



The Personal Injury Discount Rate: How it should be set in future

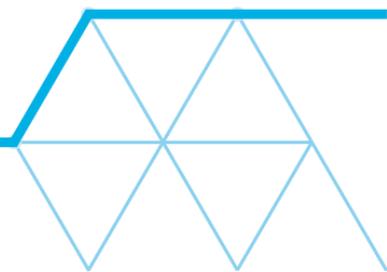
Equalities Statement

1. Introduction

- 1.1. This Equality Statement considers the impact on groups and individuals with protected characteristics in relation to the Government's announced measures on how to set the Personal Injury Discount Rate ("the rate") in the future. It represents our analysis of the likely impacts from the proposals following consultation with stakeholders in spring 2017; the consideration of draft legislation to implement the proposals by the Justice Select Committee in late 2017; and the consideration of the Civil Liability Bill by the House of Lords between 19 March and 27 June 2018.

2. Policy objective

- 2.1. The rate 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 claimants' expected future financial losses. The policy objective is to revise the principles for setting the rate to create a system for the setting of the rate that will better help produce 100% compensation, neither more nor less, for the wrongful injuries. Analysis by the Government Actuary's Department shows that the current system could be providing claimants on average with over 120% of their intended compensation (after allowing for investment management expenses and tax). By reducing this over-recovery, the reforms will support the better delivery of the 100% compensation principle in a way that is fair to claimants and defendants.
- 2.2. The proposals for reform are set out in the Civil Liability Bill. They have been developed from the responses to the consultation, the report of the Justice Committee and the consideration of the Bill by the House of Lords. The proposals relate to how, when and by whom the rate for claims in England and Wales should be set.



3. Equality duties

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. As part of the [consultation](#) we asked respondents if we had correctly identified the range and extent of effects of the proposals on those with protected characteristics.

4.2. On the basis of the available evidence - including the consultation responses set out in detail under Question 35 above - consideration has been given to the impact of the proposed changes against the statutory obligations under the Act. These are outlined below.

4.3. In its report on the draft legislation published in November 2017, the Justice Select Committee doubted whether there was “sufficient evidence for the Government’s conclusion that its proposed legislation is a proportionate means of achieving a legitimate aim, so as to justify possible disadvantages to those with protected characteristics.” The Committee also commented that “without adequate evidence about the protected characteristics of claimants, or the cost to claimants, it is hard to see how the Government can draw any sound conclusion about proportionality.” (paragraph 87).

4.4. The Government’s response was published in March 2017 and explained the reasons for its conclusions. In the response the Government agreed to update the equality statement in the light of any new relevant evidence of equalities impacts of these proposals and to keep them under review (paragraphs 61 to 64).

5. Direct discrimination

- 5.1. The revisions to the principles for setting the rate to provide neither more nor less than 100% compensation will apply equally to all claimants and defendants. The proposals will also 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 below. However, since the Government does not collect comprehensive information about personal injury claimants in relation to protected characteristics, this limits our understanding of the potential equality impacts of the proposals.
- 6.2. Overall, the proposed changes will result in the rate initially being reviewed promptly after the legislation comes into force and, thereafter, at least every five years, with that period being re-set when the rate is changed. Reviews will be completed within 180 days of starting save for the first, where the period is 140 days. The methodology to be applied in reviewing the rate will be changed to assume a low risk claimant investment profile instead of a very low risk profile. We consider below how these specific proposals being taken forward may be relevant to the potential for indirect discrimination.
- 6.3. *What principles should guide how the rate is set?*
 - 6.3.1. The discount rate 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. A single rate cannot accurately reflect the individual circumstances of each claimant. 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, however, only one rate has been in force at any one time. A single prescribed rate simplifies the conduct of litigation, saving time and expense.
 - 6.3.2. The rate is set by reference to assumed investments. 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.
 - 6.3.3. The rate will be higher if set by reference to investments with high returns and lower if set by reference to investments with low returns. A higher rate will translate into a smaller lump sum award and vice versa. The overall objective of the rate remains, however, 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).

6.3.4 Many seriously injured personal injury victims will have physical and mental disabilities as a result of the injury. Disabled persons 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.

6.3.5 Defendants will still be intended to pay full compensation to the claimant under the proposals, but would be likely to benefit from having to make smaller payments as a result of the discount rate being higher under the new law than it would have been under the current law had it remained in force. If the discount rate decreased relative to the current level, the opposite would be true in that claimants would be likely to benefit from higher payments. However, the interests of individual defendants are usually represented by their insurers or, in the case of uninsured motorists, the Motor Insurance Bureau. Insurers and public sector defendants, such as the NHS, will not have any protected characteristics since they are not individuals.

6.4. How often should the rate be set?

6.4.1. The rate is set at present by the Lord Chancellor from time to time. The consultation paper asked whether the rate should have to be reviewed at specified points in time defined by length, movements in returns on investments or otherwise. This led to the proposal for the rate to be changed at least every five years, which may lead to the rate being a more accurate rate relative to the changes in the returns on investments. The changes, if any, will, however, affect all persons equally, irrespective of their protected characteristics, so we do not expect any particular disadvantage in relation to them, even though we recognise that some claimants with protected characteristics are likely to be over-represented.

6.5. Who should set the discount rate?

6.5.1. The rate is at present set by the Lord Chancellor after consulting HM Treasury and the Government Actuary. The proposal is that (other than in relation to the first review) the rate should continue to be set by the Lord Chancellor subject to consultation with HM Treasury and to evidence and advice being provided by an expert panel chaired by the Government Actuary. In relation to the first review the Lord Chancellor is required to consult the Government Actuary and HM Treasury. Changing the law in this respect will affect all persons equally, irrespective of their protected characteristics, so we do not expect any particular disadvantage in relation to them.

6.5.2 Overall, as mentioned above, on the basis of the available limited data, we do not consider that the over-representation of claimants with disabilities, male claimants, or young claimants 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. In the unlikely event of the changes resulting in a particular disadvantage for people with protected characteristics, the Government's assessment is that the proposals represent a proportionate means of achieving the legitimate aims of the policy to revise the principles for setting the rate to produce 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.
- 7.2. The Government is also working with the relevant interested parties to ensure that users who have difficulty engaging with digital services are provided with appropriate support designed to prevent them from being excluded, and enable them to secure access to justice.

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 for the 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. The reforms are likely to produce a relatively higher discount rate than the present law. The application of the rate is intended to produce awards that give full compensation, but the rate under the new law will, relative to the rate that would have been set had the present law continued in force, be likely to reduce the amount of compensation that claimants receive. 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 reforms 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 these reforms, 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 changes 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 PSED.
- 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.