EXPLANATORY MEMORANDUM TO

THE DAMAGES (PERSONAL INJURY) (ENGLAND AND WALES) ORDER 2024

2024 No. 1261

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of His Majesty.

2. Declaration

2.1 Rt Hon Shabana Mahmood MP, Lord Chancellor and Secretary of State for Justice at the Ministry of Justice confirms that this Explanatory Memorandum meets the required standard.

2.2 Steven Jarman, Deputy Director for Civil Justice and Law, at the Ministry of Justice confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Josh Ivinson at the Ministry of Justice, Telephone: 07858680714 or email: josh.ivinson@justice.gov.uk, can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 In deciding the amount of damages to award for a personal injury the court is required to take into account the rate of return that the recipient could reasonably be expected to achieve by investing it (the "Discount Rate"). This rate is prescribed by the Lord Chancellor during reviews which must take place at least every five years. On 15 July 2024, the Lord Chancellor commenced a review to decide whether the Discount Rate should be changed to a different rate or kept the same. The Damages (Personal Injury) Order 2024 ("the instrument") gives effect to that decision by providing that the Discount Rate should be 0.5%. This will have effect from 11 January 2025.

Where does the legislation extend to, and apply?

4.2 The extent (that is, the jurisdiction(s) which the instrument forms part of the law of) of this instrument is England and Wales only.

4.3 The territorial application (that is, where the instrument produces a practical effect) of this instrument is England and Wales only.

5. Policy Context

What is being done and why?

5.1 Since the enactment of the Damages Act 1996 ('the 1996 Act') it has been a duty of the Lord Chancellor to set the Discount Rate for England and Wales. In 2018, amendments were made to the 1996 Act by the Civil Liability Act 2018 ('the 2018 Act') to ensure that the Lord Chancellor reviewed the Discount Rate at least every

five years. These amendments also updated and extended the framework for these reviews.

5.2 The previous review of the Discount Rate was concluded on 5 August 2019 and so, to satisfy the requirement for a periodic statutory review, the Lord Chancellor began a review of the Discount Rate on 15 July 2024. The legislation requires that Lord Chancellor must decide whether the Discount Rate should be changed to a different rate or kept the same within 180 days. On 2 December 2024, the Lord Chancellor announced her decision that the Discount Rate should be 0.5%. This instrument was laid on the same day, to give effect to that decision with the commencement of the instrument.

5.3 In reaching her determination, the Lord Chancellor followed the procedure set out in legislation, which specifies certain requirements and analytical assumptions that must be taken into account when determining the assumed rate of return that a recipient could reasonably expect to make from an investment of a lump sum damages payment. The Lord Chancellor consulted an independent expert panel and HM Treasury and was informed in her review by two Calls for Evidence, to which Government responses have been published (see paragraphs 7.2 and 7.3 below).

5.4 Based on the advice of the expert panel, the Lord Chancellor has determined that the previous minus 0.25 per cent PIDR would be likely to result in the significant over-compensation of claimants given expected investment returns and has set a new rate of 0.5% per cent. A Statement of Reasons in which the Lord Chancellor sets out the reasons why she determined this rate of 0.5% has been published on Gov.uk.[1]

What was the previous policy, how is this different?

5.5 Before the commencement of this instrument, the Discount Rate has been set at minus 0.25% since 5 August 2019. This rate had been introduced by the Damages (Personal Injury) Order 2019 following determination by the then Lord Chancellor, Rt Hon David Gauke MP.

5.6 The 2019 review was the first to be conducted under the amended framework introduced under the 2018 Act. Before the 2018 Act, the Discount Rate had been determined with reference to the real yields from Index Linked Gilts (ILGs) and using the legal principles governing the setting of the rate as originally laid down by the House of Lords in the case of Wells v Wells [1999] 1 AC 345. In 2018, further statutory measures were introduced to provide a more specific framework for future reviews and to ensure that reviews took better account of the investments actually made by claimants, with the intention that damages better provided full compensation to claimants without excessive under- or over-compensation.

5.7 The 2024 review followed the same core methodology, requirements and objectives as 2019 review. The legislative framework for the review remained the same, except for some small procedural differences which reflect the fact that the Lord Chancellor had more time to prepare for and undertake this review. The 2019 review was the first review to be carried out under the new 2018 framework and therefore was subject to an expedited review process, which required a determination to be made within 140 days with advice being sought from the Government Actuary and HM Treasury. The 2024 review took place under the standard review process which allowed a longer period of up to 180 for the Lord Chancellor to reach her determination. The 2024 review was also the first to require the Lord Chancellor to consult an independent

[1] https://assets.publishing.service.gov.uk/media/6749c8145ba46550018cec71/PIDR_Statement_of_Reasons.pdf

expert panel, instead of the Government Actuary, who were afforded more time to gather evidence and produce advice for the Lord Chancellor than had been available to the consultees to the 2019 review.

5.8 Following this review, and having assessed evidence including the advice of both consultees and responses to the two Ministry of Justice Calls for Evidence, the Lord Chancellor has determined that the PIDR should be changed. She has determined that the previous PIDR of minus 0.25 per cent would be likely to result in the significant over-compensation of claimants given the increase in the expected investment returns for claimants after deductions for taxation, inflation and investment management fees since the previous review. The reasons for the determination of the new Discount Rate are set out in the Lord Chancellor's Statement of Reasons. Evidence and analysis in support of this determination are set out in in the expert panel's report to the Lord Chancellor, which is available on Gov.uk. Annex E to the report in particular summarises the changes to analytical assumptions that have taken place since the previous 2019 review.[2]

6. Legislative and Legal Context

How has the law changed?

