



**The Forum of Complex Injury Solicitors (FOCIS)  
Response to**

**Justice Directorates Consultation on the Inflation Index for the Calculation of the Personal Injury Discount Rate and the Methodology for calculating the judicial rate of interest**

## About us

The Forum of Complex Injury Solicitors (FOCIS) are a group of pre-eminent solicitors who specialise in acting for seriously injured people in personal injury and clinical negligence claims. The objectives of FOCIS are to:-

- Promote the highest standards of representation for pursuers with life-changing injuries;
- Increase understanding in the wider community of issues which arise for those who suffer serious injury;
- Use members' expertise to promote debate and improvements to the law and legal process; and
- Share knowledge and information among members of the Forum.

Further information is available here: <https://focis.org.uk/>

Membership of FOCIS is intended to be at the most senior level of the profession. The only formal requirement is that members are recognised by their peers as having achieved a pre-eminence in one or more specialist types of serious injury claim. We currently have 24 members, including members from England, Scotland, Wales and Northern Ireland. Nine of the past presidents of APIL are members or Emeritus members of FOCIS. Firms represented by FOCIS members include:

Anthony Gold	Hodge Jones & Allen
Ashtons Legal	Hugh James
Balfour + Manson	Irwin Mitchell
Bolt Burdon Kemp LLP	JMW Solicitors
Boyd Rice	Leigh Day
Dean Wilson LLP	Moore Barlow LLP
Digby Brown LLP	Osbornes Law
Fieldfisher	Slater and Gordon
Fletchers	Stewarts
Freeths	Switalskis Solicitors
Gadsby Wicks	

## **Introduction**

FOCIS welcomes the opportunity to respond to the Justice Directorates Consultation on the Inflation Index for the Calculation of the Personal Injury Discount Rate and the Methodology for calculating the judicial rate of interest.

In line with the remit of our organisation, we restrict our responses relating to our members' experience, practices, and procedures relating to complex injury claims only. We therefore only respond below to questions within our remit.

## **Executive Summary**

The alignment of schedule B1 of the Damages Act 1996 with the approach used to calculate PIDR in England and Wales promotes consistency of methodology across jurisdictions. That avoids unnecessary divergence in how the PIDR is calculated, which could create an unwarranted unfairness between the citizens of Scotland, England and Wales. It would also likely decrease jurisdictional disputes in high severity injury claims with mixed connections to these UK jurisdictions

Seriously injured individuals receive just one compensation payment which they need to ensure will provide for their lifetime needs. In contrast institutional defenders like insurers and the NHS can offset any perceived over-compensation in one claim against under-compensation in others. If the PIDR is not set at a suitable rate, pursuers will be forced to engage in riskier investment strategies to try to make their compensation last for their lifetime. Inevitably when risk is taken there will be winners and losers, with some pursuers then falling back to rely on state care when their compensation runs out early.

In 2024, FOCIS collected data from FOCIS members to examine the extent to which future heads of loss are influenced by earnings related inflation. It was found that the vast majority (83%) of future losses are impacted by earnings inflation. Whilst we have not been able to repeat the exercise concentrating only on Scotland, we have no reason to believe that apportionment of heads of loss would differ. This demonstrates that the vast majority of future losses of serious injured pursuers are much more related to earnings inflation than damages inflation. That trend must be reflected in any adjustment to CPI.

The Office for Budget Responsibilities (OBR) 2022 report predicted long term real-earnings growth of 1.8% (gross earnings growth of 3.8% less CPI growth of 2.0%). That is by far and away the most reliable source of long term real-earnings growth. 83% of the 1.8% differential would be the appropriate adjustment to the PIDR, such that it should be CPI +1.5%. Even a 1.5% adjustment is likely to be an underestimate when one considers the specialist nature of many items of disability aids and equipment required by seriously injured pursuers, further details about which is set out below.

FOCIS remain seriously concerned about the continued delay in the implementation of Part 2 of the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019. With no timetable yet set by the Scottish Civil Justice Council for the development of the necessary court rules, PPO availability in Scotland remains limited. This is especially problematic in claims involving injuries of the utmost severity, which are often associated with short but uncertain life-expectancy cases. Implementing the 2019 Act alongside modified or adjusted indexation would

help ensure PPOs are readily available for those who need them. It is essential that Scottish judges, like their English counterparts, can set PPO indexation after considering case-specific evidence which will ensure compensation remains accurate, fair and realistic throughout the pursuer's life.

