

A response by the Association of Personal Injury Lawyers (APIL)

January 2026

Introduction

APIL is grateful for the opportunity to respond to the Scottish Government's consultation on the inflation index for the calculation of the personal injury discount rate (PIDR), the index for periodical payment orders (PPOs) and the methodology for calculating the judicial rate of interest.

We welcome the alignment of schedule B1 of the Damages Act 1996 with the approach used to calculate the PIDR in England and Wales. We support option A outlined in the consultation, which would provide rate setters with flexibility to apply an adjustment to the index used. This will prevent issues where decision-makers are limited to one index, promote consistency of methodology between the UK jurisdictions and avoid unfairness between the citizens of Scotland, England and Wales.

We believe the most appropriate index is CPI, as accommodation costs should be excluded when determining the appropriate inflationary index for the PIDR. Since *Swift v Carpenter*¹, the cost of buying alternative accommodation is no longer dependent on PIDR, as the reversionary interest is calculated using the life expectancy, not a PIDR-derived multiplier. The same approach has been adopted by Scottish courts, hence why we believe CPI is preferable to CPIH.

Regarding the inflation index for PPOs, we believe that the court should retain the flexibility to apply the most suitable inflation index to each head of loss, rather than prescribing a fixed index for all PPOs. We would like to take this opportunity to express our concern with the delay in implementing Part 2 of the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019. The necessary court rules have not yet been drafted, and as a result, PPO availability in Scotland remains limited.

While APIL agrees with the proposed model for the calculation of the judicial rate of interest, 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. We have provided data that illustrates the gap between the Scottish Law Commission's proposal and real borrowing costs.

APIL has responded to the questions within our remit.

Choice of price index – CPI or CPIH

Question One: 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.

¹ *Swift v Carpenter* [2020] EWCA Civ 1295

We believe the most appropriate index for discount rate calculations is CPI rather than CPIH. The CPI in conjunction with the appropriate percentage adjustment, is in the round, the closest match inflationary measure for the discount rate, as the relevant losses contain a mixture of items, many of which are driven by earnings inflation and/or by medical/technological advancements that cause rises in cost well above CPI.

Housing costs are a major head of claim, but we contend should be excluded from the future loss total before considering the inflationary weighting of the heads of loss that remain. Since the Court of Appeal's decision in *Swift v Carpenter*² the cost of buying alternative accommodation is no longer dependent on PIDR, as the reversionary interest is calculated using the life expectancy, not a PIDR-derived multiplier. Our members reported that the Scottish courts are following the same approach regarding accommodation costs, one of the reasons why we believe CPI would be the best index. In addition, the accommodation award funds are rapidly spent on purchasing and adapting a property to meet the claimant's needs. In fact, due to the reversionary interest deduction, they often have to effectively be supplemented for other components of compensation (e.g. the general damages awards). Hence, there is usually no balance left to invest.

Disability aids and equipment do predominantly relate to purchasing goods, but many of them are low production specialist equipment, which is not included in the CPI basket and are not subject to a fully competitive market for goods. Many of them are imported and are so specialist that they fall outside of the scope of the limited number of post-Brexit trade deals. Producers will often need to recoup significant research and product development costs across a relatively small number of customers. A prime example of this is to consider the comparative cost of the prosthetic that the same prosthetist would recommend today when contrasted to that recommended 20 years ago to a claimant with the same level/type of amputation. That cost has almost tripled, so significantly more than CPI inflation.

Future loss of earnings is a loss that obviously rises in line with earnings inflation. We would be surprised if any reputable expert economist would argue otherwise and in the common law jurisdiction cases in which this point has featured, the defendant's experts have not even seriously attempted such an argument. It would also be contrary to the full compensation principles to expect claimants to take more investment risk with their future loss of earnings. That would not be putting them back into anything like the position they would have been in had they never suffered the negligence inflicted by the defendant.

Future medical treatment and therapies are another major head of loss for seriously injured claimants, the majority of which is earnings related and where historically inflation is on average materially higher than CPI.

Claimants who lack mental capacity will often have a significant head of loss for the cost of a professional deputy. Once again, that is an earnings-related cost as it predominantly relates to the cost of time spent by that professional (usually a solicitor).

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 on seriously injured pursuers/claimants.

An adjusted index

² *Swift v Carpenter* [2020] EWCA Civ 1295

Question Two: 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.

APIL agrees with this. We welcome the alignment of schedule B1 with the approach used to calculate the PIDR in England and Wales. Allowing rate setters to apply an adjustment to the index used will provide a closer match to the losses and prevent issues where decision-makers are limited to one index, which may not be the most suitable measure to ensure full compensation. A flexible approach to setting the index and the adjustment will allow for the closest match to inflation and the costs incurred by injured people.

Question Three: 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.

APIL supports option A. As above, we welcome alignment between the jurisdictions in the approach and methodology to set the PIDR. This alignment promotes consistency of methodology 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.

We have concerns that option B would still limit the flexibility of rate setters. Embedding the percentage point adjustment in the legislation can impede timely responses when setting the rate if changes to the legislation are required. 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.

The rate assessor should have discretion to determine the relevant adjustment to the index to ensure it remains fit for purpose and closely matched to economic conditions.

Question Four: 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, as above, APIL supports option A outlined in the consultation.

Question Five: Do you agree that the mix of inflationary pressures affecting lumpsum 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.

APIL agrees with this.

Periodical Payment Orders

Question Six: What do you think the appropriate inflation index should be for PPOs? Please provide reasons for your answer.

