ZURICH

**Zurich Insurance submission to the Committee for Justice call for evidence on the Damages (Return on Investment) (Northern Ireland) Bill**

## *About Zurich Insurance*

Zurich UK provides a suite of general insurance and life insurance products to retail and corporate customers. We supply personal, commercial and local authority insurance through a number of distribution channels, and offer a range of protection, retirement and savings policies available online and through financial intermediaries and brokers for the retail market and via employee benefit consultants for the corporate market. Based in a number of locations across the UK - with large sites in Birmingham, Farnborough, Glasgow, London, Swindon and Whiteley - Zurich employs approximately 4,500 people in the UK.

## *Executive Summary*

Zurich is a large property and casualty insurer serving commercial and retail customers. We also have a long-standing footprint in the public sector insurance market which is one area particularly impacted by any changes to the Personal Injury Discount Rate change. We share the Justice Minister's commitment to the principle of 100% compensation where both claimant and defendant are treated fairly in a settlement. We are, therefore, committed to working with the Northern Irish Assembly to ensure that the statutory methodology by which the Personal Injury Discount Rate is assessed and established is on a sustainable footing - one that is fair to both claimants and the insurance industry.

We welcome the opportunity to provide feedback on the Damages (Return on Investment) Bill and highlight the following:

- **We do not believe that the proposed methodology to calculate the personal injury discount rate (PIDR) is the most appropriate to achieve as close to 100% compensation as possible.**
- **Utilising a notional investment portfolio will provide an undervalued representation of the returns which will be achieved and will subsequently result in the PIDR being set too low which will, in turn, lead to excessive over-compensation.**
- **There is also no justification for the inclusion of an arbitrary margin of adjustment which will undoubtedly lead to consistent over-compensation if incorporated.**
- **The obvious effect of over-compensation is a significant increase in the cost of the claims involved which inevitably results in an increase in the**

**cost of insurance premiums for all parties within a given jurisdiction whether personal, private enterprise or public sector.**

- **We firmly believe that that 30 years is not a reasonable overall average projection period and that 43 years is a more appropriate average period taking account of actual claimant life expectancy.**
- **We believe that it is appropriate that the Justice Minister should be responsible to exercise judgement in relation to the nature of the investment portfolio and any adjustment factors and to do so in consultation with a group of experts.**

**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?*

1.1 We do not believe that the proposed methodology to calculate the personal injury discount rate (PIDR) is the most appropriate to achieve as close to 100% compensation as possible.

1.2 Zurich is entirely supportive of the principle of 100% compensation and whilst recognising that a balance needs to be achieved, the proposed methodology incorporates two aspects from the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 which are clearly and deliberately weighted to exceed the 100% compensation principle.

1.3 The first aspect relates to the selection of a notional investment portfolio to be used to calculate the anticipated investment returns which is overly cautious and not reflective of the investment portfolios which will be arranged. Utilising such a notional portfolio will provide an undervalued representation of the returns which will be achieved and will subsequently result in the PIDR being set too low which will, in turn, lead to excessive over-compensation. The notional investment portfolio utilised needs to be reflective of real-life practice.

1.4 The second aspect relates to the inclusion of an arbitrary margin of adjustment reflective of the 2019 Scottish legislation which would have the effect of reducing the PIDR recommended by the Government Actuary's Department (GAD) by an additional 0.5%. There was no evidence to support the inclusion of this in the Scottish legislation and there has been no subsequent evidence to justify its inclusion – this will undoubtedly lead to consistent over-compensation if incorporated.

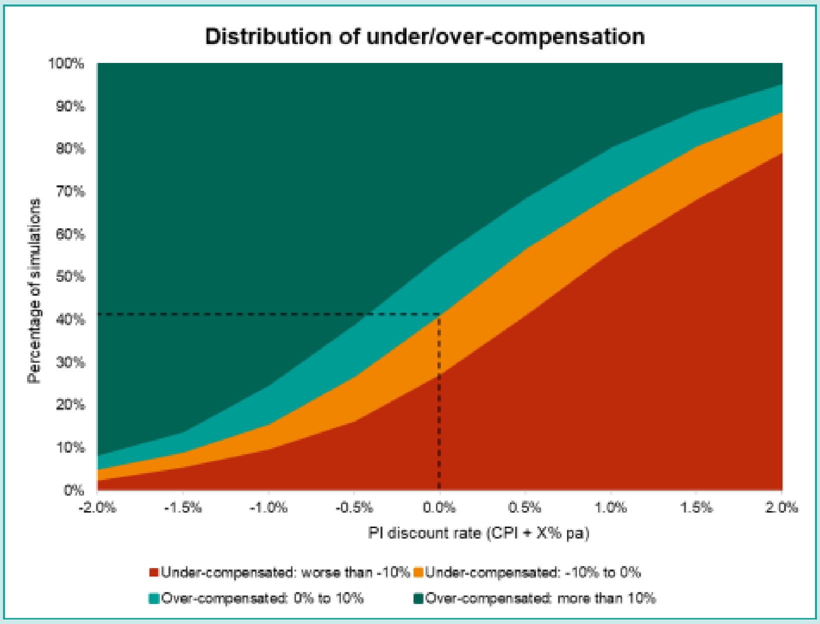
**Question 2:** *Has the new methodology the potential to veer towards over-compensation and if so how can this be rectified?*

2.1 The proposed methodology will ultimately result in over-compensation exceeding 100% and the primary factors contributing to this have been mentioned in our response to Question 1 above.

