

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

**Response to**

**The Department of Justice's Consultation - The personal injury discount rate: taking account of inflation**

## 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 claimants 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 Department of Justice's consultation on the personal injury discount rate: taking account of inflation.

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 C1 of the Damages Act 1996 with the approach used to calculate PIDR in England and Wales 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 Northern Ireland, 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, as far as possible, will provide for their lifetime needs. In contrast institutional defendants 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 Northern Ireland, we have no reason to believe that apportionment of heads of loss would differ. This demonstrates that the vast majority of future losses of seriously injured pursuers are 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.

### **Question 1: In principle, should the Damages Act provide more flexibility in relation to how the impact of inflation is to be taken into account by the Government Actuary when setting the personal injury discount rate for Northern Ireland? Please give reasons for your answer.**

FOCIS agree with this approach, which would align the approach to the calculation of the PIDR in Northern Ireland with the approach currently taken in England and Wales. Whilst this question's focus is on flexibility, we would like to emphasise that even more important than that is that the adjustment seeks to "provide a process for setting the rate, which is fair, transparent and clear (DoJ 2025 Consultation Document para 2.5).

Allowing rate-setters to apply an adjustment will avoid the rigidity that comes from being tied to a single index, which is unlikely to be the most suitable measure to achieve full compensation. Greater flexibility in setting the index and the adjustment is more likely to achieve the closest match to inflation and the real costs incurred by injured people.

**Question 2: If more flexibility is to be provided, how should this be achieved?**

- (a) **Prescribe an index, such as the consumer prices index, in the primary legislation, with the ability for the rate-setter to make an adjustment to that index;**
- (b) **Prescribe an index, such as the consumer prices index, and an adjustment in the primary legislation, with the ability for the Department to amend the adjustment; or**
- (c) **Another way (please explain)?**

**Please give reasons for your answer.**

FOCIS welcomes the alignment between different jurisdictions. Accordingly, we support option (a) as it would ensure that the approach and methodology for setting the PIDR would remain consistent across England and Wales and Northern Ireland.

FOCIS contends that option (b) could limit the flexibility of those setting rates, since requiring changes through legislation might slow down their ability to respond quickly. In contrast, allowing rate setters to adjust the index can help to ensure that it stays suitable and adaptable, even when economic conditions are turbulent. This in turn will be of benefit to both plaintiffs and defendants as the index will most closely reflect inflation and the costs incurred by injured people.

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. Consequently, the discount rate must be regularly updated to 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.

**Question 3: Which is the best inflation index to prescribe in the legislation: CPI, CPIH or another index? Please explain why.**

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 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.

FOCIS believe that CPI would be an appropriate index for discount-rate purposes, but only if an appropriate percentage adjustment is applied. This is because the relevant heads of loss encompass a wide range of items, the large majority of which are driven by earnings inflation and/or by medical or technological developments, which drive inflation well above CPI.

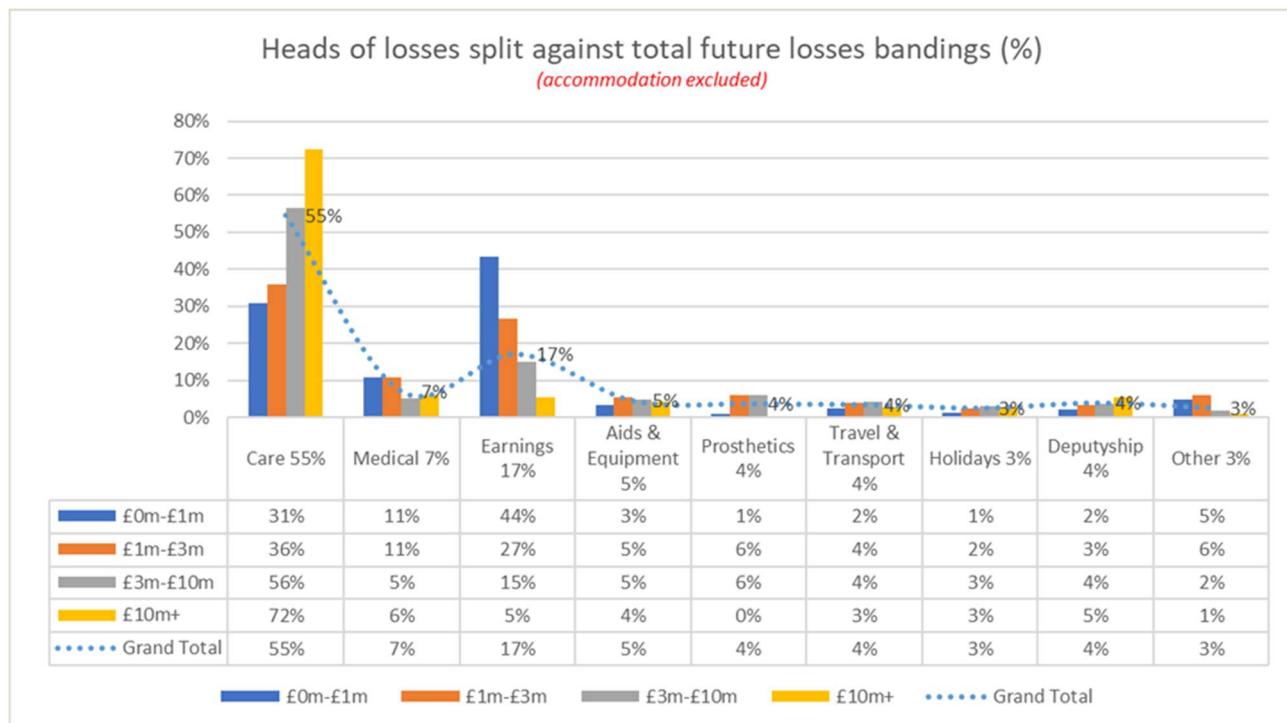
While accommodation costs represent a significant head of loss, FOCIS contends that they should be excluded from the future loss total before applying any inflationary weighting. This

