Ministry of Justice

Reforming the soft tissue injury (whiplash) claims process

A consultation on measures to disincentivise minor soft tissue injury claims & arrangements for personal injury claims in England and Wales.

A response by Access to Justice (A2J)

January 2017

Access to Justice (A2J)
Response to HM Government Consultation on 'Reforming the Soft Tissue Injury ('whiplash') Claims Process'

What is A2J?

A2J is a company limited by guarantee. It has an executive committee representing the broader personal injury (PI) sector. A2J is passionate about preserving the centuries-old right of the injured person to recover their losses caused by the fault of another.

See more about A2J on:

Web: www.ajag.co.uk

Twitter: @accesstojustice

Facebook: Access to Justice page

LinkedIn: Access to Justice

Contact details:

Access to Justice
c/o Ralli Ltd
Jackson House
Sibson Road
Sale
Manchester
M33 7RU

Martin Coyne, Chairman
0161 832 6131
martin.coyne@rallisolicitors.co.uk

Executive Summary

Access to Justice (A2J) welcomes the opportunity to respond to this consultation. Our intention is to be constructive in our comments and set out workable, evidence-based alternatives where the government's plans are not in the best interests of injured people. Some 60 million people in England and Wales will be affected by the proposals, which are draconian and do not prioritise their needs.

We would add that the seven-week consultation period has given insufficient time, particularly given Christmas and New Year, to enable sufficient data to be gathered and submitted. This is particularly unfair when it appears that the MoJ has been working with the insurance industry for over 12 months in preparing the data and questions for the consultation and impact assessment.

Overview of A2J Proposals and Research

1. The Alternative Claims Framework

We believe that in many areas there is widespread agreement from insurers and injured people's representatives on the best way to reform the claims process. It is in the spirit of collaboration as well as fairness that A2J has set out in detail its Alternative Claims Framework (ACF) in answer to question 31 of this consultation.

The ACF can be introduced almost immediately and without the need for primary legislation or the parliamentary resource this would necessitate. The ACF will reduce cold calling, eliminate older cases, inhibit the business practices of unethical claims management companies (CMCs), reduce the overall cost of whiplash litigation and be fair to genuine claimants. Specific recommendations include:

- an index-linked increase in the Small Claims Track (SCL) limit from £1,000 to £1,600, which reflects Retail Prices Inflation since 1999, when the SCL was last amended for personal injury cases;
- a change in the notification process whereby all road traffic accident (RTA) claims must be lodged with the Portal within 12 months of the day of accident. After this, claims can be lodged within three years, as per the 1980 Limitation Act, but no costs can be recovered;
- implementation of almost all of the recommendations of the January 2016 Insurance Fraud Taskforce Report;
- early implementation of the recommendations of the Brady Report into CMCs;
- creation of a cross-industry working party with an independent chairperson to oversee all reforms.

The focus of the government's policy proposals as set out in the 2015 Autumn Statement was whiplash cases. Any reforms should therefore relate to RTA claims only, which represents the sizeable majority of all claims, and not *all* minor soft tissue personal injury cases.

The non-availability of post LASPO data and impact on premiums

A2J also makes the following observations:

- That the consultation proposals undermine the principle of English law of *restituto in integrum*, in other words, that the injured should be put back into the same position, in financial terms, that they were in immediately before any accident caused by another.
- That the impact of relevant legal reforms during the last several years, including that of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012, has not been assessed or reviewed as promised by the government. In particular, no account has been taken of the savings made by insurers as a result of these reforms, estimated to be in excess of £1bn per annum, none of which have been passed on to policyholders.

Recent reforms include the following (most of which led to direct savings for the insurance industry):

1. The ban on the payment of referral fees for personal injury claims
2. The ban on the recoverability of the success fees from the losing party
3. The ban on the recoverability of after-the-event (ATE) legal expenses insurance premiums from the losing party
4. The reduction of legal fees for RTA portal cases from £1,200 to £500
5. The extension of the Road Traffic Portal to cases valued up to £25,000
6. The introduction of a Portal scheme for Employer and Public Liability (EL/PL) for claims valued up to £25,000
7. The introduction of a fixed recoverable costs scheme for non-portal cases
8. The introduction of 'qualified one way costs shifting' (QOCS)
9. The introduction of fixed cost medical reports
10. The removal of strict civil liability for employers who breach health and safety regulations
11. The removal of QOCS protection for claimants found to be fundamentally dishonest
12. The introduction of the AskCue(PI) process to help reduce fraud
13. The allocation of randomly allocated medical experts through the MedCo system.

The effect of the proposed reforms on the consumer

There is no evidence of any consumer benefit in terms of motor insurance premiums as a consequence of the above reforms, which have instead coincided with a rapid rise year-on-year. Moreover, as fewer than one per cent of UK motor insurers (two from approximately 300) have pledged to pass on any further savings made as a result of the government's latest proposals – and neither insurer has said how they will do so – consumers will rightly suspect that they will receive little or no benefit at all. In the meantime, insurers remain under investigation by the Financial Conduct Authority for actively seeking arbitrarily to increase their customers' premiums through the renewal process year on year.

It should be noted:

- That the government's proposals discriminate against those injured claimants who have physical or mental disabilities and who require the assistance of a solicitor to help properly calculate and recover their losses.
- That collaboration between all interested parties is the best way to ensure that any reforms will be fair and effective. To date, the government has relied almost exclusively on the insurance industry to help frame its policy proposals.
- That in the 2015 Autumn Statement, the government stressed the effect of fraud on the volumes of whiplash claims, when in fact it is agreed across the industry that the overwhelming majority of personal injury claims are genuine, with Association of British Insurers (ABI) figures showing just 0.25 per cent of claims are proven to be fraudulent. The rationale to introduce the government's reforms to tackle fraud is therefore flawed.
- That increasing the SCL to £5,000 will increase the propensity for fraud as it will remove the important filtering role solicitors play in removing unmeritorious claims. The vacuum created could be filled by cold-calling companies and others who do not have the best interests of injured people at heart.
- That the data referred to in the consultation and accompanying impact assessment is out-dated and partial, with almost all of the information provided by insurers and their trade body. We believe the government should fulfil its duty to use accurate, balanced and up-to-date information from across the sector.
- That the consultation trivialises mental injury and discriminates against those who suffer it.
- That victims' rights which have been established and defended since the 7th Century AD are set to be traded in for unsubstantiated savings to motor insurance premium holders. The government has not said how these would be passed on (rather than used to increase insurers' profitability, dividend payments or senior executive remuneration packages, for example).
- That the government has said it will not regulate the passing on of the purported savings to policyholders.
- That the economic impact of the government's proposals on claimants and their representatives has not been properly calculated within the impact assessment. Both private individuals and the public finances will be permanently and materially affected as a result. For further details please see in the attached appendix the January 2017 economic analysis prepared for A2J by Capital Economics.
- That the proposed £5,000 SCL will create significant financial detriment to all, but particularly to lower income groups. As £5,000 represents more than three months' take-home salary for the average worker in England and Wales, it could not reasonably be described as a 'small' claim.
- That the removal of the right to compensation for soft tissue injuries and a huge increase in the small claims limit will *de facto* result in less compensation being paid out and will prevent injured people being put into the same financial position they were in immediately before their accidents.
- That the introduction of the government's proposed reforms will encourage claimants to seek restitution as litigants in person (LiP), something most will be

unwilling or fearful about undertaking without appropriate legal advice. This creates a further imbalance of power between the LiP and the insurer in favour of the latter.

- That Lord Justice Briggs expressed strong concerns in relation to the small claims track and its suitability for personal injury claims in the final report of his review into the structure of civil courts, saying the small claims track 'would be an inefficient vehicle for the determination of such [personal injury] claims.' Lord Justice Briggs stated a preference for the retention of the Portal for personal injury claims as it is both effective and efficient.
- That the Civil Justice Council concluded that considerable time and money would be required to adapt MedCo and the Portal for use as by litigants in person when this was investigated in June 2016.
- That the government's proposed reforms are supposed to tackle the number of people claiming for whiplash injuries. In fact, based upon the data regarding settled and paid claims supplied by the Compensation Recovery Unit (CRU), whiplash claims have *decreased* between 2010/2011 and 2015/16 by 235,746. A fall in the number of claims has occurred in each of the years under review. This, together with MedCo figures, is the most reliable data available.

The decline in CRU "Whiplash" figures:

2010/2011: 571,111
2011/2012: 547,405
2012/2013: 488,281
2013/2014: 410,215
2014/2015: 376,513
2015/2016: 335,365

Since 2010 the CRU has categorised more complex injuries as "Neck and Back". These numbers have increased year on year as follows:

2010/2011: 168,618
2011/2012: 219,683
2012/2013: 271,283
2013/2014: 299,938
2014/2015: 318,506
2015/2016: 349,330

These injured persons have increased in number from 2010/2011 to 2015/2016 by 180,712 as a consequence of re-categorisation.

In contrast, in 2015/2016 the Claims Portal recorded 856,631 RTA Claims Notification Forms (CNFs) as being lodged on the system. However, there is no reliable data on how many of these claims resulted in settlements and how many resulted in no payments.

Aggregating the CRU whiplash and neck and back figures shows a 55,034 reduction in claims since the introduction of the LASPO reforms, which would represent a saving to insurers of £150m in the 2015/16 period alone. As explained later in this response, these savings have not been passed on to consumers.

2010/2011: 739,729
2011/2012: 766,794
2012/2013: 759,564
2013/2014: 710,153
2014/2015: 695,019
2015/2016: 684,695

By contrast, the number of claims resulting in a selected MedCo medical expert in the 2015/16 was 528,000, giving an indication as to the amount of claims that resulted in a medical expert selection, but even this figure does not include those claims that do not proceed because of liability.

