ABI RESPONSE TO REFORMING THE SOFT TISSUE INJURY ('WHIPLASH') CLAIMS PROCESS

About the ABI

The Association of British Insurers is the leading trade association for insurers and providers of long term savings. Our 250 members include most household names and specialist providers who contribute £12bn in taxes and manage investments of £1.6 trillion.

Executive Summary

One of the Government's stated public policy objectives for the reforms is to deliver cost savings so that those savings can be passed onto consumers in the form of lower motor insurance premiums. Since this consultation opened, the Lord Chancellor has announced that she is reviewing the discount rate and will announce her decision by 31st January 2017. **A reduction in the discount rate could entirely wipe out any savings that will be made from the whiplash reforms and the net result could be that premiums would increase**. The ABI fully support the whiplash reforms, but the timing of the discount rate announcement, particularly if any change is applied retrospectively to existing cases, will eliminate any savings for consumers.

The UK's compensation culture has been rife for years, fuelled by 'no win no fee' agreements and the significant financial gains to be made from low value personal injury claims. Claimants are not at the centre of this process, and many actors in the system view claimants as a commodity from which money can be made. It is essential if the compensation culture is to be tackled that there is a wholesale change in how claims are viewed and managed. Any minor injury should not immediately be viewed as a method to make money. The proposed reforms should be the starting point in moving away from this behaviour.

The proposed package of reforms needs to have a real and permanent impact on claims frequency. If implemented in full, the reforms should go some way to achieving this by removing the incentive to bring claims for very minor soft tissue injuries. There will undoubtedly be calls by claimant solicitor stakeholder groups challenging the package of reforms on the grounds of access to justice. The industry supports the principle that fair payment should be made to claimants with more serious injuries and are committed to simplifying and streamlining the process for claims but there needs to be a balance set between the rights of the many, who pay for these claims through their insurance premium, and the rights of the few, to receive compensation for the most minor of injuries.

For the proposed package of reforms to be truly effective and deliver the Government's stated public policy objectives, they must tackle both claims costs and claims frequency. Previous reforms aimed at tackling the compensation culture have not had the desired effect because claims frequency has not been addressed. As such, **the removal of recoverability**

of general damages for minor soft tissue injuries is by far the most effective way to address claims frequency. In tackling frequency, other societal ills, such as nuisance calls, will also be addressed as the "predatory claims industry" will no longer have as great a financial interest in relentlessly pursuing those who have been involved in an accident.

The definition of "minor" should be limited to soft tissue injuries of up to and including 6 months. Minor should be defined clearly so that claimants, and wider stakeholders, can understand what it means. For example, where a claimant receives a prognosis that they will recover after four months with minimal residual symptoms that will resolve over a longer period of time, the duration of the injury, for the purpose of the claim, should be four months (and not when the minimal residual symptoms have resolved). Those injuries where substantive symptoms settle within 6 months are considered to be minor injuries and should not attract an award of general damages.

The insurance industry strongly supports the tariff proposal within the consultation. The tariff itself is an important safeguard for claimants as it allows certainty and transparency so that all parties will know exactly what a claim is worth. The proposed figures are also supported as being appropriate in light of the overall objectives of the reforms.

The ABI would support just one tariff for general damages as a whole rather than a separate tariff for claims with a psychological element. If the second tariff is left in place it is likely that all claimants will present with some psychological injury and there can be no benefit in encouraging this behaviour as it is at odds with the stated policy aim of disincentivising minor, exaggerated and fraudulent claims.

In any model where there are thresholds there will be gaming from those involved in bringing forward a claim to try to get over the threshold. MedCo and good quality medical evidence will be key to ensuring that this is controlled. Medical experts will, in effect, be the gatekeepers of the process. It will be important for MedCo to collect data to demonstrate what happens to prognosis periods once the reforms are implemented. The re-accreditation process will also need to be conducted thoroughly to ensure that high standards are preserved and that medical evidence is only supplied by those experts who meet those standards.

Claims displacement has the potential to undermine the benefit of the reforms. The shift in focus by the claimant legal and claims management communities to other types of claim was seen following the implementation of the Jackson reforms and the reduction in fixed recoverable costs in the Claims Portal. In particular, insurers experienced a significant increase in the number of Noise Induced Hearing Loss (NIHL) claims. It is essential that careful consideration is given to how to control claims displacement and those within the claims industry that will drive this. Part of the answer to this will be by removing the significant costs that are currently available in personal injury claims from the system.

The industry supports the proposal to increase the Small Claims Track (SCT) limit to £5,000 for all personal injury claims. However, the increase should be phased, with the increase in the limit initially focusing on road traffic accident (RTA) claims. Work

should be carried out to ensure that the safeguards that are proposed in RTA claims are in place in all personal injury claims. The limit should then be increased for all other personal injury claims at a set point after the increase for RTA claims.

An important safeguard will be the development of an easy, user-friendly method for claimants to notify their claims. It is unlikely that the existing Claims Portal provides that solution in its current form, although it could form the basis of one. An IT hub that allows claimants to present and progress their claim, access rehabilitation and obtain medical evidence via a link with MedCo will be required. The ABI have already put significant thought into such a model and would be willing to share this with the MoJ and other stakeholders at the appropriate time.

This package of reforms is fully supported by the ABI. It must be implemented as a complete package to ensure that the government's policy aim of disincentivising minor, exaggerated and fraudulent claims can be achieved.

Background to the reforms

1. The insurance industry has fully supported the Government's civil litigation reform agenda over recent years. These reforms have been aimed at ensuring greater proportionality within the civil justice system and tackling the UK compensation culture. These reforms have included: the removal of recoverability of success fees and after the event (ATE) premium; ban on referral fees; introduction of qualified one way costs shifting; the horizontal and vertical extension of the Claims Portal and accompanying reduction in fixed recoverable costs; the introduction of fixed fees for cases that fall outside the Claims Portal; the introduction of the Criminal Justice and Courts Act 2015 which gives courts greater powers to deal with claims that are fundamentally dishonest; and the implementation of MedCo.

<u>The need for the reforms</u>

2. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) reforms were intended to ensure greater cost proportionality in the civil justice system. It was an exercise in disincentivising the have-a-go compensation culture that had developed in the UK. At the same time that the recoverability of success fees was removed, claimant general damages were increased by 10% following the Court of Appeal's ruling in *Simmons v Castle*[1]; and at the same time that the recoverability of ATE premiums was removed, the introduction of qualified one way costs shifting (QOCS) meant that in most personal injury cases, a defendant could not recover costs from a losing claimant. The effect of these changes has been, and was always intended to be, cost neutral.

3. It was hoped that LASPO and the corresponding Claims Portal and fixed costs extensions would deliver behavioural change that would result in a drop in the frequency of claims, by tackling the financial incentives to bring exaggerated and frivolous claims. However, claims frequency has not reduced. Despite an initial decrease, the number of claims have risen close to pre-LASPO levels which is evidenced in both independent data from the Department of Work and Pensions' Compensation Recovery Unit (CRU) and the Claims Portal

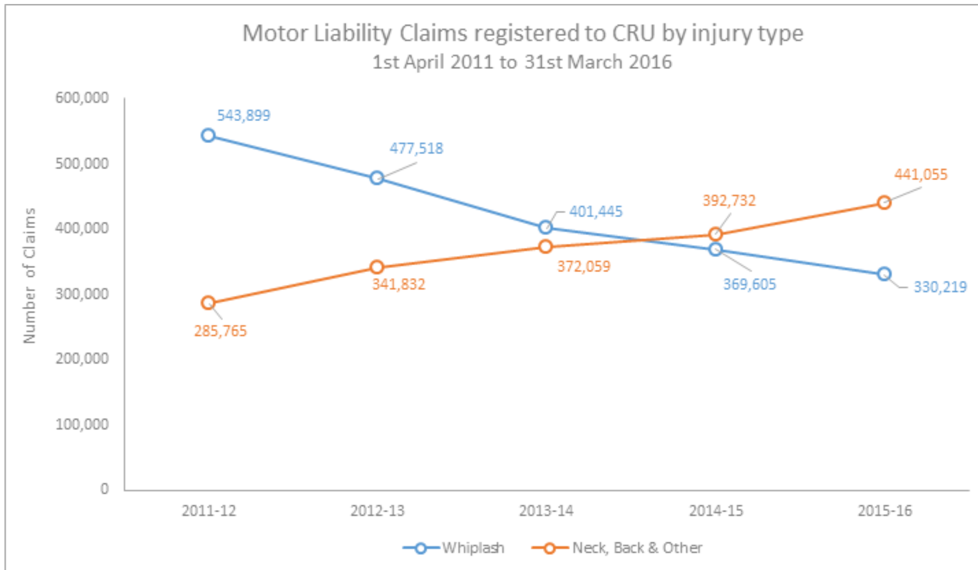
CRU data

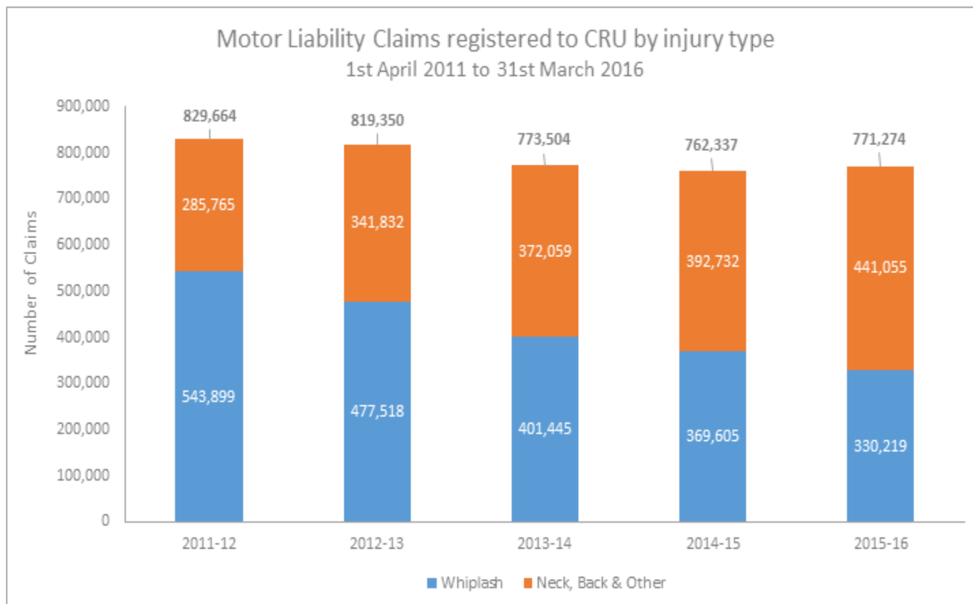
4. While the number of claims registered with the DWP's Compensation Recovery Unit (CRU) and described as "whiplash" has decreased, this has been coupled with a corresponding increase in the number of soft tissue injury claims for neck and back injuries[2]. In 2015/16, the number of RTA soft tissue injury claims fell by 5.8% from the pre-LASPO level as at 2012/13. However, the period before LASPO was introduced was had a particularly high volume of claims as claimant lawyers rushed to submit claims to avoid the new reforms. This can be seen when looking at the

[1] [2012] EWCA Civ 1039
[2] [2] The Cost of Motor Insurance: Whiplash: Further Government Response to the Committee's Fourth Report of Session 2013-14.

total number of soft tissue injury claims in 2013/14, with the total number of claims in 2015/16 decreasing by only 0.3% over the previous two years and in fact increasing by 1.2% from the previous year. This, despite the numerous reforms that the Government has introduced to the civil justice system and the improvements in car safety.

