



Department
for Transport

Department for Transport Response to the consultation on the Review of the Untraced Drivers' Agreement

Moving Britain Ahead

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Introduction

On 31 July 2013, the Department for Transport published a Summary of Responses to its consultation on review of the Untraced Drivers' Agreement 2003 and Uninsured Drivers' Agreement 1999. A copy of that document was placed on the Department for Transport's pages on Gov.uk at

<https://www.gov.uk/government/consultations/review-of-the-uninsured-and-untraced-drivers-agreements>

On 3 July 2015 we produced a further Government response after discussions with the Motor Insurers' Bureau ("the MIB") were finalised on the changes in the new Uninsured Drivers Agreement which entered into force on 1 August 2015.

We have now concluded negotiations with the MIB on the Untraced Drivers Agreement which is more complex and has taken longer to finalise than the Uninsured Agreement. This paper explains the changes made to the Untraced Drivers Agreement 2003 which are included in the new Untraced Drivers' Agreement ("the Agreement"). We have also taken the opportunity to make a Supplementary Agreement to the Uninsured Drivers' Agreement to make a number of amendments to ensure consistency between the agreements and compliance with EU law. The agreements only apply to accidents in Great Britain.

The Agreement incorporates changes made on issues on which we consulted but also includes other changes, including those required by EU law. The UK will in due course be leaving the EU. Until we do so, we will remain a member with all of the rights and obligations that membership entails. During this period the Government will continue to negotiate, implement and apply EU legislation.

The new Agreement and the Supplementary Agreement is published at <https://www.mib.org.uk/making-a-claim/claiming-against-an-untraced-driver/untraced-drivers-agreements> will enter into force on 1 March 2017 and apply to accidents occurring on or after that date.

The relevant sections and questions in the 2013 consultation for the Untraced Drivers' Agreement were:-

1. Procedural requirements (questions 4 and 5);
2. Appeals and Disputes (questions 6 -11);
3. Provisions on Costs (questions 13 – 16)
4. General issues (questions 17, 18 and 19).

Summary of responses to questions and Government Response

SECTION 1. PROCEDURAL REQUIREMENTS

Question 4

Do you agree that a claimant should be able to serve documents by any of the forms allowed under the Civil Procedure Rules? If not why not?

Most of those who responded agreed with the suggestion, but a small number thought that the proposal should apply to uninsured cases but not to claims made under the Untraced Drivers' Agreement.

The forms of service under the Untraced Agreement do not need to be identical to those under the Uninsured Agreement where the other driver is identified and there is a court process. The MIB need some certainty, especially in appeals, as some claimants have said that they have sent appeal notices in time, but the MIB has not received them. The new Agreement will allow service by recorded post or fax. These are not particularly onerous and should not cause difficulty for the claimant.

Other methods will be valid provided the MIB accepts, or it can be conclusively proved that the MIB received such notice.

Question 5

Do you agree that, for protected parties without legal representation, an arbitrator should be appointed to approve any award made by the MIB? If you do not agree, please give your reasons?

All respondents agreed with the suggestion, although a few thought the panel of arbitrators should be widened to include barristers and solicitors with 10 years or more of experience and a couple thought there should be a financial threshold below which an arbitrator would not be appointed.

The Agreement will provide for the appointment of an arbitrator to approve any award for all minors or protected parties, whether they have legal representation or not. There will not be a minimum financial threshold. Arbitrators will be appointed from the same panel

as that which hears other appeals under the Agreement. The arbitrators are taking on the role of determining whether the MIB's proposed award represents a fair settlement for the minor or protected party. Some cases can be legally very complex and of substantial value so we think this approval role should be restricted to Queen's Counsel (QCs), rather than extended to solicitors or non-QCs.

SECTION 2. APPEALS AND DISPUTES

Question 6 & 7

Do you agree that, under the Untraced Drivers' Agreement, an independent arbitrator could be appointed to determine whether an extension of time should be allowed or whether an appeal is in time? If you do not agree, please explain your reasons?

What narrow range of circumstances do you think would help prevent abuse of the process?

Most respondents agreed with the proposal in question 6, usually without qualification. Some agreed with reservations, such as an applicant should give notice of appeal within 6 weeks, without lodging documents which would then have to be supplied within a month, with the use of an arbitrator only if the applicant were unable to give notice; another questioned whether costs would exceed benefits and suggested the use of an arbitrator could be limited. Two organisations disagreed, one on the basis that the six week period should remain with arbitration being the exception and another suggested that no time period greater than that allowed for litigated claims should be allowed, on the understanding that extensions can be obtained if reasonably required.

Respondents interpreted question 7 in a number of different ways. Many suggested certain medical conditions might need to be taken into account when considering a case. Others noted the specific circumstances in which an appeal might be allowed, such as legal minority of applicant, non-receipt of award/rejection letter or bereavement. Another thought that the appointment of an arbitrator should be restricted to cases where the claimant is not represented and could prove serious incapacity throughout the period of appeal.

