

Dear Joanne,

Please find attached a letter for you and your colleagues on the Committee for Justice regarding the draft regulations relating to the Personal Injury Discount Rate.

I'd draw your attention to the scope for the Department of Justice to use the Consumer Price Index (CPI) with an additional rating as a measure for inflation, rather than Average Weekly Earnings (AWE). The Government Actuary's Department (GAD) view that using AWE as a measure of inflation is likely to track at a range between CPI +1.5% to CPI +1.8%, which is far above the range considered appropriate by stakeholders in the DoJ consultation. Indeed, the GAD report accepts that "an earnings based index would potentially overestimate the inflation experienced in practice". That is why we recommend using a measure of CPI +0.6%.

Scheduled C1 of the UK Damages Act 1996 does not require there to be a single unadjusted index. In our view it would be possible to adopt the approach used by GAD in England and Wales in the previous PIDR review: CPI + X%, which would factor out this element of over-compensation. This is in contrast to what the DoJ told the Committee last week about the flexibility it currently has on measuring inflation. It is our clear view that the current legislation provides for flexibility in respect of the appropriate index and does not require there to be a single unadjusted index. We would respectfully suggest that this review is undertaken now to enable the Committee to consider this matter further and test it with the DoJ.

I have also attached a copy of our written submission to the Committee for reference.

We appreciate that as you and your colleagues noted last week, this is a very complex and taxing matter for the Committee. If it would be helpful to have an oral briefing for us to give evidence to the Committee we would be very happy to do that.

If you have any questions about the points raised in our letter please do get in touch.

Regards,

A black rectangular redaction box covering the signature of the sender.

24 May 2024

Ms Joanne Bunting MLA
Chairperson
Committee for Justice
Parliament Buildings
Ballymiscaw
Stormont
Belfast
BT4 3XX

By e-mail only

Dear Chair

I am writing to you in my capacity as Head of Public Policy (Scotland, Wales & Northern Ireland) at the Association of British Insurers, which represents motor and liability insurers in the UK. Together, these firms support millions of customers and businesses and fully support ensuring that those who suffer life-changing injuries receive reasonable and appropriate compensation.

Further to the meeting of the Committee for Justice on 16 May which considered the proposed Personal Injury Discount Rate (PIDR) regulations, the Damages (Process for Setting Rate of Return) Regulations (Northern Ireland) 2024, I am writing to set out the reasons why, if the regulations are approved, the changes will result in over-compensation for claimants. For the reasons given, we would urge the Committee to amend the regulations as proposed below, resulting in a PIDR which better reflects the principle of 100% compensation (the stated aim of all parties). In turn, this would avoid significant additional costs for premium paying businesses and customers in respect of motor, employers' liability and public liability premiums, as well as minimise the impact on Health Trusts in respect of clinical negligence claims. There are four key reasons:

1. The proposed regulations would increase the standard adjustment to the PIDR – which accounts for the cost of investment expenses and taxation to claimants – from 0.75% to 1.25%. However, our analysis is that there is already over-prudence in the extent to which the PIDR in Northern Ireland currently accounts for investment expenses and taxation. Further increasing the standard adjustment from 0.75% to 1.25% would move beyond the principle of 100% compensation as set out in the relevant legislation, and lead to over-compensation for claimants.
2. The regulations also propose that the Retail Prices Index (RPI) is replaced by Average Weekly Earnings (AWE) for calculating the impact of inflation. While we welcome the move away from RPI – as we agree with the Government Actuary's Department's (GAD's) analysis that it is no longer an appropriate index to use in damages claims – it must also be noted that AWE will overstate inflation. The wording of Schedule C1 of the Damages Act 1996 does not require there to be a single unadjusted index. As such, in our view it would be possible to adopt the approach used by GAD in England and Wales in the previous PIDR review:

CPI + X%, which would factor out this element of over-compensation. Indeed, a claimant's losses can only be expected to increase over time at around CPI +0.6%.

As has been noted by the Committee, a range of stakeholders responded to the initial consultation, including claimant representatives. The GAD report states:

"The responses to the 2023 joint request for views were largely unanimous in that RPI was no longer a suitable measure of inflation, and the base index should change to CPI. There was disagreement around the adjustment to apply to CPI however, with a core range of CPI +0% to +1%."

GAD has advised that using the AWE is likely to track at a range between CPI +1.5% to CPI +1.8%, which is far above the range considered appropriate by stakeholders. Further, the GAD report accepts that *"an earnings based index would potentially overestimate the inflation experienced in practice"*.

During the course of the Committee meeting on 16 May, Mr Moore from the Department of Justice advised that the Department *"have committed to reviewing the legislation before the next review of the discount rate to see whether it is possible to provide more flexibility on what the legislation says about inflation."* As noted above, it is our clear view that the current legislation provides for flexibility in respect of the appropriate index and does not require there to be a single unadjusted index. We would respectfully suggest that this review is undertaken now to enable the Committee to consider this matter further in advance of the forthcoming review.

3. If the standard adjustment to the PIDR for investment expenses and taxation is left where it is at 0.75%, and CPI +0.6% is used for calculating the impact of inflation rather than AWE, it should result in the PIDR in Northern Ireland being higher than the current minus 1.5% (the lowest in the world). This is because the setting of the PIDR should factor in the benefit from an improved environment for investment returns, which means low-risk investors of lump sums can receive higher returns. The improved environment for investment returns would not negate the standard adjustment for investment expenses and taxation being increased, and AWE being used for calculating the impact of inflation.

In this way, a higher PIDR in Northern Ireland would help to reduce over-compensation for claimants and the significant additional costs for premium paying businesses and customers, as well as Health Trusts. This is an outcome which would accord with the intent of the Damages (Return on Investment) (Northern Ireland) Act 2022: namely, that claimants should not receive any more or less than 100% compensation. We do not believe it is the case that the proposed regulations would need to be approved to achieve 100% compensation on average. For the reasons set out above, the regulations would instead lead to over-compensation for claimants.

4. It should also be noted that the regulations are in addition to the proposal to maintain the further margin adjustment of 0.5%, which means there is potential for significant over-compensation in the setting of the PIDR in Northern Ireland. The further margin adjustment reflects a policy choice to over-compensate

claimants, but again undermines the principle that claimants should not receive any more or less than 100% compensation (neither over nor under-compensation), as is provided for in the relevant legislation. Over-compensation in the setting of the PIDR should be avoided given the significant additional costs for premium paying businesses and customers, as well as Health Trusts.

Attached is a briefing on the PIDR, which sets out the ABI's perspective on the proposed regulations.

If there is any point on which the ABI can assist further, please do not hesitate to contact me: [REDACTED] We would also welcome the opportunity to provide further evidence to the Committee if that would assist.

Yours sincerely

[REDACTED]