FOCIS consider the proposed judicial interest rate of 1.5% above the Bank of England (BoE) base rate to be unfair to seriously injured pursuers, who are often unable to work and already facing significant debt. The interest rate must reflect the real borrowing conditions that they face and not theoretical rates available to financially secure individuals. A realistic judicial rate should not materially affect insurers as they ought to be funding rehabilitation and making timely interim payments in accordance with the Rehabilitation Code and Serious Injury Guide. If insurers do this the remaining interest on past losses will be minimal and unlikely to impact insurance premiums.

**Question 1: Do you have a preference for CPI or CPIH or another index as the appropriate inflation index to be referenced in the legislation? Please give your reasons.**

Our preference is for CPI rather than CPIH. CPI, when uplifted with the appropriate percentage adjustment, provides the closest match to the inflation actually experienced across the principal future heads of loss. This is because the relevant losses comprise a mixture of items, the majority of which are affected by earnings inflation and, in many cases, by medical or technological developments which drive cost growth above CPI.

A key reason for not favouring CPIH is that accommodation costs should be excluded when determining the appropriate inflationary index for the PIDR. Following *Swift v Carpenter*<sup>1</sup>, the cost of alternative accommodation is no longer dependent on the PIDR, as the reversionary interest is calculated by reference to life expectancy rather than a PIDR-derived multiplier. In practice, accommodation awards are spent rapidly on purchase and adaptation to meet the pursuer's needs and, due to the reversionary deduction, often require supplementation from other heads (for example, solatium). There is therefore usually no residual balance left to invest. It has been reported by our Scottish members that the Scottish courts are now following the *Swift v Carpenter* approach.

Our secondary reason for preferring CPI is that it would be preferable to have a consistent approach across the UK jurisdiction, absent any evidence to suggest there are material differences between them on the impact of inflation of seriously injured pursuers/claimants.

**Question 2: Do you agree that the Damages Act 1996, schedule B1, should be amended to enable the possibility of a modified or adjusted inflation index to be used in the calculation of the discount rate? Please provide reasons for your answer.**

Inflation on earnings-related heads of loss (notably for care) far exceed prices-related heads. Therefore, the most appropriate single measure is an earnings-related measure, as used in the 2024 legislation.

However, we agree that schedule B1 should be amended to allow for the use of a modified or adjusted inflation index when calculating the personal injury discount rate. Allowing an adjustment to whichever

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<sup>1</sup> [Swift v Carpenter \[2020\] EWCA Civ 165 \(20 February 2020\)](#) at paragraph 205

index is prescribed is essential to ensuring that the discount rate more fairly reflects the real inflationary pressures that apply to injured pursuers' future losses.

It is imperative that injured parties are not forced into taking inappropriate or risky investment decisions to counteract the effects of inflation inadequately provided for by the discount rate. The discount rate must properly account for the likely effects of both earnings and prices inflation, particularly given that the majority of long-term losses for seriously injured pursuers are earnings-related. A rigid reference to one index, without the ability to adjust it, would risk locking the system into an inflation measure that may not accurately track pursuers' costs, thereby undermining the full compensation principle.

Providing the rate-setter with discretion to adjust the index will allow a closer match to the actual pattern of losses experienced. The flexibility to apply an uplift prevents the shortcomings that arise when decision-makers are confined to a single unadjusted index that may not be the most suitable for ensuring full and fair compensation.

