Claimants with particular religious or other beliefs may be restricted in the type of investments they are able to make consistent with their beliefs, and while there is no conclusive academic research, the logical expectation would be that by narrowing investment options the returns may be affected to some degree.

6.4 Our Call for Evidence sought evidence of investments made generally, and would be expected to include evidence relating to a representative cross-section of claimants, including those with protected characteristics within the meaning of the Equality Act 2010. As such the GA analysis already takes account of the investments actually made, and the returns actually achieved, by protected groups, on the basis of the actual levels of risk they are prepared to take and these will factor into the GA model of the representative claimant.

6.5 A single rate cannot accurately reflect the individual circumstances of each claimant and the benefit of having a single rate to which the Court must have regard could be undermined if multiple rates were potentially applicable. It should be borne in mind that the Court retains a discretion to apply a different rate of return than the rate prescribed by the Lord Chancellor if there is evidence that it would be more appropriate in the individual case in question (though it has not, to our knowledge, ever exercised this power to date). The present law and the proposals do, however, allow the Lord Chancellor to set different rates for different classes of case if he or she wishes. To date only one rate has been in force at any one time, but as the 2019 Review demonstrates, active consideration is being given to the potential adoption of multiple rates or a dual rate in the future. However, the purpose of the Bill, to enable the Lord Chancellor to set a rate or set of rates to reflect the 100% compensation principle must be borne in mind and the Lord Chancellor has limited scope to make

provision to protect the interests of particular groups. It would be unlikely to be appropriate, for example, to adjust the PIDR in the event that the proper application of the legal tests has a particular impact on protected groups, though the impact on protected groups could be relevant to the question of whether multiple rates are appropriate than a single rate, and this should be weighed up against the benefits of a single rate.

- 6.6 The PIDR is set by reference to assumed investments. Subject to religious or other beliefs as mentioned above, the ability to make these investments is not limited by, or specific to, any protected characteristics - even child claimants and claimants lacking mental capacity have representatives who will invest on their behalf. The overall objective of the PIDR remains to help ensure that the award of damages for future loss fully compensates the claimant for all the losses he or she has suffered as a result of the injury (the 100% compensation principle).
- 6.7 Many seriously injured personal injury victims will have physical and mental disabilities as a result of the injury. People with disabilities are therefore likely to be more highly represented in the population of claimants than among the general population. Among the most seriously long term injured and in receipt of the largest awards the proportion of very young children injured at birth and young men injured in road accidents is likely to be higher than the proportion of babies and young men in the general population. Claimants with the protected characteristics of disability (physical and psychological health injuries), age (younger) and sex (men) are therefore likely to be more affected by the choice of methodology for the setting of the rate than others without these protected characteristics.
- 6.8 Defendant interests are usually represented by insurers (and in the case of uninsured motorists, the Motor Insurance Bureau) and public sector defendants, such as the NHS.
- 6.9 Overall, as mentioned above, on the basis of the available limited data, we do not consider that the overrepresentation of claimants with disabilities is likely to result in any suffering of a particular disadvantage from the proposals for people with these protected characteristics when compared to people who do not share them. The particular vulnerabilities of claimants were taken into consideration in the devising of the legal tests – in particular that the representative claimant should be considered a low risk investor compared with the ordinary prudent investor, in light of his or her likely dependency on the award to meet his or her future needs, including care needs. The Government's assessment is that the Review and the methodology introduced by the new legislation represent a proportionate means of achieving an award that helps to provide 100% compensation (no more, no less).

7. Discrimination arising from disability and a duty to make reasonable adjustments

- 7.1 We will continue to make sure that reasonable adjustments are made to ensure access to justice for claimants with disabilities. As mentioned earlier, the characteristics of claimants who register a personal injury claim in relation to disability are not centrally recorded. We also consider it likely that claimants pursuing a personal injury claim are more likely as a result of the relevant injury to have a physical or psychological disability when compared to the general population.

8. Harassment and victimisation

8.1 The Government does not consider there to be a risk of harassment or victimisation to those with protected characteristics as a result of the implementation of these proposals.

9. Advancing equality of opportunity

9.1 Consideration has been given to how these proposals affect the duty to have due regard to the need to advance equality of opportunity: by removing or minimising disadvantages suffered by people due to their protected characteristics; by taking steps to meet the needs of people with protected characteristics where those needs might be different to those without protected characteristics; and by encouraging people with protected characteristics to participate in public life.

9.2 We do not consider that the proposed changes provide any particularly significant opportunities to advance equality of opportunity. Overall, the reforms are intended to help ensure that full compensation is paid to all claimants with injuries that cause future financial loss through the application and regular review of the rate under a suitable methodology, involving the advice of the Government Actuary in this first Review and the setting up and use of an independent expert panel of advisers, chaired by the Government Actuary, for the second and subsequent reviews. All of these measures will continue to help ensure the needs of claimants are met, including those with physical and psychological disabilities from personal injury.

9.3 The Government will work with key stakeholders from across the personal injury sector, including interested advice agencies, to develop a system that will provide the necessary support for claimants pursuing a PI claim as a litigant in person. This will include greater use of assisted digital support measures, the use of which help ensure access to justice is maintained for all claimants.

10. Fostering good relations

10.1 The Government considers that it is unlikely that there will be a particular impact on fostering good relations between people with protected characteristics and those without protected characteristics from these proposals.

11. Conclusion

11.1 Many of the recipients of the awards of damages will have a physical or psychological disability, albeit most of them would not have had such disabilities before their injuries. Also, certain injuries are more likely to affect some parts of the population more than others (e.g. road accidents and young male drivers). Overall, however, the objective of the Review has been to enable the Lord Chancellor to set a rate which will result in damages awards that are fair between claimants and defendants in helping to provide 100% compensation, neither more nor less, for the wrongful injuries.

11.2 Having considered the equalities impacts of the proposals for this Review, we do not consider that they are likely to result in any unlawful discrimination for the reasons mentioned above. There are some areas where the advancement of equality is a likely consequence of the legislative changes made, through meeting the expected needs of claimants in a way that is fairer to claimants and defendants; and we will continue to make the necessary reasonable adjustments for claimants with disabilities to maintain

access to justice. We therefore continue to consider that the proposed reforms are consistent with the Public Sector Equality Duty.

11.3 As mentioned earlier, the rate will be reviewed at least every five years, which is likely to lead to a more accurate rate that is fair to both claimants and defendants. We will continue to assess the equalities impacts of these proposals in the light of any relevant new data.

Ministry of Justice
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