Ministry of Justice Consultation:

Reforming the Soft Tissue Injury ("whiplash") Claims Process

Response from the Motor Accident Solicitors Society

January 2017

This response is prepared on behalf of the Motor Accident Solicitors Society (MASS) and submitted by the Chairman, Simon Stanfield.

MASS is a Society of solicitors acting for the victims of motor accidents, including those involving personal injury (PI). MASS has 120 solicitor firm Members, representing approximately 2000 claims handlers. We estimate that member firms conduct in the region of 400,000 PI motor accident claims annually on behalf of the victims of those accidents. The Society's membership is spread throughout the United Kingdom.

The objective of the Society is to promote the best interests of the motor accident victim. This is central, and core to our activity. We seek to promote only those policy and other objectives which are consistent with the best interests of the accident victim. We seek to set aside any self interest in promoting these arguments, recognising that we are in a position of trust, and best placed to observe the best interests of motor accident PI victims first hand. We are a not for profit organisation, which requires specialism in motor accident claimant work as a pre-requisite for membership. We also have a Code of Conduct which member firms are required to abide by, which is directed to the best interests of the motor accident victim.

Contact:

If you have any queries or would like further information, please contact at first instance - Jane Loney at:

MASS
19-20 St Augustines Parade
Bristol. BS1 4UL

Tel: 0117 925 9604
Email: jane@mass.org.uk
www.mass.org.uk

1. Executive Summary

The Government's proposals will completely fail to protect the interests of most injured persons and raising the small claims limit for all PI claims and capping minor whiplash claims will fall straight into the hands of those who would exploit claimants, and the system.

Solicitors acknowledge the urgent need to tackle so-called whiplash fraud but this should not be at the expense of legitimate claims for justice. These measures are unfair, unjustified and will prevent accident victims from seeking the redress and justice that they deserve. The proposed measures would adversely impact all claims, regardless of whether they are legitimate. Even the insurance industry acknowledges that the overwhelming majority of claims are legitimate.

The MoJ's last round of reforms have still yet to be fully implemented and should be given time to work. It is still not too late for the Government to take stock and allow the industry to come forward with a fairer and more proportionate programme to tackle fraudulent claims and some of the others issues in the sector. Past cross-industry initiatives have demonstrated that so much more can be achieved by dialogue. The sector should be given time to discuss areas of possible common agreement.

An alternative package of measures should focus on continued improved data sharing; early implementation of the Insurance Fraud Taskforce; implementation of the Brady Review into CMCs; provide the legal powers for a ban on cold calling and texting; tough enforcement action against professional enablers; better enforcement of data protection legislation; continued action against uninsured drivers; improved driver education and graduated licenses; improved car design and telematics.

MASS is deeply concerned with the evidence base and the assumptions behind the proposals. The proposals are overly reliant upon insurance figures, which are not independent and have a vested interest in maximising the levels of alleged fraud, reducing the role of independent legal advice and maximising profits in a highly competitive insurance sector.

<u>We would challenge many of the common assumptions associated with whiplash:</u>

- Whiplash is a genuine injury that can cause significant pain and loss of amenity
- The effects of whiplash can last in excess of 18-24 months
- There are fewer UK deaths on the roads, but a larger number of more minor accidents at lower speeds on busier roads in more crowded cars
- International comparisons should be approached with caution given cultural variations, differences in legal systems, definitions of fraud, the availability of insurance and fraud detection capabilities
- France has a very different legal system and a direct comparison is simply not comparing like-with-like
- Whiplash can be prevented by improving head restraints and car seats

<u>The Government's evidence base does not stand up to scrutiny:</u>

- The more reliable statistics on the number of settlements shows that the number of successful claims has fallen consistently for four years

- The Government's continued focus on the falling number of reported accidents means that no regard has been taken of the DfT estimated 630,000 "slightly" injured casualties on British roads each year

- Contrary to public messages, it is clear that insurer claim costs have fallen dramatically in recent years by over £2.4bn

- Whilst we fully acknowledge that fraud is a problem and that it must be addressed, we strongly question the view that a high proportion of claims are fraudulent. When the "proven" and "suspected" fraud figures are separated, the incidence of proven fraud drops to 0.25% of all motor claims

- We reject the notion that 85% of the suggested £1bn savings will be passed onto consumers by insurers through lower motor insurance premiums. The LASPO cost reforms reduced legal costs by 60% but the insurance industry did not permanently pass on all the cost savings to consumers following the reforms. Motor premiums have now almost returned to pre-LASPO levels

- The Government acknowledges that it has no mechanism to force insurers to pass savings to customers and with around 80% of the insurance market having made no commitment to do so, they clearly have no intention to do so

- Claims that further motor insurance premiums are due to fraud and whiplash claims should be treated with the scepticism they deserve

- There is clear evidence that other costs have increased dramatically which are completely unrelated to injury claims, such as the recent 43% increase in repair costs and the doubling of IPT

<u>The proposed measures would have a range of unintended and unwanted consequences:</u>

- Increase in the number of Litigants in Persons (LiPs) – claimants would not be able to find quality and independent legal support for their case

- Burden on the court system – LiPs would mean longer hearings, delays in justice, longer waiting lists and higher costs

- Complexity of the claims process for LiPs – even for lower value claims, claims can be confusing and complex

- Adversely impact vulnerable groups such as people on lower incomes, the disabled, the young, the elderly, those with reduced mental capacity and those with poor or no digital access

- The unsuitability of the small claims court may lead to more fraudulent activity and no guarantee that the number of claims will fall

- Increase in under-settlement of claims – the proposals would provide a strong temptation for insurers to offer lower settlements, exploiting consumer ignorance of the process

- Reduced access to justice and equality of arms – many accident victims will be put off by attending court against experienced insurers or representatives for the defence

- Increased number of claims driven by CMCs – will drive an increase in claims with claimant fees deducted from the damages and potential increase in nuisance calls as LiPs are encouraged to process claims

- Enhanced role of McKenzie Friends (paid or unpaid)

- Increase in cold calling, nuisance calls and spam text

- Uncertain future role of the electronic Claims Portal

- Significant injuries will lose compensation – these include, neck, back and soft tissue injuries that can take up to 2 years to heal; loss of part of fingers; dislocations and fractures

- Damages have not increased proportionally as fast as the proposed new SCL – damages awarded today may be the same or less than awards made in the early 1990s

- Substantial costs to public finances - loss of up to £162m to the NHS; £31m to DWP; loss of IPT on ATE and BTE policies; loss of VAT, corporation tax and PAYE; reduction in court fees; loss of jobs in sector; impact on healthcare sector; impact on consumers of having less money awarded

- Increase cost of BTE, if the current model can survive at all

- Loss of Legal Expenses Insurance (LEI) – legal costs will no longer be payable by the at-fault insurer but paid by the legal expenses provider.

<u>Below is a summary of our views on the consultation questions:</u>

- The proposed definition for defining RTA related soft tissue injuries is not fit for purpose

- Diagnosable psychological injuries are serious and to include them in the definition would be to trivialise mental health issues

- We do not consider a six-month injury to be a minor injury, and would prefer a shorter duration, preferably three months

- We agree with the Government's view that setting the period at 9 months would have a disproportionate effect on genuine claimants with significant injuries

- Compensation for pain, suffering and loss of amenity should not be removed. It will have a serious detrimental impact upon claimants, would be an unjustified erosion of legal rights and is not fair or proportionate. Policyholders would justifiably question what they are paying their motor premiums for

- MASS objects to a fixed tariff scheme but if one is introduced then it should be along the lines of the Judicial College Guidelines. Clearly a fixed sum is preferable to no damages at all, but we cannot accept that the massive reductions proposed are reasonable

- If it is felt appropriate that a tariff scheme be introduced, we would urge that the tariff reflect the levels of compensation currently allowed by the courts. The sum suggested clearly does not

- We believe the 'diagnosis' approach could cause difficulties in ensuring that rehabilitation treatment (which would generally be physiotherapy) was provided at the appropriate stage

- There is no problem in principle with the prognosis approach, with which lawyers, medical experts and judges are already familiar and which is used across many personal injury claims including very severe injuries

- The introduction of a diagnosis model would have the opposite effect to controlling claims being brought late in the limitation period

- MASS is opposed to a tariff based system and believe the figures proposed to be far too low

- We agree that there should be judiciary discretion to apply an uplift, but do not feel that a 20% limit is sufficient to cater for all circumstances

- It is not necessary or in any way relevant to the reform of the whiplash claims process to bring other PI claims within the scope of the reform

- MASS has significant concerns with regard to raising the small claims track limit (SCTL) beyond the current figure of £1000. We do not feel that a figure higher than £5,000 could be regarded as reasonable or fair. The suggested figure of £5,000 already far exceeds a figure that could be justified by any inflation-based calculation

- The Small Claims Track in its current form would be wholly unsuitable for PI claims. A new process would have to be made much simpler and easier to understand. MASS reiterates our view that the small claims court is not suitable for personal injury claims as the complexity of handling these claims should not be underestimated

- The Claims Notification Form be amended to include the source of referral of claim but MASS believes that the information provided should be disclosed only to the Insurance Fraud Bureau, not to the third-party insurers.

2. Challenging Assumptions

2.1. MASS is deeply concerned with the evidence base and assumptions behind the Government's proposals. Whilst there is undoubtedly a problem with fraudulent claims it is far from clear that the problem is as wide spread as claimed and we would challenge many of the suppositions behind the notion of a "compensation culture".

Independence of evidence

2.2 We would strongly urge the Ministry of Justice to look carefully at the statistics and evidence surrounding fraudulent whiplash claims, and not be overly reliant upon insurance figures, which are not independent and have a vested interest in maximising the levels of alleged fraud, reducing the role of independent legal advice and maximising profits in a highly competitive insurance sector.

Whiplash is a genuine injury

2.3 Whiplash is a genuine injury that can cause significant pain and loss of amenity. For even a moderate case the accident victim will be in regular pain and constant discomfort for a year or more, and have symptoms for significantly longer. Typical symptoms include headaches and pain and reduced movement at the back of the neck. In severe cases the victim will suffer lower back pain, paraesthesia in the arms and hands, muscle spasms, dizziness, tiredness, blurred vision and vertigo. Anyone who has suffered from whiplash will strongly testify to its pain and debilitating effects.

The effects of whiplash can be lasting

2.4 The more severe cases of whiplash injury can last in excess of 18 – 24 months and the associated losses can amount to significant figures particularly where a loss of earnings or a reduction in hours is involved. Most people would not consider a claim associated with injuries that can last for as long as two years as 'small' or 'minor'.

Fewer deaths, but a large number of accidents at lower speeds on busier roads in more crowded cars

2.5 Whilst the number of deaths from road accidents has been steadily falling over the last decade, with the number of reported accidents also falling (down by 30% in the past 10 years to the lowest level in the EU), the total number of road casualties (including those not reported to the police) is estimated by the Department for Transport to be significantly higher –with a central estimate of 710,000.

2.6 Average car speeds (due to congestion) in the UK are amongst the lowest in Europe and so minor accidents are more common. The number of road deaths per million population in France is nearly double that of the UK (France – 51.4 per million in 2014, UK – 28.7 per million), whilst in Germany it is 41.7 per million.[1] In short, the number of fatal and serious accidents may have decreased, but the number of less severe injuries has increased with more accidents.

2.7 Careful consideration of the terminology and definitions is needed when accurately comparing figures internationally. Significantly more accidents occur in France, Germany and Spain that do not involve cars but bikes or mopeds, which do not result in whiplash injuries.

2.8 Combined with average speeds in the UK generally being lower than many countries, the UK also has some of the highest concentration of vehicles on our roads in the

[1] RAS52002, International comparisons of road deaths: number and rates for different road users, by selected countries, 2004 – 2013, Department for Transport, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389101/ras52002.xls

world (the UK has 77 vehicles per kilometre of road, compared to an EU average of only 43) [The World Bank, Vehicles (per km of road), 2008-12].

2.9 The Insurance Fraud Taskforce acknowledged the relationship between high vehicle concentration and an increased chance of low velocity accidents in its final report January 2016[2]:

> *"There are some specific physical factors, for example World Bank research has found that the UK has 79% more vehicles per kilometre of road compared with the EU average, increasing the likelihood of low velocity accidents with relatively minor injuries."*

2.10 The UK also has a higher average occupancy of cars than many countries, so if an accident does occur, more people are likely to be injured.

2.11 With slower but busier roads and crowded cars, it follows that low velocity accidents with more minor injuries are more likely to occur in the UK rather than high-speed, more serious injuries. These accidents are more likely to be rear end collisions which are more likely to result in whiplash injuries. A number of academic studies (e.g. Gordon Bannister, Professor of Orthopaedic Surgery at Bristol University) have shown that 90% of RTAs occur at speeds of less than 14mph and others that a collision speed of just 5mph produced neck pain. A MASS survey of 5,042 accident victims suggested 54.8% below 15mph.

2.12 In a 2008 report[3], the ABI observed that whiplash could be prevented by the use of anti-collision technology, correct head restraint adjustment and protective vehicle seat design, as well as improving driver behaviour (such as reducing 'tailgating'). Studies have suggested that a correctly fitted head restraint can reduce the chance of sustaining a whiplash injury by 24%[4], whilst cars fitted with advanced whiplash prevention systems have a 50% lower risk of sustaining long-term whiplash injuries than those in others cars[5].

2.13 This view has been supported by insurer AXA UK, who said in July 2012 that better designed head restraints and car seats could lead to a reduction of around 65%[6].

International comparisons should be 'approached with caution'

2.14 The insurance industry has been highly successful in bestowing the unwanted title of '*whiplash capital of the world*' upon the UK. The reality is that accurate and comparable international data remains notoriously difficult to obtain. Legal systems are very different across jurisdictions and the terminology/classification of accidents or injuries varies greatly.

2.15 This was acknowledged in the Insurance Fraud Taskforce final report in January 2016[7]:

> *"stakeholders generally agreed that direct comparisons with other countries has to be approached with caution given cultural variations, differences in legal systems, definitions of fraud, comparative penetration of insurance and fraud*

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[2] Para 2.37, Insurance Fraud Taskforce final report, 18 January 2016, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/494105/PU1817_Insurance_Fraud_Taskforce.pdf

[3] ABI, 'Tackling Whiplash', November 2008, http://www.abi.org.uk/content/contentfilemanager.aspx?contentid=24986

[4] Farmer C.M, Wells J.K., Werner J.V., Relationship of head restraint positioning to driver neck injury in rear-end crashes, Accident Analysis and Prevention 31, p722, 1999

[5] Kullgren A., Kraft M., Lie A, Tingvall C., The effect of whiplash protection systems in real-life crashes and their correlation to consumer crash test programmes, 2007

[6] Axa UK, 'Poor head restraints put two thirds at increased risk of whiplash and may add £1bn plus to claims costs', 6 July 2012, http://newsroom.axa.co.uk/media-releases/2012/poor-head-restraints-put-two-thirds-at-increased-risk-of-whiplash-and-may-add-%C2%A31bn-plus-to-claims-costs/

[7] Insurance Fraud Taskforce final report, 18 January 2016, paras 2.35-2.36, https://www.gov.uk/government/publications/insurance-fraud-taskforce-final-report

detection capabilities.