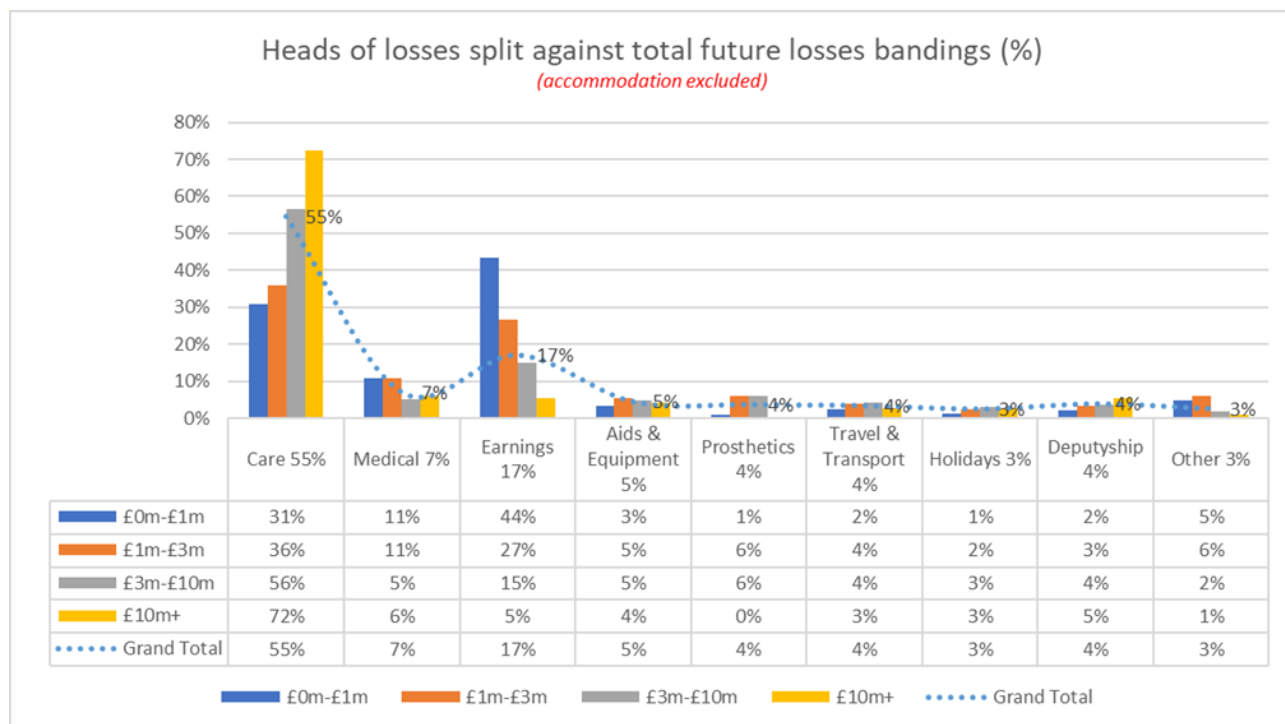
For these reasons, we support amending schedule B1 to enable the use of a modified or adjusted inflation index when setting the PIDR. This is a necessary and fair reform that strengthens the alignment between the index used and the losses suffered and upholds the principle of full compensation.

In 2024, FOCIS gathered information from its members to understand the apportionment of future losses. 114 claims were examined and damages apportioned between heads of loss as best as possible, considering many claims settle on a global basis. For reasons given above, damages for accommodation were excluded from the data and only the other heads of loss were examined. The data is useful in assessing the weighting of earnings-sensitive heads of loss.

Whilst FOCIS have not been able, for time reasons, to repeat the exercise for Scottish only firms, we have no reason to believe that the apportionment would differ significantly from the apportionment shown in the earlier data review. .

The data collected by FOCIS found that 83% of future heads of loss were in categories affected by earnings inflation ([Figure One](#)) . These include care, medical, earnings and deputyship. To achieve full compensation for these heads, it is crucial to apply an inflation assumption that reflects their earnings-driven nature, best tracked by ASHE 6115/6145/6146.

**Figure 1- average of future heads of loss (without accommodation)**



Most heads of future loss are earnings-related and therefore affected by earnings inflation. It would be contrary to the principle of full compensation to expect pursuers to assume greater investment risk simply to keep pace with that earnings inflation, if an index that does not track earnings inflation were applied.

Future medical treatment and therapies constitute a major head of loss for seriously injured pursuers and, historically, their inflation has on average been materially higher than CPI. Deputyship for pursuers lacking capacity is similarly driven by professional time costs and is also therefore earnings-linked. Against that background, an inflation assumption that acknowledges the predominance of earnings-related heads is essential to deliver full compensation.

