

Introduction

The Damages Act 1996 (“the Act”) requires the Lord Chancellor to start a review the personal injury discount rate (“the rate”) within 90 days of the amendments made to the Act by the Civil Liability Act 2018 coming into force. This occurred on 20 December 2018. The review of the rate must start on or before 19 March 2019.

The Act provides that the Lord Chancellor must review the rate and determine whether it should be (a) changed to a different rate, or (b) kept unchanged.

The Act requires the Lord Chancellor in conducting the review to consult the Government Actuary and the Treasury.

This paper sets out the terms and content of the Lord Chancellor’s statutory consultation with the Treasury.

Background

The rate is the rate of return prescribed by the Lord Chancellor by order from time to time under the Act or, as is the case at present, deemed to be prescribed under section 10(3) of the Civil Liability Act 2018. The court is required to take the rate into account in determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury.

The rate of return to be set by the Lord Chancellor is the Lord Chancellor’s estimate of the rate of return that a recipient of relevant damages could reasonably be expected to achieve if the recipient invested the relevant damages for the purpose of securing that—

- (a) the relevant damages would meet the losses and costs for which they are awarded;
- (b) the relevant damages would meet those losses and costs at the time or times when they fall to be met by the relevant damages; and
- (c) the relevant damages would be exhausted at the end of the period for which they are awarded

In determining the rate, the Lord Chancellor must have regard to the actual returns available to investors and the actual investments made by investors of relevant damages. The Lord Chancellor is also to assume that the investor is properly advised.

The practice to date has been to set a single rate for all cases, but the Lord Chancellor’s order may prescribe different rates of return for different classes of case.

The Act requires that:

- The Lord Chancellor must determine the rate within 140 days of the review commencing.
- The consultation of the Government Actuary must start within the period of 20 days beginning with the day on which the 140-day review period starts.
- In making his assessment of what the rate should be the Lord Chancellor may make assumptions but is required to assume that:

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- o the recipient is properly advised on the investments;
 - o the damages are awarded as a lump sum; and
 - o the recipient of the relevant damages invests the relevant damages in a diversified portfolio of investments using an approach that involves (i) more risk than a very low level of risk, but (ii) less risk than would ordinarily be accepted by a prudent and properly advised individual investor who has different financial aims.
- In making his assessment of what the rate should be, the Lord Chancellor may take other factors into account but must:
 - o have regard to the actual returns that are available to investors;
 - o have regard to the actual investments made by investors of relevant damages; and
 - o make appropriate allowances for taxation, inflation and investment management costs.
 - In deciding what response to give to the Lord Chancellor, the Government Actuary and the Treasury must take into account the duties imposed on the Lord Chancellor in relation to the determination of the rate.¹

In preparation for the review the Ministry of Justice published ***Setting the Personal Injury Discount Rate A call for Evidence***² on 6 December 2018. The period for responses to the Call for Evidence ended on 12 February 2019.

Following commitments made by the department in March 2018 in its response to the report of the Justice Select Committee on the draft personal injury discount rate clause published in September 2017, the department has also commissioned the Government Actuary's Department ("GAD") to carry out further research and analysis based on the results published in GAD's July 2017 report *Ministry of Justice Personal Injury Discount Rate Analysis*.³ This report was intended "to analyse outcomes for claimants in receipt of a lump sum award of damages for future financial loss under different illustrative PI discount rates which, based on information gathered during the [March 2017] consultation,⁴ reflect the way that claimants invest their award and the way in which they are advised to invest their award by their investment advisers."⁵

The replies received to the Call for Evidence and the results of GAD's further research and analysis will be provided to the Treasury to assist in the preparation of its response to the Lord Chancellor as soon as practicable after the start of the review.

¹ See Damages Act 1996, schedule A1, para 4.

² <https://consult.justice.gov.uk/>

³ <https://consult.justice.gov.uk/digital-communications/personal-injury-discount-rate/results/gad-analysis.pdf>

⁴ The Personal Injury Discount Rate How it should be set in future published March 2017 by the Ministry of Justice and the Scottish Government.

⁵ Ministry of Justice Personal Injury Discount Rate Analysis para. 1.1: see footnote 1.

The Treasury's role

The Treasury's role in relation to carrying out the first review is advisory. The Lord Chancellor is not required to follow the advice of the Treasury.

The purpose of the Treasury's response to the Lord Chancellor's consultation is to provide advice to the Lord Chancellor on matters relevant to the setting of the rate. The matters on which the Lord Chancellor is seeking the advice of the Treasury are specified below under Terms of Consultation.

The Treasury will consider the responses to the Call for Evidence and the further research and analysis carried out by GAD in considering the Lord Chancellor's request, but is entitled to decide what other evidence, including oral evidence, to consider while preparing its response to the Lord Chancellor's consultation and what weight to give to the evidence that it considers. It may also draw conclusions from its own experience.

Acting as a statutory consultee will not restrict or inhibit the ability of the Treasury to provide advice to the Lord Chancellor and his department outside the scope of the statutory consultation at any time, including during the statutory consultation period.

Reporting

The Lord Chancellor will consult the Treasury no later than 20 days of the commencement of the review (beginning with the day on which the review starts). The Treasury will provide a written response to the Lord Chancellor in response to the Lord Chancellor's request no later than 80 days of the Lord Chancellor's consultation (beginning with the day on which the request is made).

The response must contain a reasonable explanation of the advice provided. All conclusions set out in the response must be presented in such a way as to make clear the reasoning and evidence on which they are based.

The format of the response is to be agreed between the Treasury and the Lord Chancellor prior to completion.

Publishing of information

The Treasury's response to the Lord Chancellor will remain confidential until the review is concluded. The Treasury's response will be published when the Lord Chancellor announces the outcome of the first review.

The Treasury's response may be redacted, if necessary, to comply with the requirements of the Data Protection Act 2018.

Terms of consultation

The Lord Chancellor requests the advice of the Treasury on the matters that should be taken into account in the setting of the rate in accordance with the Act generally. In this context, the Lord Chancellor suggests that the Treasury may want to consider:

- the portfolios for consideration in the setting of the rate.

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- the relevant economic and financial forecasts for the UK economy as a whole over the short, medium and long term.
- the rates of inflation that, in the opinion of the Treasury, are to be expected in the short, medium and long terms for (i) prices and earnings generally; and (ii) on the cost of care and treatment.
- whether, in the opinion of the Treasury, there is reason to change from a single rate to multiple rates, by reference to the duration of the award.
- any other matters that the Treasury considers relevant to the setting of the rate.