NI ASSEMBLY JUSTICE COMMITTEE PIDR CONSULTATION

CBI NORTHERN IRELAND, RESPONSE (MAY 2021)

As the UK's leading business organisation, the CBI speaks for some 190,000 businesses that together employ around a third of the private sector workforce, covering the full spectrum of business interests both by sector and by size.

The CBI in Northern Ireland (**CBI NI**) represents more than 75% of the largest employers. This includes companies headquartered in Northern Ireland, as well as those based in other parts of the UK that have operations and employ people in the region.

Executive Summary

CBI NI welcomes the opportunity to share our views on reforming the methodology for calculating the Personal Injury Discount Rate (**PIDR**) applicable in Northern Ireland through the Damages (Return on Investment) Bill (the **Bill**).

CBI NI has welcomed and fully supports the Department of Justice's overarching commitment to the principle of 100% compensation (**100% Principle**). Upholding the 100% Principle is crucial, as it ensures both insurers and claimants are both treated fairly.

However, we accept that designing a framework to deliver on that principle is not without its challenges.

Indeed, a framework needs to be developed that is both:

- **Fair:** one that strikes the balance between adequately compensating claimants whilst avoiding driving up costs or limiting choice for policyholders; and
- **Flexible:** one that affords a sufficient degree of flexibility to allow the rate setter to avoid overcompensating.

The process for setting a new rate comes at a critical time for the Northern Ireland business community as it navigates through both the implementation of the Northern Ireland Protocol and recovery from the COVID-19 pandemic. As a cross sector business organisation, CBI NI would seek to ensure that a solution is found which avoids imposing additional costs on local businesses, consumers and the public purse as a consequence of legislating for overcompensation.

As a starting point, it is imperative that the Bill is progressed as soon as reasonably practicable to replace the out-of-date methodology currently used to calculate the rate. The current "Wells v Wells" methodology is widely recognised as being flawed, and its continued application in Northern Ireland is wholly inconsistent with every other part of the UK.

As a result, whilst acknowledging and supporting the need for due and proper scrutiny, CBI NI would urge the Committee to deal with this matter with a sense of urgency to provide much needed certainty, and to mitigate the potential implications of the adoption of the temporary rate of -1.75% when it takes effect in a matter of weeks.

Committee Questions to Stakeholders

Question 1: Is the new statutory methodology to calculate the personal injury discount rate the most appropriate to achieve as close to 100% compensation as possible?

The proposed new methodology is a welcome step away from the flawed, existing methodology.

The methodology proposed in the Bill, based on the Scottish framework, includes a welcome departure from that model in that it provides for a more realistic, evidence based, notional investment period of 43 years, rather than the shorter 30-year period used in the Scottish model. As a result of this amendment, the methodology is more likely to achieve a result closer to the 100% principle.

No less, CBI NI does not believe that it is the most appropriate way of achieving the 100% principle. As set out in our response to the Department of Justice's consultation, CBI NI would guard against adopting the more rigid approach taken in Scotland. Under the Scottish statutory framework, the rate-setting process is much more prescriptive with little discretion as to the final rate. As a result, low returns stemming from the Scottish rate risks overcompensation and ultimately additional costs for insurers and compensators, often in the form of public bodies.

Question 2: Has the new methodology the potential to veer towards overcompensation and if so, how can this be rectified?

Whilst not as acute as the risk of overcompensation under the current methodology, CBI NI believe the methodology in the Bill may risk veering towards overcompensation.

The methodology is based upon the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019, in which the portfolio is described as "cautious"[1] or "very cautious" as compared with the "low risk" notional investor model in England and Wales.

If the starting point is a "cautious" or "very cautious" low risk investor, it begs the question as to why a further downward adjustment of 0.5% is incorporated into the model in the Bill. It is our view that this downward adjustment should be removed as it conflicts with the 100% principle.

We would also support an independent review of the underlying notional portfolio, again to determine whether it adheres to the 100% principle.

Question 3: Has the new methodology the potential to veer towards under compensation and if so, how can this be rectified?

CBI NI has not seen any evidence to support such an outcome.

Question 4: Does the new statutory methodology reflect how a claimant would be advised to invest their award?

The CBI NI is not in a position to comment.

Question 5: What are the likely effects of using an investment period of 43 years rather than 30 years in the model and do you agree with this approach?

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[1] Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019, Policy memorandum https://www.parliament.scot/-/media/files/legislation/bills/previous-bills/damages-investment-returns-andperiodical-payments-scotland-bill/introduction/policy-memorandum-damages-investment-returns-andperiodical-payments-scotland-bill.pdf

It is our understanding that in 2017 the ABI provided the UK Ministry of Justice with an analysis which showed that the average investment period for a PIDR award is 46 years. An investment period of 43 years would therefore appear to be a more accurate investment period than 30 years, and as such we welcome this approach.

Question 6: What are the advantages or disadvantages of transferring responsibility for setting the rate from the Department of Justice to the Government Actuary and is there an appropriate level of accountability in the new statutory methodology?

The issue with this approach is that it leaves little discretion to the rate setter and removes ministerial responsibility. It is our view that the new framework for Northern Ireland should incorporate ministerial responsibility over the investment portfolio and any adjustments.

However, any such powers should be carefully balanced with a statutory obligation on the Justice Minister to consult with and have due regard to the views of an independent expert advisory body comprising business groups, economic experts, financial advisers and representatives for claimants and compensators. Such a framework would be consistent with our stated aspiration of having a structure in place that is both fair and flexible.

For further information, please contact Stuart Anderson.