By contrast, while disability aids and equipment involve the purchase of goods, many of these are low-volume, specialist products that are not captured within the CPI basket and are not priced within fully competitive mass markets. Many are imported and, because of their specialist nature, may fall outside the scope of the limited number of post-Brexit trade agreements. Producers often need to recoup significant research and development costs across a relatively small customer base. For instance, the experience with prosthetics is illustrative: comparing like-for-like clinical recommendations over a twenty-year period, costs have almost tripled, substantially outstripping CPI. In 2023 FOCIS gathered data which showed that the cost of a particular prosthetic model rose by 131% over 25 years against 78% for CPI, and the associated clinical fees rose at approximately CPI +1%. For lower-limb amputees compensated in 1998, subsequent prescription of more modern prosthetics has meant

current costs that are 200-500% higher than those assumed when their future loss was first calculated.<sup>2</sup> This pattern underscores why CPI without adjustment would tend to under-compensate.

We continue to agree with the observation of Professor Wass in response to the 2024 English MOJ Call for Evidence in England and Wales that:-

*“The UK is ill-prepared to meet the pressures of recruiting and retaining a medical and care workforce of sufficient size to meet increasing demand for health and social care. This is and will continue to be a huge policy issue for the UK. Overall, the drivers and barriers will combine to exert upward pressure on wages in care that we haven’t seen before.”*

The current long-term (2071-2072) forecast from the Office for Budget Responsibility (OBR) 2022 report predicted real-earnings growth of 1.8% (gross earnings growth of 3.8% less CPI growth of 2.0%). We note that Professor Wass describes the adoption of these OBR projections as “a straight-forward approach”. This is to our mind the benchmark against which the PIDR should be adjusted to reflect the typical weighting of earnings and prices heads of loss suffered by claimants. She also observes that the OBR *“projects that the costs of social care will double as a proportion of GDP over the next 50 years, from 1.2% of GDP in 21-22 to 2.6% in 71-72. This is a very challenging prospect for a sector which does not meet current demand.”* For CPI to be a fair base rate it is crucial to apply an inflation assumption to reflect the impact of earnings including care inflation.

We are of course well aware that when setting the rate for England and Wales the GAD adopted a materially lower assumption (1.2%) for earnings inflation than the above OBR figures. In answer to a subsequent FOI request by APIL the GAD confirmed in October 2024 that the additional evidential sources they relied on were their own technical committee and two economists who replied to the call for evidence. The first was Professor Victoria Wass, an expert who has given evidence accepted in many of the seminal injury cases relating to earnings inflation over the last 30 years. Acting in an independent capacity, she responded that *‘future trends in wage growth in care will be shaped by population ageing... my recommendation is for current care cost inflation at CPI+1.7PP rising to CPI+2.0PP for future care cost inflation’*. The second was Oxford Economics, whose submission was commissioned by the Association of British Insurers (ABI). They expected long-run average earnings growth in the UK to be around 1.25PP higher than price inflation.

The GAD confirmed they did consult with the OBR, who pointed them to their above published longer-term outlook of 1.8PP. They also confirmed they did not consult with the Treasury, who would presumably have views on how inflation would affect long-term economic policy. In an article by the FOCIS Chair, Julian Chamberlayne for the New Law Journal (7 February 2025) he questioned what that was consistent to with the obligation under Sch A1, s 2(4), CLA 2018 to consult with the Treasury.

We remain of the view that the OBR projection of 1.8% is by far the most reliable, transparent and authoritative projection and consequently it ought to be used for this purpose. GAD adopting in England and Wales of just 1.2% was neither justified nor transparent. It was also inconsistent with the approach GAD itself adopted for analogous purposes; GAD assumed 1.8% real earnings growth from 2028/29 onwards in the Reports on the NHS Pension Scheme and Teachers’ Pension Scheme Actuarial Valuations, both published in April 2024 ([2020 Valuation - NHS Pension Scheme \(England](#)

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<sup>2</sup> Figures provided by Richard Nieveen, expert prosthetist.

[and Wales\) - GOV.UK](#) and [2020 Valuation - Teachers' Pension Scheme \(England and Wales\) - GOV.UK](#)).

As our data indicated that losses affected by earnings inflation accounted for an average of 83% of the total of future losses that were subject to PIDR. 83% of the OBR long term forecast of a 1.8% differential would be the appropriate adjustment: so CPI + 1.5%. In light of the point, we make above about the very specialist nature of many items of disability aids and equipment even CPI+1.5% may well be an underestimate.

