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Rt Hon David Gauke MP
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Copied to:
Rt Hon Lord Keen of Elie QC, Ministry of Justice Spokesperson, House of Lords
David Parkin, Deputy Director for Civil Justice and Law, Ministry of Justice
Dominic Clayden, CEO, Motor Insurance Bureau

12 June 2019

Dear Lord Chancellor,

Development of the new RTA claims process

As we did during the development of Portal Co and MedCo, MASS has actively and positively engaged throughout the development process as a member of the Stakeholder Advisory Group and its sub-groups and more recently as a delegate in the MoJ/MIB Hartwell two-day workshops. Whilst our views on the direction of the reforms is well known, our representatives have always sought to share their experience and knowledge of legal claims to overcome obstacles in the development process and to ensure that the new claims process works for the benefits of motor accident victims.

We would like to urgently raise several issues and concerns with the development of the new RTA claims process.

Dual operation of the existing Portal and new Litigant in Person (LIP) Portal
We are disappointed that the decision has been taken to have dual-operating Portals, one for RTA whiplash claims below £5,000 and one for all other claims, rather than full integration. This has long been considered the worst option available. It is unfortunate that the MoJ has chosen to cut corners in the development process in order to meet the politically driven deadline of April 2020, rather than taking this opportunity to develop a fully integrated, functional system.

Having dual operating portals with no transfer of data between the two systems will increase costs and result in duplication. It is generally not possible to value injury claims until receipt of the medical report and inevitably there will be many claims which will need to be transferred between the two Portals. Having to re-submit claims will be time consuming, expensive and very confusing for LIPs, insurers and claimant representatives alike. It creates the potential for extensive satellite litigation over who starts what, where and when and possible data protection concerns.

There are several aspects of the new LIP Portal that will not be available to legally represented claimants. It is now confirmed that the MID and AskCUE PI searches are to be incorporated into the new Portal and will be free to LIPs/Claims Management Companies, but there will be a charge for legally represented claimants. LIPs/CMCs will have the option to use ADR in the new Portal, but legally represented claimants will not have this option. The principle appears therefore to have been accepted that different processes will apply to legally represented and non-legally represented claimants. This is discriminatory, unfair and will result in a highly complex system.

In our view, there is little benefit in requiring legally represented claimants to use the LIP Portal, whereas there would be significant benefits in allowing all legally represented claimants to continue to use the current Portal for injury claims below the Small Claims Limit. This would significantly reduce the on-boarding, IT, training and operational demands on insurers and lawyers, and the risk to claimants of a disrupted claims process should there be problems with the new portal. Significantly fewer claims would need to be moved between the Portals, reducing the risk of error and delay.

Allowing legally represented claimants to continue to use the Stage 3 process will significantly reduce the number of cases dropping into Part 7, reducing pressure on the Court Service. It is hard to see why professional users, whether insurers or solicitors, should be required to move to a new Portal, when there is an existing proven process that will remain in operation. Allowing legally represented claimants to continue to use the current Portal would significantly simplify implementation of the reforms, without limiting the intention of the reforms.

Minors/protected parties

The LIP Portal creates a significant risk that vulnerable claimants will not receive the damages that they are due following an accident. We presently have provisions intended to ensure that vulnerable claimants are not exploited, that the correct amount of damages is secured, and that the sums paid are retained by the vulnerable claimant and not spent by a third party.

A child, or person lacking capacity, cannot pursue their own claim through the LIP Portal. They cannot, and should not, be expected to do so. The likelihood is that a parent or other adult will be expected to pursue a claim on behalf of the child or protected party. This removes the protection currently provided to vulnerable claimants through independent legal advice. The current Civil Procedure Rules require every case involving a minor to enter court proceedings, but there is no indication as to how this will be achieved in the new process. Who will arrange and pay for counsel's advice on quantum, who will draft, issue and serve the court proceedings, who will pay the £308 court issue fee, and who will represent the clamant at the hearing?