Fig 1&2: Motor liability claims registered to CRU by injury type



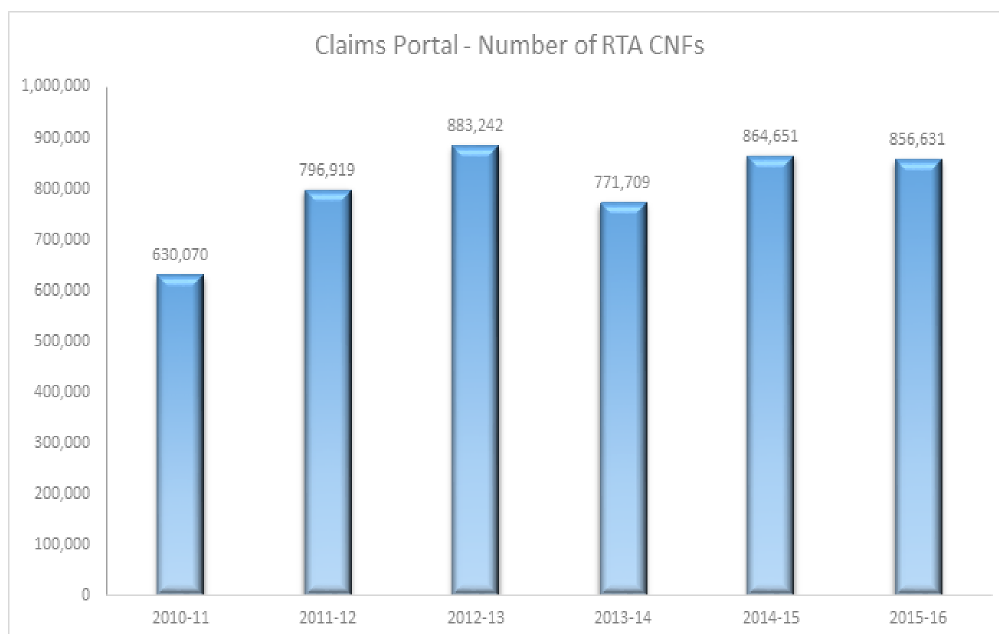


Claims Portal data

5. Data from the Claims Portal demonstrates even more clearly the rising number of claims following the LASPO reforms. Whilst the number of RTA claims notified decreased by 3% from the pre-LASPO high in 2012/13 to 2015/16, the number of claims notified actually increased by 11% in the two year period of 2013/14 and 2015/16. The inclusion of RTA claims into the portal with a value of £10,000-

£25,000 following the extension of the portal process does not have any visible effect on these numbers as they represent less than 1% of RTA claims.

Fig 3: Claims Portal – Number of RTA CNFs 10/11-15/16



6. It is clear that these reforms have not had the desired effect of tackling the compensation culture, and fraudulent or fraudulently exaggerated claims. Claimants can still proceed with claims under "no win no fee arrangements" safe in the knowledge that if they lose, defendants are unlikely to be able to recover costs without a finding of fundamental dishonesty having been made. This has led to a number of claims reportedly being pursued to the doors of the court and then discontinued at the last minute.

7. This level of frequency sits against a background where the UK is one of the safest places to drive in the EU and vehicle are getting increasingly safe. Thatcham Research reports that 88% of new vehicles in 2012 had seats rated 'Good', which would suggest a considerable reduction in the risk of real world whiplash injuries. Additionally, good bumper design, such as that used in almost all newer vehicles, has been shown to work in conjunction with seats to reduce whiplash injury risk[3].

Nuisance calls and Claims Management Companies (CMCs)

8. Further evidence of the compensation culture that is rife in society can be seen in the levels of nuisance calling and other behaviours of claims management companies (CMCs). In 2014, the Information Commissioner's Office (ICO) received 175,000 reports of nuisance calls and texts[4]. The ICO and Claims Management

[3] See Thatcham Research's 'Whiplash Causation and Countermeasure' at Annex E, particularly the sections on seat design and vehicle structure.
[4] https://www.gov.uk/government/news/government-cracks-down-on-nuisance-calling-companies

Regulator (CMR) have been given substantial powers to fine organisations that violate regulations protecting consumers from nuisance and cold calls. Despite these, the number of nuisance calls has not decreased to the levels hoped for. From January to October 2016, the number of reports was over 140,000[5].

9. This is partly explained by the fact that the CMR has only collected 3% of fines it has levied. This is due to two primary factors: firstly, offenders can tie up the process with appeals; secondly and more importantly, rather than pay the fines, several offenders have closed their doors and reopened as 'phoenix' organisations.[6] This shows that the CMR's powers are insufficient to serve as a check on unwanted behaviour. The rigours of the FCA's Senior Managers Regime are required as soon as possible.

10. Despite the implementation of recent reforms, it is clear that the financial incentives that remain in the claims system are still encouraging many CMCs to go to great lengths to circumvent the rules. In addition to these reforms, it is important the Government makes swift progress in fully implementing the recommendations from the Carol Black review of CMC regulation, including the transfer of the regulatory regime to the Financial Conduct Authority (FCA).

EU comparison

11. Given the current level of minor soft tissue injury claims, UK motorists pay some of the highest premiums in the EU.[7]

12. Although the lack of an objective test for minor whiplash injuries is an international problem, it is the UK's civil litigation system and wider compensation culture which has led to whiplash problem.

13. Research carried out by the European Insurance and Reinsurance Federation (now Insurance Europe) in 2004 showed that, at 76%, the UK had as a percentage double the whiplash claims as a proportion of personal injury claims compared with the European average. The ABI has carried out further research with a number of insurance federations across the EU and the overall position has changed little since 2004. The UK (78%) still has substantially higher than average percentage of whiplash claims as a proportion of personal injury claims, than our EU counterparts (48%).

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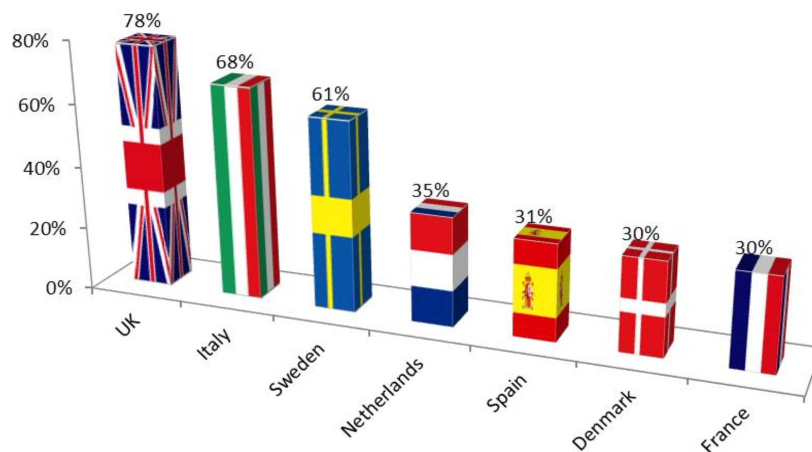
[5] https://ico.org.uk/action-weve-taken/nuisance-calls-and-messages/
[6] https://www.lawgazette.co.uk/practice/exclusive-cmc-watchdog-failing-to-collect-fines/5058982.article
[7] 'The AXA Whiplash Report', Axa, 2013

Fig 4: International comparison[8]



Cost of personal injury claims vs. cost of insurance

14. As we noted in our response to the Ministry of Justice's 2012 consultation *"Reducing the Number and Costs of Whiplash Claims"*, a public policy debate is required to consider whether society deems it fair that motorists are paying higher premiums so that a few can receive significant levels of compensation for minor RTA injuries.

15. In general, the public are in favour of reforms that confront the compensation culture. In its Road to Reform research, Aviva commissioned a poll of 2,000 consumers. Of those, 83% said they want the Government to honour its commitment to tackle high motor insurance costs by reforming whiplash compensation laws.[9]

16. The wider compensation culture has had an impact not just on premium paying motorists, but also on local authorities, large and small businesses, and others who have had to incur cost and time in dealing with minor complaints. It is a positive step that the policy decision has already been taken to remove general damages and increase the small claims track limit, and that the Government's stated aim underpinning the consultation is to disincentivise "minor, exaggerated and fraudulent claims" and tackle the wider compensation culture.

17. A package of reforms is now needed that defines what proportionate compensation looks like, so that minor claims do not attract a level of damages that allows the compensation culture to thrive. It needs to be emphasised that the reforms have to be implemented as a package to have the desired effect.

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[8] Information has been supplied by the ABI, the Danish Insurance Association, Insurance Sweden, Dutch Association of Insurers, Unespa, Fédération Française des Sociétés d'Assurances, ANIA. The Hungarian, Austrian and German Insurance bodies were unable to supply data on whiplash as they do not capture the information as it is not seen to be a problem in their countries.