Taking the CRU figures of 684,695 and the MedCo figure of 528,000, it is clear that there has been a clear reduction of claims as these figures represent live cases which have either settled or are going to settle. The Portal figures also represent those cases which are lodged and go no further or are successfully defended by insurers.

Post-LASPO savings by insurers

The ABI estimate that £1.1 billion in total savings was passed on to policyholders in the period 2013 to 2015. The supportive data has not been produced and therefore cannot even be challenged or understood. A2J believes the savings are more likely to be in the region of £1.3 billion per annum since 2013. Average motor insurance premiums rose 12 per cent in 2015, with a similar double-digit increase for 2016 (data from ABI Average Private Comprehensive Motor Insurance Premium Tracker). IPT has been raised by 4 per cent to date, damages increased notionally by 10 per cent, but there has been no noticeable reduction in car insurance premiums, despite the annual savings. Thompsons Solicitors has suggested insurer savings of over £6 billion since 2010.

A2J recommends that the MoJ asks the insurance industry to detail the savings made annually since LASPO was implemented in April 2013. Forthcoming analysis from Capital Economics looks set to show that if costs do reduce, insurance premiums may not follow suit to deliver the consumer benefits promised in the consultation.

Post-consultation implementation data

The ABI believes that in their most severe form (the abolition of all compensation for minor soft tissue injuries *and* the raising of the Small Claims Limit to £5,000), the government's proposals will save £1 billion for insurers. This translates to £40 per motor insurance policy, which will be passed on to policyholders in reduced premiums. The government has acknowledged there will be no mechanism to enforce this.

The analysis contained within the attached report from independent actuaries Mazars dated 6 January 2017 shows that any savings of £40 per policy are unfounded and the savings, if passed on, would in likelihood only amount to £10. Given the lack of competitiveness in the insurance market, savings will not be apparent in any case and premiums look set to continue to rise.

While the ACF will generate savings of more than £300m per annum, again there is no guarantee that any such savings will be passed through to policyholders by insurers.

Economic Impact

The report of Capital Economics dated 5 January 2016 is attached with this A2J response. By instigating the reforms in their most severe form – with no compensation for soft tissue injuries whatsoever and an increase in the small claims limit to £5,000 - Capital Economics have made the following key findings:

- Legal firms employ 27,800 workers for activity related to personal injury compensation cases, but personal injury related work is not confined to solicitors and law firm employees; it comprises legal firms, claims management companies, medical reporting organisations, insurance claims companies and after-the-event insurers. Overall, Capital Economics estimates that activity related to personal injury cases directly provides more than 44,000 jobs

- Economic activity related to personal injury cases is spread across the United Kingdom but there are particularly large clusters around the cities of Manchester, Liverpool and Sheffield

- An additional 40,000 jobs and £2.1 billion of value added to the British economy is supported by the spending of companies on their suppliers and the spending of personal injury employees on goods and services from business across the country

- The loss of personal injury case activity will push margins in many legal firms to unsustainable levels; Capital Economics estimates 70 per cent of employment related to personal injury cases is at high risk of being lost and a further ten per cent is at moderate risk

- Direct jobs related to personal injury case activity at moderate or high risk total over 35,000, which represents fourteen per cent of the entire legal sector in England and Wales; re-deployment of these workers to other areas of the sector will be tough given the legal sector has grown by only three per cent in the last six years

- The total number of jobs supported in the economy by the personal injury case-related activity in firms at high risk is 66,000 with a further 11,000 in firms at moderate risk

- The impact will be felt in all regions and nations of the United Kingdom; the largest impacts will be in the North West, London, South East and Yorkshire and the Humber

- With clusters of activity some cities will be particularly vulnerable; Manchester and Liverpool, which already have higher unemployment than the national average, could lose one quarter and one fifth of all jobs in solicitors firms respectively.

In conclusion, A2J believes the government should seek to control the number of whiplash claims, reduce fraud, save money for consumers and tackle cold calling by implementing the Alterative Claims Framework we have set out. This will achieve the government's stated aims but do so in a way that is both fair and effective.

A2J's detailed responses to the consultation questions are set out below.

A2J's Response to the Consultation Questions

Definition of Soft Tissue Injury

Question 1: *Should the definition in paragraph 17 be used to identify the claims to be affected by removal of compensation for pain, suffering and loss of amenity from minor road traffic accident related soft tissue injury claims, and introduction of a fixed tariff of proportionate compensation payments for all other such claims? Please give your reasons why, and any alternative definition that should be considered.*

Answer 1: It is assumed this should read paragraph 23, not paragraph 17. This being the case, we are concerned that while the focus of this consultation is 'whiplash', as per the title, this definition is much more extensive.

A2J agrees neither with the removal of compensation nor the introduction of a fixed tariff.

'Whiplash' is typically associated with neck and/or back injuries, but the proposed definition in paragraph 23 includes all soft tissue injuries, including those commonly seen in road-traffic accidents caused to shoulders, hands, legs and elsewhere caused by impact with seatbelts, airbags and other parts of the vehicle. Typical examples are burns, pressure sores, bruising caused by seat belts, damage to internal organs, cuts and lacerations, tears to ligaments, muscles and tendons or nerve damage. While such injuries may be less severe than bone fractures and breaks, they can have longer-lasting effects, be more painful and more disfiguring – all adding to any psychological trauma, which can accompany physical injury. Soft tissue injuries can also lead to chronic pain syndrome, which requires on-going reference to pain-management specialists. The loss of amenity, pain and suffering can be much worse than, for example, a broken bone.

The definition of soft tissue injuries is therefore far too wide and includes a host of injuries not within the scope of the original consultation – and especially in terms of how this is being portrayed to the general public as a clampdown on 'whiplash' fraud, with Chancellor Philip Hammond stating in his 2016 Autumn Statement speech: "*I can confirm the government's commitment to legislate next year to end the compensation culture surrounding whiplash claims – a major area of insurance fraud – saving drivers an average of £40 on their annual premiums.*"

There is concern too that certain victims of road traffic accidents are being unfairly discriminated against and not being treated with equality under the law. For example, a claimant who suffers a broken bone may require little or no time off work and make a full and speedy recovery. However, they would receive far more in compensation than someone who suffered a soft tissue 'whiplash' injury and who could be in severe pain for many months and be unable to work, sleep properly, carry shopping, exercise, play with their children or grandchildren or have anything approaching the freedom of movement most of us would expect in our day-to-day lives. Such a person may suffer loss of earnings for several weeks and without legal assistance could get into financial difficulty and be unable to recover their losses.

In attempting to clamp down on one type of injury which the government deems to be largely trivial - and which the insurance industry no longer wishes to compensate genuine claimants for - it is acting in a way which is grossly unfair to genuine victims, including injured people who have suffered a whole range of other soft tissue damage.

A single, one-size-fits-all definition of minor soft tissue injuries is neither practical nor fair, not least because many RTA victims will suffer multiple injuries which may not be restricted to their neck or back. It is universally accepted that injuries and their associated pain are unique in intensity to the individual, regardless of age, disability or gender.

As stated above, A2J agrees neither with the removal of compensation nor the introduction of a fixed tariff. There is already in place a damages system which independently reflects an appropriate compensation level for each type of injury, both through case law and the Judicial College Guidelines (JCGs). It should be noted that the constituent members who produce the JCGs represent a cross-section of the personal injury sector. No one injury is the same, so fairness can be maintained by using the "prognosis" evaluation referred to in question 9 below, ensuring an individual receives proportionate compensation rather than the 'one-size-fits-all' tariff system the government proposes.

Instead A2J urges the government to focus on the central issue, which is how to reduce the volume of questionable 'whiplash' claims in England and Wales, something addressed in greater detail in answer to Question 31 below.

There is also a lack of clarity when the consultation refers to "low speed" and "minor" road traffic accidents. Low-speed accidents can still cause significant injuries depending on the disposition of the injured. Similarly, the title of the consultation paper refers to "whiplash" injuries, which are not one and the same as "soft tissue injuries.

Psychological Injuries

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? Please provide further information in support of your answer, including if relevant, how this definition could be amended to effectively capture this classification of claim.*

Answer 2: As in Question 1 above, it must be assumed the definition referred to is that in paragraph 23, not 17.

The severe implications of psychological symptoms on injured people should not be considered based merely upon "anecdotal evidence from the insurance industry" (paragraph 27).

Research confirms that psychological injuries are distinct and separate from any soft tissue injury. Indeed they can happen without any physical injury and are often complex, long lasting and require specialist treatment. Such injuries can affect relationships and family life.

These recognised psychological injuries, such as post-traumatic stress disorder (PTSD) - as opposed to travel anxiety - have their own section within the current JCGs. Given the complexity of these injuries, £25 is totally inadequate compensation to cover the harm caused. The one-size-fits-all approach is unfair, discriminatory and trivialises such injuries. Such cases must be evidenced by a specialist psychiatric or psychological report, not a GP's report.

The intention to capture all psychological injuries within this definition is grossly inequitable and discriminatory to accident victims and needs a full review based on the medical and psychological research available. It should be noted that such injuries cannot and should not be assessed by general practitioners. As this is only a potential adverse consequence, data should be obtained to assess if it turns into an actual consequence. Amendments to the Compensation Recovery Unit (CRU) form could be introduced whereby the 'primary' injury is logged as well as any 'secondary' injury. That way, any impact can be properly assessed.