An alternative option would be to set more than one PIDR rate depending on the head of loss. In our 2025 response to The Guernsey Policy and Resources Committee proposals to set either two or three PIDR rates, and in our 2024 response to the Ministry of Justice's call for evidence on the PIDR we support the setting of a distinct PIDR rate for care cost inflation. As set out in those responses we strongly supported the recommendation of the Expert panel that such a rate is inclusive of medical treatment and therapy costs. If separate rates are set, we propose that the adjustment for future costs of care be set at the top of the UK forecast range. As can be seen from the data set out in [figure one](#), well over half of the total award for future losses is for care, case management and medical therapies

**Question 3: Do you prefer Option A or Option B as a means of enabling the possibility of a modified or adjusted inflation index to be used in the calculation of the discount rate? Please provide reasons for your answer.**

We prefer Option A as the means of enabling a modified or adjusted inflation index to be used when calculating the personal injury discount rate. We consider Option A to be the most appropriate mechanism because it aligns the Scottish approach with that already adopted in England and Wales. That alignment promotes consistency of methodology across jurisdictions and avoids introducing unnecessary divergence in how the PIDR is calculated, which could create an unwarranted unfairness between the citizens of Scotland, England and Wales. It would also likely increase jurisdictional disputes in high severity injury claims with mixed connections to these UK jurisdictions.

Option A also preserves the essential flexibility required to ensure full compensation. If the index is prescribed in legislation but the adjustment is left to the rate-setter, then the adjustment can evolve in response to economic conditions, common law (e.g. if there was a departure from the *Swift v Carpenter* approach) or changes in the typical makeup of pursuers' future losses.

By contrast, Option B would embed the percentage-point adjustment in primary legislation. That approach would risk locking-in an adjustment that may become outdated and would require further legislative change before any correction could be made. This would unnecessarily slow the ability of decision-makers to respond to real-world inflationary or legal trends and could lead to periods in which pursuers are not fully compensated because the statutory adjustment no longer reflects the inflationary pressures affecting their losses.

For these reasons, alignment across jurisdictions and the need to preserve sufficient responsiveness and flexibility, we support Option A.

**Question 4: Do you have an alternative option for enabling the possibility of a modified or adjusted inflation index to be used in the calculation of the discount rate? Please fully describe the alternative option and provide reasons for your answer.**

No, we support Option A as set out above.



**Question 5: Do you agree that the mix of inflationary pressures affecting lump-sum awards of damages in Scotland is likely to be the same as that in England and Wales? Please provide evidence for your view either way.**

Yes, we agree with the above statement.

**Question 6: What do you think the appropriate inflation index should be for PPO's? Please provide reasons for your answer.**

The appropriate approach is for the court to retain the flexibility to apply the most suitable inflation index to each head of loss, rather than prescribing a fixed or default index for all or most PPOs. This reflects long-established practice in England and Wales, where most PPOs concern future care and case management, and the court determines the index having considered the specific evidence and submissions before it. Parties remain free to argue for the index that best reflects the inflationary pressures relevant to the head of loss and we consider it important that this flexibility continues.

Different categories of loss are influenced by different inflationary drivers and therefore require different indices to ensure full and fair compensation. In practice, PPOs typically follow these conventions:

- Care and case management costs are linked to ASHE 6115, which reflects wage inflation within the relevant care workforce.
- Loss of earnings is linked to AWE or the closest matching ASHE category to the pursuer's pre-injury career, ensuring that the award tracks the correct labour-market comparator.
- Deputyship costs are usually indexed to the relevant ASHE category or RPI, reflecting the professional labour element of those costs.
- Medical treatment and therapies were historically linked to HCHS, but are now linked to RPI or to the most relevant ASHE category.

Accordingly, we consider that the court should determine the most appropriate index for each head of loss, using the established indices identified above, with parties retaining the ability to present argument and evidence on the most suitable measure in the circumstances. This approach best maintains the accuracy and fairness of PPO indexation.

**Question 7: Do you agree that provision should be made to enable the possibility of a modified or adjusted inflation index to be used for PPO's? Please provide reasons for your answer.**

It is essential that provision should be made to enable the use of a modified or adjusted inflation index for PPOs. PPOs are intended to provide long-term certainty and full compensation across a pursuer's lifetime. A key attraction of PPOs is the ability to close match the compensation to the loss, providing an appropriate amounts of funds for as long as the injured pursuer lives. To achieve this, the indexation applied must accurately reflect the real-world inflationary pressures on the costs they are designed to meet.