[9] http://www.insuranceage.co.uk/insurance-age/news/2470285/aviva-poll-calls-for-whiplash-reform

18. That is not to say that genuine claimants with injury claims that are more than minor should be deterred from presenting claims as litigants in person. A simple and consumer-friendly process is required which enables claimants to present their claims direct, to receive the information and support they need, which delivers the compensation due in a timely manner. That system must be both easy to engage with and offer a claimant certainty about the sums offered by way of damages.

Potential savings

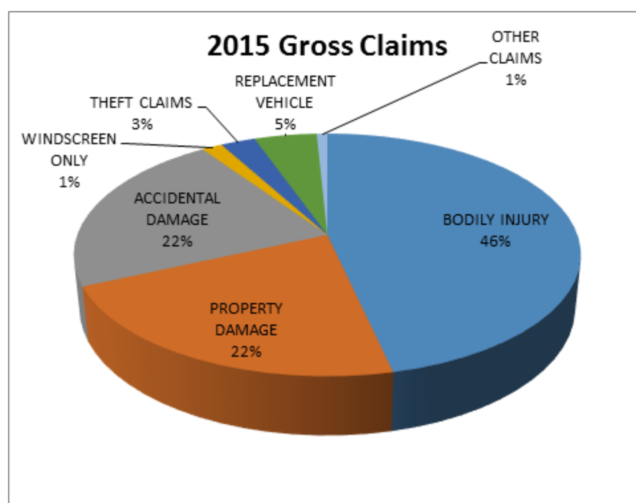
Motor insurance pricing basics

19. The basics of motor pricing are essentially simple; motor premium rates are directly influenced by the frequency and cost of the claims an insurer has to pay, the expenses incurred by the insurer, solvency capital provisions required by the regulator and an insurers' targeted profit margin. Of this, the cost of the claims is by far the largest element. One way insurers compete with each other on pricing is to try to gain a competitive advantage in their capability to appropriately control claims costs and reflect the effect of that control in either reduced premiums, or comparatively lower premium inflation, and thus write more business.

20. The pie chart below, illustrates the main components of motor claims cost which are:

- personal injury claims,
- property damage (damaging someone's property/car),
- accidental damage (damaging your own vehicle),
- replacement vehicles (including credit hire) and
- theft claims.

Fig 5 – Breakdown of claims costs



Passing on savings

21. Saving from the reforms will be passed on to consumers because, as outlined above, a reduction in personal injury claims will reduce overall cost and insurers, in a market where most consumers are driven by price rather than product offering, will be forced to pass this on to remain competitive. Furthermore, a number of large insurers have already publicly committed to passing on the savings resulting from the reforms.

22. The insurance industry has a strong track record of passing on savings from recent reforms. At the start of 2013, the average premium was £412 when insurers first started to price in the LASPO reform savings. Over the next two and a half years, insurers passed on £1.2bn of savings to consumers, following the LASPO reforms.

23. Insurers are confident of this because motor insurance is a simple product; the basic motor policy is the same offering regardless of provider. This makes the car insurance market very fluid (it is easy for a consumer to change provider) and extremely price sensitive. Whether or not reduced input claims costs for low value injury claims results in an overall reduction in average market premiums will then be dependent upon whether other inflationary factors in claims and operating costs remain at a lower level than the savings achieved from the Autumn Statement reforms.

24. An insurer who can gain a competitive advantage by reducing claims costs, independently of the market, has huge advantage as it can gain more business not by marketing or advertising, simply by reducing its prices. Given the big shift in recent years from brokers to online aggregators, motorists are more price sensitive than ever before and will switch providers for only a small saving. When one insurer moves (as a number of insurers have publicly said they will if the Government implements the Autumn Statement reforms), all will move or risk losing market share very quickly.

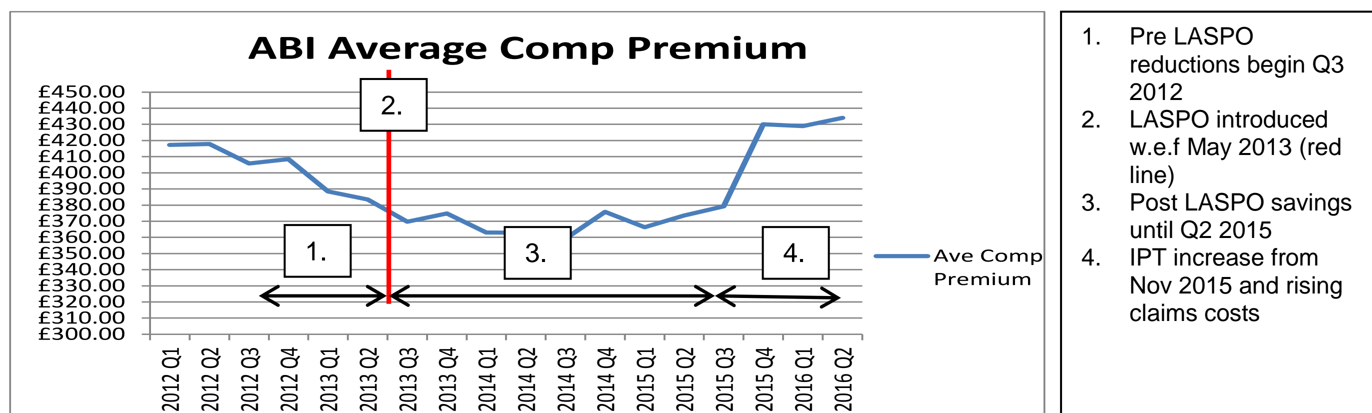
25. The motor insurance market has multiple participants, is highly competitive with 98 insurers writing motor insurance and hugely price sensitive. Any cost reduction factor will inevitably be pushed into pricing.

How savings will be passed on

26. The best way to illustrate this is using the LASPO reforms as a template. The graph below uses the ABI's average personal motor premium tracker and shows how savings were passed on to consumers as a result of the LASPO reforms. It clearly shows a reduction in the average premium prior to, during and after the implementation of the LASPO reforms. This is because motor policies are written on a 12 month contract. LASPO was passed in 2012 but the full reforms did not roll in until 2013. Premiums began to fall in early 2012 anticipating LASPO savings and continued to fall throughout 2013 and 2014. However, as the market cycle started to

harden and insurers started to experience inflationary costs pressures from a number of sources, premiums started to rise again.

Fig 6: ABI average comprehensive premium for private motor insurance



As can be seen above LASPO prompted average premium reductions of £40 - £60 but many customers would have seen this over 2 renewal cycles, not all at once.

Note 1 – Although the chart above shows that average premiums have risen from Q4 2015, following the IPT increase in November 2015, they are still below where they would have been adjusting the average Q1 2012 premium for RPI inflation. Recent inflation on some aspects of claim cost (e.g. AD and Property) has run at higher rates than RPI.

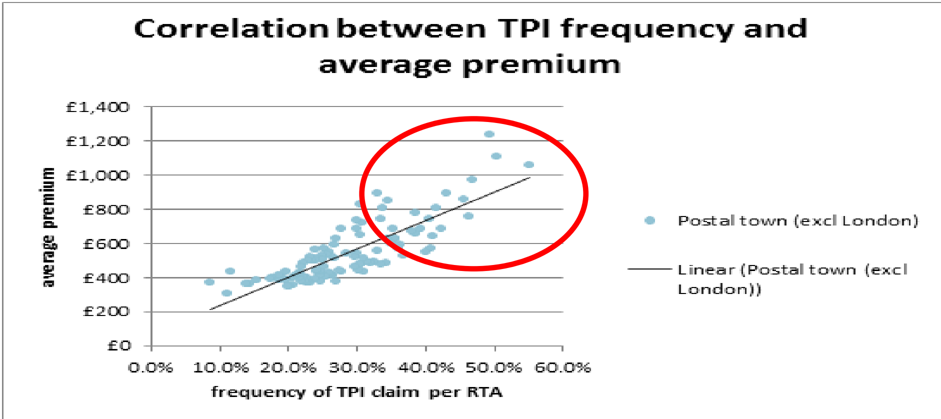
Impact on various consumers groups

27. It is important to understand the potential savings experienced by motorists will differ depending on the type of customer**.** When assessing the likelihood of an incident which causes cost, insurers employ sophisticated models which attempt to classify risk and ensure those who pose a higher risk pay a higher premium. While the detail behind how these models work will be commercially sensitive and will differ according to each insurer, it is possible to draw some broad conclusions as per the following examples:

    Young Drivers – this group will not see such a big reduction. This is because young drivers are a greater risk of severe accidents (a male driver aged 17-21 is up to four times more likely to be involved in a fatal accident than a 40 year old male driver) and severe incidents are not included in the Government's proposals.

    High Risk Post Codes – this group may see a larger reduction. Insurers have long been able to correlate post codes where there are multiple CMC's/Credit Hirers/Solicitors with higher propensity to low severity injury claims and fraud/crash for cash scams etc (see graph below). If these proposals cut such problems then such areas may see bigger than average reductions as the fraudsters move into other fields.

Fig 7: Correlation between RTA bodily injury claims and the average motor insurance premium[10]



As can be seen there is a direct correlation between frequency of injury claims and the average premium paid.

Any action by Government which reduces frequency in the higher risk postal codes (circled) will have a higher impact.

Low Risks – this group is likely to see a lower reduction for reasons opposite to the above.

Commercial Risks – the situation with larger commercial risks is more complex. There is a huge range of models for commercial pricing. This ranges from single vehicles such as vans which are priced similarly to personal lines policies right up to large fleets who effectively self-insure up to certain levels. It is possible to say there will definitely be an impact on commercial policies but that this will be harder for insurers to demonstrate specifically.

[10] This is based on average premium data from the AA as the ABI premium tracker does not provided geographical breakdowns.

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

Definition of RTA related Soft Tissue Injury Claims

Question 1: Should the definition at 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?

Please give your reason why, and any alternative definition that should be considered.