Psychological injuries as such can generate similar compensation to hard tissue injuries such as broken legs and should not be grouped with soft tissue injuries. They are treated as a distinct injury within the JCGs and should remain separate.

If psychological trauma is the primary injury, then this should patently fall outside any fixed tariff given the varied nature of such injuries and their prognosis, complexity and need for expert evidence. Banding such injuries with minor RTAs would result in often very vulnerable claimants not getting access to justice or being unfairly compensated at an unacceptably low level. The government has expressed a desire to tackle mental illnesses in the UK – and has given them parity of esteem under the 2012 Health and Social Care Act - but the proposals within the consultation trivialise and downgrade such conditions.

As stated above, it is a matter of deep regret that a reform with such potentially severe implications on injured people should be considered based on "anecdotal evidence from the insurance industry" (paragraph 27). There should be a proper, independent assessment before those with psychological injuries have their rights to adequate compensation removed. To trivialise mental injury in this way is discriminatory, obtuse and ill considered.

Minor Injury – an injury lasting 6 months or less

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

Answer 3: A2J opposes this proposal.

The reduction or removal of compensation for pain, suffering and loss of amenity for soft tissue injuries in RTAs is not in the interests of the public, but rather is clearly in the interests of insurers. As confirmed in the impact assessment accompanying this consultation, a consequence of these proposals is that insurers' profitability will be

considerably enhanced on top of the savings they have accrued following reforms such as the LASPO Act 2012.

The object of compensation for personal injury is to put the victim in the same financial position as at the point immediately before the accident. Pain, suffering and loss of amenity can only be compensated monetarily. Rehabilitation medicine such as physiotherapy aids the reduction of the pain, suffering and loss of amenity, but cannot be equated with compensation.

These proposals take no account of the genuine pain suffered and the loss of amenity associated with typical RTA injuries. This includes needing help to get dressed or take a shower, needing to be driven by others, sleeplessness, missing out on pastimes and family life and so forth. To remove compensation for this altogether, or to set fixed and unjustifiably low awards that have no link with the injured persons' circumstances, is unsympathetic at best and vindictive at worst.

A soft tissue injury to the chest/ribs can mean excruciating pain on every movement for the entire period of suffering, which could be anything up to two months. Because such injuries are untreatable in medical terms, they have to be left to recover in their own time. The degree of pain will also vary from person to person. This can result in loss of sleep and substantial effects of activities of daily living resulting in psychological/mental distress and time off work, leading to financial hardship, reliance on the state for benefits and NHS physiotherapy costs.

In an unfair exchange for the loss of the centuries-old rights, motor insurance policy holders are being offered up to a £40 saving from their annual motor insurance premium. However, this figure does not withstand actuarial scrutiny, and is even doubted by HM Treasury's own analysis. The 'Red Book' figures accompanying the 2015 Autumn Statement, suggested the saving to be £12.19 in 2017-18, £15.40 in 2018-19 and £18.48 in 2019-20 (although independent analysis from Mazars attached as an appendix to this submission suggests a figure of £10 to be credible). Moreover, no enforcement mechanism has been suggested to ensure any potential savings will be passed on to the public and any savings would come at a time of rapid increases in average premiums (up £109 per premium, on average, in 2015-16 alone).

More than a year after the government's proposals were first announced, only two UK insurers, out of approximately 300 (Aviva and LV=) have said they will pass any savings on to their customers, with neither proposing how they will do this openly and transparently. Meanwhile road users such as car passengers, cyclists and pedestrians will receive no theoretical savings in exchange for the loss of their rights, unless they are themselves also motor insurance policyholders.

The rationale behind the government's proposals is to reduce the price of motor insurance premiums for consumers. This can only happen if the proposals deliver savings for the insurance industry and if these savings are then passed onto consumers.

The Ministry of Justice assume that 85 per cent of insurance industry cost savings will pass through as lower premiums. This is based on previous analysis by the Competition and Markets Authority, which is only weakly related to the specifics of these proposed reforms. There are good reasons to believe that assumed pass-through rate is excessive and that it would be lower in reality.

First, the high pass-through rate used in the impact assessment relies on a weak assumption that the motor insurance industry is competitive. Consumers can receive a number of quotes through price-comparison websites, which may give the appearance of strong competition. However, many of these will have been made by the same underwriting group and cannot be seen as separate offers. In addition, yet to be published research suggests that consumers will typically see competitive quotes from just two or three underwriting groups.

Second, what goes up doesn't necessarily come down. The 85 per cent pass-through rate assumption is based on analysis that examined what the pass-through rates for additional costs or additional revenues might be. Looking specifically at the likely impact of cost reductions, evidence from other industries suggests that firms do not respond to cost decreases in the same way that they do to cost increases. It is more likely that a firm will increase prices than decrease them.

While it would have been likely that insurers would have passed on a significant proportion of a cost increase, perhaps in the region of 50 to 70 per cent, it is unlikely that any cost reductions that result from the proposed reforms would be passed on to the same degree.

The proposed reforms are more likely to deliver a boost to insurers' profits than they are to achieve the government's stated aims of reducing the price of motor insurance premiums for consumers.

As motor insurance is mandated by the state, dissatisfied policyholders have no option but to accept the dramatic reduction in the potential recompense they (and other road users) will or will not receive in the event of an accident. The clear inference drawn from the government's consultation and the comments made by the Chancellor in his 2016 Autumn Statement is that insurers' profitability is far more important than genuinely injured people's rights, and that the abolition or severe restriction in general damages in such cases is being brought in to recompense insurers for recent increases in Insurance Premium Tax.

There has been no call from either the judiciary or medical bodies to reduce compensation for injuries suffered in road-traffic accidents. In similar jurisdictions to England and Wales, awards are often much higher: in the Republic of Ireland, for example, the 'General Guidelines as to the amounts which may be awarded or assessed in Personal Injury Claims – Book of Quantum' (p.27) suggest such minor injuries merit compensation of up to €19,400. Even within the UK there is inconsistency, with damages of up to £6,600 for 'whiplash'/minor soft tissue injuries in Scotland.

In terms of defining an appropriate length of time which people can be expected to suffer pain as a consequence of someone else's actions without compensation, six months is far

beyond what any decent society should find acceptable, even in exchange for a possible £10 off individual motor insurance policy holders' annual premiums.

By implication, these proposals trivialise, demean and question the integrity of the injured and innocent RTA victims. They also significantly affect the victim's human rights under Article 6 the Human Rights Act 1998.

These proposals are inconsistent with the awards for soft tissue injuries within the Criminal Injuries Compensation Awards Scheme (CICA). Under this scheme, the government accepts the existence of "Neck/Whiplash" as a genuine injury. The bracket of compensation under CICA is "Disabling for more than 13 weeks - £1k." CICA guidelines do provide whiplash compensation for 13 weeks and above. There is a £1,000 minimum level of compensation if the injury is disabling for more than 13 weeks, then the awards rise to the category "Seriously Disabling" for non-permanent injury, for which the award is £3,000. "Permanent Injuries" attract awards of £11,000+.

Therefore the proposal in question 3 is inconsistent with other compensation schemes provided by the government.

Injuries lasting nine months or less

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 the scope.*

Answer 4: As outlined above in answer to question 3, this proposal is strongly opposed. An injury, which takes up to six months let alone nine months to recover from would not be described by any reasonable or objective person as 'minor'.

The Removal of Compensation for "minor claims"

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? Please explain your reasons.*

Answer 5: A2J opposes this proposal, subject to Answer 3 above.

The right to recover compensation for injury caused by another's negligence dates back to the 7th century and is referenced in Magna Carta. The government is proposing a fundamental change by primary legislation of an integral part of English law which affects the human rights of the public, purely for the benefit of insurers. There is additionally a substantial loss to the Exchequer as a result of the significant unemployment its proposals will result in.

While the government is actively promoting compensation for negligent behaviour (for instance, as seen in paragraph 12 of the 2015 Autumn Statement, calling for compensation when trains run late – plans which have subsequently been implemented for some train

operating companies), it seems perverse that it is also trying to make political capital by removing compensation from drivers, passengers and other road users who are genuinely hurt through no fault of their own in RTAs.

Removing this right undermines a basic principle of the law of tort and would be a profound restriction on access to justice. It sends the unambiguous message that while an at-fault driver – through their insurer – is expected to pay to have any damage to another motorist's vehicle repaired, in most cases any physical or psychological harm inflicted on the motorist, their passengers and any other road users or themselves merits little or no compensation.

In addition, the relative volume of road traffic claims has reduced significantly over the last few years, partly as a result of reforms to the claims management industry, predictive/fixed legal costs and the 'Jackson reforms' through LASPO – for a fuller list of the changes, please see page 3 above.

Finally, there is no reasonable or evidential basis on which to make statements that the amount of damages is "out of all proportion" to or "too high" for the level of pain suffered. Pain is subjective, each case and each victim is unique and the injuries under consideration can be extremely debilitating, especially for more vulnerable people such as the young, the elderly or the disabled. Removing their right to reasonable compensation is unfair both on them as individuals and on wider society, which through state-funded public services will be expected to provide the restitution which insurers no longer care to.

A fixed sum in compensation for "minor claims"

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? Please explain your reasons.*

Answer 6: As stated previously, each case is unique and it would be wrong to treat all claims for pain suffered in the same way. A fixed sum cannot take into account the type and range of injures involved and it would be illogical to compensate a two-week injury in the same way as one which takes five months to recover from.