Furthermore countries with tort law systems, like England and Wales, may tend to have higher claims frequency, and more fraud, as a by-product of greater access to justice and knowledge regarding the right to compensation."

2.16 The UK is frequently cited as having one of the highest average motor insurance premiums in Europe. However, differences across the systems are not reflected in these premiums. For instance, the income replacement provided through social security in many states affects the compensation that insurers need to pay and this feeds back through to the premiums. This can make the UK seem more expensive when these costs are borne by the welfare state in other countries. Spain has whiplash incidence reported to be as high as 59%[8].

2.17 For instance, France and the UK have very different legal systems. In France, a no-fault scheme has replaced claims for road traffic injuries. The no-fault law extinguishes the legal rights of those who have suffered injury in return for a guarantee of compensation, regardless of who was to blame for the accident. Where there is no basis for finding a person liable for an accident, such a victim will be compensated by the Social Security system. Although this system provides for only limited compensation, the victim will be automatically and immediately indemnified for any injuries suffered.[9]

2.18 As a result, on the question of the mitigation of damages, which the system does not formally recognise, France appears to be an exception in the legal European landscape and indeed has come under increasing pressure from the European Union authorities to harmonise and adopt a more Anglo-style legal process.

Whiplash can be prevented

2.19 In July 2012 Axa[10] said that £1 billion could be saved on claims costs by improving head restraints. Poor head restraints put two-thirds of drivers at increased risk of whiplash. The company carried out research, in conjunction with leading motor research organisation Thatcham, into the cars on the UK's roads and estimated that only 34% have head restraints and seats that would be categorised as "good" when it comes to reducing the risk of the driver being the victim of whiplash injuries.

2.20 Consumers are increasing the risk for themselves through their own negligence. Only 39% of people ever adjust their head restraint while 26% of people say they don't even know how to adjust it. 23% of drivers say that they have been shown how their head restraint should be set - 13% when they bought their car.

2.21 From studies, the factors involved appear to be height (shorter or taller people impacted by a badly adjusted headrest), gender (studies suggest that females are twice as likely to suffer from whiplash as males), vehicle size/weight and head restraints (more elastic seat backs and high head restraints positioned to reduce posterior excursion of the head contribute to a reduction of claims by approximately 50% in vehicle fitted with such seats (Kullgren Report).

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[8] "Minor cervical trauma claims"; Ponle Freno-AXA (2013) "Conclusiones del estudio sobre le latigazo cervical", available at http://www.antena3.com/ponlefreno/centro-estudios/estudios/cuatro-cada-diez-victimas-trafico-sufren-esguince-cervical_2013050700177.html

[9] Compensation for Personal Injury in France, Michel Cannarsa, Universite Jean Moulin-Lyon 3 (France) and Universita del Piemonte Orientale (Italy), http://www.jus.unitn.it/cardozo/review/2002/cannarsa.pdf

[10] Axa UK, 'Poor head restraints put two thirds at increased risk of whiplash and may add £1bn plus to claim costs', press release, 6 July 2012, http://www.axa.co.uk/newsroom/media-releases/2012/poor-head-restraints-put-two-thirds-at-increased-risk-of-whiplash-and-may-add-1bn-plus-to-claims-costs-1/

2.22 We believe that better designed head restraints and seats could play a major role in reducing the number of soft-tissue injuries caused in road traffic accidents.

3. Critiquing the Government's Evidence Base

Number of claims

3.1 The Ministry of Justice tends to rely upon the number of claims recorded with the Department of Work and Pensions (DWP) and Compensation Recovery Unit (CRU) which are unreliable because of potential over reporting. The more reliable statistic is the number of settlements recorded by CRU, because insurers are less likely to over report actual payments made.

3.2 It is worth noting that includes all the pre-medical offers where people are offered compensation without any evidence of whiplash. This is assigned by a claims handler in their office diagnosing and reporting "whiplash".

Total Settlements registered with DWP CRU (2009-2016)

2015-16	555,841
2014-15	577,870
2013-14	641,939
2012-13	651,942
2011-12	641,224
2010-11	570,722
2009-10	543,105

3.3 These figures demonstrate that since a peak after the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) was implemented in April 2013, the number of settled claims has been consistently falling and has nearly reached the levels previously seen in 2009-10.

Number of accidents (reported and unreported)

3.4 A second justification used by MoJ is that at the same time as the number of motor PI claims has increased, there has been a "23% decrease in the number of road traffic accidents reported to the police – between 2006 and 2012 they decreased from 190,000 to 145,00, although trends in unreported accidents are unknown".[11]

3.5 Below are the detailed Department for Transport statistics on the reported personal injury road accidents, by severity, in Great Britain (2006-2014)[12]:

Number of accidents

Year	Fatal	Serious	FSA (Fatal/Serious)	Slight	Total
2006	2,926	24,946	27,872	161,289	189,161
2007	2,714	24,322	27,036	155,079	182,115
2008	2,341	23,121	25,462	145,129	170,591
2009	2,057	21,997	24,054	139,500	163,554
2010	1,731	20,440	22,171	132,243	154,414
2011	1,797	20,986	22,783	128,691	151,474
2012	1,637	20,901	22,538	123,033	145,571
2013	1,608	19,624	21,232	117,428	138,660
2014	1,658	20,676	22,334	123,988	146,322

[11] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/330722/fact-sheet-unjustified-personal-injury-claims.pdf

[12] RAS10013, Reported personal injury road accidents, by severity, Great Britain, 1979-2014, Department for Transport Statistics, https://www.gov.uk/government/publications/reported-road-casualties-great-britain-annual-report-2014

3.6 However, the Department for Transport also acknowledges the deficiencies in the data:

> *"However, it has long been known that a considerable proportion of non-fatal casualties are not known to the police, as hospital, survey and compensation claims data all indicate a higher number of casualties than police accident data would suggest."*
>
> *"The current best estimate is that around 710 thousand people are injured to some degree in road traffic accidents each year. Of these, only around 191 thousand casualties are reported to the police and recorded…. This suggests that about 519 thousand casualties are unreported a year, of which roughly 57 thousand probably had a serious injury."*

3.7 Looking at the more detailed figures, the DfT estimates, with 95% confidence levels, that somewhere between 550,000 and 710,000, with a central estimate of 630,000, people were "slightly injured" in RTAs throughout Britain on average between 2011 and 2015[13]:

Table 4: Estimated total number of reported and unreported casualties, average for 2011-2015, Great Britain

Number (thousands, estimates rounded to nearest 10 thousand)

		95% confidence limits			
	NTS Central estimate (reported and unreported)[1]	Lower	Upper	Stats19 reported[2]	Estimated unreported
Seriously injured	80	50	110	23	57
Slightly injured	630	550	710	168	462
Total casualties	710	630	800	191	519

1. Based on National Travel Survey data collected for 2011-2015
2. Based on police-reported Stats19 casualties for 2011-2015

3.8 Taking into consideration this DfT data, it is wholly inaccurate to consider only the number of reported road traffic accidents when it is acknowledged that there are around 710,000 total accidents (reported and unreported) in Great Britain, with an estimated 630,000 people "slightly injured". The number of settled claims should be seen in this context.

Claims costs

3.9 The costs attributed to whiplash vary greatly and are largely unsubstantiated, despite their adoption by both the Government and the media. The ABI first used the figure of £90 per motorist in February 2012 and this has been used extensively since without any evidence as to its validity or any adjustments for changes in the claims numbers or value. It has further suggested that 20% of motor insurance costs are due to whiplash[14].

3.10 By December 2015[15], the Ministry of Justice was still using the £2bn/£90 per premium cost of whiplash figures first used by the ABI in 2012, suggesting that nothing had changed in nearly four years, despite the abundant evidence.

[13] Page 27, Reported road casualties in Great Britain: main results 2015, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/556396/rrcgb2015-01.pdf

[14] ABI, 'Lifting the bonnet report uncovers the real cost of motor insurance', 5 March 2013, http://www.abi.org.uk/Media/Releases/2013/03/Lifting_the_bonnet_report_uncovers_the_real_cost_of_motor_insurance_.aspx

[15] MoJ press release, Insurers vow to pass on whiplash reform savings, 28 December 2015, https://www.gov.uk/government/news/insurers-vow-to-pass-on-whiplash-reform-savings

3.11 In 2013, Aviva suggested that whiplash and other claims add £118 per driver and that reform, including money "wasted on legal fees", would reduce car insurance bills by an average of £60 per head[16]. By 2015 Aviva claimed that whiplash cost £2.5bn per year, adding £93 to the average motor insurance premium of £372[17].

3.12 The actual figures are very different and are available as a data set from the ABI but only at the cost of several hundred pounds and never released publicly. According to the ABI figures[18], claims costs have actually fallen 29% since 2010 with the amount paid out annually by motor insurers falling from £8.3 billion in 2010 to £5.89 billion in 2014 – a decrease of £2.41 billion.

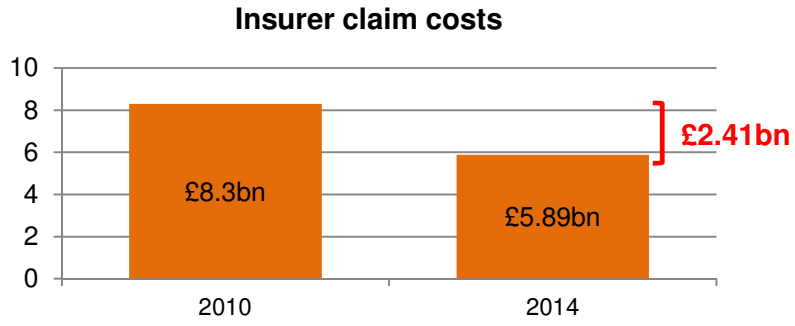

Chart 1 – data source: ABI

3.13 The total value of claims rose consistently each year to 2010 – but much of the increase reflected only general inflation. Between 1991 and 2010, the value of claims rose 116% but, after allowing for inflation, the 'real' increase was only 29%. Since 2010, the total value of motor claims has fallen.

Scale of fraudulent claims

3.14 The scale of fraudulent claims is by its very nature difficult to assess and has always been highly controversial. Figures produced by the insurance sector, which obviously has a strong self-interest in maximising the scale of estimated fraud, have always been challenged by the claimant sector.

3.15 We strongly question the validity of the number of "detected" fraud cases. The "fraud" figure actually combines both proven (staged accident claims, etc.) and what it calls "suspected" fraud, where a claimant withdraws the application having been accused of fraud and/or when a claimant "*accepts (without a credible explanation) a substantially reduced settlement offer in respect of a claim*"[19]. In other words, what is thought to be fraud but cannot be proved as fraud is also included in the ABI's figures as "detected" fraud.

3.16 When the "proven" and "suspected" fraud figures are separated, **the incidence of proven fraud (on its own figures) dropped to 0.25% of all motor claims**. We have no idea what percentage of these 0.25% of claims are for whiplash or other soft-tissue injuries only. Technically fraud cannot increase insurance premiums as to be legally

[16] The Guardian, 'Whiplash add £118 to your car insurance bill', 16 February 2013, http://www.guardian.co.uk/money/2013/feb/16/whiplash-car-insurance-bill
[17] Aviva press release, 12 March 2015, http://www.aviva.co.uk/media-centre/story/17467/aviva-whiplash-costs-25bn-per-year-adding-93-to-mo/
[18] ABI data subscription packages https://www.abi.org.uk/Insurance-and-savings/Industry-data/Subscription-packages
[19] Annex C of the Insurance Fraud Taskforce Final Report

proven fraud it means not only does the insurer not pay out any money, but it also recovers its costs. Suspected frauds and actual frauds are not the same thing.

3.17 Evidence is obviously hard to come by, but there is a strong suspicion that some insurance companies put considerable pressure on employees to 'red flag' as many claims as fraudulent or suspect as possible. A caller to Radio 4's 'You and Yours' programme on 30 May 2014[20] claimed that some insurance call-centre staff have been personally threatened with losing their job if they did not ('red alert') report as many claims as possible.

3.18 Solicitors – both claimant and defendants – have put the level of suspected or alleged fraudulent claims in the range of 1-3%. Even Tom Gardiner, Head of Fraud at Aviva, has said:

> "*We identified fraud on less than 1.9% of claims we received.*"

Detected fraud

3.19 The ABI has claimed that, from data accumulated from its members, the number of detected fraudulent claims has increased steadily in recent years:

> 37,000 cases or "7% of all motor claims" which it valued at £441 million in 2011[21], to 67,000 cases, valued at £835 million, in 2014[22].

3.20 Aviva, one of the leading insurance companies that has actively campaigned against "the compensation culture" and "excessive legal fees" has said that it detected:

> £59.4 million in 2013 (54% of £110 million value of total detected insurance fraud[23])
> 8,400 cases, valued at £57 million in 2014 (60% of 14,000 fraudulent claims worth £95 million in value[24])
> Organised fraud accounted for £38 million in 2014
> One in nine (11%) whiplash claims are associated with fraud.

3.21 This equates to the following average cost per detected fraudulent claim (value of claims divisible by number of cases):

> 2011 - £11,918 per claim (ABI figures)
> 2014 - £12,462 per claim (ABI figures), £6,785 per claim (Aviva figures)

3.22 Given that around 95% of claims are valued under £5,000, these figures (either the value or number of cases or both), particularly from the ABI, appear grossly inflated, unless they include substantial insurer costs.

3.23 Whatever the actual number or percentage of detected fraudulent claims, these claims have presumably not been paid any compensation, so it is false to classify these as costs to the consumer – they were potential costs that were successfully saved by improved detection methods.

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[20] Radio 4's You and Yours, 30 May 2014, 1 min 15 secs, http://www.bbc.co.uk/programmes/b044jh6s
[21] P5, 'No Hiding Place, Insurance Fraud Exposed', ABI, September 2012, https://www.abi.org.uk/~/media/Files/Documents/Publications/Public/Migrated/Fraud/ABI%20no%20hiding%20place%20-%20insurance%20fraud%20exposed.ashx
[22] ABI press release, 13 July 2015, https://www.abi.org.uk/News/News-releases/2015/07/You-could-not-make-up-Savings-honest-customers-insurers-expose-3-6-million-worth-insurance-frauds
[23] Aviva press release, 23 April 2014, http://www.aviva.co.uk/media-centre/story/17299/aviva-detects-110-million-of-insurance-fraud-up-19/
[24] Aviva press release, 12 June 2015, http://www.aviva.com/media/news/item/aviva-organised-fraud-up-28-as-gangs-continue-to-exploit-cash-for-crash-17491/

Undetected fraud

3.24 The ABI estimates that £1 billion of motor insurance fraud went undetected in 2014, out of in the region of £2.1 billion in annual undetected insurance in 2014. But given its highly dubious pronouncements on detected fraud figures, this figure, which by its nature is almost impossible to quantify, the ABI's figures should not be trusted.and have no sound basis in evidence.

