DAC BEACHCROFT

Comments on the Department's Response to Consultation on the Personal Injury Rate Parameters

DAC Beachcroft's Claims Solutions Group provides general insurance claims litigation and claims handling services to insurers in England, Wales, Scotland and Northern Ireland. As part of DAC Beachcroft LLP which services Scotland, Northern Ireland and global markets, we have more than 500 insurance professionals and act for all of the top 20 UK general insurers and have expertise and experience across the entire sector. Our long history of commitment to, and investment in, the insurance sector means that we have an unrivalled depth of experience and breadth of insight. Our claims business reacts quickly to the dynamic claims industry and the changing needs of our clients whilst providing a local service with the support of a global network.

Our team has a deserved market-leading reputation for providing innovative and pragmatic solutions to liability claims disputes of all types and insurance issues generally. We pride ourselves on delivering commercial, value-driven legal services. With specialist expertise covering catastrophic injury, claims validation, costs, credit hire, disease and safety, health and environment law, the team covers the full range of personal injury work. Our strategic Advisory team offers a unique service for insurers dealing with emerging and important market issues.

The Issue

The personal injury discount rate (PIDR) in Northern Ireland is currently set at minus 1.5%. This is an outlier and is by far the lowest in the world. Small changes in the PIDR will lead to significant changes in the amount of compensation that a plaintiff will receive.

DAC Beachcroft supports the position that plaintiffs should receive full compensation. That must however mean exactly that – not under- nor over-compensation. The mechanism for setting the PIDR in Northern Ireland is set out in Schedule C1 to the Damages Act 1996. We are concerned that the outcome of the consultation and the changes proposed to Schedule C1 will lead to significant over-compensation of plaintiffs.

Such over-compensation will be to the detriment of premium paying members of the public, to businesses who may find that they are underinsured as a result of the changes and to the various Health Trusts and other public bodies who will be required to make compensation payments.

We comment on the proposals as follows:

The Notional Portfolio: it is proposed that there will be no change to the notional portfolio. As per our response to the consultation, we consider that it is overly cautious. As a starting point, this overly-cautious position already builds in an element of over-compensation.

The Assumed Investment Period: we agree that this should remain at 43 years. It is,

however, vitally important when calculating the PIDR, that a real world approach be adopted. We have previously made representations that reference should be made to wide ranging market-studies, such as the Barclays Equity Gilt Study, to ensure that real world outcomes are applied.

Inflation: a position appears to have been adopted that under the legislation - any alternative measure to be prescribed must be a single, unadjusted index and not an adjustment to an index. We do not agree that this is the case. The legislation states:

The impact of inflation is to be allowed for by reference to, whether indicating an upward or downward trend—

(a) the retail prices index, or

(b) some published information relating to costs, earnings or other monetary factors as is, for use instead of the retail prices index, prescribed in regulations made by the Department of Justice.

The words "by reference to" make it, in our view, possible to have the far better alternative that is applied in England and Wales of an index expressed to be CPI + X%.

When the legislation was introduced, RPI was a reasonable reference point as it tracked at a point between CPI and earnings. By indexing against Average Weekly Earnings (which GAD projects as tracking at somewhere between CPI + 1.5 – 1.8%), there is a very significant level of over-compensation being built into the process. By contrast, the evidence that we obtained from Oxford Economics on behalf of the ABI for the Call for Evidence in England and Wales, proposed that the correct mid-point between services and earnings would be CPI + 0.6%. That evidence also stated that ASHE should be the preferred index for earnings rather than AWE, and we agree that position.

Tax and Expenses: 0.75% for tax and expenses should be maintained rather than increased. Recipients of awards to which the PIDR apply will always have access to financial advice. It should be assumed that they are properly advised and are making the full use of tax wrappers to ensure that their exposure to tax is mitigated. Some years there will be no tax to pay and as the award diminishes over time the tax liability is reduced. Given the low risk appetite that is assumed, it should also be expected that a passive approach to investment is adopted, where fees can be kept very much at the bottom end of the range. Overall we consider that a move from 0.75% to 1.25% will compound the likelihood of over-compensation.

Further Margin: Schedule C1 allows for a margin of 0.5%; this is to ensure that the plaintiff is not under-compensated. We would stress that in light of the excessively over-cautious approach that would flow from adopting GAD's proposals, the only possible outcome is over-compensation. Keeping the margin at 0.5% only compounds that position to the detriment of the premium paying public, businesses, health trusts and public authorities. The further margin should therefore be removed or set at 0.0%.