28. Having a definition which is broad enough to avoid circumvention by the claims industry will be challenging, but achieving this is vital to the effectiveness of the reforms. Insurers have already experienced efforts by the claims industry to re-categorise their clients' injury as something other than whiplash and that it appears that "whiplash" claims are decreasing, as they say is demonstrated by CRU data.

29. The proposed definition outlined in the consultation should be effective with a minor modification. The current definition of soft-tissue injury in the RTA Protocol[11] has not, as far as we are aware, been challenged or tested in court since it was introduced in October 2014. It may be that the financial consequences of non-compliance have been relatively limited and so have not led to the need for test cases. Nonetheless, this does attest to the strength and general acceptance of the definition.

30. Insurers are comfortable that the definition used in these reforms should not be extended beyond the "occupant of a motor vehicle". Other road users, such as cyclists and motorcyclists suffer very few minor or soft tissue injuries as a result of an accident and are not seen as part of the "rampant compensation culture[12]" problem.

31. The definition should however be extended to cover psychological claims as a primary injury for the reasons set out below. The ABI's proposed definition is:

    "a claim brought by an occupant of a motor vehicle where the main physical injury caused is a soft tissue injury and extends to claims where there is a psychological injury (whether or not associated with a physical injury)."

32. This definition builds on the current workable and generally accepted definition, and aims to change the emphasis on psychological claims to avoid any perverse incentive arising as explained below.

[11] Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents
[12] MoJ press release 17 November 2016

Extension of Definition to include psychological claims as a primary injury.

Question 2: 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?

33. The extension of the definition to include psychological claims is both necessary and proportionate. As noted in the consultation paper, the current definition used in the RTA Protocol already incorporates claims where psychological injury is pursued as a secondary injury.

34. There are currently very few claims where psychological injury is pursued as the primary injury. However, in a new system where general damages would not be recoverable for a physical injury, but where general damages remain recoverable if the psychological element is the primary injury, a perverse incentive will be created not to pursue the physical injury at all.

35. Given the very limited number of claims where psychological injury is claimed as the primary injury, it would be sensible to include them within this definition rather than creating a loophole that will be exploited by claimant lawyers and CMCs.

36. Stand-alone psychological claims in the wake of *Page v Smith* [1995] UKHL 7 are allowed. According to the *Judicial College Guidelines*, 13th edition, (JCG) the less severe examples of psychiatric and psychological damage result in an award of between £1,290 and £4,900 (with 10% *Simmons v Castle* uplift). The JCG reports that minor injury claims (those taking up to 3 months for complete recovery) solely in respect of shock or travel anxiety in the absence of physical or recognised psychiatric injury will not attract an award of compensation.

37. Whilst this is technically correct, reporting experts in RTA claims have developed a series of "labels" for recognised psychiatric injuries as an addition to a whiplash injury (e.g. travel anxiety, phobic anxiety state etc.). If these were claimed as stand-alone injuries without any physical injuries attached, they would probably be accepted by local County Courts and would result in awards of £1,160-2,050[13]. In addition insurers would face the substantial cost of medical reports for psychological injury which are not covered by MedCo and therefore not fixed cost reports.

Definition of 'minor' claims

Question 3: 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?

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[13] *Judicial College Guidelines*, 13th edition

Question 4: Alternatively, should the government consider applying these reforms to claims covering nine months' duration or less?

Please explain your reasons, along with any alternative suggestions for defining scope.

38. When looking to define the scope of minor injury, it will be important to balance the need to protect claimants with serious injury against those where an injury has had little impact on the claimant. As such, using an injury period of up to and including six months to define 'minor' helps to achieve this balance. A period of up to and including 9 months appears too severe but any threshold below 6 months would tip the balance too far in the other direction.

39. There is little doubt that wherever the Government sets the threshold for minor claims, there will be an attempt by those in the claims industry to push claims over that threshold to achieve higher financial reward. What will be of utmost importance therefore is the inter relation between the threshold and the tariff (the tipping point). The incentive at the tipping point should not be sufficient that it encourages claimants to exaggerate the nature of the symptoms that they suffer to push themselves into the tariff bracket.

40. One way to address the tipping point issue is to define duration more definitively within the definition of "minor". It is important that a claimant who is, to all intents and purposes, fully recovered save for the odd ongoing 'niggle', is not able to argue for a much longer duration period. If the prognosis given is full recovery within three months with ongoing minimal residual symptoms, then the duration should be confirmed as three months; not an ongoing period during which the claimant has almost no symptoms whatsoever and there is no meaningful interference with daily living.

41. Subject to the above comments about the need to define duration, the ABI agree with the Government that a definition of 'minor' as 'up to and including six months' is the appropriate way forward.

42. In order to incorporate duration into the definition the ABI propose that it reads as follows:
"minor injury" means the claimant has fully recovered from the main physical and psychological symptoms by six months (inclusive) after the accident, save for any minimal residual complaints.

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

The Announced Policy

43. The ABI notes that the government is now consulting on two options. In his 2015 Autumn Statement announcement the then Chancellor announced a package of

reforms:

a. *"1.143 The government is determined to crack down on the fraud and claims culture in motor insurance. Whiplash claims cost the country £2 billion a year, an average of £90 per insurance policy, which is out of all proportion to any genuine injury suffered. The government intends to introduce measures to end the right to cash compensation for minor whiplash injuries, and will consult on the details in the New Year This will end the cycle in which responsible motorists pay higher premiums to cover false claims by others. It will remove over £1 billion from the cost of providing motor insurance and the government expects the insurance industry to pass an average saving of £40 to £50 per motor insurance policy on to consumers."*

b. *"3.103. The government will bring forward measures to reduce the excessive costs arising from unnecessary whiplash claims, and expects average savings of £40 to £50 per motor insurance policy to be passed on to consumers, including by: 1) removing the right to general damages for minor soft tissue injuries; and 2) removing legal costs by transferring personal injury claims of up to £5,000 to the small claims court."*

44. It was stated that the Government intended to end the right to cash compensation for minor injuries and to raise the small claims track limit to £5,000.

The options

Question 5: 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?

Question 6: Please give your views on whether a fixed sum should be introduced to cover minor claims as defined in Part 1 of this consultation?

Question 7: 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.

Please explain your reasons.

45. The ABI support option 1 - the removal of compensation for PSLA for all minor RTA related soft tissue injury claims. We have outlined why we do not consider option 2 works from paragraph 55 below. Option 1 is the policy announced by the Chancellor and the insurance industry has supported this package of reforms from the outset.

46. The number of claims currently falling within the "minor" bracket is very significant which helps to illustrate the rampant compensation culture. The industry fully support the principle of those with a more serious injury receiving full compensation.

There are, however, too many examples of claimants with very minor injuries obtaining disproportionately high pay-outs, at the ultimate expense of the millions of people who purchase motor insurance.

The Australian example

47. There are strong public policy arguments in favour of addressing the current situation. Addressing the compensation culture will mean rebalancing public expectation so that those who have only suffered a minor injury do not expect to receive compensation in the form of general damages.

48. In other jurisdictions where a compensation culture has been prevalent, there has been a move to allow no compensation for minor injuries. For example in Victoria, Australia, the government has set up the Transport Accident Commission (TAC). This is a no-fault scheme[14] which covers all RTA related injuries. Medical expenses and rehabilitation required due to the accident are recoverable and loss of earnings is also recoverable if it continues beyond 18 months post-accident. Damages for injury are paid only where the claimant has a whole body impairment (WPI) of 11% or over on a scale of damages with a range from 7,310 AUD (£4,316 as at 07/12/16 (1AUD = 0.590419 GBP)) where impairment is 11% to 333,630 AUD (£196,981 as at 07/12/16) where WPI is assessed at 100%. WPI rating can result from a single injury or a series of related injuries.

49. The TAC, it is to be noted, operates against a background of state medical provision. It is not a replacement for insured treatment costs.

50. The WPI measurement is based on the American Medical Association (AMA) evaluation. Soft tissue injuries never attract over 3% WPI on the AMA evaluation, so under the TAC rules would not they would not attract any compensation at all.

51. Common law damages can also be claimed but would require a serious injury where there is a permanent impairment of 30%. The *Transport Accident Act (1986)* defines serious injury as:

   (i) A permanent impairment of 30% or more
   (ii) Serious long-term impairment or loss of a body function
   (iii) Permanent serious disfigurement, such as scarring
   (iv) Severe long-term mental or severe long-term behavioural disturbance or disorder
   (v) The loss of a foetus.

52. The removal of compensation for minor whiplash injuries has also been successfully

[14] The ABI would strongly reject any notion that a no-fault scheme is the right approach for England and Wales. The point we make is that the notion of removing and/or restricting the right to minor damages has been considered elsewhere; indeed the level of restriction adopted in Victoria has been significantly more radical than is now proposed by the MoJ.

applied in Italy. In 2012 they introduced the Decree 1/2012. This removed compensation for very minor injuries and a reduction in claims frequency has followed[15].

53. Within this context, the government's proposals for the removal of damages for PSLA in minor claims is a considered and proportionate approach and based on the Italian example it would seem that the removal of general damages for the most minor of claims will impact positively on claims frequency.

Option 2

54. There is the potential that the measures set out in option 2 will still encourage those with little or no injury to make a claim for general damages and keep claims frequency high. A tariff which allows general damages of £400 for an injury lasting 0-6 months means that those with an injury only lasting for a few days will still have a strong financial incentive to make a claim in the knowledge that they are likely to receive a set £400 pay-out. It also presents an opportunity for the predatory claims industry to market their services.

55. It should be noted that one of the government's stated policy objectives is to reduce the cost of car insurance. The impact assessment estimates that the reforms, if implemented fully, could deliver savings of £40-£50 per policy. Given the assumption that £40 saving will be of benefit to consumers, it must also be assumed that £400 will remain an incentive to claimants and those facilitating their claims.

56. Soft tissue injury claims are by nature self-reported and there is no objective test for most minor soft tissue injuries. Insurers cannot prove that someone does not have a soft tissue injury any more than a claimant can prove that they do. This means that soft tissue injury claims will often be paid out by insurers purely on the word of a claimant that they suffered an injury in a car accident, with no objective evidence. The medico-legal expert is unable to add any benefit as all they are able to do is report the history of the minor injury as relayed by the claimant.