3.25 It should be clear by now that the vast majority of claims are entirely legitimate and genuine. This majority should not suffer from being prevented from seeking justice and compensation for their injuries.

3.26 Speaking at an insurance fraud conference on 10 March 2016, it was reported that Tom Gardiner, Head of Fraud (UK and Ireland) at Aviva, said:

> "*Only 5% of customers are fraudsters. How can we make sure the 95% aren't impacted by prevention measures*?"

Motor insurance premiums

3.27 A final justification for the proposed measures is that savings will be passed on to the consumer by insurance companies through reduced motor insurance premiums:

> *"Whiplash claims cost the country £2 billion a year and add £90 to the average motor insurance policy. Previous Government reforms have contributed to a fall in premiums of over 10% since 2012 and insurers have committed to hand over savings from these new reforms to the country's drivers as quickly as possible."*
> Ministry of Justice press release, 28 December 2015[25]

> "*The insurance industry confirmed that motor insurance premiums would fall as a consequence but did not provide an estimate of the likely reduction*."
> Dominic Raab MP, Parliamentary Under-Secretary of State, Ministry of Justice, 13 January 2016[26]

3.28 The Government anticipates its proposed measures will yield cost savings of around £1 billion of which insurers will pass 85% to motorists in reduced motor insurance premiums. There is little historical evidence that these "savings" will be passed onto consumers by insurers through lower motor insurance premiums. There is however considerable evidence to suggest that motor insurance premiums are high because motor insurers are over-charging their policyholders.

3.29 According to the Institute and Faculty of Actuaries (IFoA)[27], in 2014 all third party injury claims up to £13k together are estimated to have contributed over £47 to the average cost per policy, so it would be necessary to exclude all these claims in order to reach the targeted level of savings. The IFoA concluded that even if all of the savings are passed on to consumers to lower the average premium per policy, the Government's target reduction is unachievable.

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[25] MoJ press release, 28 December 2015, https://www.gov.uk/government/news/insurers-vow-to-pass-on-whiplash-reform-savings

[26] MoJ Written Question Answer, http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-01-13/22233/

[27] Institute and Faculty of Actuaries Short Report on Third Party Claims, December 2015, Point 9, page 3, https://www.actuaries.org.uk/news-and-insights/media-centre/media-releases-and-statements/top-6-uk-cities-highest-personal-injury

The poor history of cost savings being passed to consumers

3.30 Part of the problem in tracking the impact of reforms on the price of motor insurance premiums is that there are several systems published and used by the media. Whilst these can agree on general trends over a longer period of time, they can fluctuate in the short term and have greatly varying increases and decreases. Older historical data is also more difficult to source.

3.31 Premiums rose gradually in 2008, accelerated in 2009 and sky-rocketed in 2010 (38% in one year according to the Confused and Towers Watson Car Insurance Price Index). Law firm, Irwin Mitchell, has concluded that of the increase (in the cost of insurance premiums) since 2006, 10.3% was from an increase in whiplash claims and 26.3% was down to inflation, but the vast majority of the rise, 63.4%, is unexplained[28].

3.32 More recently it appears that motor insurance premiums fell moderately initially following implementation of the LASPO reforms in April 2013, the impact of which would not have passed through the system for some time. But since then motor insurance premiums have risen to above or near pre-LASPO levels. Legal costs have been falling for over ten years, having been fixed for RTA cases in 2003, review (and negotiated with insurers) in 2010 and the **LASPO cost reforms introduced in April 2013 reduced legal costs by 60%**.

3.33 The ABI's figures show that the average premium in Q2 2013 was £407. This fell to a low of £381 in Q3 2014 but has since risen to the highest level (£429 in Q1 2016) since the back end of 2012. Over the same period the AA-BIPI Shoparound Survey says that the average premium price was £636 in Q2 2013, falling to a low of £513 in Q2 2014, before rising to near pre-LASPO levels of £625 in Q4 2015.

3.34 The only conclusion is that contrary to numerous claims, **the insurance industry did not permanently pass on all the cost savings to consumers following the reforms (LASPO) in 2012** but enjoyed a **period of record profits** whilst only marginally reducing premiums (much of these falls have been attributed to sector competition).

3.35 With the number of settled claims having fallen since 2010-11 and legal costs having fallen for 10 years, the allegation from the ABI that the cost of motor insurance increased in 2015 due to an increase in the compensation culture is utterly spurious and should be rejected.

[28] Irwin Mitchell, ' Civil Justice Plans To Leave Consumers Short-Changed, Experts Warn', 12 March 2013, http://www.irwinmitchell.com/newsandmedia/2013/march/Civil-Justice-Plans-To-Leave-Consumers-Short-Changed-Experts-Warn

Average motor insurance premium prices according to the ABI and AA-BIPI

Year/Quarter	ABI average motor insurance premium tracker[29] (incl IPT) (£)	AA-BIPI Shoparound Survey[30] (£)
2011 Q4		723
2012 Q1	442	700
2012 Q2	443	706
2012 Q3	430	694
2012 Q4	433	675
2013 Q1	412	655
2013 Q2	407	636
2013 Q3	392	608
2013 Q4	397	579
2014 Q1	385	547
2014 Q2	385	513
2014 Q3	381	519
2014 Q4	398	520
2015 Q1	388	514
2015 Q2	396	541
2015 Q3	403	566
2015 Q4	427	625
2016 Q1	429	

3.36 There is clear evidence that other costs have increased dramatically which are completely unrelated to injury claims. The ABI itself acknowledges that the cost of repairs has increased by 43% in the last three years. In the 2013 ABI report "Lifting the lid on car insurance" the ABI stated average daily payouts for all aspects of claims were £19.4m per day i.e. £7.081bn. They stated that 29% of that figure related to damage and replacement vehicles i.e. £2.053bn.

3.37 In the 2016 ABI report of the same name[31] (published Oct 2016 and using data from 2015) the cost per day had increased to £21.2m per day i.e. £7.738bn. Of this 38% is now attributed to repairs and replacement vehicles, i.e. £2.94 bn. This equates to an increase of £887m or just over 43%.

3.38 Given the insurance sector's track record, it is highly unlikely that the £40-50 reductions promised both in 2012 and again in 2015-16 will ever be passed to consumers. As RAC Insurance Director, Mark Godfrey, said when the latest reforms were announced:

> "*Anything that reduces the cost of car insurance for motorists has to be welcomed, but we should be cautious around the saving figure of £40-£50 a year on average policy costs as previous estimates of savings have been over-egged and one of the reasons behind recent increases in car insurance premiums across the market. The devil, of course, will be in the detail which we wait to see.*"[32]

[29] ABI average motor insurance premium tracker, https://www.abi.org.uk/News/Industry-data-updates/2016/04/ABI-average-motor-insurance-premium-tracker-Q1-2016-data

[30] AA-BIPA Shoparound Survey, 20 January 2016, http://www.theaa.com/newsroom/bipi/car-home-insurance-news-2015-q4-bipi.pdf

[31] ABI, October 2016, Lifting the Bonnet on Car Insurance https://www.abi.org.uk/~/media/Files/Documents/Publications/Public/2016/Motor/Lifting%20the%20bonnet%20on%20car%20insurance.pdf

[32] RAC press release, 25 November 2015, http://www.rac.co.uk/press-centre#/news/autumn-statement-reaction-car-insurance-premiums-139421

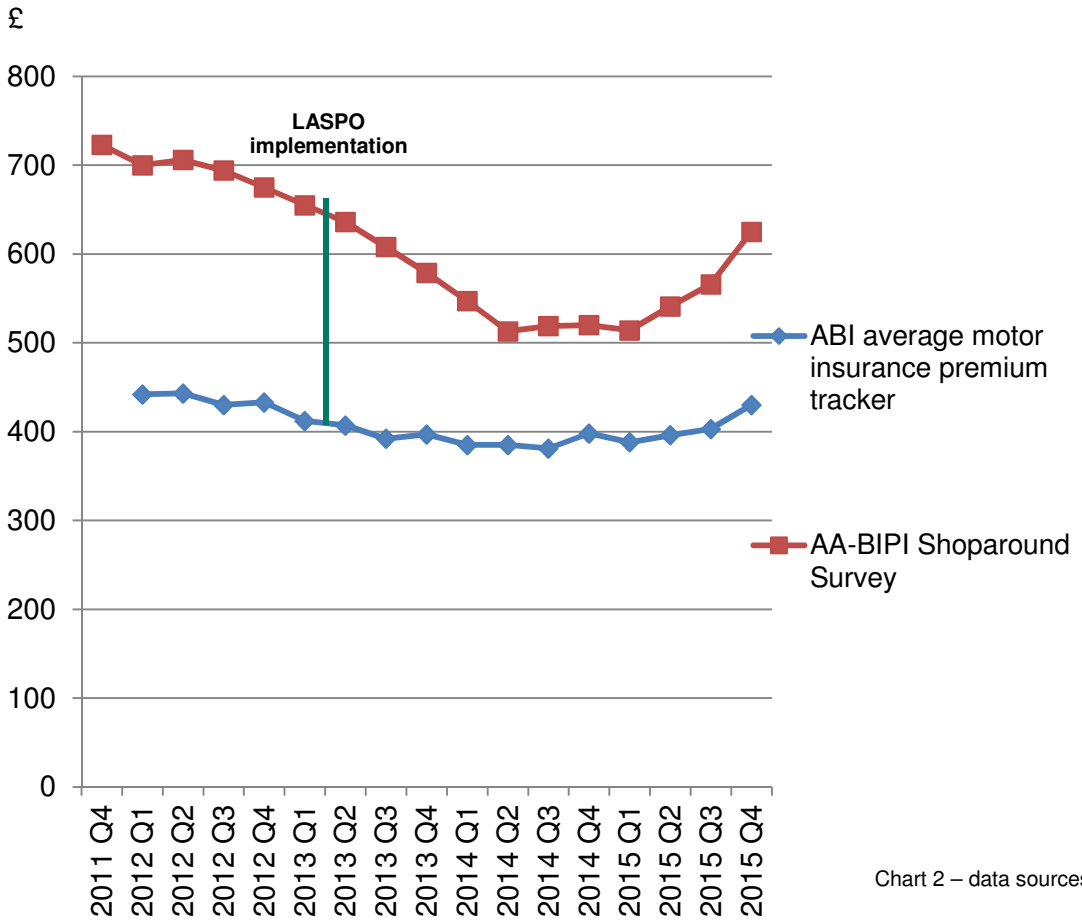

Chart 2 – data sources: ABI & AA

3.39 A 2016 House of Commons briefing paper[33] set out the reasons for this trend:

> "*A feature of the insurance industry is that it is very cyclical and companies frequently use one type of insurance as a loss leader in order to attract other types of cross selling opportunities. Thus, premium rates do tend to follow a cycle in which years of very low increases are followed by years when they catch up. Whether rates harden in a period tends to be correlated by the competitive behaviour of the market. Insurance is a product which is difficult to differentiate as between suppliers. To most drivers it is something you have to have in order to get on the road, the incidence of uninsured driving suggests that were there no legislative requirement for insurance many drivers would 'risk it'.*
>
> *Products that are sold not on the basis of their quality, but on the basis of price are enormously sensitive to price changes and, hence, profits of the sector as a whole are highly volatile. In the face of varying profits, it is relatively cost free for financial groups to either enter the market or to contract the form of business they offer. Eventually, the market as a whole decides that it can no longer afford to charge loss making rates and the catch up period follows*."

Government has no mechanism to enforce savings

3.40 HM Treasury has acknowledged[34] that that there is no mechanism by which the Government can force insurers to pass on the supposed savings from reduced motor

[33] Motor Car Insurance, House of Commons Library, 1 April 2016, http://researchbriefings.files.parliament.uk/documents/SN06061/SN06061.pdf

[34] HM Treasury, Parliamentary Question Answer, 16 December 2015, http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-12-16/20350/

insurance premiums to consumers. Only three insurers (Aviva, LV= and Covea), equating to around 20% share of the market, have publicly committed to passing savings to customers. In other words 80% of the market and around 130 insurance companies have yet to make any commitment to pass on savings. There would be a considerable saving to the insurance industry and yet it is fully acknowledged that there is a complete absence of any mechanism that guarantees return of the savings to consumers. The absence of a commitment from any other insurer to reduce premiums is a clear indication that they do not intend to pass on the savings.

Factors other than 'fraud' increasing motor insurance premiums

Insurance Premium Tax

3.41 Following successive increases in the Insurance Premium Tax (IPT), a doubling of the rate to 12% in 18 months (6% to 9.5% in November 2015, 9.5% to 10% in October 2016 and 10% to 12% from June 2017), it is abundantly clear that the insurance sector will continue to pass IPT increases directly to consumers in increased motor insurance premiums. Claims that further motor insurance premiums are due to fraud and whiplash claims should be treated with the scepticism they deserve.

Add-on insurance

3.42 For the last two years, the Financial Conduct Authority (FCA) has been investigating add-on insurance, of which motor legal expenses insurance is the most popular. The investigation was triggered after the FCA fined Swinton, one of the UK's biggest insurance brokers, £92m for mis-selling from add-on products. The FCA's final report concluded that add-on products were of poor value, were often not what the consumer needed or wanted. If also found that the frequency with which add-on policies were purchased when done so on an opt-out basis were massive (80%), compared to the 40% penetration when sold on an opt-in basis.

3.43 As of the 1st April 2016, the use of pre-ticked boxes and other opt-out methods of selling additional 'add-ons' with purchases of regulated financial products has been banned. There is little doubt that this will hit the profitability of the main motor insurers and that motor insurance premiums will be impacted. It also means that the prevalence of BTE assumed in the Impact Assessment is likely to be out of date and materially wrong.

4. The Unintended Consequences of the proposals

4.1 MASS is extremely concerned at what we believe will be very real unintended consequences should these proposals be introduced. We would urge the Ministry of Justice to consider very carefully what unintended consequences may occur which we believe are likely to create significant difficulties and extra expense for the industry as a whole, and most importantly, leave the accident victim worse off. This would surely be contrary to the Government's intentions of supporting the British public in general, and those 'just about managing' specifically, that they believe would be achieved through these proposals.

4.2 Consequently we are highlighting just some of those unintended consequences and we strongly suggest that the MoJ would benefit from researching in more detail, with full and independent evidence, before embarking on introducing their proposals.

Increase in Claim numbers driven by Claims Management Companies (CMCs)

4.3 MASS is extremely concerned that by raising the Small Claims Track Limit (SCTL) to £5000 it could force claimants into the hands of both the regulated and unregulated CMC sector as Litigants in Person (LiPs) are encouraged to process claims with "assistance" for a fee. We believe that this will lead to an accelerated increase in the number of CMCs operating in PI.

4.4 There are several implications for accident victims and consumers as more CMCs become involved in the personal injury market:

- As more CMCs operate in the personal injury market there will be a **reduction in the quality and independence of advice** available to motor accident victims about their rights and what they should claim for, especially if through unauthorised CMCs.

- There will also be an **increase in fraud**, as CMCs do not have the same professional obligations to assess the validity of a claim before bringing the case forward. These firms will profit from every case and encourage all claims, no matter how spurious.

