

**EXPLANATORY MEMORANDUM TO**  
**THE DAMAGES (PERSONAL INJURY) ORDER 2019**  
**2019 No. 1126**

**1. Introduction**

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

**2. Purpose of the instrument**

- 2.1 In deciding the amount of damages to award for a personal injury the court is required to take into account the rate of return specified by the Lord Chancellor from time to time as the rate to be expected from the investment of a sum of damages for future costs and expenses (the “Discount Rate”). The Damages (Personal Injury) Order 2019 (“the instrument”) provides that the Discount Rate will be minus 0.25%. This will have effect from 5 August 2019.

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 None.

*Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)*

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

**4. Extent and Territorial Application**

- 4.1 The territorial extent of this instrument is England and Wales only.  
4.2 The territorial application of this instrument is England and Wales only.

**5. European Convention on Human Rights**

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

**6. Legislative Context**

- 6.1 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 that may be prescribed from time to time by the Lord Chancellor, when determining the size of a lump sum award of damages in personal injury cases.  
6.2 Under Schedule A1 of 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. The first review of the rate must be set within 140 days of the coming into force of Schedule A1 to the 1996 Act, which expires on 5 August 2019. This power has

previously been exercised twice under the 1996 Act (as it stood before it was amended by the 2018 Act), 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)). Before this time the rate was set by the Courts.

## **7. Policy background**

### *What is being done and why?*

- 7.1 The discount rate was last set in 2017, by the then Lord Chancellor, Rt Hon Elizabeth Truss MP, at a rate of minus 0.75%. This rate was set with reference to the real yields from Index Linked Government Securities (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. This methodology was widely considered to produce a rate that was too favourable to claimants, as compared to defendants and changes were introduced by the 2018 Act, to provide a new methodology that better reflected the investments actually made by claimants and to provide a rate that was fairer to both claimants and defendants.
- 7.2 The 2018 Act also introduced a requirement that the Lord Chancellor, having consulted the Government Actuary and HM Treasury, review the discount rate using the new methodology within 140 days of the coming into force of the 2018 Act. This period expires on 5 August 2019.
- 7.3 Subsequent reviews of the rate must be undertaken at least every 5 years, with the benefit of the advice from a new expert panel that is to be established under the 1996 Act as amended by the 2018 Act.
- 7.4 In view of the change in methodology, the Lord Chancellor published a Call for Evidence (see para 10.1) to gain new data and information on investment behaviour, as well as information concerning what may be considered an appropriate allowance for taxes, expenses and inflation. This in turn informed advice submitted by the Government Actuary and HM Treasury. On the basis of this advice, the new discount rate has been set as minus 0.25% (as rounded to the nearest 0.25%). A Statement of Reasons explaining the background and reasoning behind the decision has been placed in the Libraries of both Houses.

## **8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union**

- 8.1 This instrument does not relate to withdrawal from the European Union.

## **9. Consolidation**

- 9.1 None.

## **10. Consultation outcome**

- 10.1 In December 2018 the Ministry of Justice published *Setting the Personal Injury Discount Rate: A Call for Evidence* which asked a series of questions to gather new data, information and evidence to inform the first review under the Act. The Call for Evidence ran from 6 December 2018 to 30 January 2019. There was a total of 40 responses received to the Call for Evidence. The information provided informed the new personal injury discount rate which has been set at minus 0.25%.

- 10.2 The Government's Response to the Call for Evidence was published on 15 July 2019 alongside the Government Actuary and HM Treasury's advice to the Lord Chancellor, which can be found at: <https://www.gov.uk/government/consultations/setting-the-personal-injury-discount-rate-call-for-evidence>

## **11. Guidance**

The rate is used by the courts but is of significant interest to all parties involved in personal injury litigation where damages may be payable for future financial loss. The "Ogden tables" (actuarial tables produced to assist the judiciary and parties to personal injury disputes in calculating the appropriate lump sum damages award) will be updated to reflect the new Discount Rate.

## **12. Impact**

- 12.1 The impact on business, charities or voluntary bodies is on the amount of damages that may be payable in any personal injury action to which they may be party. This could have an effect on the cost of insurance.
- 12.2 The impact on the public sector is on the amount of damages that may be payable in any personal injury action in which they may be party – most commonly NHS providers.
- 12.3 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the [legislation.gov.uk](http://legislation.gov.uk) website.

## **13. Regulating small business**

- 13.1 The legislation does not regulate the activities of small businesses, although 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.

## **14. Monitoring & review**

- 14.1 The approach to monitoring of this legislation is subsequent reviews of the rate of return, which must be started within the 5 year period following the last review.

## **15. Contact**

- 15.1 Peter Farr at the Ministry of Justice Telephone: 07540 262982 or email: [peter.farr@justice.gov.uk](mailto:peter.farr@justice.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 David Parkin, Deputy Director for Civil Justice and Law, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Paul Maynard at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.