Process for Assessing Injury Duration

Question 8: 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.

Please explain your reasons.

[15] http://www.ania.it/export/sites/default/it/pubblicazioni/rapporti-annuali/Italian-Insurance-Statistical-appendix/Italian-Insurance/2014-2015/ANIA-Relazione-inglese-2015-web.pdf?bcsi_scan_d2bf548f367f768b=0&bcsi_scan_filename=ANIA-Relazione-inglese-2015-web.pdf

Question 9: 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.
Please explain your reasons.

Question 10: Would the introduction of the 'diagnosis' model help to control the practice of claimants bringing their claim late in the limitation period?

Please explain your reasons and if you disagree, provide views on how the issue of late notified claims should be tackled.

57. The 'prognosis' approach would best support the new claims system. The diagnosis method is likely to preserve rather than limit the practice of late notified claims.

Medical reporting

58. The introduction of MedCo should also drive changes in medical reporting standards. As of 1 June 2016, all medical experts involved in preparing medico-legal reports for soft-tissue injury claims following a road traffic accident have to be accredited. MedCo is collecting data and monitoring the work of the experts and will be able to investigate those experts whose medical reports are out of kilter with those of their peers. The requirement for re-accreditation should ensure that only those experts who are diagnosing within appropriate norms continue to provide reports under the system.

59. While looking to fulfil its original objective, MedCo has also, over the last 18 months, worked to highlight some of the worst behaviours taking place within the system. Whilst the main focus should be on improving medical reporting, significant time and resources have had to be applied by both MedCo and the Ministry of Justice (MoJ) in dealing with those seeking to maximise profit from the medical reporting system, such as those MROs that registered multiple shell companies in order to bypass the MoJ's policy decision on randomisation. It is to be hoped that the new Qualifying Criteria issued in October 2016 will be sufficient to address those issues.

60. Good quality medical reporting and the ability to assess quality of the reports will be key to the success of the proposed reforms. It will be essential to measure the impact that these reforms will have and to ensure that there is no significant upsurge in the number of claims that would have otherwise been considered to be minor; and that minor claims are not being re-packaged as something allegedly more significant.

Diagnosis method

61. Whilst the diagnosis method does initially appear attractive, the problem remains that there is no defined objective test for minor soft tissue injury - it is largely self-reported. So the diagnosis method does not achieve the intended aim as the

claimant could report ongoing symptoms which the medico-legal expert will record in the absence of any objective testing methods.

62. Furthermore, there is also no proposed end point to the diagnosis method. A claimant could attend at the medical examination, for example after 18 months and just report symptoms that continued for ten months or a year. The expert would simply record this as there is no other basis on which they can assess the claimant at that stage. There is anecdotal evidence that some claimants have been 'coached' in such circumstances to give an injury history which is guaranteed to secure compensation.

Prognosis method

63. Given the concerns outlined above, the prognosis method should be applied. If the injury is likely to last for more than six months, claimants should not have to wait for six months to obtain the medical report in order to progress their claim. It is more likely under a prognosis method that the report would be obtained at an earlier stage, while the claimant still has symptoms, and the expert could at least then comment on any possible objective signs of injury, such as limited range of movement, etc.

Additional proposal

64. The optimum time for obtaining a medical report in soft tissue injury claims is between three and six months. A disincentive should be in place to discourage claimants with minor claims from obtaining a report at a late stage, for example 12 months, and self-reporting that symptoms continued for over nine months. It is proposed that where a claimant obtains a medical report more than 6 months post-accident, there should be a rebuttal presumption that the injury is "minor" (i.e. not attracting compensation under option 1), unless there is objective evidence of ongoing injury. The MoJ should work with MedCo to determine what those objective indicators might be.

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

Question 11: The tariff figures have been developed to meet the government's objectives. Do you agree with the figures provided?

Please explain your reasons why along with any suggested figures and detail on how they were reached.

Question 12: 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?

Please explain your reasons why, along with what circumstances you might consider to be exceptional.

65. The introduction of a tariff will be key to supporting the overall objective of the reforms and should act as a disincentive against claims inflation. A fixed tariff is therefore strongly supported by the industry. A fixed tariff has obvious advantages, however these would be significantly undermined by any concept of discretionary uplift - this should be avoided.

Protecting the threshold

66. In any system where a threshold is created by removing the recovery of general damages, there needs to be a method by which the threshold is protected to ensure it remains effective. An appropriately populated tariff is an effective method to ensure the threshold is protected and maintained.

67. The other major benefit to the tariff is that it will cover the vast majority of RTA claims within the small claims track. It provides an important safeguard for unrepresented claimants as it provides them with certainty when valuing their claim for PSLA (where they are entitled to it). With the introduction of a tariff, the need to argue over the value of a claim is eliminated or significantly reduced; this advantage is important when considering the option of a discretionary uplift and is one of the reasons why that option is not supported.

The proposed tariff

68. The tariff is also aimed at rebalancing damages to a level more proportionate to the level of pain and suffering caused. The relatively incremental increases between tariff periods at the lower end also mean that there is less incentive for claimants to exaggerate their symptoms, as the financial benefit of doing so is limited. The ABI supports the proposed numbers in the tariff and also the upwards curve within the tariff which allows significantly more compensation at the upper end of the tariff. It is right that this system targets the most minor of claims, but rightly ensures that those

with more significant soft-tissue injuries receive greater damages.

69. The upward curve also means that the tariff works up to the point where it converges with the common law damages for injuries beyond two years duration. It is recognised that such claims would fall outside the small claims track as they will have a value of over £5,000. There will be a very limited number of soft tissue injury claims that meet such criteria.

One tariff v two tariffs

70. There should only be one tariff for injury flowing from a RTA where soft-tissue injury is the main injury. A second tariff to include psychological injury, especially where the increase is so limited, will drive an increase in the number of claims where a psychological injury is recorded, this may well cause confusion for claimants as to what constitutes a psychological injury. For the sake of simplicity and certainty for claimants there seems no benefit in allowing for two separate tariffs.

A more granular approach

71. As noted, the insurance industry supports the removal of general damages for minor injuries for up to and including six months post-accident. However, if it is decided that the option of low damages for minor injuries is preferred then having just one tariff category (0-6 months) is too broad and consideration should be given to a more granular approach.

72. The savings assumed for the low damages (rather than no damages) option noted in the impact assessment is £504 million gross (Annex A demonstrates how the figures within the impact assessment require some additional work). This will not be achievable unless the significant challenge of high claims frequency can be tackled. The opportunity to claim £400 for just a few days of injury is unlikely to assist with reducing frequency. Indeed, it may well encourage claims that would not have been brought as claimants would have otherwise considered them to be too minor.

73. The most effective way to address frequency is not to allow any damages for PSLA for up to and including six months, which will also mean that insurers can deliver maximum savings to the premium paying public. However, if Government decides against this option, then the proposed £400 should be revisited, as the period of 0-6 months is too broad and may well lead to increased frequency for the reasons outlined above. Allowing £400 for claims within just a few days injury does not meet the Government's aims of disincentivising minor, exaggerated and fraudulent claims.

74. We suggest an alternative approach where the 0-6 month band is broken down into either two or three month bands. This would address the issue of those with the most negligible of symptoms receiving the same as those with minor (six month or less) symptoms and would help to control frequency at the very minor end.

Index linking

75. The tariff should be index linked and amended on a set regular basis. We have set out comments on this in response to Part 4, it is important that the small claims track and tariff rise in line with each other or the value of each will be eroded over time.

Single figure or range

76. The tariff should have one set figure in each band rather than a range. One of the purposes of the tariff is to provide certainty for claimants. A range does not provide that certainty and in any scenario where there is an element of doubt, there is greater potential for dispute and the need for intervention either by lawyers or the court. The tariff allows a claimant to assess their damages quickly and easily once they are in receipt of their MedCo medical report.

77. It is recognised that the single figure adopts a broad brush approach, but this balances the fact that claimants are receiving a reasonable, re-balanced and proportionate sum for their PSLA claim against the significant additional cost and lack of certainty that introducing a range entails. There is no benefit in arguing over what would be a minimal difference in settlement damages, especially where the lack of certainty means that the claimant may feel the need to engage a solicitor to argue the point on their behalf.

Discretionary uplift

78. Any element of discretionary uplift should be avoided for the reasons outlined above. It removes certainty for the claimant and may well encourage litigation in circumstances where the maximum uplift (£140 in a claim where the tariff is set at £700) is disproportionate to the cost, time and court resource required to address the issue. The idea of a discretionary uplift would appear to mainly benefit claimant lawyers rather than their clients.

79. Simply put, the benefits of a fixed tariff are in its simplicity and certainty, with no need for argument by lawyer or in court over quantum. Introducing even the concept of a discretionary uplift removes all those benefits at a stroke.

80. The option proposed whereby exceptionality could be defined does not work in circumstances where it is accepted that a broad brush approach should be applied. Any definition of exceptional will necessarily need to be quite wide and as a result would lack clarity and certainty.

81. The claimant lobby has argued that an uplift is required for exceptional cases, but their argument is flawed; an exceptional circumstance is far more likely to have an impact on loss of amenity, rather than pain and suffering. Pain and suffering is measurable and the prognosis in each case will determine whether the case is

above or below the two year threshold. In cases where there is an exceptional loss of amenity, the claimant would usually be compensated through their claim for special damage. Where for example a sportsman could not train for a period, they would be compensated by special damage for financial losses flowing from the accident, e.g. unused gym membership; or where a horseman cannot ride and has to employ someone to ride for them. The loss of enjoyment of a holiday also has a specific and separate financial value which can be claimed.

82. As with the argument against a range of figures within the tariff, a claimant may feel the need to engage a solicitor to argue the exceptionality points. Whilst this may work to protect claimant industry revenue streams, it is of little or no benefit to the claimant who is likely to need to pay a fee calculated across full damages recovered rather than just the additional uplift received.

83. Appropriate use of court resources should be a priority consideration when reviewing the position on exceptional cases. However defined, the ‘exceptional’ cases are likely to be run with high regularity and will put significant additional strain on the court system – which is precisely what the tariff is designed to avoid.