- In early 2016 the MoJ consulted[35] on the level of fees that CMC can charge consumers relating to PPI or PBA claims (including the banning of third party payments, maximum and capped completion fees, maximum 'cancellation' fee and all upfront fees). This regime of cost controls must be extended to CMCs operating in PI, as soon as possible.

- Alongside all of these changes, there will also be an **increase in cold calling and spam text messages** that plague consumers as the number of CMCs, and the competition between them, increases. This in turn will lead to an increase in the number of claims and not a decrease as expected by the Government.

Increase in Litigants in Person

4.5 In a recent report on LiPs in family courts[36], the Citizens Advice Bureau (CAB) found that "7 in 10 people report that without being able to afford a lawyer, they might 'think twice' about taking a case to court by themselves". Furthermore, 9 in 10 people with

[35] Cutting costs for consumers in financial claims, MoJ, 15 February 2016, https://www.gov.uk/government/consultations/cutting-costs-for-consumers-in-financial-claims

[36] Citizens Advice Bureau, Standing Alone: going to the family court without a lawyer, 28 March 2016, https://www.citizensadvice.org.uk/standing-alone-going-to-the-family-court-without-a-lawyer/

experience of going through court as a LiP say it affected (negatively) at least one other aspect of their life – mental and physical health, working lives, personal finances and relationships with family and friends. The report also points out that there have been adverse effects on courts' administration and efficiency, on court outcomes, extended timeframes and extra costs. In 2013-14 the increase in LiPs in the family court was estimated to cost the MoJ £3.4 million. CAB research shows that only 14% of its users felt confident about representing themselves in court. The experience of being a LiP in a motor accident claim and the subsequent effects on the court is likely to be little different.

4.6 If whiplash claims were to be conducted in the Small Claims Court, District Judges would find themselves dealing with cases with a value significantly higher than £5,000. Under new Civil Procedure Rule 3.1A, judges must ensure that the case management of a claim must have regard to a LiP and adopt a flexible approach. Judges must also make processes more accessible to LiPs, for example by ascertaining those matters to be put to a witness, or supporting the LiP in questioning. Clear language in drafting directions and orders was also to be encouraged – directing people to 'Advicenow' wherever possible. With the courts and judges already under extreme pressure, we question how sufficient time and advice will be provided.

4.7 Greater assistance for LiPs is of course welcome, but no amount of website information or guidance and assistance by Court staff or the Judges is going to sufficiently equip a LiP with the knowledge of how to value their claim and if approached with a low offer how to contest it. The consumer is only likely to find out once it is too late and the settlement has been concluded to their detriment. Consequently this would be no substitute for professional, independent legal representation and would not in anyway close the gap regarding inequality of arms.

Increase in Under-settlement of Claims

4.8 One of the main benefits of legal representation is the independence brought by a lawyer and being able to quantify and value cases correctly. Very often, with legal involvement, the true value of a claim can be significantly more than the offer being first put by an insurer. From a random sample of over 3000 cases settled by MASS Members between 2015-2016, 80% of the final settlement figures were higher than the initial offer made by the third party insurer. MASS is under no illusion that if lawyers are restricted or prevented from the legal process, this will only increase to the detriment of the victim who is unlikely to know any different.

4.9 Of course, this is in part why the insurance sector wishes to strip out "costly" lawyers from the process. They argue that lawyers artificially inflate claims, presumably for their own benefit, rather than acknowledging that they might have something of a financial interest in securing the lowest possible payout on an insurance premium, in order to increase their own profits and shareholders dividends. Findings from YouGov[37] indicate that a significant number of consumers were not confident that an insurer would provide them with the correct amount of compensation if they did not have a lawyer assisting them.

4.10 It is almost impossible for the LiP to have sufficient knowledge and expertise to be able to adequately 'value' their entire claim. The proposals will provide a strong temptation for insurers to offer lower settlements, exploiting consumer ignorance of the process. The MoJ's intention of more robust scrutiny will be seriously undermined if a large number of claims are settled prematurely and under settled even before they have

[37] YouGov Sixth Sense Personal Injury Survey, May 2012 https://yougov.co.uk/news/2012/08/16/personal-injury-claims-low/

been issued. The risk of under settlement will only increase if lawyers are excluded from the process.

Impact on Vulnerable Groups of Society

4.11 The raising of the Small Claims Limit would directly affect the poorer in society, the disabled, those suffering with mental health issues and the young, and indirectly impact on those sections of society who continue to have little or no access to the internet.

4.12 People on lower incomes will likely lose access to justice as they will not be able to fund their own litigation costs and/or will be more adversely affected by losing a proportion of their damages (under a Damage Based Agreement).

4.13 Approximately one third of disabled adults between the ages of 25 to retirement live in low-income households, which is twice the rate of non-disabled adults. It therefore follows that disabled people will be directly affected by the proposals, as less will be able to bring a claim on the fast-track with recoverable costs under a Conditional Fee Agreement (CFA) which protects them from losing any of their damages in paying for legal fees.

4.14 Similarly approximately 30% of children and young adults aged 0-21 live in low-income households. Aside from the impact that the raising of the small claims limit may have on the likelihood of a parent bringing a claim on behalf of a child, those young adults between the ages of 18-21 who are statistically more likely to be on low incomes and live in low-income households than other age demographics in the population, will be directly affected by the raising of the small claims limit, for the same reasons as disabled people will be affected.

4.15 We recognise that it is the MoJ's overall strategy to move many areas of the legal system, both criminal and civil, to online platforms, and fully recognise that there may be considerable efficiencies from doing so. Indeed, the PI sector has been at the vanguard of early adoption in the legal sector of the benefits of technological advances with the successful operation of the Claims Portal and more recently the ongoing development of MedCo.

4.16 We do however have serious concerns that many vulnerable groups, already susceptible to a variety of inequalities when forced to act as LiP, would be further disadvantaged by poor digital access. CAB has noted the increasing problems faced by consumers in legal matters. Whilst initiatives such as CourtNav for those able to fill in court forms unaided are to be welcomed, CAB have highlighted the importance of face-to-face advice for vulnerable clients. Only 25% of CAB users had internet access and 33% had basic IT skills.

4.17 Ofcom's latest[38] assessment of "non-users of the internet is telling. Significant proportions of vulnerable groups are still classified as 'non-users' of the internet. These people will be extremely unlikely to continue to have access to justice without the assistance of legal representation. If they do proceed to claim, they will be highly vulnerable to CMCs who do not have the legal expertise in which to advise and support.

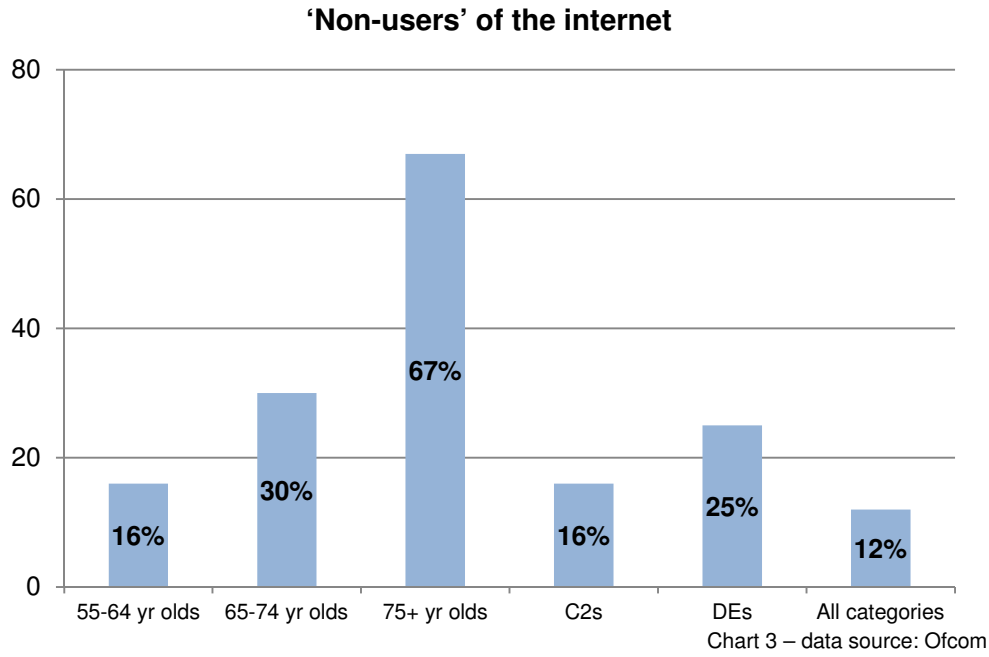

Chart 3 – data source: Ofcom

4.18 It is clear that the drive to self-representation away from independent professional legal advice and the planned over-reliance on online processing will adversely affect people with the protected characteristic of both disability and age.

Increase in Cold Calling, Nuisance Calls and Spam Text

4.19 According to Ofcom[39], unwanted, so-called nuisance calls, relating to accident claims and compensation have increased from 2% in 2013 to 7% in 2015. Whilst still far behind calls about PPI claims (23%) and accompanied by calls about market research (9%), solar panels (8%), home improvements (8%) and insurance (6%), it is noteworthy that the increase in the proportion of PI calls is commensurate with the growth in profitability of the CMC market during the last two years.

4.20 It is clear that the cycle of cold calls, data mining and the sale of data is highly profitable in the UK market. The telephone calls, text messages and emails would not occur if there was not a paying market for the claims they generate. At present there seems to be little or no regulation of CMCs and other organisations of their capability and use of this form of marketing. However, solicitors are not allowed to take on claims generated by cold calls, but clearly some are accepting the generated claims from this source. This is unacceptable and we welcome the Solicitors Regulatory Authority's (SRA) recent warning to solicitors of the serious consequences and robust action if any firms or individuals are found to be doing so.

[38] P.194, Ofcom 'Adults' media use and attitudes' Report May 2015, http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/adults-2014/2014_Adults_report.pdf
[39] Figure 2.5, page 21, Ofcom's Landline Nuisance Calls Panel, Wave 3, January-February 2015 http://stakeholders.ofcom.org.uk/binaries/telecoms/nuisance-calls-2015/Nuisance_calls_W3_report.pdf

Increase in Fraud

4.21 For several years the Government has expressed it's concerns regarding the rise in the number of fraudulent claims, especially those related to whiplash injuries arising from road traffic accidents. MASS has consistently argued that fraud is an unwanted scourge on society and instigated original discussions with the ABI to discuss how the industry can collaborate to tackle the rising trend. These discussions culminated in the development of 'askCUEPI' which was introduced into the claims process in June 2015 as a start of exchanging information within the industry. We have always believed that this should be developed further.

4.22 We are extremely concerned that the Government has now changed its position from tackling fraudulent whiplash claims to a more aggressive position, indicated by these proposals, which has shifted their emphasis by showing a desire to prevent genuine accident victims from claiming compensation for an accident that was through no fault of their own and who are entitled to justice.

4.23 MASS strongly believes that these proposals will have an adverse effect on reducing fraud and are likely to increase fraudulent behaviour:

- Solicitors have processes and systems to identify potential fraudulent behaviour / claims and therefore are able to filter out such claims. If solicitors are no longer in the process, then the number of fraudulent claims will continue to rise.

- There is little doubt that the number of CMCs will increase. Whilst many do operate within their regulated and authorised parameters, there remains a number who do not. Unless and until there are sufficient resources to ensure full and thorough regulation and policing, these proposals are likely to fuel the activity and existence of unregulated CMCs who are willing to exploit the accident victim and encourage frivolous and fraudulent claims.

Enhanced Role of McKenzie Friends (paid or unpaid)

4.24 We are concerned that the MoJ is considering a greater role for McKenzie Friends to support claimants in the absence of professional, trained legal support, following the raising of the Small Claims Limit. Unqualified, unregulated, uninsured but fee charging McKenzie Friends are not a viable alternative to professional legal advice.

4.25 The Society of Professional McKenzie Friends (SPMF) proudly says on its website: "*Anyone can call themselves a McKenzie Friend*." The Legal Services Consumer Panel noted that most had neither a legal qualification nor Professional Indemnity Insurance.

4.26 Whilst it is not within our remit to comment on the value of McKenzie Friends in other areas of civil law, such as family law, we disagree with the encroachment of McKenzie Friends into fee paying legal services. We understand that to date the majority of McKenzie Friends are sole traders and that they command a typical hourly rate of £35-60 and a daily rate of £150-200. Such a fee structure is likely to exceed that of many solicitors who have undergone up to 8 years of training, have paid for a Practicing Certificate, are closely regulated and pay expensive rates of professional indemnity insurance.

4.27 The Legal Services Consumer Panel[40] regrettably ruled out statutory regulation but called for a system of self-regulation via a trade association and a code of practice. It

[40] Legal Services Consumer Panel report, Fee-charging McKenzie Friends, April 2014, http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/2014%2004%2017%20MKF_Final.pdf

recommended that: "*Fee-charging McKenzie friends should be recognised as a legitimate feature of the evolving legal services market [but that] … automatic rights of audience should not be granted to McKenzie friends*."

4.28 We reject the notion that opposing the growth of McKenzie Friends are 'conservative attitudes'. It is perfectly acceptable if people wish to act as McKenzie Friends for free and consumers wish to form a relationship with them on that basis. But charging for such services should not be acceptable, unless they are subject to the same strictures, rules and training of lawyers. It is not accurate for fee-charging McKenzie Friends to portray themselves as a cheap alternative to a lawyer. Ones that charge for their help are an expensive alternative to a LiP doing the work themselves.

4.29 Below is a list of services offered by one unqualified McKenzie Friend online relating to motor accident claims:

> *"Preparing a standard protocol letter in the correct format*
> *Preparing a Statement of Claim and Schedule of Special Damages*
> *You can download examples of Standard Protocol Road Traffic Accident letters and Statements of Claim*
> *Complete Allocation Questionnaires and List of Documents*
> *Prepare Statements*
> *Prepare pre-trial check lists and Listing Questionnaires (sic)*
> *Prepare Bundles for trial*
> *Completing the Motor Insurers' Claim Form for Uninsured and Untraceable Drivers*
> *Researching the value of your claim."*

4.30 MASS would question how an unqualified individual can provide the same standard of advice and support on issues as listed above, without having any legal qualification or significant experience of handling claims.

4.31 In a recent consultation[41], the Judicial Executive Board's expressed its provisional view that:

> "*reform of the courts' approach to McKenzie Friends should adopt the approach taken in Scotland [where fee-charging is banned].….Reform should prohibit recovery of expenses and fees incurred by McKenzie Friends. It should do so through providing that the provision of reasonable assistance in court, the exercise of a right of audience or of a right to conduct litigation should only be permitted where the McKenzie Friend is neither directly nor indirectly in receipt of remuneration*."

4.32 They also suggest that the name should be changed as the original description, which dates from the 1970s, no longer accurately reflects the kind of business-relationship that is now offered. A code of conduct should be introduced so that the court is aware of what they can and cannot do. We would support the general approach of the Judicial Executive Board – McKenzie Friends need to be controlled and regulated as a matter of urgency and a ban on fee-charging and the introduction of a code of conduct would provide some protection for potentially vulnerable claimants.