The Judicial College Guidelines created by Roger Cox QC are assessed by a cross-industry panel of personal injury experts. The current Judicial College Board (JCB) includes Lady Justice Rafferty, Mrs Justice Davies, Mr Justice Foskett, Mr Justice Wyn Williams, His Honour Judge John Phillips, Judge Brian Doyle, Professor Judge Jeremy Cooper, Professor Judge Andrew Grubb and Sheridan Greenland. The book is used by all judges, recorders, district judges and all other stakeholders in personal injury law. The JCGs have been refined from decades of common law and are the recognised, authoritative guide for the full range of awards for general damages. The JCGs were endorsed in the Court of Appeal in *Simmons v Castle [2012] EWCA 1288.*

Therefore the government's proposals are rejecting decades of careful analysis, without any proper consultation with such experienced/learned individuals as judges in practice and the JCB for the guidance of the proper and proportionate compensation for genuine injuries.

Loss of amenity awards vary greatly between claimants and depend upon individual circumstances, for instance whether they are prevented from taking an examination or pursuing sports or hobbies. Under a system of fixed sums, such diverse injuries and losses would again be treated identically. This cannot be just or fair.

Judges hear injured people explain details of their actual pain, suffering and loss of amenity in courts of law and make their awards based upon lay and medical evidence. It would be wholly wrong and unfair to dismiss centuries of law-making to suit the persistent but very short-term lobbying demands of the insurance industry.

Fixed Compensation of £400 or £425 for minor claims

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.*

Answer 7: A2J opposes these proposals.

Any proposed tariffs should reflect the current awards, where active research of independent judges has been undertaken in the JCGs, which have been drawn up and refined over decades of common law and were established in 1991. As an example, a three-month injury award of £2,050 is a reasonable starting point for the first tariff band. The proposed tariff in the consultation document is based upon heavily discounted historic insurance data, which is well below judicial awards.

The guidelines referred to in the consultation documents are the 12th version and are therefore not up to date, as the 13th version was published before this consultation was published. As the 13th version increased soft tissue awards by 20 per cent, the small sums currently being suggested by the government are made to look even smaller still.

The proposed sums appear to have been chosen without any basis in current practice and possibly at a particularly low level so as to discourage claims and save insurers more money. £400 is equivalent to the compensation received when a flight is delayed for three hours within the European Union (€400), a minor inconvenience when compared to many months of pain, suffering and loss of amenity.

The £400 sum proposed should also be compared to the fixed costs of medical reports in soft tissue injury claims started under the RTA Protocol, which include £420 for a consultant orthopaedic surgeon (inclusive of a review of medical records, where applicable) and £360 for a consultant in accident and emergency medicine. Such medical costs are wholly disproportionate to the sums being proposed for compensating genuine victims.

A2J would further suggest that an additional £25 compensation for psychological injury is derisory, discriminatory and trivialises mental illness. This is particularly so when an accident victim has to travel past the same scene of the accident on a daily basis and may suffer the recurrent flashbacks, palpitations and anxiety. Such a small figure suggests little understanding of the effects of such injuries on RTA victims.

Medical Reports – The 'Diagnosis' Approach

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.*

Answer 8: The 'Diagnosis' approach is designed to prevent genuine victims making claims. Waiting six months before a medical report is permitted to be obtained will result in the injured person not having a perfect recall of the symptomology suffered throughout the whole period since the accident. This delay is likely to result in an unfair negative medical prognosis, which does not reflect the truth of the suffering. They will also have to wait six months before finding out if any loss of earnings can be recovered.

This 'diagnosis' proposal constitutes a significant barrier to justice and could prevent access to the physiotherapy which the government and insurers assert is the most suitable way of addressing minor 'whiplash' injuries. Unless it is clear that the costs of such physiotherapy can be recouped, many will choose to go without, which could increase workplace absenteeism and pressure on general practices. This would especially affect many vulnerable or disadvantaged victims for whom immediate payment for a typical course of physiotherapy ahead of reimbursement would in many cases be a financial impossibility.

Diagnosing 'whiplash' after six months can also be challenging, although unethical claims management companies and others would have the incentive to tutor clients to ensure they get over this barrier. This diagnosis approach after six months will rely upon the memory of the injured, who may not have kept a journal of the physical effects of the injury. This is akin to a claimant being asked to recall injuries before a medical practitioner more than two years from the date of the accident. If an aim of the government's and insurance industry's proposals is to prevent 'exaggerated' claims, then a 'Diagnosis' model could have the reverse effect because victims will, perfectly understandably, be less likely to remember fully the symptoms they had in the immediate aftermath of their accident, which would not be the case if examination happened soon after it, as per NHS guidelines.

The 'Diagnosis' model would artificially extend the average claims period and increase associated handling costs for all parties. It is likely to impact access to legal services too, as a law firm would find it impossible to assess whether they were to get paid for supporting a client who may recover within six months.

Medical Reports – The 'Prognosis' Approach.

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*.

Answer 9: A2J believes the 'Prognosis' approach is far better than the 'Diagnosis' alternative, for the reasons set out above and at paragraphs 49-52 of the consultation document. The safeguard as stated in paragraph 53 would address the potential disadvantage of this model. The 'Prognosis' approach avoids delay and uncertainty.

'Diagnosis' approach impact upon Late Claims

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.*

Answer 10: The 'Diagnosis' model would deter genuinely injured claimants from claiming, or encourage claimants to wait and see how their injury develops and make a subsequent claim.

A better alternative would be to reduce the notification period for the Portal to 12 months, meaning the Claims Notification Form (CNF) should be lodged on the Portal within one year of the date of the accident or no costs can be recovered. This proposal does not require primary legislation, can be implemented immediately, will reduce the number of cases and tackle cold calling. This would discourage older, less easy-to-prove claims and in particular act as a disincentive to the data-mining and cold-calling approach favoured by some claims management companies. There should be exceptions to cover, for example, infants and members of HM Armed forces who may be on deployment during this 12-month period. This proposal is included in A2J's Alternative Claims Framework set out below in answer to question 31.

This approach is also both simpler and fairer than that set out in recommendation 10 of the Insurance Fraud Taskforce Report (January 2016).

A Tariff for Compensation

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.

Answer 11: A2J does not agree with the proposed tariff figures, as they do not provide adequate compensation. The figures do not have any scientific, legal, comparative or ethical basis and are instead seem to be based on insurer data and a political calculation, which is an egregious and cynical way to treat injured people. The proposed figures also differ dramatically from compensation levels in Scotland and Northern Ireland, thereby creating alarming disparity within the UK at a time when the Union is already under considerable strain.

Judicial guidelines have been established by the judiciary and refined over decades as the basis to determine general damages and should be adhered to. The proposed tariff figures are too low and would be grossly unfair to the injured victim and too rigid in their application. A2J supports the figures contained in the 13th Edition of the JCG booklet.

The government's attitude towards compensation is wholly inconsistent. Those delayed by airlines or train companies are encouraged to make claims, however, those hurt by the

negligent behaviour of other motorists are often accused of fraud, exaggeration and malingering, their injuries a 'scourge' rather than the result of having in excess of 30.5m private motor vehicles on our heavily congested, poorly maintained roads. Meanwhile the suggested figure of £25 for psychological injuries is derisory.

20 per cent Discretionary Tariff Uplift

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.*

Answer 12: A2J cannot accept the premise of this question. The defendant and the insurer's conduct must always be taken into account and if it has been unreasonable, then additional compensation and indemnity costs should be payable. A 20 per cent uplift on £400 represents £80 and is unlikely to work as a deterrent to poor conduct. No mechanism for access to the judiciary is detailed nor is a cost assessment for implementation referred to in the consultation.

Raising the Small Claims Limit

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.*

Answer 13: A2J will in question 14 address the unfairness in dramatically increasing the small claims track limit for road-traffic accident cases, but we also believe calls for any increase for wider PI claims should be rejected.

However, A2J does agree that the small claims track limit should be increased for all PI cases in line with the Retail Prices Index from 1999, which would give a new limit of £1,600 (an RPI increase from 1991 would result in a new level of £2,000). This increase is proportionate although it represents a significant increase in the view of the House of Commons Transport Select Committee, which in its 2013 'Whiplash' report at paragraphs 50, 51 and 52 stated:

50. "*There are good arguments for and against switching whiplash claims of between £1,000 and £5,000 to the small claims track, but on balance we do not support this proposal at the present time. We believe that access to justice is likely to be impaired, particularly for people who do not feel confident to represent themselves in what will seem to some to be a complex and intimidating process. Insurers will use legal professionals to contest claims, which will add to this problem.*

51. It would be financially difficult for many solicitors to assist litigants fighting personal injury claims using the small claims procedure, given the limited fees available. However, we are concerned that some claims management firms might find a way to enter the process, fuelling another boom in their activities.

52. We are also concerned that use of the small claims track could prove counterproductive in efforts to discourage fraudulent and exaggerated claims."

The above is a fair analysis of what is likely to occur should the small claims track be increased not only for whiplash cases but also for all other PI cases with pain, suffering and amenity awards of less than £5,000. A £5,000 small claims limit will remove virtually all PI claims with a value of less than £5,000 and put at least 66,000 people at high risk and 11,000 at medium risk of unemployment. In this respect see the supportive calculations contained in the attached report of Capital Economics dated 5 January 2017. Further, it will deny the public their legal right to proper compensation for genuine losses caused by the negligence or breach of statutory duty of another.

The purpose of this consultation and the government's stated aim of reducing 'whiplash' claims would not be served by extending any small claims track increase to other forms of personal injury. This would include employer's liability, public liability, occupier's liability, clinical negligence, abuse and other types of claim and we believe would be unreasonable, unfair and unwarranted, not least because even in motor claims, issues of causation and liability are on the whole very complex – and far more so with many other types of personal injury.