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

Question 13: Should the small claims track limit be raised for all personal injury or limited to road traffic accident cases only?

Please explain your reasoning.

Question 14: 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?

84. The small claims track (SCT) should be increased to £5,000 for RTA claims only at the moment. In time, the increase should apply to all personal injury claims, but in view of the safeguards needed for an increase to be effectively implemented, it is better to apply the increase to RTA only at first, with a firm commitment to extend the increase to all other areas of personal injury at a later date.

Inflation of damages

85. In our response to *"Reducing the Number and Costs of Whiplash Claims"* we highlighted the case for increasing the SCT limit to £5,000 in RTA claims. It was noted that:

> "*In 1991 the SCT was extended to cover claims for pain, suffering and loss of amenity (PSLA) with a value under £1,000 for RTA personal injury claims. In 1991 around 50% of personal injury claims would have been valued within the SCT threshold. By 2005 that had decreased to approximately 15% and by 2012, this number had fallen to approximately 9%."*

86. Significant further damages inflation since 2012, including the 10% uplift following *Simmons v Castle*, means that almost no claims for PSLA fall within the current SCT limit.

Safeguards for claimants

87. In their response to that consultation, the MoJ stated that they remained of the view that extending the SCT would be beneficial in providing a low cost route to bringing a claim through the courts, with each side bearing its own costs. They decided that they should delay doing so until "adequate safeguards are developed to protect genuine claimants from any detrimental effects relating to access to justice or to the under-settling of claims from any future rise in the limit".

88. Insurers agree that genuine claimants should be afforded adequate protection and believe that the proposed tariff goes a long way towards providing that protection to claimants. Under-settling will not be possible because of the certainty that is afforded by the tariff system. A claimant will obtain a medical report which will state

the length of their injury. For the most minor of injuries, as previously stated, there should be no general damages. If the injury prognosis is over six months then the claimant has all of the information required to value the claim.

89. The MoJ's concerns around perceived access to justice also need to be addressed. This can be managed through creating an easy, accessible and consumer-friendly process for litigants in person. This step-by-step claims process should provide guidance to ensure that the claimant can notify their claim, receive any assistance required (e.g. rehabilitation, medical report etc.) and provide details of any claim for special damages. A good example of clear accessible guidance is the Intellectual Property Enterprise Court Guide[16] for low value intellectual property disputes within the small claims track.

90. The work undertaken during the Civil Courts Structure Review has already paved the way for an Online Court system for use in the SCT. Personal injury claims are not covered by these reforms at present as the extension of the SCT Limit in personal injury was not considered as part of the Review. Lessons can be learned from the Review and used in the development of a specific IT solution for minor soft-tissue injury claims.

An IT solution

91. The Claims Portal is already used for RTA claims up to £25,000 and it is essential that these reforms do not lose the gains of an efficient, secure electronic solution. It will be important that these reforms are supported by an IT solution.

92. In its present form neither the Claims Portal nor the RTA protocol that underpins it are suitable for use in the SCT. The current portal is, in essence, an electronic post box and document hub as a business to business solution. It is possible to develop the Claims Portal for use below the SCT limit, with an interface that is user friendly for claimants.

Liability disputes

93. In developing a new approach, it would also be possible to develop an electronic way of addressing issues of liability. Liability is not disputed in the vast majority of RTA claims. In the minority that are disputed, it would be of benefit to develop an online decision making tool that provides a provisional decision on RTA claims. Where this is not accepted, a simple dispute resolution process would be required. Parallels can be drawn with the recommendations in the final report of Lord Justice Briggs' 2016 Civil Courts Structure Review and lessons learned as to what that dispute resolution process may look like.

[16] https://www.gov.uk/government/publications/intellectual-property-enterprise-court-a-guide-to-small-claims

94. One of the important points with such a tool would be to ensure that, as far as possible, it provides a way of resolving all likely disputes without requiring cases to be handled via the courts. This could for example include having a mandatory requirement for referral of any liability dispute to a simple Early Neutral Evaluation mechanism, similar to the ideas considered within the Briggs Review.

95. A further lesson to be taken from the Briggs Review relates to the unbundling of legal services (see final report 6.31 – 6.36[17]). This could be an important safeguard for claimants by allowing them to obtain advice on certain aspects of their claim if they choose to do so, without having to incur the greater expense of instructing a lawyer to deal with the claim on their behalf.

96. It should also be noted that the before the event insurance (BTE) market will need to adapt to accommodate the changes these reforms will bring and will need to consider providing both more bespoke cover and access to advice for claimants. We have commented further on the BTE market in Annex A.

Increasing the SCT limit for all claims or RTA alone

97. As noted, it is important that there are appropriate safeguards in place to protect genuine claimants and to allow them to bring their claims. This is the case for claims related to RTAs, but that currently cannot be said for wider personal injury claims.

98. There is a concern that proper safeguards are not in place, nor are there plans to implement further safeguards, to other personal injury claims beyond RTA. As such, consideration should be given to delaying the implementation of the increase in the SCT for other personal injury claims for a period of no more than 12-18 months post implementation of the increase for RTA claims.

99. This would allow for suitable safeguards to be considered and developed for employer's liability (EL) and public liability (PL) claims. One such safeguard could be a suitable mechanism, based on the proposed RTA IT solution that would provide appropriate options around liability, access to services (rehabilitation, medical reports) and the assessment of quantum of damages.

100. When the Claims Portal was developed, a deliberate decision was taken to develop the RTA portal first and then extend it to EL/PL claims. This approach was far simpler than it would have been to develop the two together. That does not mean that any significant delay is required: the policy decision can be made now to extend the SCT limit to all injury claims and work can start on considering the safeguards needed for EL and PL in particular.

[17] https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf

101. In the interim, thought should be given as to how to limit the displacement of claims through imposing greater control via the use of fixed recoverable costs (FRC) both for claims proceeding within the Claims Portal and for those claims that are either started outside the Claims Portal or fall out of it. The level of FRC in EL and PL claims should be reduced from the current level as a containment measure and a long stop date provided within a 12-18 month timeframe as to when the work will be completed and the limit raised to demonstrate that the window of opportunity, as it may be seen, is finite.

The need for regulation

Question 15: 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.

Question 16: 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.

102. Apart from the possible safeguards discussed in response to question 14, there should be a level regulatory playing field covering all those who are likely to offer their services to claimants. There should be controls across the board on how much claimants can be charged.

103. Whilst genuine claimants must be able to present and value their claims, we must not lose sight of the overall objective of the reforms - to disincentivise minor, exaggerated and fraudulent claims. To fully achieve this objective the Government must review the protections that are in place for the claimant against the predatory claims industry. Too many claims farmers are making nuisance calls and pestering those who have had an accident until such time as they give in and agree to bring a claim.

104. The first step in ensuring this protection will be to ensure that all players in this market are regulated. Solicitors, insurers and CMCs are, but credit hire organisations, McKenzie Friends and medical reporting organisations are not. If the government intend to put a regulatory framework in place to protect claimants, then the only way to make the framework enforceable will be to ensure that all of the parties within that framework are appropriately regulated – see additional comments in Part 6.

105. Avoidance behaviour from qualified lawyers opting to work as McKenzie Friends to avoid the regulatory controls imposed by the Solicitors Regulation Authority (SRA) is already being reported. There are also differences between the rules for CMCs and solicitors.

106. It will be vital as part of this process to control the fees that can be charged to claimants. The simplified process should ensure that the vast majority of claimants can present their own claims without legal representation. However, this does not mean that they will choose to do so. As was evidenced with compensation for mis-sold Payment Protection Insurance, despite the claims process being simple and free of charge, many people chose to engage CMCs to submit claims on their behalf.

107. Some solicitors have already publicly stated how it would be possible to fund cases and charge up to the equivalent of 40% of the damages recovered.[18] The current Damages Based Agreement Regulations would not prevent this from happening. It is therefore important that the total fees that can be charged to claimants proceeding in the SCT, whether by a solicitor, a CMC or a McKenzie friend are capped at a maximum level, however the sum is calculated, whether by CFA, DBA or otherwise. Inherent in this concept is that only one fee can be charged per claim: a CMC should not be able to charge the capped fee and then recommend a solicitor or McKenzie friend who charges the same capped fee.

108. In the ABI's response to the MoJ consultation on "Cutting the Costs for Consumers – Financial Claims" in April 2016 we set out the need for government intervention in the personal injury sector. A copy of that response is attached in Annex B**.**

109. It is important to note that a McKenzie Friend charging for claims handling services is likely to be providing regulated claims management services and should be regulated by the CMR. The CMR should be alerted to the potential for this development and should consider, ideally in conjunction with the SRA, what steps should be taken now to raise public awareness of the need to deal with regulated persons. At the same time the regulators could consider how best to publicise the availability of an alternative free service via any IT solution that is built to accommodate these reforms.

Index link

110. As an additional safeguard against damages erosion, a mechanism should be built in to ensure that the level is kept under review. Furthermore, any future increase in the SCT limit should be linked to increases in the tariff. This approach will avoid the erosion of damages over time, and means that inflationary pressures will not result in claims being taken over the SCT threshold in the future, as is evidenced in the current system.

111. We have considered whether there is any statutory provision that allows for periodical review. The Fatal Accidents Act 1976 states in section 1A(5):

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[18] https://kerryunderwood.wordpress.com/2016/03/07/running-small-claims-track-personal-injury-claims/

The Lord Chancellor may by order made by statutory instrument, subject to annulment in pursuance of a resolution of either House of Parliament, amend this section by varying the sum for the time being specified in subsection (3) above.

112. In the Explanatory Memorandum to the Damages for Bereavement (Variation of Sum) (England & Wales) Order 2007 it states as follows:

"In the consultation paper "The Law on Damages" published by the Department for Constitutional Affairs on 4 May 2007 http://www.justice.gov.uk/publications/cp0907.htm the Government announced its intention (at para 60) to increase the award of bereavement damages on a regular basis in line with the Retail Prices Index (rounded to the nearest £100), and that the first such increase would be made later in the year. It also indicated that subsequent adjustments would be made every three years thereafter. The appropriate rounded figure to reflect changes in the Retail Prices Index since 1 April 2002 is £11,800."