4.33 We are also greatly concerned at anecdotal evidence that McKenzie Friends are being hired on a self-employed basis by CMCs ahead of the proposed reforms. This worrying

[41] Reforming the courts' approach to McKenzie Friends: a consultation, Lord Chief Justice of England and Wales, February 2016, https://www.judiciary.gov.uk/wp-content/uploads/2016/02/mf-consultation-paper-feb2016.pdf

development would certainly add to our concerns about what a future claims market might look like if the proposed reforms proceed.

Cost to Public Finances

4.34 There will be a wide range of costs to public finances, either through lost recoverable monies or a reduction in various tax revenues from the sector.

- loss of CRU monies (NHS and DWP pick up costs currently paid by insurers on behalf of the at-fault driver);
- loss of Insurance Premium Tax on ATE and BTE policies;
- loss of VAT, income tax, corporation tax (largely SMEs) and PAYE from the claimant and defendant solicitors;
- reduction in court fees (currently subsidises other parts of the court service);
- loss of jobs in the industry (claimant, defendant and all support industries);
- impact on private healthcare industry, medical agencies, etc;
- impact on consumers of having less money awarded (and to spend).

4.35 It is estimated that the sector employs around 40,000 people, pays out more than £1.1 billion in wages, contributes more than £530 million in tax revenue and supports almost 12,500 jobs in the wider economy. Much of this will be threatened by the proposals.

4.36 Each £1 of extra turnover in the legal sector stimulates £1.39 in the rest of the economy, according to an independent analysis[42] undertaken for the Law Society by Cambridge Econometrics. The proposed reforms would have a devastating impact upon the legal sector forcing many firms operating in personal injury out of business and those that survive will have to fundamentally restructure their business model.

4.37 If consumers are deterred from bringing a whiplash claim, then recoverable benefits which would otherwise have been recovered from the 'at fault' driver's insurance company will have to be borne by the public purse. A total of £197,278,035, including £162,830,855 in England, was reclaimed by the NHS following accidents between April 2015 to March 2016[43].

4.38 In 2015/16 the total amount of money re-paid by insurers to the DWP from motor claims was £31.25 million (recoveries made by CRU), recoverable under the Social Security (Recovery of Benefits) Act 1997. Whilst the vast majority of personal injury victims who claim compensation for whiplash do not claim DWP benefits which are recoverable, this is a significant further cost to the public purse.

Claims Portal

4.39 The Claims Portal has delivered considerable benefits to both insurers and law firms over the past few years. We are pleased to note that Claims Portal is likely to have a continued role, but would point out that the Claims Portal currently deals only with liability admitted cases and is designed as a business to business solution, not a business to customer solution and would not, in its current form, be suitable for use by LiPs. MASS believes that it is vital that the Claims Portal is retained but anticipates that significant changes would be required to both the Pre-Action Protocol and the Claims Portal, which would have to be amended prior to any future reforms are implemented.

[42] Economic Value of the Legal Services Sector, The Law Society of England and Wales, March 2016, http://www.lawsociety.org.uk/News/Press-releases/a-25-billion-legal-sector-supports-a-healthy-economy/

[43] https://www.gov.uk/government/publications/nhs-injury-costs-recovery-scheme-april-2015-to-march-2016/nhs-injury-costs-recovery-icr-scheme-amounts-collected-april-2015-to-march-2016

Increase cost of BTE

4.40 If the small claims limit is increased, then the legal costs will no longer be payable by the at-fault insurer through Legal Expenses Insurance (LEI). They will instead have to be paid by the legal expenses provider. Either it will likely become uneconomic for insurers to offer an LEI policy, or the policy may become prohibitively expensive and no-one will buy it. Under both scenarios, the consumer loses out.

4.41 If the reforms are implemented, it is important for the Government not to assume that the BTE market will be able to adapt easily. This is a complex area and it will be very difficult (and could take many years) for BTE insurers to put together a product that works financially; they certainly will not be able to sell any form of BTE insurance at current prices. Whatever view consumers take of the removal of their right to claim for whiplash, they will certainly oppose a policy where they can only get their insurance policy excess back if they pursue through the courts themselves.

Inequality of Arms

4.42 MASS has consistently argued that inequality of arms must be considered when proposing to raise the SCTL for personal injury claims. It cannot be right that an unqualified and vulnerable individual, with little or no legal experience and without 'professional' legal advice, is fighting their claim against a defendant lawyer or insurer representative who will have considerable experience in defending claims. We repeat that the small claims court is not appropriate for personal injury claims, no matter how 'minor' they may be perceived to be.

5. Part 1 – Identifying the issues and defining RTA related soft tissue injuries

Q1: Should the definition in paragraph 17 be used to identify the claims to be affected by changes to the level of compensation paid for pain, suffering and loss of amenity from minor road traffic accident related soft tissue injury claims, and the introduction of a fixed tariff of proportionate compensation payments for all other such claims?

5.1 No. The definition that is given in 1.1(16A) of the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents was drafted for a different purpose. While it was intended to include whiplash claims sustained by the occupants of motor vehicles, in an attempt to minimise the opportunity for non-standard whiplash claims not to be caught, it was deliberately allowed to be wide enough to include other types of soft-tissue injury and would include for example a sprained ankle or wrist, or severe bruising to the knee from contact with the dashboard. This type of injury is not generally "hard to disprove".

5.2 When the only consequence of an injury being caught by the definition was that a certain type of medical report would be required, it was felt that in the interests of ensuring that all whiplash-type injuries including for example radiation of neck pain to the shoulders, it was acceptable that non-whiplash injuries would fall within the definition.

5.3 However when considering a consequence as serious as not assessing compensatory damages on the usual basis for injuries that fall within the definition, we consider the definition needs to be re-drafted so that it covers only the type of injury at which the "whiplash" changes in the law are aimed, i.e. soft-tissue injury to the neck and back.

5.4 If this definition were used, it is likely to lead to disputes and satellite litigation. It would create a situation where the "value" of the pain caused by a sprained ankle was treated differently by the law depending on whether it was sustained in a pavement tripping incident or an RTA.

5.5 We would suggest that a stakeholder group, made up of not only lawyers and insurers but also medically qualified experts, be set up to work on the appropriate definition that would include neck and back whiplash injuries and symptoms such as shoulder pain radiating from the neck, but not other soft-tissue injuries.

Q2: Should the definition at paragraph 17 be extended to include psychological trauma claims, where the psychological element is the primary element of a minor road traffic accident related soft tissue injury claim?

5.6 The wording in paragraph 17 was drafted to address a particular issue that was causing concern in the industry at the time, namely certain law firms obtaining psychological reports in a large percentage of what appeared to be routine whiplash injury claims. Where there is an identified psychological injury that is relatively minor but for example the duration of symptoms exceeds the duration of symptoms from the whiplash injury but is still relatively short, it may be appropriate for such an injury to be covered by the definition, although it should be carefully drafted to ensure that accidents causing serious psychological problems are not included and that psychologically vulnerable individuals are not exposed to prejudicial treatment under the system. We would suggest that it should specifically exclude conditions diagnosed as falling within recognised clinical conditions within ICD or DSM classification systems. Diagnosable psychological injuries are serious and to include them in the definition would be to trivialise mental health issues.

5.7 Again this could be considered by a stakeholder group as suggested in reply to Q1.

Q3: The government is bringing forward two options to reduce or remove the amount of compensation for pain, suffering and loss of amenity from minor road traffic accident related soft tissue injury claims Should the scope of minor injury be defined as a duration of six months or less?

5.8 We do not consider a six-month injury to be a minor injury, and would prefer a shorter duration, preferably three months. Arguably minor whiplash injuries already fall within the current small claims track limit of £1,000, which would be an injury causing symptoms for less than approximately one month. Minor whiplash injury is categorised in the Judicial College Guidelines as an injury from which a full recovery is made within three months. Furthermore, medically, a pain lasting more than 12 weeks is regarded as being 'chronic'.

5.9 However a six-month period would certainly be preferable to a nine-month period.

Q4: Alternatively, should the government consider applying these reforms to claims covering nine months' duration or less?

5.10 No. A nine-month injury is certainly not a minor injury. In our experience, there are a significant number of whiplash injuries where the symptoms last beyond six months and can fail to resolve fully, with the condition becoming chronic. Consequently by extending the period to nine months runs the risk that cases are inappropriately settled.

5.11 We agree with the Government's view that setting the period at 9 months would have a disproportionate effect on genuine claimants with significant injuries.

6. Part 2 – Reducing the number and cost of minor RTA related soft tissue injury claims

Q5: Please give your views on whether compensation for pain, suffering and loss of amenity should be removed for minor claims as defined in Part 1 of this consultation?

6.1 It should not be removed. Doing so would have a serious impact on the people defined by the Prime Minister as "just about managing". People who are struggling to pay their bills every month are the very people who most need financial support if they have an accident, even a minor one. Even a relatively short period off work can have severe consequences for those who are not in the type of employment where paid sick leave can be taken. Even the relatively small amounts proposed under Option 2, although in our view far too low, would make a difference to these people. It is also right in principle as well as well-established law that the tortfeasor should pay compensation for injury caused as well as making good financial losses. As Lord Young said in his report [44] "Clearly, it is right that people who have suffered an injustice through someone else's negligence should be able to claim redress. It is a basic tenet of law and on which we all rely on".

6.2 If these reforms are introduced they will at best deliver a benefit to approximately 21 million consumer policy holders, providing that the £40 saving suggested, is actually passed on and remains. However, it will be over 60 million consumers who will be penalised. This would be an unjustified erosion of legal rights and is not fair or proportionate.

6.3 It is also likely to have an adverse effect on the public perception of the value of compulsory motor insurance, particularly as even on the most optimistic view any reduction in premiums is likely to be minimal, and lead policyholders to question what they are paying for if a significant proportion of the claims for which this insurance was formerly required are no longer able to be brought.

Q6: Please give your views on whether a fixed sum should be introduced to cover minor claims as defined in Part 1 of this consultation?

6.4 MASS objects to a fixed tariff scheme but if one is introduced then it should be along the lines of the Judicial College Guidelines, which are in a sense a tariff scheme but incorporate some flexibility to take into account individual circumstances and the fact that different people may be affected in radically different ways by very similar injuries. This allows damages to be assessed within a set matrix but also allows damages to be fair. Any fixed sum scheme loses this benefit. Clearly a fixed sum is preferable to no damages at all, but we cannot accept that the massive reductions proposed are reasonable.

Q7: Please give your views on the government's proposal to fix the amount of compensation for pain, suffering and loss of amenity for minor claims at £400 and at £425 if the claim contains a psychological element.

6.5 We reiterate our objection to a fixed sum, but if it is felt appropriate that a tariff scheme be introduced, we would urge that the tariff reflect the levels of compensation currently allowed by the courts. The sum suggested clearly does not.

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[44] Common Sense Common Safety October 2010
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60905/402906_CommonSense_acc.pdf

6.6 The starting point of £1,800 does not reflect current levels of damages for a 6th month injury in any event (a figure of £2,500 would be more realistic), and it is not clear how from this starting point a figure of £400 is reached. It would appear that the MoJ figures are based on the software used by insurers, Claims Outcome Adviser (COA) and / or Colossus data.

6.7 MASS believes that this is not only inappropriate but this data is based on settlement data and not outcomes of judicial decisions. There has been no independent audit of COA / Colossus data with the controls that case law reporting would have. We understand that the intention is to allow a relatively nominal sum for PSLA rather than a compensatory award, but would suggest that a sum less than a sixth of the amount that would currently be allowed is far too low.

6.8 A figure of only an additional £25 for claims including a psychological element is far too low. Where the psychological element amounts to no more than a normal level of shock or distress, damages are not awarded in any event. It is necessary to demonstrate a clinically diagnosable psychological reaction, and these symptoms should be properly compensated alongside the physical injury. Even within a fixed tariff scheme some account should be taken of whether there is a diagnosable condition.

6.9 A danger of including a purely nominal sum too low to warrant much argument is that it will simply be paid in every case so those with a genuine psychological injury will not be compensated for it at all.

Q8: If the option to remove compensation for pain, suffering and loss of amenity from minor road traffic accident related soft tissue injury claims is pursued, please give your views on whether the 'Diagnosis' approach should be used.

6.10 We believe the 'diagnosis' approach could cause difficulties in ensuring that rehabilitation treatment (which would generally be physiotherapy) was provided at the appropriate stage. If claimants had to wait six months before obtaining a medical report, they may be concerned at incurring the cost of private physiotherapy with a risk that when they see a medical expert, the expert does not support the need for physiotherapy, leaving them further out of pocket.

6.11 There can be long waiting times on the NHS for physiotherapy, so this could mean that treatment was not provided early enough to have maximum benefit. There would also be a cost to the NHS for provision of treatment which is currently generally provided in the private sector.

6.12 It would also mean that the opportunity of claimants being examined while symptoms were severe would be lost, and would almost certainly lead to many claimants being left in financial hardship due to having to wait to recover loss of earnings. In terms of the risk of paying for the report, for impecunious claimants who are already suffering financial hardship as a result of the accident, it would be very hard for them to meet this expense.

Q9: If either option to tackle minor claims (see Part 2 of the consultation document) is pursued, please give your views on whether the 'Prognosis' approach should be used.

6.13 There is no problem in principle with the prognosis approach, with which lawyers, medical experts and judges are already familiar and which is used across many personal injury claims including very severe injuries. One of the main objectives for

which MedCo was formed was to address the perception that experts were not giving reliable prognoses, and MedCo is now well-placed to move forward with this work to ensure that experts are not simply giving the prognosis period that either the insurer or the solicitor instructing them requires.

Q10: Would the introduction of the 'diagnosis' model help to control the practice of claimants bringing their claim late in the limitation period?

6.14 No, it would have the opposite effect. If claimants are generally not examined until severe symptoms have resolved, there would be likely to be more rather than fewer claimants coming forward long after symptoms have resolved.

6.15 Our view is that addressing the issue of data mining and cold calling/texting would also resolve the problem with late notification of claims. However if the Government remains of the view that late notified claims will remain a problem in future and that action is needed, we believe that:

(a) It is imperative that nothing be done that would change the current legal position on limitation, which sets a fair balance between a defendant's right not to have an open-ended liability and a claimant's right to bring a claim within a reasonable period

(b) The IFT recommendations are probably not workable as drafted, particularly in the context of the further reform that is proposed, but further work could be done to develop a set of rules that would not have an impact on limitation but place some restrictions on the costs recoverable by claimants whose claims were brought after say 12 months where there was no way of verifying that the injury had been identified earlier.

7. Part 3 – Introduction of a fixed tariff system for other RTA related soft tissue injury claims

Q11: The tariff figures have been developed to meet the government's objectives. Do you agree with the figures provided?

7.1 MASS is opposed to a tariff based system and believe the figures proposed to be far too low. We are not clear why the new tariff amounts are set so far below the current payments. As stated above we consider the starting-point median levels to be on the low side, and of course the Judicial College Guidelines version referred to is already out of date.