6.1 The instrument provides that as of 11 January 2025 the Discount Rate will be 0.5%. This supersedes the previous Discount Rate of minus 0.25% which had been determined in 2019.

6.2 This rate must be taken into account by the court when determining the return to be expected from the investment of a lump sum that is awarded as damages for future pecuniary loss in an action for personal injury (although the legislation does not prevent the court from taking a different rate of return into account if appropriate in a particular case).

6.3 The next review of the Discount Rate must be started by 11 January 2030.

Why was this approach taken to change the law?

6.4 Under section A1 of the Damages Act 1996 (the "1996 Act") as inserted by section 10 of the Civil Liability Act 2018 (the "2018 Act"), the Courts of England and Wales must have regard to the Discount Rate, as prescribed by the Lord Chancellor, when determining return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury. This does not prevent the court taking a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question.

6.5 Under Schedule A1 to the 1996 Act, as inserted by the 2018 Act, the Lord Chancellor must review the rate periodically and consider whether a new rate should be set. Paragraph 1(3) of Schedule A1 to the 1996 Act stipulates that a review of the rate of return must be started within a 5 year period following each review.

6.6 The first review of the Discount Rate was concluded on 5 August 2019 when the commencement of the Damages (Personal Injury) Order 2019 implemented the Discount Rate of minus 0.25% that the then Lord Chancellor had determined and announced on 15 July 2019.

6.7 The Lord Chancellor therefore had a duty to begin the subsequent review of the Discount Rate by 5 August 2024. The Lord Chancellor began this review on 15 July

[2] These documents can all be found at: https://www.gov.uk/guidance/personal-injury-discount-rate

2024. This review was the second review under section A1 of the 1996 Act. The review therefore followed the procedure specified in Paragraph 3 of Schedule A1 to the 1996 Act which applies to all subsequent reviews after the initial review.

6.8 On 2 December 2024, the Lord Chancellor announced her determination of the Discount Rate. This instrument implements her determination by setting the Discount Rate at 0.5%. The commencement of this instrument formally concludes this statutory review. This instrument, according to section A1(6) of the 1996 Act, is subject to the negative resolution procedure.

6.9 This power for the Lord Chancellor to determine the Discount Rate has now been exercised four times under the 1996 Act: twice before it was amended by the 2018 Act and twice subsequently. It was exercised once in 2001 (see the Damages (Personal Injury) Order 2001 (S.I. 2001/2301)) and again in 2017 (see the Damages (Personal Injury) Order 2017 (S.I. 2017/206)) under the 1996 Act as it stood before it was amended by the 2018 Act. It was then exercised in 2019 (see the Damages (Personal Injury) Order 2019 (S.I. 2019/1126) and again by this instrument under the powers that were inserted into the 1996 Act by the 2018 Act. Before 2001 the rate was set by the Courts.

7. Consultation

Summary of consultation outcome and methodology

7.1 As required by the 1996 Act, as amended by the 2018 Act, the Lord Chancellor consulted an independent expert panel and HM Treasury before reaching her determination. The report produced by the expert panel for the Lord Chancellor is available on Gov.uk.[3]

7.2 A Call for Evidence was published on 17 January 2023 to gain insight into the potential reasons for, and practicalities of, introducing a dual or multiple Discount Rate.[4] A government response to this Call for Evidence was published on 11 September 2023. Findings from this Call for Evidence were later shared with the statutory consultees to the review and were considered by the Lord Chancellor.

7.3 On 16 January 2024, a further Call for Evidence was published by the Ministry of Justice on behalf of the expert panel.[5] The panel commissioned this Call for Evidence to obtain data and evidence for their advice. Findings were shared with both statutory consultees to the review. A government response to this Call for Evidence was published following the Lord Chancellor's determination of the Discount Rate.

8. Applicable Guidance

8.1 A Statement of Reasons explaining the background and reasoning behind this determination of the Discount Rate has been placed in the Libraries of both Houses and has been published on *gov.uk*.[6]

---

[3] https://assets.publishing.service.gov.uk/media/6749ca7d75bb645366b3a22b/Expert_Panel_report_to_the_Lord_Chancellor.pdf

[4] https://www.gov.uk/government/consultations/personal-injury-discount-rate-exploring-the-option-of-a-dualmultiple-rate

[5] https://www.gov.uk/government/calls-for-evidence/setting-the-personal-injury-discount-rate

[6] https://assets.publishing.service.gov.uk/media/6749c8145ba46550018cec71/PIDR_Statement_of_Reasons.pdf

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

Impact on businesses, charities and voluntary bodies

9.2 As claimants are individual people, the impact on business, charities or voluntary bodies will be limited to those who are defendants in personal injury cases where they are found to have been negligent. As any lump sum award of compensation is usually paid by an insurer in such circumstances, those who provide insurance to such affected organisations will be most impacted. The final value of any lump sum damages payments paid by compensators in these cases will, however, be lower if they are adjusted using the new Discount Rate compared to using the previous rate. These wider economic impacts did not inform the Lord Chancellor's determination of the Discount Rate in this review, which was based on the factors set out in the legislation.

9.3 The legislation does not significantly impact small or micro businesses, however the Discount Rate will be taken into account in the calculation of any lump sum damages award for future pecuniary loss in a personal injury case to which a small business is a party.

9.4 The impact on the public sector is mainly in their role as defendants in personal injury cases. NHS Resolution are expected to be most impacted.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The approach to monitoring this legislation is that periodic reviews are required by statute. The Lord Chancellor must commence the next review by 11 January 2030, which is 5 years after the conclusion of the previous review.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

12.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").