In non-RTA type claims the issues are almost always complex and may involve:

- complicated facts concerning the work place or machinery;
- obtaining proofs of evidence from witnesses;
- medical issues concerning more than one medical discipline (such as orthopaedic, psychiatric, dental or neurological);
- specialist engineering evidence to prove liability and causation;
- hard-to-prove or disputed liability by insurers with allegations of contributory negligence;
- various defendants (e.g. sub-contractors) with responsibility for shared liability, for instance with a building site accident;
- site visits, photographs and inspections of the accident location;
- documents being disclosed to prove the case, sometimes with disclosure applications to the court.

In addition, insurers generally defend these cases from the outset. Employer's liability and public liability claims statistics show significant falling claims numbers over the last decade. Also, there is no evidence to suggest that there are any issues with non-RTA injury claims. Employer's liability, occupier's liability and public liability cases are reducing year on year. In 2013/14, a total of 208,869 employers' liability and public liability claims were brought, falling to 203,473 in 2014/15, and to 179,204 in 2015/16. Over the last three years, noise-induced hearing loss cases have almost halved (data from CRU/Datamonitor).

The claimants in many employers', occupiers' and public liability cases will be uninformed about the complex statute and common law governing the determination of liability or fault. Also, they will lack any experience in the gathering and presenting of evidence on liability, causation and quantum. Unaided, they would have to choose appropriate experts

on liability, causation and quantum (expert engineering evidence, for example), pay their fees and scrutinise the detail in the reports for accuracy. Liaising and negotiating with multinational insurance companies during the pre- and post-issue stage of court proceedings puts them at a distinct and unfair disadvantage and is a pronounced inequality of arms. Even this presumes that such victims will have the time, inclination and ability to navigate the complex civil procedure system without specialist legal advice.

It is accepted that fewer people are likely to bring an injury claim than a RTA whiplash claim. Also, only around 10 per cent of people who suffer personal injury as a consequence of a medical mistake go on to claim for their losses. The introduction of tribunal fees in employment cases saw the number of cases fall by 56 per cent between 2013 and 2016. The same will happen if the injured have to bring cases as litigants in person in the small claims track and fund their own disbursements, which are currently funded by legal firms.

Such up-front payment of the claim expenses is likely to dissuade many genuinely injured persons from bringing claims. If the small claims limit was increased to £5,000 for all PI cases, the public would in addition have to fund the following expenses to trial, an example of which in an employer's liability case might be:

Medical Report cost	£660
GP Records	£50
Hospital Records	£50
Court Issue Fee	£205
Application Fee	£255
Hearing Fee	£335
Witness Summons Fee (2)	
And witness expenses	£140
TOTAL	£1,695

A working person in 2016 on the average gross income of £28,000 (source: Salary Calculator) or less is unlikely to be able to afford to pay £1,695 in expenses, which are a disincentive to recover losses for injuries and earnings.

Litigation as a consequence of accidents in the workplace has ensured that health and safety standards are imposed and maintained. As soon as the ability to bring a claim for a workplace accident is diminished by the increase of the small claims limit, fewer checks could result in standards falling and increased numbers of injuries.

Many claimant clinical negligence specialists do say that almost all clinical negligence cases are fought to their conclusion, instead of the NHS Litigation Authority (NHSLA) making sensible offers at an early stage. Any case worth less than £5,000 would be almost impossible for a litigant in person to manage, due to the complex medical records and supportive independent medical evidence that requires expert assessment in order to prove liability and causation. Deserving claimants who have suffered loss and injury would be dissuaded by the task ahead from pursuing their case, which could mean poor medical practice continues unchallenged.

Additionally, any person bringing a non-RTA claim would be at a serious disadvantage due to the ability of insurers and the NHSLA to frustrate any claim by employing expert legal advice, denying liability and slowing down the claims process, which represents a clear inequality of arms.

There is no evidence of fraud or exaggeration in non-RTA injury claims.

The process for differentiating between RTA and non-RTA claims for the purposes of allocation to the small claims track could be dealt with via a straightforward amendment to Civil Procedure Rule 27.1(2). Other types of cases are accordingly differentiated and there is nothing complicated in being able to do this.

It is perfectly possibly to restrict any index-linked increase to RTA cases and we would urge the government to do so, if it decides on any increase at all.

There is a facility within the court process that if a case in the small claims court is complicated, then the court has discretion to move it to another track (fast-track or multi-track and costs bearing). This facility could result in further unintended consequences arising from these proposals being imposed. There is likely to be many such successful applications to change track placed before the courts. The consequence will mean an increase in satellite litigation and further increased costs contrary to the intention of the proposals.

Cases involving injuries valued under £5,000 which are complex include anything with a liability dispute, low-velocity impact cases, allegations of fraud/fundamental dishonesty allegations or risk. These all require fast or multi-track directions, ability to raise Part 18 and Part 35 questions and often non-standard disclosure.

Complex injuries valued at under £5,000 include fractures, scarring, temporary tinnitus, acceleration/exacerbation cases or cases with significant pre-existing conditions (requiring the production of medical records and scans) and some soft tissue, e.g. where hydrocortisone injections are recommended, for example when a client develops a frozen shoulder. Such cases could involve an application to have the case transferred from the small claims track and heard in the fast track.

Raising the Small Claims Track to £5,000

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?*

Answer 14: A2J is opposed to any increase in the small claims limit beyond a percentage indexed link rise from 1999. The small claims track limit for personal injury claims was last increased in 1999, not 1991, as this question implies. From 1991, once damages for pain, suffering and loss of amenity amounted to in excess of £500 and the aggregate of other

losses (e.g. for loss of earnings) amounted to a combined figure in excess of £1,000, costs were recoverable. After 1999, only if the pain, suffering and loss of amenity damages alone were in excess of £1,000 were costs recoverable. It is therefore 17 years since the limit was raised.

The case for a further increase has been considered on a number of occasions since then and has been rejected each time. In 2013 the government decided against an increase following a report from the Transport Select Committee, which raised particular concerns that genuine claimants might be deterred from making claims because "*they would have to represent themselves or bear the cost of legal representation themselves*" and "*are likely to come up against legal professional [sic] engaged by insurers, leading to a potentially unfair inequality of arms*" (Transport Select Committee, 2013).

These and other concerns have not been addressed since and while insurers have shown reluctance to contest cases, even when they believe them to be fraudulent, there is nothing to suggest they will not use large and well-remunerated teams of lawyers in future to challenge cases and provide a strong disincentive for genuine claimants who fear navigating the legal system unaided from making a claim at all.

It would therefore be unreasonable to countenance a significant increase now. A Retail Prices Index (RPI) increase on the 1999 figures would take the limit to around £1,600 and there is no justification for a rise in excess of that, even if the issues raised by the Transport Select Committee are addressed. The £5,000 figure suggested by the insurance industry is an arbitrary sum chosen for its benefit alone.

Raising the small claims limit to £5,000 is not therefore 'proportionate'. An accident victim will need to be injured and suffer pain and loss of amenity for a period in excess of two years to achieve a settlement of £5,000 or more under current JCG figures. By no stretch of the imagination can this suffering be described as "minor." Similarly, there is no hard data produced in the consultation to support the view or contention that many of the non-RTA PI claims are exaggerated or fraudulent.

The consultation has produced no meaningful data to measure the effect of raising the small claims limit to £5,000 or beyond. In particular:

- Access to justice will be severely restricted.
  Clients will not bring cases, as they will not be able to afford the legal fees, court fees or the medical fees to prove their losses and injury. They will not know how to claim their losses from their opponent or the relevant insurer. They will be dissuaded by the complexity of the law and having to navigate the court process alone. If they do bring a claim they will face an inequality of arms, as the insurer will instruct a solicitor or a barrister to attend the hearing and oppose their claim. In a survey conducted for A2J by YouGov in September 2016, 60 per cent of customers believed they would be treated fairly by their own insurer if they had legal support, against 23 per cent of drivers who believe this would happen without legal help. But the situation is much worse for non-fault customers injured in a car accident. Asked whether the other driver's insurance company would treat them fairly without legal

help, 71 per cent said no and only 15 per cent said they trusted the other driver's insurer. (Note: All figures are from YouGov Plc. Total sample size was 1,699 adults. Fieldwork was undertaken between 6-7 September 2016. The survey was carried out online. The figures have been weighted and are representative of all GB adults aged 18+).

- Capital Economics in its January 2017 report for A2J submitted with this response has calculated that the jobs of 44,200 people working within the personal injury industry will be at high risk if the government's proposals are implemented. In the worst-case scenario incorporating both personal injury jobs and jobs in supplier industries, there are 66,500 people at high risk of unemployment and 11,000 at moderate risk of unemployment. Most law firms providing a personal injury advice service will close down, or go into administration, as no costs will be recovered in the vast majority of accident cases and fees are likely to fall to 20 per cent of their current levels.
- The impact assessment states "*those providing services (lawyers, medical experts, Claims Management Companies) are assumed to find alternative economic activities*." There is no evidential support for this statement. The majority of these jobs will be lost in the 'Northern Powerhouse' cities of Liverpool, Manchester, Leeds and Sheffield, although the job losses are UK-wide.
- There are 2,777 firms in England and Wales which practise personal injury law. Many firms exclusively practise personal injury law and those non multi-disciplinary practices will close. The wholesale closing down of so many law firms will cause enormous issues for the Solicitors Regulation Authority, which will have to cope with all of the concomitant issues for clients resulting from firms closing at very short notice.
- Capital Economics predicts that almost £900m annually will be lost in tax revenue to HM Treasury following the raising of the small claims limit to £5,000.
- There will be increased claims for state benefits from those who have lost their jobs.
- Insurers will save billions each year and are unlikely to pass on any savings to the public, with only two from [300] saying they would do so and neither saying how.
- Increasing the small claims limit is also discriminatory. Lawyers are particularly valuable where a claimant is poor, uneducated, or has a learning disability. All of these people will have to bring the claims themselves while insurers will send legal representatives to court as a matter of course and defend more claims to discourage other victims from claiming.
- The SCT is wholly unsuited to rooting out fraud:

  (a) if fraud is alleged, the case will be reallocated to the cost-bearing fast track anyway: CPR 26 PD 8.1(1)(d).