7.2 If such a fixed tariff system is introduced we would suggest that to ensure that the figures are set at a fair level, the Judicial College should be asked to calculate the tariff amounts. We feel that within any proposed tariff system there should be some flexibility to ensure that fair compensation is paid to those more severely affected than the average person by a particular injury.

Q12: Should the circumstances where a discretionary uplift can be applied be contained within legislation or should the Judiciary be able to apply a discretionary uplift of up to 20% to the fixed compensation payments in exceptional circumstances?

7.3 We agree that there should be judiciary discretion to apply an uplift, but do not feel that a 20% limit is sufficient to cater for all circumstances.

7.4 Examples of exceptional circumstances, but in no way exhaustive, include:

- Where fraud, fundamental dishonesty or low velocity impact (LVI) is alleged
- Where liability is disputed (inappropriately?)
- Where the individual's loss of amenity is higher than usual, e.g. keen sportsmen or elderly people or disabled whose ability to live independently is hampered.

8. Part 4 – Raising the small claims track limit for personal injury claims

Q13: Should the small claims track limit be raised for all personal injury or limited to road traffic accident cases only?

8.1 The answer appears to lie in the title of this Consultation. It is not necessary or in any way relevant to the reform of the whiplash claims process to bring other PI claims within the scope of the reform.

Q14: The small claims track limit for personal injury claims has not been raised for 25 years. The limit will therefore be raised to include claims with a pain, suffering and loss of amenity element worth up to £5,000. We would, however, welcome views from stakeholders on whether, why and to what level the small claims limit for personal injury claims should be increased to beyond £5,000?

8.2 MASS has significant concerns with regard to raising the small claims track limit (SCTL) beyond the current figure of £1000. The small claims track (SCT) was introduced to provide an informal environment for resolving disputes, with the strict rules of evidence not applying. MASS submits that the majority of personal injury

claims are not suitable for the SCT. In order to ensure fairness, equality of arms and the true meaning of restorative justice, these claims require a formal process and legal guidance to establish liability, the correct medical evidence and to ascertain the right and fair level of compensation. Personal injury claims are subjective and can be complex, even for perceived 'minor' injuries. Whilst some accident circumstances maybe similar, individuals' react to the same or similar injuries differently and their personal background and circumstances vary in every case. Consequently they should not be regarded as an 'item or product' that can easily be formulised and treated as a standard commodity.

8.3 The current limit has been reviewed a number of times and confirmed to be reasonable as it excludes minor injuries but allows claimants to be legally represented where they would be unable to pursue claims effectively without legal representation. None of the key reasons given during these reviews, concluding that the limit should remain at the current level, have changed. In addition the reforms that have been put in place as a result of the reviews need sufficient time to bed in and the beneficial results properly analysed. There are also a considerable number of unintended consequences that are highly likely to occur if the SCTL is raised significantly.

8.4 MASS accepts that the current level has not been raised since 1991 and that there is an argument that a rise is overdue. If that principle is to be followed then there is no justification to raise it to the arbitrary figure of £5000 or above, without the appropriate evidence and calculation in order to justify such a figure.

8.5 It is also worth noting that the current level of the European Small Claims Procedure is for claims worth up to 2000 euros, significantly less than the proposed figure of £5000. Consequently, if the SCTL is to be raised, then MASS would urge that a more measured approach is taken by calculating it on an inflation basis.

8.6 We therefore do not feel that a figure higher than £5,000 could be regarded as reasonable or fair. The suggested figure of £5,000 already far exceeds a figure that could be justified by any inflation-based calculation.

Q15: Please provide your views on any suggested improvements that could be made to provide further help to litigants in person using the Small Claims Track.

8.7 The Small Claims Track in its current form would be wholly unsuitable for PI claims, and in any event the changes to the Civil Courts proposed by Lord Briggs are likely to make the Small Claims Track, in terms of a court process that involves litigants attending a face to face court hearing in a Courtroom, a thing of the past. If the courts are to deal with the subsequent large numbers of litigants in person presenting their own personal injury claims, something closer to an extension of the Claims Portal to deal with these claims would be required, in order to meet the Government's aspirations of a cost and time efficient process.

8.8 A new process would have to be made much simpler and easier to understand, and no matter how much it was simplified, there would still be a percentage of people – those with literacy problems, language difficulties, those unable to use computers due to a wide range of reasons including disability – who would be denied access if they could not afford legal representation. See also paras 4.11-4.18 on the impact on vulnerable groups.

8.9 There are also children and other vulnerable claimants to consider as it is not clear how child claims are to be dealt with under the system proposed. At present court

approval is required for all settlements involving children, and this process carries an inherent requirement for legal advice. This would be inconsistent with a SCT system without lawyer. A similar issue arises in claims by adults without capacity.

8.10 Provision would also need to be made for claimants with disabilities who for example may require a sign language interpreter or non-English speakers who would require a court-approved interpreter.

8.11 We would suggest that if it is regarded as appropriate for some clients to be dealt with within the SCT, it should only be those cases where liability is not in dispute. Otherwise there is no penalty to the insurer for failing to admit liability, and of course it is particularly in liability disputes that the inequality between an unrepresented claimant and a legally represented insurer, creates unfairness.

8.12 MASS therefore reiterates our view that the small claims court is not suitable for personal injury claims as the complexity of handling these claims should not be underestimated.

8.13 There is no such thing as a "relatively straight forward" whiplash claim and such a view demonstrates a fundamental misunderstanding of the difficulties and complexities that can be involved.

8.14 There are many stages in presenting a whiplash claim, including evidential, procedural and technical issues and processes. We are concerned that a LiP would find it difficult, or disproportionately time consuming, to negotiate the number and the complexity of the stages involved and the complication and technicalities which can arise, all of which justify the continued inclusion of independent legal representation within the process.

8.15 The claimant must prove on the balance of probability that:

i. They were owed a duty of care (that the defendant has an obligation not to cause you loss or damage); and
ii. There was a breach of that duty of care; and
iii. The breach of the duty of care caused the injury.

8.16 In proving these three elements claimants will be faced with overcoming legal arguments raised by third party insurers on a range of issues such as:

- Pay for, obtain and understand information in a police report and secure the details of the vehicle(s) involved in the incident;
- Identifying and bringing the claim against the right person; whether that is the driver, the driver's employer, the highways authority or another responsible for causing a hazard on the road;
- Submit applications to the Motor Insurers' Bureau and know why and how this is to be done;
- Deal with specific problems such as causation issues or having pre-existing injuries;
- Understand the need to mitigate their loss and to keep their losses to a minimum;
- Identifying what losses and expenses are recoverable and gathering the evidence in support; in our view many heads of damage would be overlooked such as, for instance, minor gratuitous care claims.
- Apply case law surrounding liability and understand the intricacies of liability decisions;

- If the insurer accepts liability, arrange treatment and medical examinations by an independent medical expert and use the report to understand the value of the claim and determine the right time to settle.
- A dispute on liability and/or contributory negligence; necessitating the gathering of evidence from witnesses, the police and engineering experts.

8.17 Claimants will also have to address problems with their claim both in terms of process and discussions with insurers. This might include:

- Difficulties using the RTA Portal, particularly in complex cases or when the case falls out of the Portal system; or
- Negotiating with an insurer who denies liability;
- Considering and advising upon any offers including Part 36 Offers to Settle, which are often used tactically by an adroit insurer.

8.18 All this presumes that the person at fault is actually insured. When a third-party driver is found to be uninsured (there are estimated to be around 1 million uninsured drivers on British roads), untraced or a foreign driver, then complex rules and procedures need to be followed in pursuing a claim against the Motor Insurers' Bureau.

8.19 That the unrepresented claimant is sufficiently competent to master all the necessary evidential and technical points that may be raised by third party insurers is frankly unrealistic. The proposed system would pit the LiP against a well-resourced, trained professional opponent and removes any semblance of a level playing field by effectively disallowing legal representation.

8.20 Lord Woolf when reviewing the Civil Justice System in 1996 stated that:

> "*Personal Injury cases are too complex and difficult to be dealt with under a summary procedure with no legal representation and…litigants would have difficulty in quantifying their claims without legal advice and that it is unfair to expect an un-represented individual to conduct a claim against an insurance company with legal representation*."

We contend that this is as much the case today as it was twenty years ago.

Q16: Do you think any specific measures should be put in place in relation to claims management companies and paid McKenzie Friends operating in the PI sector? Please explain your reasons why.

8.21 We would firstly have great concerns if these reforms were to be introduced before the Brady reforms to Claims Management Regulation were implemented. Even if these reforms were in place, we would still have considerable misgivings as to the extent to which activities of the claims management sector can be controlled.

8.22 The Claims Management Company Regulator is to be transferred to the Financial Conduct Authority, but it must be properly resourced to regulate the activities of these companies. MASS understands that this is unlikely to happen much before 2020 and has reservations whether the FCA will have the 'will and resources' in which to adequately regulate this sector, bearing in mind it will be a relatively small element of their extensive remit. Concerns have also been expressed across the industry about how CMCs will be held to account in the future. Furthermore, tighter regulation is likely to lead to increased unregulated activity.

8.23 We believe that injured people are best served and protected by being represented by a solicitor. It is vital that whatever changes take place, it remains practicable and affordable for claimants to have access to a solicitor, and that a situation is not created where solicitors, because of the higher cost of running a law firm compared with the cost of running a CMC, exit the market leaving claimants either with no assistance or with assistance only from a CMC or a "paid McKenzie friend". The cost of running a law firm of necessity includes matters such as the cost of effective regulation, full professional indemnity insurance for the protection of clients, and system of staff supervision and training that will ensure that claimants receive a good service.

9. Part 5 – Introducing a prohibition on pre-medical offers to settle RTA related soft tissue injury claims

Q17: Should the ban on pre-medical offers only apply to road traffic accident related soft tissue injuries?

9.1 MASS' concern is with RTA claims. We support the ban in relation to RTA claims, but have no comment to make on non-RTA claims.

Q18: Should there be any exemptions to the ban, if so, what should they be and why?

9.2 Not in relation to RTA soft-tissue injuries.

Q19: How should the ban be enforced?

9.3 A reporting system could be set up whereby any insurer making a pre-medical offer could be reported, e.g. to the FCA, and fined.

9.4 Alternatively or in addition, by providing in law that any payment made pursuant to a pre-med offer should be entirely disregarded in any subsequent legal proceedings, i.e. an insurer would have to pay the damages assessed or awarded by the court without credit being given for the pre-med offer payment.

10. Part 6 – Implementing the recommendations of the Insurance Fraud Task Force

Q20: Should the Claims Notification Form be amended to include the source of referral of claim?

10.1 Yes but MASS believes that the information provided should be disclosed only to the Insurance Fraud Bureau, not to the third party insurers. This information should be provided only for the purposes of the IFB's fraud investigations and should be of no interest to individual insurance companies. Disclosure only to the IFB should remove any concerns on the part of claimant representatives either that they were disclosing commercially sensitive information that might come to the notice of the market, or that insurers' treatment of their client might be influenced by some adverse opinion of a particular referral source.

Q21: Should the Qualified One-way Costs Shifting provisions be amended so that a claimant is required to seek the court's permission to discontinue less than 28 days before trial (Part 38.4 of CPR)?

10.2 No. Whilst it is always undesirable to see claims discontinued shortly before trial, we believe the current system, whereby defendants can apply to set aside a Notice of Discontinuance, is sufficient to cover the exceptional case where a claim is discontinued close to trial without justification, and we understand from members that this power is regularly exercised by insurers.

10.3 Shifting the onus to claimants to seek permission would firstly cause considerable problems with court listing in requiring the courts to accommodate short-notice requirements for hearings, but more importantly would not cause unnecessary costs to be incurred in cases where for example late evidence came to light that changed the claimant's views on the prospects of success.

11. Part 7 – Call for evidence on related issues

We have provided initial opinions for a few of the questions within this section that are directly appropriate for MASS to respond. However, we understand additional time is available for this section if required.

Q22: Which model for reform in the way credit hire agreements are dealt with in the future do you support?
a) First Party Model
b) Regulatory Model
c) Industry Code of Conduct
d) Competitive Offer Model
e) Other

Q23: What (if any) further suggestions for reform would help the credit hire sector, in particular, to address the behaviours exhibited by participants in the market?

Q24. What would be the best way to improve the way consumers are educated with regards to securing appropriate credit hire vehicles?

11.1 In answer to questions 22-24, MASS is aware of, and contributed to, the extensive work undertaken by the CMA in relation to this area during their 2 year enquiry. We would therefore suggest that any further examination of this area needs to be thought through and the input of specialists are sought.

11.2 No doubt the Government is aware of the extensive amount of cases that settle within the ABI GTA and through mutual arrangements between CHO's and insurers. There is also a plethora of case law in this area, which can provide the certainty for the paying party (Copley v Lawn) that appears to be the area of concern. Perhaps the correct working party to take this forward would be the ABI GTA technical committee with the input of lawyers who specialise in this area.

11.3 This is a highly complex area and we may wish to comment further in the future.

Q25: Do you think a system of early notification of claims should be introduced to England and Wales?

11.4 No. It is not necessary. There are other ways of resolving the problems of late-notified claims. See comments in reply to question 10 above.

Q26: Please give your views on the option of requiring claimants to seek medical treatment within a set period of time and whether, if treatment is not sought within this time, the claim should be presumed to be 'minor'.

11.5 MASS believes this is a bad idea. It could create considerable injustice in that a claimant aware of this requirement who had sought medical treatment would escape penalty while an equally or more severely injured claimant who had purchased pain killers over the counter in the hope that this would resolve matters would not. It could also result in unnecessary hospital and GP attendances by individuals, at a point where they did not know whether their injury would prove to be significant, in order to avoid penalty.

Q27: Which of the options to tackle the developing issues in the rehabilitation sector do you agree with (select 1 or more from the list below)?
Option 1: Rehabilitation vouchers
Option 2: All rehabilitation arranged and paid for by the defendant
Option 3: No compensation payment made towards rehabilitation in low value claims
Option 4: MedCo to be expanded to include rehabilitation
Option 5: Introducing fixed recoverable damages for rehabilitation treatment
Other:

11.6 Option 4 seems to be the only sensible option that would ensure that claimants were able to access rehab at the relevant time without being subject to delay or inappropriate treatment where the rehab was controlled by insurers.

11.7 Option 1 is likely to limit the choice of rehab provider available to claimants, as it seems unlikely that all providers would participate in a voucher scheme, but could be used in conjunction with Option 4 if all MedCo rehab providers were required to accept the vouchers.

11.8 Option 2 would also limit choice, and could involve delay while insurers investigate liability, or simply because of delays inherent in the claims handling process.

11.9 Option 3 could clearly leave claimants without access to necessary treatment and increase reliance on NHS provision.

11.10 Option 5 would result in over-payments to some claimants and under-payment to others, and could also mean that claimants decide not to undergo treatment as they feel that they cannot afford it.

Q28: Do you have any other suggestions which would help prevent potential exaggerated or fraudulent rehabilitation claims?

11.11 We may wish to comment further in the future.

Q29: Do you agree or disagree that the government explore the further option of restricting the recoverability of disbursements, e.g. for medical reports?