2.2 The over cautious notional investment portfolio and the additional 0.5% adjustment margin separately result in unrealistic theoretical outcomes leading to real-life over-compensation and when taken in tandem this will magnify the over-compensation impact.

2.3 The ABI submitted evidence for the DoJ 2020 consultation including analysis showing that the proposed notional investment portfolio is overly cautious and not consistent with independent financial analysis.

2.4 We also include an extract from the Government Actuary's advice to the Lord Chancellor on the PIDR in June 2019 which highlights the risk of over and under-compensation when assessing the PIDR. We would highlight that this assessment was based on a more realistic investment portfolio rather than the more cautious portfolio now being proposed so the likelihood of over-compensation may be further exacerbated:




*Setting a lower PI discount rate reduces the chance of claimants being under-compensated (red and orange) and increases the chance of them being sufficently compensated (light and dark green).*

*For example, setting the PI discount rate at CPI+0% pa would result in roughly a 60% likelihood of the representative claimant being able to meet their needs, and approximately a 70% likelihood that the representative claimant is able to meet at least 90% of their needs.*

2.5 Referring to the above chart, it is important to highlight that the recently announced interim discount rate of -1.75% will lead to over-compensation in approximately 90% of cases.

2.6 The obvious effect of over-compensation is a significant increase in the cost of the claims involved which inevitably results in an increase in the cost of insurance premiums for all parties within a given jurisdiction whether personal, private enterprise or public sector. There is also concern that where the PIDR is set at a level which promotes over-compensation then there is a significant risk that small businesses and enterprises may struggle to arrange insurance on what should be expected to be standard terms where fixed limits of indemnity may no longer be sufficient to cover the potential increase in the cost of catastrophic claims – where a limit of indemnity is breached then any surplus claims cost would require to be met by the business itself which may lead to considerable financial difficulties.

2.7 It should also be recognised that Plaintiffs have the option to seek a periodic payment order (PPO) in the event that they have any concerns whatsoever regarding the adequacy of a lump sum claim settlement. We have experience from a very recent case in Northern Ireland where the impact of a change in the PIDR could have had a dramatic and erroneous impact on the overall settlement value of the claim had it not been for the fact that a considerable number of the Heads of Claim were resolved by way of PPO. The differential impact between the future loss sums calculated at -0.75% (Scottish PIDR) and at -1.75% (new NI Interim PIDR) would have been £5.25 million which would have resulted in extensive over-compensation.

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

3.1 We have not seen any evidence presented which would demonstrate a problem with under-compensation.

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

4.1 Historically, insurers and other compensators have not had any visibility in relation to how a Plaintiff will ultimately invest the proceeds of any substantive damages award.

4.2 It is reasonable to expect that independent financial and investment advice would be recommended to and arranged for Plaintiffs in relation to high value damages awards, especially where future loss elements are incorporated. We think it is also reasonable to assume that such Plaintiffs would be regarded as "low-risk investors".

4.3 We note that the Association of Personal Injury Lawyers (APIL) responded to the 2017 Ministry of Justice (MoJ) consultation indicating that 60% of firms offered investment advice with the majority of the remaining firms strongly recommending that the claimant obtain independent financial and investment advice.

4.4 We believe that this is a fundamental aspect to inform the DoJ in relation to the real-life advice and actions of such investors and trust that the DoJ will be given clear and open responses from lawyers and independent financial advisers acting on behalf of such Plaintiffs.

**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?*

5.1 ABI analysis submitted to the MoJ in 2019 covering over 2,500 high value personal injury settlements showed that the average investment period for a PIDR Damages award was around 46 years.

5.2 As such, we firmly believe that that 30 years is not a reasonable overall average projection period and that 43 years is a more appropriate average period taking account of actual claimant life expectancy where 78% of claimants have a life expectancy of more than 30 years. For settlement awards between £1 million and £3 million, the average life expectancy was 47 years with 80% having a life expectancy of more than 30 years. For settlement awards over £3 million, the average life expectancy was 50 years with 88% having a life expectancy of more than 30 years.

5.3 Using 30 years as a reasonable overall age projection period would, therefore, lead to over-compensation in these high value cases.

**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?*

6.1 Due to the wide-ranging and considerable impact of any change in the PIDR, we believe that there should be political accountability for any decision to set or review the rate. To that end, we believe that it is appropriate that the Justice Minister should be responsible to exercise judgement in relation to the nature of the investment portfolio and any adjustment factors and to do so in consultation with a group of experts which should include economists, financial advisers, persons with links to the financial services market, as well as representatives from both compensators and claimants with a view to understanding the impact of the following important aspects during any given period of review:

- The current and future economic environment
- Investment options and advice available to claimants and,
- How claimants actually invest their damages.

***Zurich Insurance***
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