Allowing a modified or adjusted index is therefore essential to ensuring that PPOs remain properly aligned with the actual rate of cost increases faced by seriously injured pursuers. A fixed statutory index would not adequately respond to changing economic conditions, creating an inevitable mismatch between the award and the pursuer's needs over time. PPOs remove significant risks inherent in lump-sum awards, including longevity risk, because payments continue for the pursuer's lifetime and

are linked to an appropriate inflation index. Ensuring flexibility over that index strengthens this protection by maintaining accurate uprating throughout the PPO's duration.

We would like to take this opportunity to express our serious concern about the ongoing delay in implementing Part 2 of the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019. The Scottish Civil Justice Council has not yet set a timetable for developing the necessary court rules, and as a result, PPO availability in Scotland remains limited. This is particularly problematic in high-severity, short-life-expectancy cases, where PPOs would be of greatest value. Progressing the implementation of the 2019 Act, alongside enabling modified or adjusted indexation, would help ensure that PPOs fulfil their intended purpose and are more readily available to those who need them.

For these reasons, we view it as essential that PPO indexation can be set by judges after hearing case specific evidence and arguments, to ensure accurate, fair and realistic compensation throughout the pursuer's life.

**Question 8: Are you aware of any subsequent case law or legislation which impacts the SLC's recommendation on determining the judicial rate of interest? If yes, please provide details.**

For clarity and simplicity in settlements, it is useful to have a defined judicial rate of interest. Recent Scottish case law has reaffirmed the breadth of the discretion of Scottish courts to determine the rate of interest.

*F v Chalmers*<sup>3</sup> confirms that the court's discretion is wide both in relation to the rate of interest applied and the period over which such interest accrues. The decision illustrates that, while a standard judicial rate may be helpful as a starting point, courts are neither constrained nor limited by it. Where the facts justify it, the court may adopt a different rate to achieve fairness between the parties.

Accordingly, while the Scottish Law Commission's recommendation provides a useful reference point, subsequent case law underscores that judicial discretion remains central to ensuring that awards of interest properly reflect the circumstances of each individual case.

**Question 9: Are you aware of change in practice which impacts the SLC's recommendation on determining the judicial rate of interest? If yes, please provide details.**

**Question 10: Do you agree that the Bank of England base rate should be used to establish the Judicial Rate of Interest? Please provide reasons for your answer.**

**Question 11: If the Judicial Rate of Interest is to be pegged to the BoE base rate what should the percentage increase on the base rate be? Please provide reasons for your answer.**

**Response to Q9-11**

FOCIS have had sight of APIL's submissions in relation to the typical cost of borrowing to injured pursuers. We refer to and endorse APIL's response to questions 9 to 11.

For these reasons, the proposed model of 1.5% above the BoE base rate is not fair to pursuers with serious injuries. In our members' experience many pursuers with serious injuries are unable to work and have fallen into significant debt. Any adjustment must be grounded in the economic reality of

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<sup>3</sup> [F v Chalmers \[2025\] CSOH 23](#)

injured pursuers' borrowing conditions, not in theoretical lending rates available only to financially robust individuals. We would add that setting a realistic rate of judicial interest need not have an adverse effect on insurers with liability for claims of these types, as in serious injury claims they ought to be funding the pursuers rehabilitation expenses under the Rehabilitation Code or Serious Injury Guide and making timely interim payments for the pursuers other losses. Providing they do the residual interest on past losses would be nominal and unlikely to have any material impact on insurance premiums.

Accordingly, while we accept a model tied to the BoE base rate in principle, the percentage uplift must be materially higher than 1.5% if it is to reflect the real cost of borrowing for most seriously injured pursuers and to ensure that the judicial rate of interest provides meaningful compensation rather than widening financial disadvantage.

**Question 12: Is there suitable, published and accessible data which would inform what the percentage increase to the base rate should be? Please provide reasons for your answer.**

We refer to our answer to 10-11 above.

**Question 13: Should the Scottish Ministers have power to amend by regulation the percentage modification of the base rate, either upwards or downwards? If not, please provide reasons for your answer.**

Yes.

**Question 14: Do you have an alternative option for determining the Judicial Rate of Interest? Please fully describe the alternative option and provide reasons for your answer.**

We do not have an alternative option and agree with the proposed approach, provided that Scottish courts retain their wide discretion in relation to the rates applied.

28 January 2025