113. We propose a model that allows for the damages tariff and SCT limit to be increased every three years (or alternatively every five years) in line with inflation.

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

Question 17: Should the ban on pre-medical offers only apply to road traffic accident related soft tissue injuries?

Please explain your reasons why.

Question 18: Should there be any exemptions to the ban, if so, what should they be and why?

114. Pre-medical offers are largely a symptom of the current dysfunctional system. The ABI supports a ban in those cases which fall within the definition of RTA-related soft tissue injury claims proposed within this consultation.

The Issue

115. The issue of pre-medical offers was considered by the Insurance Fraud Taskforce in their final report in January 2016. They noted that:

"stakeholders considered the widespread use of pre-medical offers contributes to the perception that insurance claims, especially minor soft tissue injury claims, are "easy money". Insurer representatives stated that pre-medical offers are sometimes requested by the claimant's lawyer, they allow compensation to be paid to the claimant more quickly, and they would be more inclined to obtain a medical report in these cases if the quality of such reports were improved under MedCo"

116. In their recommendations the Taskforce noted that:

"The ABI should discourage the inappropriate use of pre-medical offers"

117. The use of pre-medical offers has arisen largely due to the fact that medical evidence often has very little evidential value in a claim for soft tissue injury. In most cases where the injury is very minor, the claimant sees the expert at a point when they are fully recovered and the expert simply reports the symptoms as relayed to them by the claimant. In these circumstances the medical evidence does nothing but delay settlement and add cost to the process.

118. Insurers accept that the inappropriate use of pre-medical offers in RTA soft tissue injury claims should be banned. It is for this reason (among others) that the prognosis approach is supported. Medical evidence should be obtained early in the process, usually at 3-6 months, so that a medical expert has the opportunity to examine the claimant whilst they still complain of symptoms. On that basis the medical evidence becomes something more than just a historical narrative, as the expert can consider objective factors such as range of movement etc.

119. Any prohibition should be linked to the same definition of soft tissue injury claims. It is anticipated that statutory definitions will be required both for the changes to general damages and for the prohibition of pre-medical offers, so it makes sense for the definition to be the same in both instances. This will address the concerns expressed both by the Insurance Fraud Task Force in their report and by the Government in this consultation. Any wider ban would be disproportionate to the problem and/or disconnected from its potential solution.

120. In claims other than RTA soft tissue injury claims, early offers are used for entirely different and more appropriate reasons. In such cases, largely outside the controls of the RTA or EL/PL Claims Portal, there is little incentive for the claimant's solicitor to provide early disclosure of medical evidence and sometimes putting an early offer on the table is the only way that a defendant can make progress with the claim. In these cases, insurers' ability to make these offers, as one of the few control mechanisms available to them, is entirely appropriate.

121. MedCo provides an important safeguard to ensure the quality and objectivity of the medical report. As MedCo's remit is limited to RTA soft-tissue injury claims, there is no case for extending any ban on the use of pre-medical offers more widely.

Enforcement of the ban

Question 19: How should the ban be enforced?

Please explain your reasoning.

122. We do not accept the assumption on page 19 of the impact assessment that 80% of claimants whose claim is settled by way of pre-medical offer have no legal representation. Many claimant solicitors will make or invite pre-medical offers and are happy to recommend to their client that they are accepted.

123. For that reason it is necessary that any ban must be capable of enforcement by all regulators, including the CMR. All ends of the transaction should be prohibited: the making of offers, the invitation/inducement to make offers and the recommendation to a client to accept an offer. Consideration should be given to making it a requirement to report any breach of such provisions to the appropriate regulator to ensure that the ban can be enforced effectively.

124. This is a further example of the need to ensure that all of those operating in the claims space are regulated. Whilst McKenzie Friends are not normally regulated, in circumstances where they are providing paid advice on offers, they are providing claims management services and should be registered with the CMR. It is entirely inappropriate to have such a ban which leaves any type of operator in the claims arena able to flout it or incite breach.

Part 6 – Implementing the recommendations of the Insurance Fraud Taskforce

125. The ABI supports the proposals by the Insurance Fraud Taskforce for amendments to the Claims Notification Form (CNF) and to the rules on qualified one-way costs shifting provisions (QOCS).

Question 20: Should the Claims Notification Form be amended to include the source of referral of claim?

Please give reasons.

126. The recommendation that the CNF should be revised to include the source of the referral of the claim is a sensible proposal that should help support the fight against insurance fraud. It will have limited additional cost, but will enable defendants to address fraud by adding this information to the fraud indicators that they already use.

127. While some sources of claims are entirely reputable, others are less so. If an insurer is able to cross check where the claim has been referred from it enables them to scrutinise claims more closely and will assist in addressing potentially fraudulent claims.

Question 21: 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)?

Please state your reasons.

128. The ABI also supports the proposal to amend the qualified one way costs shifting (QOCS) provisions. Whilst the Civil Procedure Rules (CPR) already allow a defendant to apply to set aside a notice of discontinuance, that often involves significant wasted costs where the discontinuance takes place close to trial.

129. The proposed amendment means that the claimant will need to consider at an earlier point in the process whether they wish to discontinue the proceedings, at a point before fees are incurred by the defendant for experts attending at trial and for counsel's brief. It also allows for a better use of the court's resources as trials will not be vacated at the last moment.

Additional Comment

130. It is essential that there is joined up and strong regulation of those operating within the claims industry. As part of their final report the Insurance Fraud Taskforce also recommended (recommendation 14) that the government should: consider strengthening the fining powers of the SRA for fraudulent or corrupt activity; and consider reviewing the standard of proof used in cases put before the Solicitors

Disciplinary Tribunal. The ABI support implementation of this recommendation.

Part 7 – Call for evidence on related issues

131. The ABI welcomes the opportunity to respond to this call for evidence. Some of the issues raised are clearly stand-alone issues. Others are of relevance to the current reforms and we have highlighted where we consider that the issues raised here should be incorporated into and work with the consultation.

i. Credit Hire

Question 22:
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**

Please provide supporting evidence/reasoning for your view (this can be based on either the models outlined above or alternative models not discussed here).

Question 23: 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?

Please provide the factors that should be considered and why.

Question 24. What would be the best way to improve the way consumers are educated with regards to securing appropriate credit hire vehicles?

132. The various models proposed each have their complications. The concept of a 'first party model' is particularly complex as there are a number of permutations. As an industry body, and recognising the differing positions of individual members, the ABI is not well placed to form any conclusion on which if any of these models to favour.

133. After consultation with our membership, the pros and cons of the proposed models and our response on credit hire is set out in Annex C**.**

ii. Early notification of Claims / Intention to claim

Question 25: Do you think a system of early notification of claims should be introduced to England and Wales?

Please provide reasons and/or evidence in support of your view.

Question 26: 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'.

Please explain your reasons.

134. A system of early notification to insurers would act as a means of access to relevant services and is consistent with the overall aims of the reform package. Claims for vehicle related damage are generally reported to insurers at a very early stage and there is no reason to believe claimants are unable to report their injury claim early.

135. This issue is closely bound up with the question as to whether the prognosis or diagnosis method is the appropriate method by which medical evidence should be obtained.

136. As stated previously, the prognosis method is the best solution on the basis that it is better for the claimant to be examined at the point in time when they still have symptoms. Insurers have suggested that between three and six months is the optimum time for the medical examination to take place.

137. The ABI set out a proposal in paragraph 60 to discourage claimants from obtaining medical evidence after six months. The suggestion is an adaptation of the Government's proposals in paragraph 137 of the consultation paper. <u>We propose that where a medical report is obtained later than six months post-accident, it will be assumed that the injury is minor (as defined) and therefore either attracts no damages or the set figure of £400, unless the medical expert reports objective indicators of ongoing injury.</u> It would be appropriate for the MoJ to work with MedCo to consider what those objective indicators might be.

138. This links to the need for early notification of the claim to insurers. In a process where limitation in personal injury claims is three years, claimants should be encouraged to bring claims early, but it is acknowledged that they cannot be obliged to do so. However, if an IT solution is to be developed that allows claimants to bring claims, early notification should be encouraged so that the claimant can access all the information and services that they require (for an example, see later comments on rehabilitation).

<u>Incentivising early notification</u>

139. We propose an incentive to notify claims within one month of the accident. The best incentive would be for <u>insurers to pay the disbursements incurred by the claimant (usually just the cost of the medical report) up front if the claim is presented within one month of the date of accident.</u>

140. This would be an unconditional payment, not recoverable from the claimant if they either do not proceed with their claim, or their claim proves to be "minor" as defined

and does not attract an award of general damage. If the claim is presented later than that period, then the claimant will need to meet their own disbursements and the cost cannot be recovered from the insurer at a later date.

141. Whilst the claimant would not be prevented from bringing the claim late, they would be incentivised to present it an earlier stage. The ABI consider that working to raise consumer awareness of this incentive will ensure its success. That said, there are many examples of deadlines which apply to claims (such as for unfair dismissal) and other types of legal entitlement (such as applications for school places or registration for voting) where legal advice is not normally expected.

iii Rehabilitation

Question 27: 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: Please give your reasons.

Question 28: Do you have any other suggestions which would help prevent potential exaggerated or fraudulent rehabilitation claims?

142. The insurance industry strongly favours option 2, possibly with elements of options 4 and 5. Further work is needed to determine exactly how the delivery by insurers should be controlled for the benefit of claimants and insurers alike. This could be delivered as part of an IT solution for handling claims below the SCT limit.

143. Whilst insurers are supportive of rehabilitation as a general concept in personal injury claims, we agree with the Government position that rehabilitation is not necessary or appropriate in every case as set out in the NICE guidelines. In dealing with low value soft tissue injury claims, the current emphasis appears to be on using rehabilitation, rather like credit hire, as a means of deriving additional revenue for commercial enterprises out of the perceived need of the individual claimant for services (in this case, treatment). As with credit hire, the overall effect of this approach is to relegate the interests of the claimant themselves behind various commercial organisations using their low value injury claim as a means to gain access to the market.

144. We do recognise however that there are some cases where a genuine need for treatment arises and that it is important that those needs are met with appropriate advice and treatment. Sometimes advice and self-help, suitably guided by trained professionals, can be as effective as the claimant attending sessions for physical treatment.