  (b) it would be highly unfair for a claimant to face allegations of dishonesty within the SCT. They would be unrepresented against a represented defendant. The rules of evidence would not protect them (because they are relaxed in the SCT: CPR 27.8(3)). Evidence is exchanged only days before the hearing.

  (c) it would be of little value to the Defendant. Dishonesty in PI claims is identified by reference to medical records, claims history, inconsistencies between statements signed with statements of truth, examination of evidence given under oath, careful consideration of disclosed evidence etc. None of this applies in the SCT,

which is designed as a quick, informal procedure with limited disclosure taking place shortly before the hearing.

- The consequence of increasing the SCT limit will mean that many more cases will be brought without legal representation. This brings with it numerous problems of its own:
  - Litigants in person (LiPs) will not be able to bring a proper case in employers' liability or public liability. They are very unlikely to know of or understand the role of Health & Safety Regulations in EL claims, the Animals Act, the Defective Premises Act, s.58 of the Highways Act, etc. No amount of guidance notes will assist them here;
  - LiPs often bring claims which make no sense at all. Applications before District Judges to strike out garbled or legally unsound Particulars of Claim are already common.
  - LiPs do not owe a duty to the court. They can turn up at the hearing with new documents or with things to say which have never been said before. None of this can be avoided in the SCT.
  - LiPs do not co-operate with defendants. Extensions of time are not agreed and insurers are forced to apply to the court.
  - LiPs do not settle cases. They do not have independent advice on their prospects of success and believe they are right. The prospect of cases fighting to a hearing is increased if the claimant is self-represented.
- The encouragement of McKenzie friends is an unwelcome development. Such people rarely help courts. They are not regulated. They have no duty to the court or professional indemnity insurance. They rarely bring any more expertise than LiPs themselves and often bring as many of the problems listed above as LiPs.
- Claims management companies (CMCs) will become very active in SCT cases. If the government is concerned about public perception of the compensation culture, increasing the activities of CMCs will hardly address it. The advertisements for claims will be common, with the added advantage to CMCs of being able to state exactly how much their customer can expect to recover.
- Further, some CMCs, unlike lawyers, will be less troubled by the possibility of supporting a claim, which may not be honest. Few solicitors want to lend their aid to the pursuit of such claims.

Improvements to the SCT for LiPs

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*.

Answer 15: Litigants in person generally encounter difficulties with the formalities of Court proceedings and would benefit from greater guidance, for example standardised Particulars of Claim for major claim types. They also require specific guidance in obtaining – let alone preparing - formal detailed witness statements and in adhering to rules of evidence. Experienced lawyers currently handle this work and to remove this layer of expertise through an increase in the small claims limit to £5,000, will massively burden the claimants, the court system and the judiciary.

Efforts should also be made to avoid distressing and unnecessary court appearances, with provisional awards made based on the available evidence but with either party able to apply for an oral hearing to challenge the finding within a set period of notice of the award.

District and other judges are already under considerable pressure and an influx of new litigants in person will do nothing to ease their workload, improve their morale or enhance the attractiveness of the judiciary as a career, let alone promote access to justice.

CMCs and paid McKenzie Friends

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.*

Answer 16: The government's proposals are likely to lead to a proliferation in the number and activities of claims management companies (CMCs) and 'McKenzie Friends', both of which are lightly regulated and do not have the training, expertise or accountability of the legal profession. Therefore such a proposal poses a significant risk and will not serve the public well. By allowing RTA cases to proceed in the small claims track (and not the Portal), cold calling will proliferate exponentially and there will be many examples of CMCs and McKenzie friends taking financial advantage of vulnerable people.

Neither CMCs nor McKenzie friends should have direct access to the claims process. Ensuring all road-traffic cases go through the claims Portal will restrict the cold calling so widely disliked by the public. They have no formal training and are not experienced in litigation or the conduct of final hearings. Such a proposal is effectively a watering down of the litigation skills required before the courts.

In respect of paid McKenzie Friends, they are unregulated, uninsured, untrained and unapproved in the skill of litigation and advocacy before the Courts. Paid McKenzie Friends frequently overstep their role in providing advice. The government would therefore need to design fresh regulations and encourage a debate concerning a safety net for the public. In practice, it is known that the precious time of judges to apply the law is used disproportionately dealing with non-lawyers, most of whom do not respect or understand the court process.

If the government is insistent on introducing this proposal, it should make any remuneration charged by a CMC or McKenzie friend contingent on the client winning compensation, rather than a fee being charged. The insurance industry may welcome this suggestion, as it will have to pay lawyers to attend the court to defend such claims with the prospect of increased costs if there are numerous adjournments or lengthy court hearings. Costs and expenditure are minimised with the claimant being represented by a trained lawyer.

Finally, there have been reported examples of paid McKenzie friends being jailed in 2015 and 2016 for conspiracy to pervert the course of justice, which is a clear example of untrained unregulated individuals being ignorant of the respect, which parties must show to the courts and justice. Such a suggestion will not be welcomed by the judiciary, is hugely

short sighted and if poorly implemented will be a disaster for the public at large, the Ministry of Justice and the courts system.

Pre-Med Offers

Question 17: *Should the ban on pre-medical offers only apply to road traffic accident related soft tissue injuries? Please explain your reasons why.*

Answer 17: Pre-medical offers should be banned entirely in all personal-injury cases to ensure victims get the medical attention they deserve and to prevent the widespread practice of insurers under-settling cases, i.e. giving genuine claimants lower compensation than they deserve in order to control costs. A2J has a database of around 5,000 cases showing that 25 per cent received significant under-settled pre-med offers from insurers which were significantly increased when the judge made the award in court. Pre-medical offers are unfair on genuine claimants and increase the incentive for potentially fraudulent behaviour and it is regrettable that use of such offers continues to be so commonplace across the insurance industry. Recent CRU data on cases settled directly by insurers with the injured amount to around about 220,000 cases. It is not known how many involved pre-med offers.

The 2016 Insurance Fraud Task Force Report Recommendation 8 condemns this unfair insurer tactic by stating that the "*ABI should discourage the inappropriate use of pre-medical offers.*"

Alternatively, if the government chooses to ignore the recommendations of banning pre-med offers, then a safety net should be created whereby any unrepresented claimant receives the independent advice of a non-insurer tied solicitor, for independent advice on the insurer's offer, for which a fixed fee is paid to the solicitor by the third-party insurer. Such a scheme exists and already operates in Employment Tribunal cases. This suggestion is contained in the A2J Alternative Claims Framework.

Should a ban on pre-med offers be imposed, then there should be severe financial penalties enforced against the insurer breaching the regulations, with these increased exponentially with each subsequent breach.

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

Answer 18: There should be no exemptions to the ban.

Question 19: *How should the ban be enforced? Please explain your reasoning.*

Answer 19: There should be clear, unambiguous rules with stiff financial sanctions imposed on any insurer on every occasion it makes such an offer, increasing on a per-case basis. A customer who is proven to have been made an offer without having a proper medical should have their compensation doubled, with a new six-year limit on the right to seek additional compensation.

CNF and Sources of Referral

Question 20: *Should the Claims Notification Form be amended to include the source of referral of claim? Please give reasons.*

Answer 20: A2J believes there should be no such amendment. These data benefit insurers as recipients of the CNF. How a solicitor finds its client – and vice-versa – is already adequately regulated by the Solicitors Regulation Authority, s56-s60 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 and the Ministry of Justice. Including such information could open the door to data abuse by insurers, who receive a copy of the CNF, for example by writing directly to claimants and making unreasonable demands for evidence.

Insurers employ third-party capture and first notification of loss (FNOL) tactics and pass on the referral of the injured client to tame solicitors who indirectly pay the insurer for the referral by accepting a reduced fee from the referring insurer upon conclusion of the claim for the injured person.

QOCS Amendment

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.*

Answer 21: Question 21 has been drafted without considering the correct rules. The relevant rules on QOCS are found not within Part 38.4 of the Civil Procedure Rules (CPR) but 44.13 and 44.17 and a fraudulent claimant cannot simply discontinue with impunity in accordance with Practice Direction 12.4 (c) to CPR 44.

We note that the consultation paper suggests, "*current arrangements allow for the late withdrawal of fraudulent claims with impunity*", however, this is categorically incorrect. Practice Direction 44 12.4(c) (Section II) states *"where the claimant has served a notice of discontinuance, the court may direct that issues arising out of an allegation that the claim was fundamentally dishonest be determined notwithstanding that the notice has <u>not</u> been set aside pursuant to rule 38.4"*. In these circumstances, allegations of fundamental dishonesty can still be tested by a Defendant, without the notice of discontinuance being set aside. This rule effectively circumvents the 28-day rule in CPR 38.4(2).

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?*

Answers 22-24: We shall respond to these questions together.

Our contributors' experience is that the area of law covering credit hire is often misunderstood. In actual terms, because of the Association of British Insurers General Terms Agreement (GTA) and bilateral agreements formed on the back of the same, then over 80 per cent of claims settle promptly and without the need for any legal intervention and associated costs. The GTA has existed for over 15 years and it is a consensual protocol supported by the majority of insurers. The protocol reduces friction and adds value to the customer process and to the speed and efficiency of claim settlement whilst providing consumers with their common law rights.