There is no doubt that these extra costs will act as a significant deterrent to claimants and prevent access to justice, and potentially discriminate against those claimants with protected characteristics. For example, many of those who are protected parties will lack capacity due to a disability, which is a protected characteristic for the purposes of the Equality Act 2010. In order to protect and safeguard their interests, children and protected parties should be excluded from the valuation of whiplash claims on the new tariff and from any increase in the small claims limit.

Furthermore, we fail to understand why this category of claimant are no less vulnerable than those 'vulnerable road users' who have already been excluded from these reforms under the Civil Liability Act.

Rehabilitation, credit hire and repair costs

We believe that it is a serious mistake for the new LIP Portal to ignore the existence of rehabilitation and vehicle damage claims such as hire and repair. These should either be fully integrated from the outset or a clear pathway for them laid out. Not including these common elements of claims will be deeply confusing to claimants, create significant loopholes and lead to further satellite litigation. It is essential that the Part 2 consultation paper, which has been promised for over two years, is published so that the results can be carefully considered along with any potential impact on the launch of the new Portal.

MedCo integration and expansion

We have considerable concerns about the huge amount of extra work and testing that will be required to fully integrate an extended MedCo with the new LIP Portal ahead of full implementation in April 2020. It is essential that the unrepresented claimant fully understands the process and is adequately supported throughout the claims process. They need to: understand how medical reports are commissioned; understand the actual reports; know when, who and how to commission additional experts if their injuries require it; how they can appropriately challenge the findings of reports; understand the related issues around settlement; and understand who pays and when.

If MedCo is to be expanded to include experts for non-soft tissue injuries, they must be fully accredited with strict entry requirements, training, monitoring and auditing, to the level and standard of those MROs / experts who currently provide reports on soft-tissue injuries through MedCo. It would be unacceptable for them to provide expert advice to claimants at a lower level of standards.

It is unacceptable and discriminatory that there might be any doubt over the affordability of obtaining a medical report, even if only in a minority of disputed liability claims. Not being able to afford a medical report must never be a barrier to claimants being able to pursue justice.

We have serious concerns that the proposed fixed fee of £180 is too low for non-soft tissue injury experts and will lead to a sub-optimal service for accident victims, with reduced or fast-tracked time spent on examination and the report, inevitably impacting the accuracy and quality of the report.

Development process and Hartwell

As the development process has gone on, it has been very disappointing that stakeholder meetings ('Hartwell') have been cancelled or delayed and promised papers/reports have not been circulated in time for full consideration prior to meetings.

It has become increasingly clear to us that the Hartwell process has not been a genuinely consultative forum. Views expressed, including those where there has been agreement between insurance and legal representatives, have been ignored and important decisions have either been side-lined or taken elsewhere contrary to the views of the representatives.

Whilst it is welcome that some limited information on the new claims process is now in the public domain, we remain concerned that decisions are being made without proper stakeholder engagement. It appears that design decisions are being made ahead of Court Rules being finalised and there is a risk that either design is expected to dictate the Rules of Civil Justice or there will need to be a re-build. Solicitors and insurers need sufficient time and information to adapt their work processes, design workflows for the new system and integrate with the new portal processes.

MIB have been tasked with a major and complicated project to create the new LIP Portal, but the build process is having to cut corners to achieve the political deadline of April 2020. Decisions are being taken on the IT system ahead of the proper legal process being determined. It is clear to us that the agile process adopted does not work under the timetable proposed. The new LIP Portal must be fully fit-for-purpose and properly tested ahead of launch, and we cannot see that this will be possible with so many important decisions still to be taken and development work still to be undertaken.

A "minimum viable product" that does not safeguard accident victims, fully support Litigants in Person, discriminates against legally represented claimants and provides unfair advantages for CMCs should not be acceptable.

We look forward to receiving a response to these concerns. We will be publishing this letter.

Yours sincerely,

Paul Nicholls
Chair