145. Important changes were made to the Civil Procedure Rules in October 2014, ahead of the introduction of MedCo, to remove the possibility of a medical practitioner acting as expert in the claim and at the same time proposing treatment for which the medical expert themselves could then also charge. From October 2014, the medical report for claims purposes cannot be provided by a medical practitioner who is treating the claimant and likewise, any treatment recommended cannot be provided by the reporting expert.

146. The introduction of MedCo for reporting went one stage further in preventing solicitors from instructing Medical Reporting Organisations (MRO) with whom the solicitors have direct financial links. No such measures have yet been introduced to control the use of rehabilitation providers. Some firms of claimant solicitors have incorporated rehabilitation providers into their corporate group structure to take advantage of the additional revenue available from this source. Other claimant solicitors have entered into close working relationships with regular providers of rehabilitation, no doubt for mutual financial benefit.

147. The Rehabilitation Working Party is a cross industry body which for many years has championed the appropriate use of rehabilitation in personal injury claims. In 1999 the Working Party introduced a Code of Practice for use by solicitors and insurers and this has since gone through various changes, most recently in 2015. The New Code in 2015 produced for the first time a section dedicated to the use of rehabilitation in low value claims and, in doing so, promoted the notion that the rehabilitation provider should not have any direct or indirect financial links to the solicitors acting for the claimant. This eminently sensible concept had universal support within the Working Party and was originally proposed by the claimant solicitor representatives.

148. However, within weeks of the final version of the New Code being published, a rehabilitation provider linked to a solicitor threatened and then issued judicial review proceedings against the Working Party (and against the ABI as its backers), citing the independence provisions as “irrational”. Those proceedings were ultimately discontinued but demonstrate the unhealthy nature of some working relationships within the rehabilitation industry.

149. The growing use of rehabilitation in low value claims (industry data demonstrates an increase of 9% in the number of claims for soft tissue injury with a psychiatric element where rehabilitation is claimed between January 2012 and November 2015) should have a positive impact on the overall value of those claims. Treatment to

improve the claimant's condition should naturally reduce the damages paid, however no such evidence is available. This is part of the concern that the cost / benefit analysis of rehabilitation in low value claims does not make a positive case for use of rehabilitation.

150. To counter this growing market, insurer favour option 2, so that the insurer should arrange and pay for any rehabilitation needed by the claimant. This option should be pursued whether the government's ultimate choice is for removal of damages in claims of up to and including six months or whether a damages tariff applies in this period. The need for insurers to control the provision of treatment for which they will ultimately pay is obvious.

151. Insurers also see the need for the quality of treatment provision to be a real focus in any appropriate use of rehabilitation - this would come from insurers entering into service terms with relevant and trusted providers. It is also acknowledged that some extension or adaptation of MedCo to cover rehabilitation providers, as envisaged in option 4, could be beneficial, but that the way in which this would work needs to be considered further. Whether option 5 should also be considered will depend on what if anything comes of the proposal to blend option 2 and 4.

152. Rehabilitation providers, like MROs and credit hire organisations, are largely unregulated and not subject to the same controls in the way in which they operate as solicitors and insurers. As an overall point the ABI believes that all companies seeking to derive revenue from running or supporting personal injury claims should be regulated.

iv Recoverability of Disbursements

Question 29: Do you agree or disagree that the government explore the further option of restricting the recoverability of disbursements, e.g. for medical reports?

Please explain your reasons.

153. The ABI's proposal in relation to early notification of claims is relevant to this section. We propose that if the claim is notified within one month post-accident, insurers would meet the disbursement costs; later than that, the claimant should meet the cost.

154. It is assumed that the main disbursement that the claimant could be required to meet is the medical report fee. The current fixed fee of £180 + VAT should be reconsidered. Anecdotally insurers understand that the sums paid by MROs to the reporting expert may be as low as £20-£30 on each case; if that is right, it does not create the right environment for robust medical reporting. MROs themselves would have the necessary data on this.

155. <u>The cost should be revisited, especially if the proposal that claimants should meet</u>

the cost is taken forward, or if the proposals put forward by the government meet wider agreement. It may be sensible to approach the issue from the other direction: an MRO should not as a matter of principle be able to apply a percentage uplift of more than X% to the sum charged by the doctor/ health professional who examines the claimant and produces the report. The total fee should be capped at no more (and ideally less) than the current maximum of £180 + VAT.

156. In *Charman v John Reilly (Civil Engineering) Ltd* (2013) CC (Liverpool)(DJ Woodburn) – 2/05/2013, the Court considered the reasonableness or otherwise of a medical report fee of £420. The DJ referred to *Stringer v Copley* in which the Court had noted that MROs should distinguish their charges and the medical fee. In Charman, no evidence was put before the Court as to the medical fee, nor of the MROs charges. Doing the best he could in the absence of any evidence he stated "*I would assess the cost of the reasonably experienced and competent medical agency to carry out the work to obtain the medical report at £50 + VAT, where applicable……I would further assess the cost payable by the agency to the medical expert at £150."*

157. Whilst the Judge in that case was assessing the figures without the benefit of any evidence before him as to the actual sums incurred, it is clear that in his view, the MRO's fee should be around 25% of the total sum recovered.

v. A potential future option – a points based system

Question 30: 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?

Please give reasons for your answer and state which elements, if any, should be considered in its development.

158. The ABI supports the concept of making general damages more predictable, especially in lower value claims where this is preferable to leaving arguments open over comparatively minor differences in opinion as to the right level of damages. Anything which makes the process of assessing damages in such cases less subjective has to be welcomed.

159. Most insurers either use Colossus or Claims Outcome Adviser (COA) to value their claims. Both systems are general damages calculators and the vast majority of cases settle within Colossus or COA generated figures. Lord Justice Jackson in his Preliminary Report on Civil Litigation Costs described them as follows:

"Both work on a points based system, after information from the medical report has been fed into the system. The system generates a points figure from the information

provided, which translates into a settlement bracket for negotiation purposes. The system is kept up to date by feeding back in the agreed damages figures post-settlement."

160. Many Insurers are therefore already using a points based system to value their claims and are well used to the principle of a points based system. In his report Lord Justice Jackson considered the situation in Italy, France and Spain, noting that the purpose of doing so was to inform further debate in the second phase of his work. Each country had a variant of a points based system which appears to make damages for personal injuries more predictable in those jurisdictions than in England and Wales.

161. Elsewhere in the world, several jurisdictions use the American Medical Association (AMA) evaluation. This would allow for medical experts to assess the claimant based on a whole person impairment basis (WPI). This produces a % outcome and each % attracts a specified level of damages. An explanation of the AMA evaluation can be found in Annex D**.**

162. The benefit of a points based system is that it allows certainty for a claimant as to how much they will receive by way of damages. Once their medical report has been prepared and an assessment completed, then the assessed 'points' or WPI are directly linked to a value for damages.

163. It is possible to make the system as simple or as complex as is needed. It could range from a straight WPI assessment, to a significantly more complex European type system where factors such as age, dependents, time off work etc. are all built into the overall calculation. It also allows for biometric evidence to be fed into the calculations to assess the level of severity, although no account is taken of engineering evidence as to accident mechanism.

164. Overall the ABI support the points based system as a method of calculation of damages. It will be important in light of the issues raised in respect of the SCT increase where work needs to be done to ensure sufficient safeguards for claimants that this work is taken forward.

Case study: the Victorian Transport Accident Commission Scheme (TAC)

165. The AMA evaluation is used in the Victorian Transport Accident Commission Scheme (TAC)[19] in Australia. Damages for personal injury are payable under the determined benefit scheme assessed against the level of injury. The impairment benefit is a state run, no fault scheme and lump sum benefits are payable where the impairment is determined to be over 11%. Payments range from 7,310 AUD (£4,316 as at 07/12/16 (1AUD = 0.590419 GBP)) where impairment is 11% to

19 http://www.tac.vic.gov.au/providers/fees-and-policies/policy/accidents-on-or-after-16-december-2004/impairment-payments-for-accidents-on-or-after-16-december-2004

333,630 AUD (£196,981 as at 07/12/16) where impairment is assessed at 100%. No payment is made by the TAC for any impairment below 11%. As a guide, no soft-tissue injury attracts more than 3%.

166. There is also a residual common law provision for damages. This requires a serious injury with impairment of over 30%. It is limited to pain and suffering and loss of earnings as the rest is covered by the TAC. The *Transport Accident Act (1986)* defines serious injury as:

- A permanent impairment of 30% or more
- Serious long-term impairment or loss of a body function
- Permanent serious disfigurement, such as scarring
- Severe long-term mental or severe long-term behavioural disturbance or disorder
- The loss of a foetus.

Other Issues for Consideration

Question 31: Please provide details of any other suggestions where further government reform could help control the costs of civil litigation.

Controlling costs

167. We would discourage the government from making any other changes which would dilute the effect of these proposals on the cost of insurance to consumers. The recent announcement of a rise in Insurance Premium Tax with effect from June 2017 is just one example; a further increase in court fees applicable to civil claims generally or personal injury claims specifically, or a downward movement of the discount rate used for calculating future loss claims, could create costs which would offset any savings made from these otherwise welcome proposals.

168. The ABI note the Lord Chancellor's announcement on 7 December that the discount rate is to be reviewed and an announcement made by 31st January 2017. Any downward movement of the discount rate would have very significant consequences for insurers. The resulting cost could dwarf any potential savings to be made by these reforms and as a result, the premium paying public would see no benefit in the way of savings against premiums. Any saving would then necessarily only be against a premium increase (and given the proposed timings, such premium increase is likely to be far sooner).

169. The fluctuations in the pound and the upward pressure on the price of parts will also impact on premium costs.

Measuring Success

170. It will be vitally important when assessing the success of these reforms to have a baseline in place against which the savings created by these reforms can be measured. This will enable the government to assess the effect and also to measure the level of savings passed on to consumers by insurers.

Transitional Provisions

171. Transitional provisions for these changes to the law of damages ought to match the existing approach taken to changes in the law of damages.

Association of British Insurers
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