11.12 MASS disagrees. Restricting the recoverability of disbursements would create injustice for the least well-off claimants.

Q30: A new scheme based on the 'Barème' approach, could be integrated with the new reforms to remove compensation from minor road traffic accident related soft tissue injury claims and introduce a fixed tariff of compensation for all other road traffic accident related soft tissue injury claims. What are the advantages and disadvantages of such a scheme?

11.13 It seems unnecessary and inappropriate to move to a completely different approach to damages, and one that is often used in non-fault regimes.

Q31: Please provide details of any other suggestions where further government reform could help control the costs of civil litigation.

11.14 We may wish to comment further in the future.

12. Part 10 – Impact Assessment

1 – Options

Q1.1: Do you agree with the range of assumptions made in relation to Option 1.1?

12.1 No, to assumptions 1 to 3 and possibly to assumption 4.

12.2 In relation to assumption 1, we believe it to be highly unlikely that 85% of savings (if any) would be passed on to consumers, or that it would ever be realistically possible to accurately ascertain what savings had been made or what percentage of any savings had been passed on. There are always other factors that affect premiums, such as the rate of return on investment and competition between insurers.

12.3 A report commissioned by MASS, The Law Society and APIL, from Compass Lexecon (CL), attached as an Annex to this response, points out that since 2013 the cost of motor-related personal injury claims has fallen by 12% from £4.1 billion in 2013 to £3.6 billion in 2015, but premiums have increased by 4%.

12.4 Whilst we note that assurances have been given by three insurance companies, equating to around 20% of the insurance market, and that the Government is confident that it can ensure that savings are passed on, we have seen no evidence that any method has been devised to track the level of savings made by individual insurers, who for commercial reasons are unlikely to make such data public. In addition the Government has confirmed that there is no legal basis on which the requirement to pass on savings could be enforced.

12.5 The CL report also highlights the need for a sensitivity analysis and indicates that even at a pass-through rate of 90% the maximum net benefit would be £59 million, using the method of analysis adopted in the IA, and that a pass-through rate of 80% the net benefits of all proposals are negative.

12.6 In relation to assumption 2, the number of claims has reduced in recent years, for example by 12% between 2014 and 2015. Further work can bring about greater reductions in the volume and value of fraudulent and opportunistic or exaggerated

claims without the need for reforms, the main impact of which will be felt by those accident victims who have suffered genuine injury, including:

- the improvements in the quality of medico-legal reporting that can be achieved through MedCo;
- improved regulation of the activities of claims management companies, including better control of cold-calling and texting;
- the work of the IFB and other agencies in addressing crash for cash fraud.

12.7 Assumption 3 is an extraordinary assumption. Approximately 40,000 law firm employees are estimated to work in personal injury and many of these employees will have specialised throughout their career in personal injury and will not have easily transferrable skills. Many may have no formal legal qualifications and are likely to have only claims handling experience in personal injury. There can be no reason whatsoever to assume they will easily or at all, find alternative economic activities.

12.8 In relation to assumption 4, clearly there is a risk that claimants who feel that they are suffering financially as a result of reform would look at any available options to make good their losses in other ways. This risk is likely to be low where the claimants are represented by lawyers, who will advise them of the need to claim only justified and valid losses, but may increase if claimants are represented or assisted by individuals or organisations, such as claims management companies and 'McKenzie Friends', that are not subject to regulation equivalent to the Solicitors Regulation Authority Code of Conduct, or if claimants are representing themselves.

Q1.2: Do you agree with the range of assumptions made in relation to Option 1.2?

12.9 No. See response to Q1.1 in relation to assumptions 1 to 3.

Q1.3: Do you agree with the range of assumptions made in relation to Option 2?

12.10 No. See response to Q1.1.

Q1.4: Do you agree with the range of assumptions made in relation to Option 3?

12.11 No. In relation to assumptions 1,3 and 4, please see response to Q1.1.

12.12 In relation to assumption 2, the position relating to BTE insurance is far from straightforward and it is not safe to make any assumptions in relation to BTE insurance. Some BTE insurers will simply exclude SCT claims from being covered under their policies, so claimants may simply find that as soon as their claim is identified as falling under the SCT they will not be covered for legal representation. This is something consumers are unlikely to appreciate (or be made aware of) at the time of taking out the policy.

12.13 For BTE insurance policies that do cover the cost of pursuing claims in the SCT, the increased premium is likely to be high enough to deter consumers from taking our the policy. It is difficult to predict what percentage of consumers will in practice have this cover, but a reasonable assumption would be considerably less than the current levels, estimated to be around 40% of consumers.

Q1.5: Do you agree with the range of assumptions made in relation to Option 4?

12.14 Yes broadly we agree with the assumptions in relation to Option 4, although we cannot comment directly on the percentage or number of claims settled direct by insurers. We are aware that pre-med offers are still being made, despite the MedCo reforms, by some insurers to legally represented claimants, but have little knowledge of offers made to unrepresented claimants.

12.15 We agree that for genuine claimants, the offers made, pre a medical report would often be less than damages assessed on a medical report, but consideration also needs to be given to the fact that some accident victims who were uninjured may accept a pre-med offer but would not have pursued a claim if the offer had not been made.

Q1.6: Do you agree with the range of assumptions made in relation to Option 5.1?

12.16 No. See response to Q1.1.

12.17 Nor do we agree the assumed monetised costs. It cannot be assumed that if PSLA damages were removed or reduced, claimants would not still pursue their financial losses. They may well do so either through CMCs or as litigants in person, in which case insurers and other compensators would incur substantially increased administration costs in dealing with these claims.

13. An alternative package

13.1 There is no simple solution to the problem of whiplash or general fraud; no simple way to combat the deeply entrenched notions that insurance fraud is a 'victimless' crime and offers 'easy' money. It must be tackled on a myriad of fronts, all collectively making a difference – dissuading those who might be tempted to commit a crime and detecting and prosecuting those who have moved beyond temptation into practice.

13.2 The current system is far from perfect, but it does provide many safeguards to protect innocent accident victims who are seeking justice and recompense. The solution to fraud is certainly not to introduce catch-all, indiscriminate policies that might prevent some fraudulent activity, but would also prevent the vast majority of legitimate claimants from seeking the justice they deserve. This is quite simply bad policy and should not be a part of our justice system that is rightly admired throughout the world.

13.3 Tackling the issue of fraud requires a truly holistic approach looking at all aspects of the process from multiple points of view, not down the myopic tunnel of a single industry seeking to benefit financially.

13.4 We believe – and have demonstrated in recent years – that by working collaboratively we can address many of the bad characteristics of the personal injury industry, without reducing access to justice for the genuine accident victim. This alternative package of measures should focus on continued improved data sharing, early implementation of the Insurance Fraud Taskforce, implementation of the Brady Review into CMCs, given the legal powers for a ban on cold calling and texting, tough enforcement action against professional enablers, better enforcement of data protection legislation, continued action against uninsured drivers, improved driver education and graduated licenses, improved car design and telematics.

13.5 Whilst action is being taken on several of these fronts, we would still urge the Ministry of Justice to reconsider a different approach in place of the damaging measures currently being proposed.

Annex

REPORT FOR APIL, MASS AND TLS

Proposed reforms to the soft tissue injury claims process and increase in the small claims court limit

Comments on the government's impact assessment

22 December 2016

Privileged and Confidential

Justin Coombs, Alina Goad, Krishna Nandakumar

Contents

Section 1

Introduction and summary

Introduction

1.1 We have been asked by [the Strategic Alliance[1]] to comment on the impact assessment ("IA") published by the government on its proposals to reform the soft tissue injury ("Whiplash") claims process.[2]

1.2 The government is proposing to:

a. reduce or remove the right to cash compensation for 'minor' soft tissue Whiplash injuries (with 'minor' defined under two alternative proposals as either all injuries where recovery takes less than six months or, alternatively, as all injuries where recovery takes less than nine months);

b. reduce compensation for those soft tissue injury cases where recovery takes longer than those in (a) (i.e. non-minor cases);

c. raise the upper limit for the small claims track for either all road traffic accident ("RTA") claims, or possibly all personal injury claims, from £1,000 to at least £5,000;

d. ban the use of 'pre-medical' offers to settle a Whiplash claim to ensure that only those with a genuine injury receive compensation.

1.3 These measures are intended to crack down on minor, exaggerated and fraudulent Whiplash claims in order to reduce insurers' costs by about £1billion a year, which the government asserts will reduce the average motor insurance premium by around £40 per year.

1.4 Whilst the consultation has multiple potential outcomes, the government has stated a preferred option. This is to remove or reduce compensation for minor Whiplash claims where the injury is resolved within six months, and to limit the increase in the small claims track to £5,000 for all personal injury cases, whilst banning pre-medical offers for Whiplash claims.

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1 MASS, APIL and TLS

2 https://www.gov.uk/government/consultations/reforming-the-soft-tissue-injury-whiplash-claims-process

1.5 Compass Lexecon has been asked to review and comment on the Government's impact assessment of these policies as independent economic experts.

Summary

1.6 Our findings are as follows:

a. The methodology employed by the government in its impact assessment is designed in such a way as to always yield a net benefit from the policy being considered.

b. The government's methodology is also biased towards insurance companies by including their increased profits as a benefit to the policy, but against solicitors by not including their losses as a cost.

c. The impact assessment yields a positive result for the preferred policies only due to the increase in insurers' profits. Consumers and tax payers are actually worse off as a result of the preferred policies. This implies that the preferred options benefit insurers at the expense of a cost to consumers and tax payers.

d. The estimated benefits to consumers depend crucially on the assumed 'pass-through' rate: the proportion of any cost savings to insurers that are passed on to consumers through a reduction in insurance premiums.

e. The actual pass-through rate is uncertain and difficult to estimate. However, the government did not carry out any sensitivity analysis of its results to different assumed pass-through rates.

f. Even at a 90% pass-through rate (which we consider to be implausibly high), the government's preferred policy options result in net costs to consumers and tax payers.

g. At a more realistic 80% pass-through rate, all of the proposed policy options result in net costs to consumers and tax payers.

h. The critical pass-through rate, i.e. the pass-through rate above which the net benefits exceed the net costs of the policies for consumers and tax payers, is above 85% for most policy options and more than 90% for the preferred policy options. This implies that for any plausible pass-through rate, consumers and tax payers will lose out if the preferred policy options are implemented.

Structure of report

1.7 In the remainder of this report we comment on the methodology used in the IA (Section 2) and the assumptions the government makes regarding the impact of the policy proposals on insurance premiums (Section 3). Lastly, we examine the sensitivity of the IA's conclusions to alternative assumptions on the pass-through rate (Section 4).

Section 2

Methodology used

2.1 According to the IA, the objectives of the proposals are to:[3]

> *"disincentivise minor, exaggerated and fraudulent claims so as to reduce the number and cost of claims, leading to savings which insurers can pass back to policy holders in the form of reduced motor insurance premiums."*

2.2 It is clear that the proposals will lead to some reduction in insurers' costs and a reduction in insurance premiums to the extent that insurers pass on these costs.

2.3 The IA assumes a pass-through rate of 85%.[4] Whilst this pass-through rate in itself is questionable (as we argue further below), it implies that 15% of any net benefit to insurers is retained by them as profits. This increase in insurer profitability is included in the government's cost/benefit analysis as a benefit of the policy being considered.

2.4 However, the losses of other corporate stakeholders such as solicitors, medical reporting organisations and claims management companies as a result of the policies are not included.[5] Excluding the costs to these other corporate stakeholders, but including insurer's profits, implies that, by construction, the total benefits will always exceed the total costs of the policies.

2.5 The IA methodology used by the MoJ is designed in such a way as to yield a net benefit from the policy, regardless of the policy measure being assessed. It includes the increase in insurers' profits as a benefit, which is a function of the reduction in legal fees, but does not include the loss of legal fees suffered by law firms as a cost.

2.6 The IA makes the implicit assumption that solicitors, and the civil justice system as a whole, produce no benefits to society so that any reduction in solicitors' revenues is a benefit to society. Using this approach, any policy that reduces use of the civil court system appears to

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3 IA, p. 1.

4 IA, para. 2.4.

5 The IA specifically states that costs and benefits to lawyers, medical experts and CMCs is not taken into account for the NPV calculation. See, para. 2.6.

produce a net benefit to society. For example, a proposal to abolish all employment law or abolish the law of tort would lead to a net benefit under this approach since the reduction in costs to defendants (including both compensation paid and legal costs) would, by construction, exceed the loss of compensation received by claimants.

2.7 Table 1 below shows the total cost to consumers and tax payers, and the total benefit to consumers and tax payers for each proposal assuming an 85% pass-through rate, but without taking into account either profits made by insurers or the loss in fees to solicitors.

2.8 The table shows that, once insurers' costs and benefits are excluded from the impact assessment, the net benefits of most proposals are negative and where the net benefits are positive they are only marginally so. The net costs to consumers and tax payers for the preferred options (5.1a and 5.2a) are greater than £100 million.

2.9 This implies that the net impact, as presented in the IA, is positive only because insurers' profits are taken into account, i.e. insurers gain from the proposals at the expense of consumers and taxpayers.

Table 1: Net benefit to consumers and tax payers assuming an 85% pass-through rate (£ million)

Proposal	Total costs (A)	Total benefits (B)	Defendants' costs (C)	Defendants' benefits (D)	Costs to consumers and taxpayers (E = A – C)	Benefits to consumers and taxpayers (F = B – D)	Net benefit to consumers and tax payers (F - E)
Whiplash proposal (1.1a)	486	577	0	80	486	497	11
Whiplash proposal (1.1b)	884	1,034	0	142	884	892	8
Whiplash proposal (1.2a)	455	547	0	76	455	471	16
Whiplash proposal (1.2b)	834	984	0	136	834	848	14
Whiplash proposal (2a)	630	630	0	87	630	543	(87)
Whiplash proposal (2b)	377	377	0	52	377	325	(52)
Small claims proposal (3)	422	456	0	63	422	393	(29)
Medical reports (4)	138	96	0	0	138	96	(42)
Combination (5.1a)	1,411	1,505	4	205	1,407	1,300	(106)
Combination (5.1b)	1,498	1,649	3	227	1,495	1,422	(73)
Combination (5.2a)	1,379	1,473	4	201	1,375	1,272	(102)
Combination (5.2b)	1,444	1,596	3	220	1,441	1,376	(65)

Notes: *The figures listed above are taken from the most precise estimates published in the IA (which are often in footnotes)."Defendants' costs" and "Defendants' benefits" in the table above refers to the costs and benefits not passed on by insurers to consumers.*

Source: *CL calculations using figures from the IA; 1.1(a and b): p. 24 – 26; 1.2 (a and b): p. 30 – 32; 2 (a and b): p. 37; 3: p. 46-48; 4: p. 55-56; 5.1 (a and b): p. 63 – 67; and 5.2 (a and b): p. 71 -75.*

Section 3

Impact on premiums

Premiums and the cost of Whiplash claims

3.1 The MoJ expects its proposals to result in a drop in premiums of around £40 per policy, per year. This implies that there is a direct relationship between the reduction in the value of personal injury claims and the level of insurance premiums.