However, continuing developments of the GTA are being frustrated by external investigations, such as that undertaken by the Competition and Markets Authority (CMA). As an example, the GTA technical committee was working on introducing a GTA portal, which the CMA encouraged, but which insurers resiled from while the CMA inquiry was going on. The concern is that insurers take external influences, such as the CMA inquiry, and frustrate developments within the GTA.

By way of a further example, that the credit hire industry proposed a mediation/arbitration route to claim settlement with insurers to reduce the need for litigation and eradicate friction in contested claims but it was rejected out of hand by the insurers.

The perception of conflict within credit hire cases is no doubt heightened by the fact that regulation is not compulsory for credit hire firms. You tend to find that established, FCA compliant and Credit Hire Organisation member credit hire companies are those which settle the 80 per cent of claims promptly and without litigation. The companies that are not regulated or industry body members represent the bigger challenge to the insurance ecosystem and which the industry (CHO and insurers) believe need to be regulated.

Irrespective of the outcome of any findings from this consultation, the future costs and issues facing hire provided on a credit basis will invariably be linked to the outcome of the Brexit issue in terms of the unknown implications on costs of fuel, insurance, fleet and servicing – all costs associated with mobility however it is provided. When you especially bear this in mind with the CMA's comment that credit hire was the stimulus for which insurers provided any kind of mobility and we would stress that in the absence of unpredictable cost increases that insurers would not, as the CMA predicts, provide any form of mobility unless they are required to do so by law.

The reality is that insurers have had the opportunity to provide mobility to motorists for decades, through a first party model, or intervention, but have chosen not to do so because it would crystallise a cost that they would not wish to incur. We would suggest that if a legislated outcome is considered necessary that insurers should be compelled to provide a fully underwritten mobility solution to all policyholders in order that consumers had certainty as to their ability to access what is a fundamental common law right.

Early Notification of Claims

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.*

Answer 25: There is no justification for amending the three-year limitation contained in the Limitation Act 1980. However, it would be acceptable to demand that all RTA claims should be notified via the Portal within 12 months of the date of accident – with certain exemptions, for instance for minors – after which no costs prior to the issue of proceedings will be paid. This would deter older, more problematic claims – especially those generated by cold calling using telephone numbers from insurers' databases - and according to data from a leading medical reporting agency would reduce the overall quantum of claims by around 8.5 per cent.

Imposing a condition of early medical treatment

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.*

Answer 26: A2J strongly opposes this proposal as it is ill conceived, would be incredibly complex to introduce and would generate an entirely disproportionate cost. The aim of this proposal is to reduce the number of "exaggerated and fraudulent" claims. There is no data provided detailing the number of claims, which are "exaggerated," with most commentators accepting that the vast majority of RTA claimants are genuine. The incidence of proven fraudulent claims is below 1 per cent. The 12-month notification proposal made by A2J will, however, combat the promotion of old cases by CMCs, where there is no contemporaneous medical record of the injury having been suffered. The percentage of such old cases is around 8.5 per cent of all RTA claims: these would be eliminated from the claims process.

Many soft tissue injuries are combined with other contemporaneous injuries to various parts of the anatomy and do not manifest themselves or indeed their severity immediately, or may worsen or fail to improve over a long period of time, often more than a year. Demanding victims seek medical treatment within a set period of time brings a number of challenges, not least to the NHS and to GPs who are already struggling with rising demand for their services. RTAs are also more likely to occur during the winter months, thanks to more hazardous road conditions: this is also the time of year when NHS services tend to be under the most pressure. The likeliest routes to medical treatment are GPs - who will in any case often be able to do little other than confirm there has been an injury - and Accident &

Emergency Departments, which the government is actively discouraging attendance at unless in the case of serious accident.

There can be a two-week wait to see a doctor at many GP practices. To demand that an injured person should go to see a doctor within a certain time frame would put an additional burden on GP practices. During the claims process the GP records will have to be obtained, thereby causing additional administration for GPs as well as costs for insurers. The current RTA Protocol actively discourages the obtaining of medical records, suggesting they will not normally be required.

Any time bar would interfere with the Limitation Act 1980, as the limitation period is established at three years. Primary legislation through parliament would be required. Any fraudulent claimant could just see a GP and complain of injury, which would presumably be the trigger to generate a payment.

Many genuine claimants will only decide after a number of months that their case merits compensation due to on-going pain and other issues, having previously tried to shrug off the injury through the passage of time. To deny them access to justice because they decided not to take up limited medical resources at an early date is unfair and will prevent genuine claimants from receiving proper compensation.

This proposal is an inefficient reform that simply complicates the claims process rather than reducing the volume of claims.

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.

Answer 27: Under Option 1 and Option 5, a voucher approach or fixed costs would bypass established approaches, which are based upon empirical evidence and codes of practice. It would create either a system where treatments are capped due to commercial concern and do not reflect clinical need, or alternatively a system leading to over-healthcare utilisation similar to the USA, Canada and South Australia. Combined with the problematic administration and the variety of practices and behaviours across all parties that will ensue, these proposals are not acceptable.

Option 2 is an insurer-led approach to rehabilitation, which will lead to a huge range of different practices, reduce patient choice and potentially impact upon clinical outcomes. In

contrast to what the proposal states, this approach is neither independent nor transparent and is not acceptable. Further, it is not for the at-fault insurer to decide what treatment and at what cost the claimant should have, as the insurers are, by nature, incentivised to minimise the overall cost of that claim. This could potentially put them in a conflicted position vis-a-vis acting in the best interests of the claimant as their primary duty is to their shareholders.

Option 3 will create barriers to care, be inequitable and create additional burdens on public sector and NHS services. Delaying access to treatment will lead to disability and worklessness. This proposal is unfair, will have many unintended consequences and is not acceptable. In addition, this option would also increase the burden on the NHS at a time when it is clear that it is already struggling to cope with its current primary care workload.

Option 4 has potential although the complexities of the rehabilitation market will be challenging to encompass in a MedCo system. However, it could underpin standards and ethical behaviours and deliver an equitable system.

A better alternative would be to develop an accreditation programme, code of practice and industry wide agreement of rehabilitation costs for rehabilitation organisations. Such an agreement would set the standards for rehabilitation practice, ethical conduct, develop minimum standards for rehabilitation organisations and ensure quality, consistency and performance. This would also create a transparent process of rehabilitation provision between claimant and defendant parties and, more importantly, preserves the claimant's right to choose his own treatment provider.

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

Answer 28: Within fault-based systems the burden of proof to evidence losses is upon the injured person. This requires them to demonstrate the extent and impact of their losses and should not be confused with exaggeration. Processes designed to spot clinical inconsistencies and reliability of pain and disability reporting are prevalent in disability assessment medicine, however there are limitations. Health and disability is a complex interaction of biological, psychological and social factors and a person may display health behaviours, for example mal-adaptive illness behaviour, that can be readily confused with exaggeration or malingering.

The 12-month notification period set out elsewhere in this response should also help tackle rehabilitation fraud.

Making the Rehabilitation Code compulsory rather than voluntary should help address any unspecified potential for fraud. The Civil Procedure Rules recommend the use of the code. Rehabilitation should be paid for by the party responsible for the injury, not by the injured themselves. Requiring the injured to fund rehabilitation is unfair and could result in the injury persisting longer and the financial burden being transferred to the taxpayer through the NHS. The Rehabilitation Code contains industry safeguards to ensure that compensators are not forced into accepting a course of treatment or cost, which they are unhappy with.

Additionally, the claims director from insurer LV= gave oral evidence the All-Party Parliamentary Group for Insurance and Financial services that he was aware of where fraudulent claims are coming from and that there are "10" organisations associated with such fraud. All insurers should take action in this regard, make their findings public and refer them to the relevant authorities.

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*.

Answer 29: A2J disagrees. The current cost of a medical report is now much reduced, having been prescribed in 2014 following the introduction of fixed fees via MedCo, and fairly reflects the cost of the claimant obtaining a report in support of a claim. The report is a necessary step to proceed with a claim and it would seem entirely reasonable that it should be recovered at the successful conclusion of a claim. It is estimated that the reduction of average report fees from £225 (MRO Agreement Rate B) to £180 has saved £24m annually on c528,000 fixed-fee reports. The MedCo reforms are still bedding in but are already benefiting the paying party (insurers) through much decreased costs in connection with medical treatment and reports.

Passing the responsibility for payment onto the claimant would introduce yet another barrier to access to justice. This again will encourage exaggeration, both on the part of the Claimant and the expert, to increase the length of the recovery prognosis to ensure a case is cost bearing in order to recoup the medical report fee. This unfair proposal would deter claimants from pursuing a claim, especially if they are not represented.

The Barème Tariff

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.

Answer 30: There could be advantages to such an approach as an alternative to a flat rate as unlike with the existing proposals; it has some science behind it, as it is linked to the extent of injury. The disadvantage is that it seems to offer nothing different, in that medical experts will continue to make a judgment of the injury, the extent and the prognosis.

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

Answer 31:

A2J believes costs can be controlled through a reduction in claims incidence, but that genuine victims should be protected.

As we have set out in our answers to this consultation, the focus for reforms should be on frivolous and/or fraudulent claims, not the genuinely injured – and that any reforms should apply to RTA claims only. Both claimant solicitors and insurers are clear that cold calling by insurers and CMCs should be banned, late-notified claims should cease and fraudsters should be brought to justice through the courts.