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

We are disappointed with the delay in implementing part 2 of the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019. The Scottish Civil Justice Council, responsible for preparing court rules on the practicalities of imposable PPOs, has not yet set a timeframe for completion of this work, meaning that part 2 of the act is not in force. As a result, the availability of PPOs in Scotland remains very low, which is particularly problematic for high-severity, short life expectancy cases.

Regarding the appropriate inflation index for PPOs, we believe that there is nominal value in having a default index. The court should continue to have discretion to determine the most appropriate index for each head of loss, 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.

In England, most PPOs relate to care and case management, with courts determining the index used. Parties can argue for different indices depending on the specifics of the case, especially in international matters.

The indices used in PPOs have followed expert advice and been very carefully scrutinised by the legal teams for both parties, then by the court. Those indices are typically as follows:

- Care and Case Management – Annual Survey of Hours and Earnings (AHSE) 6115.
- Loss of Earnings – Average Weekly Earnings (AWE) or the most closely aligned ASHE category to the claimant's profession/grade.
- Deputyship costs – these tend to be linked to ASHE or RPI.
- Medical Treatment and therapies – Hospital and community healthcare services index (HCHS) now linked to RPI or to the most relevant ASHE category.

Judicial Rate of Interest

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

We agree that, for simplicity and clarity in settlements, it is helpful to have a defined judicial rate of interest. However, it is important to note that Scottish courts have discretion in determining the rate applied and can adopt a different rate depending on the circumstances of the case. In *F v Chalmers*³ the court reaffirmed that this discretion is wide in terms of the rate of interest to be 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 ensure that awards of interest properly reflect the circumstances of each individual case.

Question Ten: 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.

³ *F v Chalmers* [2025] CSOH 23

Question Eleven: 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.

In principle, we do not object to a judicial rate of interest which would fluctuate according to the Bank of England's (BoE) base rate plus an additional adjustment, subject to the court's discretion to change it. If the Scottish Law Commission's (SLC) proposed approach is followed, the additional percentage adjustment should be determined carefully, as it can significantly impact pursuers.

The SLC has suggested 1.5% above the BoE official dealing rate, on the basis that this would be comparable to the rate available to a prudent individual seeking a secured loan or to an average company borrowing. The proposed percentage adjustment does not reflect the real cost of borrowing for pursuers, as it is very unlikely that an injured person can secure a loan at that rate.

The BoE's base rate currently stands at 3.75%. The next BoE Monetary Policy Committee meeting is set for Thursday, 5 February (after the deadline for submissions), so there will be no base rate changes before then. If the currently proposed model is used for the judicial rate of interest, it will be set at (3.75% + 1.5% =) 5.25%.

The majority of people who borrow money tend to do so from 3 sources:

1. Arranged overdraft
2. Credit card
3. Personal Loan

One of our members has explored the current costs of such borrowings using Moneyfacts Compare for the data. The results for each of the above categories are as follows:

1. Arranged overdrafts:

The standard arranged overdraft rate for major banks differs significantly, and some, such as NatWest & Royal Bank of Scotland Premier Select, HSBC Premier and Barclays Premier offer 0% interest on overdrafts of up to £500. However, the account holder is generally required to be an employed high earner and have a substantial balance held with that bank. Even with this in place, the cost of arranged overdrafts above £500 is charged as follows: NatWest/RBS Premier Select 34.49% - HSBC – 39.90%, Barclays Premier – 35%.

Standard bank accounts, such as TSB and First Direct both charge 39.90 for their overdrafts. The Bank of Scotland charge 29.90%, Allied Irish Bank charge 19.86% and Virgin Money charge 19.90%.

2. Credit Cards:

Whilst many credit card providers offer 0% on balance transfers for periods of up to 35 months, once that period is up, the top provider rates are pretty consistent at 24.9% per annum. This rate can be found with the following providers:

- a) HSBC
- b) M&S Bank
- c) Lloyds Bank
- d) Virgin Money
- e) MBNA Limited
- f) Santander
- g) Barclaycard

- h) Tesco
- i) Royal Bank of Scotland
- j) TSB

3. Personal Loans:

The top 5 personal loans currently available are as follows:

- a) M&S Bank offer an APR of 6.9%, for those with a minimum income of £10,000 per annum
- b) Santander offers loans at 6.9%
- c) Novuna offer 7.00% APR
- d) NatWest and RBS offer existing customers a loan rate of 9.9% APR

Other personal loan rates available include Bamboo at 49.7% APR. 118118 Money offers loans at 49.9%, and Everyday Loans offers loans at 99.9% APR (available to those with lower credit ratings).

It is worth noting that all of the rates shown above are only available for individuals with a good credit history and who have stable earnings. For those with poor credit history or low earnings, the rates available will be significantly higher. 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 personal injury pursuers with serious injuries are unable to work and have fallen into significant debt, particularly in serious injury cases.

If the judicial rate is set too low, it risks building in false assumptions about the true cost of debt for injured pursuers. Even the best available interest rate of 6.9% on a personal loan with M&S bank is 1.65% per annum above the proposed method for the calculation of the judicial rate, and the reality is that many pursuers will pay double-digit interest rates.

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 seriously injured pursuers and to ensure that the judicial rate of interest provides meaningful compensation rather than widening financial disadvantage.

Question Twelve: 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.

Please see our response to question 10 and 11.

Question Thirteen: 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.

We agree with this. We suggest Scottish ministers should have the power to amend the percentage adjustment after consulting with an expert panel (with expertise in consumer debt) at the Government Actuary.

Question Fourteen: 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. We agree with the proposed approach, provided it is recognised that Scottish courts retain wide discretion in relation to the rates applied.

Any questions in the first instance should be addressed to

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