3.2 In the past, the average motor insurance premium has increased despite Whiplash claims and the cost of claims falling. This is because premiums are related to a number of factors other than the cost of claims, such as the rate of return on investment.

3.3 Since 2013, the cost of motor related personal injury claims has fallen by 12% - from £4.1 billion in 2013 to £3.6 billion in 2015.[6] In spite of this, car insurance premiums have increased over the same period.

3.4 Figure 3 below shows the number of reported personal injury RTAs, average motor insurance premiums, the net cost of motor claims and the number of Whiplash claims.

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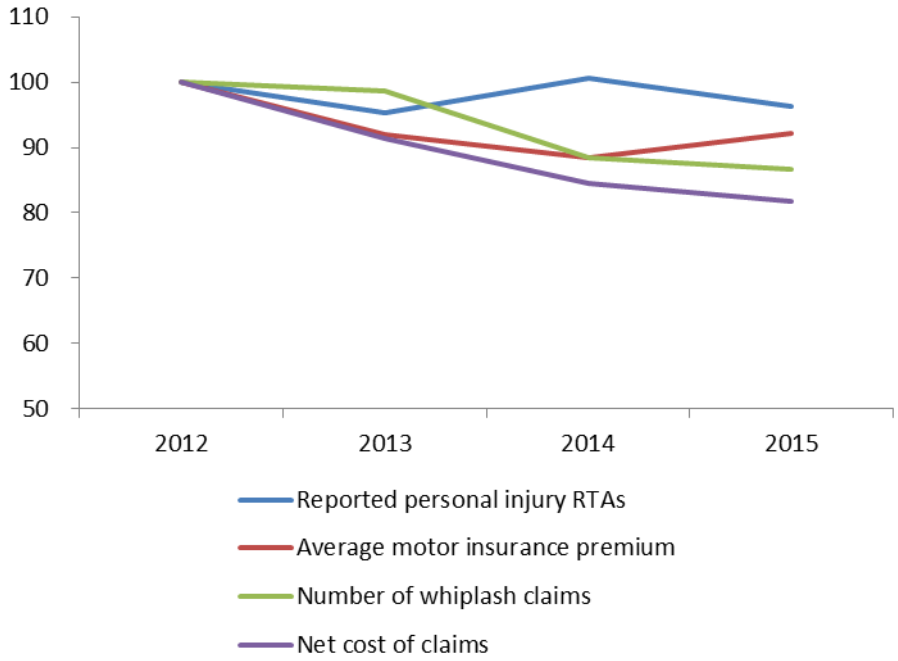
[6] Source: The ABI's Quarterly Motor Statistics, published November 2016, which provides data on the number and average cost of bodily injury claims and the ABI's Insurance Premium Statistics, published October 2016, which provides data on the average motor premium.

Figure 3: Number of personal injury road traffic accidents, average motor insurance premium, net cost of claims and Whiplash claims (base = 2012)



Notes: *Number of whiplash claims published by the CRU refers to financial years, i.e. 2012 refers to April 2011 - March 2012.*

Source: *Reported RTA accidents - DfT, average motor insurance premium and net cost of claims - ABI, number of whiplash claims - CRU.*

3.5 The graph shows that, in 2015, the number of Whiplash claims and the net cost of motor claims fell compared to 2014 (by 12% and 3% respectively) but the average motor insurance premium increased (by 4%). It is not possible to say with certainty whether there is a direct relationship between the average motor insurance premium and the number of Whiplash claims without controlling for other factors. However, given that premiums have risen despite Whiplash claims and the net cost of claims falling, there appears to be a lack of evidence of a strong positive correlation between the cost of claims or the number of Whiplash claims and motor insurance premiums.

Pass-through assumption

3.6 The IA assumes a pass-through rate of 85%, which is based on a Competition and Markets Authority assumption that the pass-through rate is 80-90%.[7]

[7] See 2.4 (iii) of the IA.

3.7 However, as we have identified above, there are many factors that impact the level of premium and a quantitative estimate of pass-through is difficult to obtain. There is certainly no evidence of any correlation between insurers' costs and premium levels in the past.

3.8 Given the uncertainty of the pass-through rate it would have been prudent for the government to have carried out some sensitivity analysis around the 85% assumption, at the very least to calculate the impacts with an 80% and 90% pass-through. We carry out such a sensitivity analysis in the section below.

Section 4

Sensitivity analysis

Introduction

4.1 As explained above, it is important to understand the net benefits that accrue to consumers and taxpayers under alternate assumed pass-through rates. The net benefit is calculated as the total benefits to consumers and taxpayers *less* total costs to consumers and taxpayers. Each of which are calculated as below:

a. Total benefits (costs) as published in the IA but adjusting for a different pass-through rate and for insurance premium tax ("IPT")[8]; *less*

b. Benefits (costs) retained by insurers[9]:

   i. Sum of the benefits (costs) to "Defendants" and "Wider social and economic benefits (costs)" as published in the IA except benefits (costs) relating to IPT[10]; *multiplied by*

   ii. 1 – Pass-through rate.

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8 The total benefits and costs published in the IA assume a pass-through rate of 85%. Therefore, the total costs and total benefits have been adjusted to take into account the assumed rate of pass-through in each sensitivity scenario. For example, for the Whiplash proposal (1.1a) and assuming a pass-through rate of 90%, the total benefits are equal to £577 million (published in the IA) *less* £45 million (IPT using 85% pass-through rate) *plus* £48 million (IPT using pass-through rate of 90%) which is equal to £580 million. The same procedure is followed for total costs.

9 For example, if the pass-through rate is 90%, the benefit to insurers for the Whiplash proposal (1.1a) is calculated as £80 million (defendants' benefits) + £498 million (wider social benefits) - £45 million (insurance premium tax) = £533 million. This is multiplied by 10% (1 – pass-through rate of 90%) which is equal to £53 million. The benefits to consumers and taxpayers are calculated as the difference between £580 million (total benefit) *less* £53 million (benefit not passed on to consumers) which is equal to £526 million (difference due to rounding). The same procedure is followed for the cost to insurers.

10 These have been considered under "Total benefits (costs)" using the rate of pass-through assumed under each sensitivity scenario.

Pass-through rate of 90%

4.2 Table 2 below shows the net benefit to consumers and tax payers assuming a pass-through rate of 90%.

Table 2: Net benefit to consumers and tax payers assuming an 90% pass-through rate (£ million)

Proposal	Total costs (A)	Total benefits (B)	Defendants' and wider social costs (C)	Defendants' and wider social benefits (D)	Costs to consumers and taxpayers (E = A – Cx10%)	Benefits to consumers and taxpayers (F = B – Dx10%)	Net benefit to consumers and tax payers (E / F)
Whiplash proposal (1.1a)	489	580	-	533	489	526	38
Whiplash proposal (1.1b)	889	1,039	-	951	889	944	55
Whiplash proposal (1.2a)	458	550	-	506	458	499	41
Whiplash proposal (1.2b)	839	989	-	906	839	898	59
Whiplash proposal (2a)	633	633	-	581	633	575	(58)
Whiplash proposal (2b)	379	379	-	347	379	344	(35)
Small claims proposal (3)	424	458	247	421	399	416	17
Medical reports (4)	137	95	115	13	126	94	(32)
Combination (5.1a)	1,418	1,512	218	1,369	1,396	1,375	(21)
Combination (5.1b)	1,505	1,656	178	1,506	1,488	1,506	18
Combination (5.2a)	1,386	1,480	218	1,340	1,364	1,346	(18)
Combination (5.2b)	1,451	1,603	178	1,457	1,433	1,457	24

Notes: *The figures listed above are taken from the most precise estimates published in the IA (which are often in footnotes).The figures in columns A and B have been adjusted to take into account a 90% pass-through for insurance premium tax. Columns C and D include all costs and benefits except insurance premium tax (which is already considered under A and B respectively).*

Source: *CL calculations using figures from the IA; 1.1(a and b): p. 24 – 26; 1.2 (a and b): p. 30 – 32; 2 (a and b): p. 37; 3: p. 46-48; 4: p. 55-56; 5.1 (a and b): p. 63 – 67; and 5.2 (a and b): p. 71 -75.*

4.3 The table shows that, once insurers' costs and benefits are excluded, even with a 90% rate of pass-through, the net benefits of each proposal is no more than £59 million. The preferred proposals (5.1a and 5.2a) still both result in a net cost to consumers and tax payers rather than a net benefit. The only reason that the MoJ's assessment results in a positive policy impact is because it includes the increased profits of the insurers. However, this table clearly shows that this increase in profit is, for many policy options, at the expense of a net loss to consumers and taxpayers.

4.4 Table 3 below shows the net benefit to consumers and tax payers assuming a pass-through rate of 80%.

Table 3: Net benefit to consumers and tax payers assuming an 80% pass-through rate (£ million)

Proposal	Total costs (A)	Total benefits (B)	Defendants' and wider social costs (C)	Defendants' and wider social benefits (D)	Costs to consumers and taxpayers (E = A – Cx20%)	Benefits to consumers and taxpayers (F = B – Dx20%)	Net benefit to consumers and tax payers (E / F)
Whiplash proposal (1.1a)	483	574	-	533	483	468	(16)
Whiplash proposal (1.1b)	879	1,029	-	951	879	839	(40)
Whiplash proposal (1.2a)	452	544	-	506	452	443	(9)
Whiplash proposal (1.2b)	829	979	-	906	829	798	(31)
Whiplash proposal (2a)	627	627	-	581	627	511	(116)
Whiplash proposal (2b)	375	375	-	347	375	306	(69)
Small claims proposal (3)	420	454	247	421	370	370	(1)
Medical reports (4)	139	97	115	13	116	94	(22)
Combination (5.1a)	1,404	1,498	218	1,369	1,361	1,225	(136)
Combination (5.1b)	1,491	1,642	178	1,506	1,455	1,340	(115)
Combination (5.2a)	1,372	1,466	218	1,340	1,329	1,199	(130)
Combination (5.2b)	1,437	1,589	178	1,457	1,401	1,297	(104)

Notes: *The figures listed above are taken from the most precise estimates published in the IA (which are often in footnotes).The figures in columns A and B have been adjusted to take into account a 80% pass-through for insurance premium tax. Columns C and D include all costs and benefits except insurance premium tax (which is already considered under A and B respectively).*

Source: *CL calculations using figures from the IA; 1.1(a and b): p. 24 – 26; 1.2 (a and b): p. 30 – 32; 2 (a and b): p. 37; 3: p. 46-48; 4: p. 55-56; 5.1 (a and b): p. 63 – 67; and 5.2 (a and b): p. 71 -75.*

4.5 The table shows that, once insurers' costs and benefits are excluded and with an 80% rate of pass-through, the net benefits of all proposals are negative. If the actual pass-through rate was closer to 80%, this would imply that for all policy options, the net benefit of the policies as found by the MoJ's IA, was achieved through insurer's additional profits at the expense of consumers and tax payers.

Critical level of pass-through

4.6 Given that the pass-through rate is difficult to estimate accurately, another way to assess whether consumers are likely to experience a net benefit from the proposals is by calculating the critical pass-through rate required for the costs and benefits of the policy to break even from the point of view of the consumer. The critical pass-through rate indicates the minimum level of pass-through required for the benefits to outweigh the costs for consumers and tax payers. We calculate two versions of the critical pass-through rate as we explain below.

Simple pass-through

4.7 This pass-through rate is based on the net costs and net benefit figures as published in the IA. However, it is biased because the impact of IPT (which depends on the extent to which insurance premium falls) is a function of the pass-through rate itself. The net costs and net benefits used for this calculation are based on a pass-through rate of 85% for the impact of IPT. This simple pass-through rate is calculated as follows:

a. Net cost to consumers, NHS and HMRC; *divided by,*

b. Net benefit to insurers: calculated as the sum of the net benefit to "Defendants" and "Wider social and economic benefits".

Adjusted pass-through

4.8 In order to solve for the above bias, we also calculate an adjusted pass-through rate by solving for the pass-through rate taking into account the fact that IPT is a function of the pass-through rate.[11] This pass-through rate is not materially different from the simple pass-through rate calculated above, because IPT accounts for a very small proportion of net costs and net benefits for each proposal.

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11 The pass-through rate is calculated by solving the following equation: $P = \frac{(C+N+H)+P\ x\ IPT}{I\ +\ P\ x\ IPT}$. C, N and H refer to net benefits to consumers, the NHS and HMRC which do not depend on pass-through. IPT refers to the insurance premium tax assuming a 100% pass-through. P refers to the pass-through rate. I refers to net benefits to insurers that are independent of the pass-through rate used.

Results

4.9 Table 4 below shows the impact of each option considered in the IA and the critical pass-through rate required for the net benefits to exceed the net costs from the point of view of consumers and taxpayers.

Table 4: Critical pass-through rate for each proposal

Proposal	Net benefits to (£ million)							Critical pass-through (%)	
	Claimants (A)	NHS (B)	HMRC(C)	Defendants (D)	Wider social benefits (E)	Claimants, NHS and HMRC (F = A + B + C)	Insurers (G = D +E)	Simple (F / G)	Adjusted
Whiplash proposal (1.1a)	(413)	(9)	(64)	80	497	(486)	577	84%	84%
Whiplash proposal (1.1b)	(760)	(13)	(111)	143	891	(884)	1,034	85%	85%
Whiplash proposal (1.2a)	(385)	(9)	-61	76	471	(455)	547	83%	83%
Whiplash proposal (1.2b)	(714)	(13)	(107)	136	848	(834)	984	85%	85%
Whiplash proposal (2a)	(581)	0	(49)	87	543	(630)	630	100%	100%
Whiplash proposal (2b)	(347)	0	(30)	52	325	(377)	377	100%	100%
Small claims proposal (3)	(130)	(2)	(42)	63	146	(174)	209	83%	83%
Medical reports (4)	52	0	19	0	(113)	71	(113)	63%	62%
Combination (5.1a)	(1,029)	(9)	(133)	201	1,064	(1,171)	1,265	93%	93%
Combination (5.1b)	(1,129)	(13)	(156)	222	1,228	(1,298)	1,450	90%	90%
Combination (5.2a)	(999)	(9)	(130)	196	1,036	(1,138)	1,232	92%	92%
Combination (5.2b)	(1,080)	(13)	(152)	214	1,182	(1,245)	1,396	89%	89%

Notes: *The net benefit is calculated based on the sum of all impacts. This differs from the figures published in the IA due to rounding.*
Source: *IA; 1.1(a and b): 24 – 26; 1.2 (a and b): 30 – 32; 2 (a and b): 37; 3: 46-48; 4: 55-56; 5.1 (a and b): 63 – 67; and 5.2 (a and b): 71 -75.*

4.10 The table above shows that the critical level of pass-through required is greater than 85% for most proposals. For the government's preferred options (5.1a and 5.2a), the critical pass-through rate is greater than 90%.

4.11 This implies that if the actual pass-through rate is 90% or below, the government's preferred policy options lead to a net loss to consumers and taxpayers.