A2J - Alternative Claims Framework

The Alternative Claims Framework (ACF) proposed by Access to Justice (A2J) will achieve these aims and obviate the need for unnecessary legislation, which erode people's rights. The ACF, moreover, pulls together a number of separate government initiatives - the Brady Report, the Insurance Fraud Taskforce and the Nuisance Calls Action Plan - and creates new impetus for positive change.

A2J's objectives in proposing the ACF are straightforward. We wish to:

- simplify the claims process;
- give certainty to both the claimant sector and insurers;
- cut the cost of claims;
- help eradicate cold calling;
- find a formula for managing claims which balances consumer rights with responsibility, and;
- reduce the friction and conflict, which has bedevilled the sector in recent years.

Alternative Claims Framework – detailed proposals

Indexation

Proposal	Note
The Small Claims Limit for road traffic accidents (RTAs) to be increased by CPI/RPI from the date of the last increase in 1999. An increase to the limit has been considered at various points since 1999, most recently in 2013 by the Transport Select Committee and the Lord Chancellor determined that no increase was required. To provide a stable market and certainty the limit should be adjusted every three years hereafter by RPI	The claimant industry acknowledges that the small claims limit needs to rise. The limit has been unchanged since 1999
PI fixed costs to adjusted by RPI every three years	A mechanism to index general damages should also be considered

Notification of RTA claims involving fast-track soft tissue injuries

Proposal	Note
The limitation period (currently three years) should remain unchanged	The issues within claims are as a result of flaws in notification, not limitation
RTA claims should be processed though the Claims Portal and submitted within 12 months from the date of the accident	Exceptions are likely but should be limited and simply defined, these could include infants, HM armed forces personnel serving overseas, or persons with a disability
If the RTA Claims Notification Form (CNF) is served after 12 months, and none of the exceptions apply, then no pre-issue legal costs will be recoverable by the claimant. All RTA claims brought after 12 months must be lodged in the Portal by solicitors (and will not fall into the Small Claims Track), thereby preventing CMCs from exploiting the opportunity for cold calling, gaining control of claims and taking advantage of injured people	By allowing no costs for pre-issue work, money is taken out of the market, thereby preventing solicitors from paying CMCs for such work. Tackling the economic levers that support CMCs from seeking out "aged claims," in addition to more robust regulation of CMCs, will also address those operators involved in cold-calling activity, which tends to focus on aged claims. This will reduce the dysfunctional effect on the market caused by CMCs. It will limit the opportunity for CMCs to pursue cases, which are older than 12 months. Note the vast majority of cold calls are Payment Protection Insurance (PPI)-related

Other recommendations

- As recommended by the government, pre-medical settlement offers should be banned as they encourage fraud. Best practice should go further and ensure that all unrepresented claimants and pre-medical offers require a Compliance/Settlement Certificate which must be signed by an independent personal injury solicitor and advise whether the sum offered is fair and reasonable. The insurer should pay the solicitor's fee. This solution is successful common practice when handling employment law compromise agreements and such a safety net will protect the injured party.
- Third-party capture activity should be prohibited
- Embed, enhance and impact assess AskCUE (PI) and MedCo. Both require more time.

Brady Report on CMC regulation

- The 10 recommendations in the March 2016 Brady report should be adopted, and the transfer of CMC regulation from the Claims Management Regulator (a unit of the Ministry of Justice) to the Financial Conduct Authority (FCA) should be accelerated. There is much that can be implemented prior to the FCA adopting the regulatory responsibilities for CMCs, which seems unlikely until late 2018 or 2019. Examples include:
    - (a) immediately banning CMCs from cold calling, just as solicitors are;
    - (b) introducing a fit-and-proper-persons test for directors and controlling parties of CMCs;
    - (c) more robust Solicitors Regulation Authority (SRA) regulation of solicitors who undertake work introduced by CMCs, including guidance on best-practice due diligence;
    - (d) consider formal recording on the CNF that there has been no cold-calling activity;
    - (e) the '7726' number used by mobile companies to report cold texting should be promoted more;

Insurance Fraud Taskforce

- The 26 recommendations made in the January 2016 Insurance Fraud Taskforce Report should be adopted other than items 10 & 17. This ACF proposal provides an alternative to items 10 and 17, which are unnecessary if the other aspects of the framework are adopted.
- More effective and proactive regulation by the SRA of law firms identified as potentially involved in fraudulent activity or associated with CMCs potentially involved in fraudulent activity. Solicitors, insurers and the Insurance Fraud Bureau should take on more accountability and support the SRA to identify malpractice in the market.
- Coordinated and robust oversight and action by the three primary regulators relevant to the claims sector, namely the SRA, FCA and Information Commissioner's Office, with support from the claims sector, will make a significant and enhanced contribution to improved management of the market.

Financial Impact of the ACF

The ACF would immediately and significantly reduce the volume of motor claims and associated costs. By increasing the small claims limit to an index-linked £1,600, the volume of claims caught within the small claims track would increase by c.10 per cent, based upon our initial data.

In addition, based upon the data provided by the largest medical reporting organisation in England & Wales, the introduction of a 12-month notification period for motor claims would impact c.8.5 per cent of all claims. (NOTE, these figures will overlap to an extent). Therefore we estimate that the combined impact would be for >15-20 per cent of all motor claims to be caught by the proposal.

Furthermore, through the embedding of existing fraud/cold calling controls (such as MedCo/AskCue(PI)) and the introduction of the enhanced controls proposed in the ACF, a significant additional number of claims would be caught/removed.

A2J estimate that the combined impact of the ACF could be in the region of 25 per cent of all current motor PI claims.

More detailed analysis is being undertaken of the initial data and, as previously discussed with the MoJ, A2J would welcome the opportunity to discuss further the approach within the ACF proposal and the evidence to support the above assessment.

Taking the figures used in the impact assessment at paragraph 2.2, which states 523,000 soft tissue RTA injury cases resulted in a financial settlement in 14/15, we estimate that the ACF would impact up to c.130,000 claims/annum (25 per cent of the 523,000). We should state that the volume of 523,000 cases is not an agreed or realistic figure, but will be used for illustrative purposes only.

Within the graph at 2.16, at point 10 of the impact assessment, it is stated the average legal costs to be £550 and at point 11 states the average medical report fees to be £180. These figures are exclusive of VAT, which has to be added, as insurers are unable to recover VAT. We do not agree these figures, and contend that the average legal costs are in fact higher. In addition, other fees are incurred which will increase the average disbursement figure. For illustrative purposes however we will rely upon the figures quoted in the impact assessment pending production of our own figures.

At this stage, and subject to our further analysis, the likely impact the ACF proposal would have on the motor PI market is:

- A saving of the average claimant legal costs/claim of c.£660 (£550 + VAT) x 130,000/annum = £85,800,000;
- On the basis that a number of the 130,000 claims/annum would still continue under the proposed regime, then the associated disbursements would continue to be incurred, but it is inevitable that a significant number of claims would no longer be brought due to the inability of the solicitors to receive payment from a third party of their legal fees and hence represent the claimants. For illustrative purposes if this was a presumptive 50 per cent of all such claims, the additional medical report savings would be £216 (£180 + VAT) x half of the 130,000 claims/annum = £14,040,000.
- For each claim that did not proceed under the new regime the average defendant costs/claim would also be saved, again for illustrative purposes, if this was 50 per cent, this would equate to a saving of c£250 (including VAT) x half of the 130,000 claims/annum = £16,250,000.

- Again using an illustration, if it is presumed that 50 per cent of claims valued at less than £1,600 were no longer pursued, there would be a presumed saving in damages of £1,300 per claim (an assumption of the average value of claims taking into account the increase in the small claims limit to £1,600 and the introduction of the 12-month notification period) for general damages and £100 for special damages (impact assessment p41). Equating to £1,400 x half of 130,000claims/ annum = £91,000,000.

Therefore, realistically the minimum expected savings from adopting the ACF would be more than £100,000,000 but could reasonably have a range up to (or possibly beyond) £85,800,000 + £14,040,000 + £16,250,000 + £91,000,000 = £207,090,000.

Next steps

Both sides, insurers and claimant lawyers, must collaborate in future if the dysfunction in the claims market is to be resolved. The government's proposed 'whiplash' reforms will neither remove the scourge of cold calling nor lead to a sustainable reduction in insurance premiums.

The government should urge insurers, through the Association of British Insurers, to come together with the MoJ and with claimant lawyers under the auspices of an independent chairman to establish common ground. The intention would be to agree proposals, which the government could adopt immediately as a cross-industry agreed, fair and sensible solution and one that involves and is supported by the primary regulators.

Conclusion

A2J argues that the ACF would substantially reduce the incidence of RTA 'whiplash' claims as well as make significant inroads into injury-related cold calling, insurance fraud and frivolous claims.

In concert with the implementation of recent government and industry initiatives such as the Insurance Fraud Taskforce Report, the Brady Report and the Nuisance Calls Action Plan, these measures add up to a comprehensive package of reforms, which meet government objectives and maintain consumers' legal rights.

A2J recommends that the government urge stakeholders to adopt these proposals and collaborate to bring about a more effective, efficient and fair claims environment.

A2J Response to the Impact Assessment

A2J has invested significant time in responding to the consultation and commissioning two reports from Capital Economics and one actuarial report from Mazars. These three reports answer some of the points raised within the impact assessment.

The refusal of the government and the MoJ to permit more time (the standard 12 weeks instead of just 7 weeks over Christmas and New Year) has seriously affected and impeded A2J in gathering the necessary data and answering the impact assessment in full.

Access to Justice
January 2017