approach reflects the Court of Appeal's decision in *Swift*<sup>1</sup>, which confirmed that the cost of purchasing and adapting suitable accommodation is no longer calculated using the PIDR, as the reversionary interest is instead assessed by reference to life expectancy. As courts in Northern Ireland also follow the *Swift* judgment, this supports the use of the CPI index in the legislation. Furthermore, in practice, accommodation awards are typically spent immediately on acquiring and adapting the claimant's property to their needs. Due to the deduction for the reversionary interest, these awards often need to be supplemented by other elements of compensation - such as general damages - meaning that no residual sum remains available for investment.

In 2024, FOCIS collected data from FOCIS members to understand the apportionment of damages by head of future loss. Member firms provided data in relation to 114 claims, where damages were apportioned by head of future loss as best as possible, given that many claims are settled on a global basis with no breakdown. For reasons set out above and following the decision in *Swift v Carpenter*<sup>2</sup>, accommodation claims were excluded from the data review to assess the weighting of earning-sensitive heads of loss, see. [Figure 1](#). Whilst we have not been able to collect updating data only from Northern Ireland firms, we have no reason to believe that the apportionment of heads of future loss would differ significantly in Northern Ireland.

The review by FOCIS found that 83% of future heads of loss were for losses affected by earnings inflation, including care, medical, earnings and deputyship costs. To ensure the principle of full compensation is achieved, it is crucial that the inflation assumption which reflects earnings is used. This is best tracked by ASHE 6115/6145/6146.

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



Future loss of earnings is a loss which inevitably rises in line with earnings inflation, and it is well established in many common law jurisdictions, that such losses should be calculated in

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

<sup>2</sup> [Swift v Carpenter \[2020\] EWCA Civ 165 \(20 February 2020\)](#)

line with earnings inflation. Expecting claimants to take on greater investment risk to match earnings inflation would run counter to the full compensation principle - as this would fail to restore plaintiffs to the position they would have been in had the defendant's negligence not occurred.

Disability aids and equipment costs have generally risen far faster than normal CPI inflation. Whilst these costs are may be usually considered to be 'goods and services', because of their highly specialist nature in the injuries sector, being low-volume production products, the cost falls outside the usual CPI basket. These specialist products are often not priced within a fully competitive market, because of the lower number of developers and manufacturers in this limited field.

A significant proportion are imported and so specialised that they sit beyond the scope of the limited post-Brexit trade agreements. Furthermore, and given their unique nature, manufacturers often need to recover substantial research and development costs from a very small customer base which has the effect of driving prices sharply upward. A prosthetic limb created today, for example, would cost almost three times that of one recommended 20 years ago to a claimant with the same level/type of amputation, a rise far exceeding CPI inflation. In data collected by FOCIS in 2023 it was found that the cost of a particular prosthetic model had risen by 131% over 25 years against 78% for CPI with associated clinical costs rising at approximately CPI +1.5%. For lower-limb amputees compensated in 1998, subsequent prescription of more modern prosthetics has meant that current costs are 200-500% higher than those assumed when their future loss was calculated<sup>3</sup>. Such rises underscore why CPI without adjustment would tend to leave plaintiffs undercompensated.

FOCIS 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."*

Plaintiffs who lack mental capacity will also frequently have a significant head of loss for the cost of a professional deputy. This is also an earnings-related cost, as it primarily reflects the time spent by a professional in administering the plaintiffs' affairs with the fees charged being directly influenced by earnings inflation. Future medical treatment and therapies are a major head of loss for seriously injured plaintiffs that are largely earnings-related.

Historically, earnings inflation has been materially higher than CPI, demonstrating why CPI must be used in conjunction with an appropriate percentage adjustment. 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.

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<sup>3</sup> Figures provided by Rochard Nieveen, expert prosthetist

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 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 4: Do you agree that the balance of inflation affecting lump-sum awards of damages in Northern Ireland is likely to be the same as that experienced in England and Wales? Please provide evidence for your view either way.**

FOCIS agrees with this statement.