Financial Guidance and Claims Bill (HL)
Written evidence submitted by the Motor Accident Solicitors Society (MASS)

1. MASS is a Society of solicitors acting for the victims of road traffic accidents (RTA), including those involving personal injury (PI). MASS comprises 120 solicitor firms that employ over 2,000 lawyers and claims handlers throughout the UK. Collectively member firms conduct the vast majority of RTA PI claims each year.

2. We represent claimant solicitors on the boards of MedCo and Claims Portal, both organisations we helped to establish, and have actively engaged in negotiations with both MoJ and the insurers on many aspects of civil justice, including the establishment of the 'askCUE' PI enquiry service to combat fraud. We are currently one of several stakeholder representatives on the MoJ's Whiplash Reform Steering Group and four sub-groups, one of which is the Guidance and Support Working Group considering the implications of the Government's reforms on all relevant court users, including Litigants in Person (LIPs).

Part 2: Regulation of Claims Management Services

3. MASS generally welcomes the Part 2 provisions of the Financial Guidance and Claims Bill in relation to the Regulation of Claims Management Services. This was a key provision of the Brady Review into CMCs and we have long called for a full and complete implementation of the Review's recommendations.

4. Our hope remains that the transfer of the Claims Management Regulation Unit (CMRU) to the Financial Conduct Authority (FCA) is carried out speedily and that the CMC regulator has the tools it needs to oversee the sector properly, both in terms of the powers it is granted in legislation and the financial resources to police the sector. It is imperative that the new regulatory regime is in place and fully functioning so that there is no risk of gaps occurring in the regulatory regime during the transfer. We welcome the extension of the provisions to include Scotland.

5. The regulation of CMCs must also be seen in the context of the Government's proposed changes to whiplash claims - the introduction of an arbitrary and low fixed tariff system to be introduced as part of the forthcoming Civil Liability Bill, and raising the small claims limit from £1,000 to £5,000 under Civil Procedure Rules/Statutory Instruments. At a time when the CMC market is in decline – turnover for the regulated CMC PI sector decreased by 15% in 2016[1] - it is illogical and contradictory that the Government is seeking to effectively force accident victims to either represent themselves as Litigants in Person (LIPs) or lose part of their damages in costs, probably to CMCs. The Government's proposals on whiplash will lead to an accelerated increase in the number of CMCs operating in the personal injury market (currently at around 750 according to the CMRU).

6. We strongly believe that effectively forcing claimants into using CMCs to seek justice is a retrograde step. CMCs operate at much lower professional standards threshold than solicitors, who must account for 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. With an increased number of claims driven by CMCs likely in the future and a potential increase in CMC activity associated with cold calls, it is vital that the regulatory regime is robust and able to cope with these challenges. There will likely 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.

7. We are, however, also aware that tighter regulation runs the risk of leading to increased levels of unregulated activity, either domestic or offshore, and so there is a difficult balance to be struck before the tipping point is reached.

Capping CMC fees (New Clause 3: Interim restrictions on charges)

8. MASS welcomes that the FCA will be given power to impose a cap on the fees that claims management companies can charge for their services. We do, however, hope that the FCA will

[1] P19, Claims Management Regulation Annual Report 2016/17

fully consult with interested parties on the levels of the proposed cap on fees and that Parliament will have a further opportunity to consider this issue.

9. We would also like to put on record our concerns that the higher standard fees charged by the FCA, compared to the CMR, may drive regulated CMCs underground to the unregulated market. FCA regulatory fees need to be set at a reasonable and acceptable level for CMCs.

Cold calling (Clause 4 and New Clauses 6 & 9)

10. MASS has been calling for a complete ban on cold calling for several years, certainly in relation to personal injury claims. It was disappointing that the Bill did not originally include provisions to ban CMCs from cold calling about making a personal injury claim. With millions of calls made to consumers each year actively encouraging them to make a claim after-the-event, claims are encouraged with the temptation of guaranteed compensation that almost certainly would not have been pursued. A blanket ban would dramatically reduce the number of frivolous and potentially fraudulent claims made each year.

Clause 4

11. As a result, we were pleased that amendments seeking to introduce a complete ban (Clause 4) gathered cross-party support and were successfully introduced. However well intentioned, we do agree with the Government that the new Single Financial Guidance Body (SFGB) is not the appropriate body to introduce a ban on cold calling, but should be the FCA, working in close partnership with other relevant regulators such as the Information Commissioner's Office. We also see merit in the argument that the provisions, as it currently stands, would take time to implement - the body needs to be established, develop a report and recommendations, secondary legislation needed to implement. Crucially, the SFGB can only make a recommendation which may be discounted by the Secretary of State. In the event of implementation, neither would the Secretary of State have the power to enforce a ban. Aimed primarily at the financial services CMC market, there remain some doubts about whether this is applicable to the PI CMC market.

New Clauses 6 & 9

12. We have serious concerns about the Government's response (New Clause 6, NC6) to the wishes of the House of Lords. The concept of consent already exists, is highly problematic and can be readily exploited and, as the millions of unwanted nuisance calls every year testify, does not prevent abuses occurring. The Government's proposed NC6 would do little to help solve the problem of cold calling and a golden opportunity to tackle this pressing problem will have been missed.

13. New Clause 9 (NC9) is far preferable as it would introduce a comprehensive ban of cold calling, stipulating a precise timetable, avoiding the concept of consent, defining cold calling to include texts, emails and other forms of communication ("by whatever means, digital or otherwise") and directing the FCA to be the responsible body to implement the ban.

14. We recognise, however, that whilst a ban might be one of most important single initiatives to deter fraudulent and other unwanted behaviour, it is only part of the solution. Fines, enhanced powers for the regulators and caps on the fees that CMCs can be charged will all help dissuade poor behaviour and reduce fraud. However, it is worth noting that only 3% (£60,000) of £2.2 million in fines levied between December 2014 and December 2016 had been paid[2]. Fines only act as a disincentive if they are paid. We acknowledge that even with a ban, cold-calls may still originate from overseas, and some claims farmers may go underground in the UK.

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[2] Law Society Gazette, 28 November 2016, https://www.lawgazette.co.uk/practice/exclusive-cmc-watchdog-failing-to-collect-fines/5058982.article