The new Agreement will give the claimant six weeks to notify the MIB of an intention to appeal and allow the request of an extension of time to supply the grounds and any further evidence and observations. An extension can be agreed by the MIB or the request referred to an arbitrator with the discretion to determine whether an appeal is in time or whether an extension of the time limit is appropriate. This will be mirror more closely the position in an uninsured or identified driver claim where a claimant could ask a court to determine how the time limits apply, so it will take the decision out of the MIB's sole discretion.

Question 8

Do you agree that there should be a single dispute resolution process?

All respondents agreed with this proposal with one adding that the time limits for giving notice of appeal should be the same irrespective of the nature of the appeal (in the 2003 Agreement this is 6 weeks for disputing an award and 4 weeks for other reasons).

Under the Agreement the time limit will be six weeks for all types of appeal and there is one dispute resolution process instead of two in the 2003 Untraced Agreement.

Question 9

Do you agree that the MIB as well as the claimant should be required to agree that they accept the arbitrator's decision as final? If not, why not?

Most respondents agreed with the proposal. In the Agreement the MIB as well as the claimant will be required to accept the arbitrator's decision as final.

Question 10

Do you agree with our proposal that a claimant should be entitled to an oral hearing for all disputes, including those not related to the award? If not, what are your reasons?

Most respondents agreed with the proposal. One felt that Civil Procedure or First Tier Tribunal Rules should be used. A couple felt that oral hearings should only be allowed in exceptional circumstances e.g. a complex or expensive case or where an arbitrator accepted the reason for a request. Another thought that an increase in oral hearings would go against the thrust of reform for civil procedures and should only be allowed in exceptional circumstances.

In the 2003 Agreement the right to an oral hearing is restricted to when it relates to the award, although an arbitrator can request an oral hearing if he/she thinks it necessary. This is inconsistent with the position in a case where the at-fault driver in an accident is identified or insured, and the case could be heard before a court. Therefore the new agreement will include the right of the claimant to an oral hearing with an arbitrator for all disputes, regardless of whether the oral hearing relates to the award.

Question 11

Do you agree that there should be the potential for an arbitrator to impose a costs penalty if unreasonable challenges are made and pursued to an oral hearing? If not, what are your reasons?

Most respondents agreed, although some thought it might be difficult to agree on the level of penalty, or the MIB should be able to request an oral hearing. One respondent thought the proposal seemed a little harsh and another that a penalty should only be imposed

where the case was frivolous or wholly without merit. Others felt that section 61(2) of the 1996 Arbitration Act already made such a provision.

We think that there should be a costs penalty in order to discourage unreasonable or frivolous requests for an oral hearing. Therefore the new Agreement will provide the powers for an arbitrator at his/her discretion to be able to make an order that the claimant, or other person acting on the claimant's behalf, should reimburse the MIB its reasonable legal costs of the arbitration proceedings.

SECTION 3. PROVISIONS ON COSTS

Question 13

Do you agree that there should be more flexibility for the MIB to award more costs to cover legal expenses in exceptionally complex cases? If so, in what circumstances do you feel that such a discretion should apply?

The vast majority of respondents agreed there should be flexibility to award higher costs for exceptionally complex cases. Some felt that a form of banding would be appropriate and others that cases should be decided on merit. Further responses were that such discretion should only apply in exceptional circumstances, while another response was that discretion should only apply to cases worth over £10,000.

The Untraced Agreement involves an inquisitorial process in which the MIB is obliged to investigate cases, gather evidence and set out the reasons for its decision. The work is very different to cases with identified tortfeasors. The Agreement will include a revised table of bands for a contribution to legal expenses based on the size of the award so higher costs will be awarded for larger awards. The table will have different levels of costs than the 2003 Agreement but the changes to the scale have been the result of investigations conducted concerning the amount and complexity of the legal work likely to be undertaken. The table would have a cap on costs at a maximum of £250,000 but there would be flexibility for the MIB to award more than the amount specified in exceptionally complex cases. This flexibility would be dependent on the complexity of the case, not the value of the award.

Question 14

Do you agree that the claimant should have the right of appeal to an arbitrator to challenge the MIB's refusal to award supplementary costs in an exceptionally complex case?

Most respondents were in favour of this proposal. A couple thought that it should only apply to cases worth over £10,000 and a few thought that rather than giving the right of appeal to an arbitrator the introduction of some form of banding for costs would be a better solution.

Under the Agreement the claimant will be entitled to a right of appeal to an arbitrator if the MIB do not award extra costs in exceptionally complex cases.

Question 15

Do you have any comments on how fixed costs at the bottom end of the scale could be amended to more accurately reflect the actual amount of legal fees which will necessarily be incurred in a low value, straightforward claim?

To determine the appropriate costs, consideration was given to the amount of work a solicitor would need to do to present a claim under the Agreement, and the Guideline Hourly Rates for solicitors. Consideration was given to the costs awarded under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (dated 31 July 2013), along with how the amount of work required by a solicitor might differ when presenting a claim under the Agreement where MIB have an investigatory role. Many felt that the £500 minimum payment for costs in the 2003 Agreement should be removed. Some felt that the fees from the Pre-Action Protocol should be used while others believed that no costs should be paid on claims within the small claims track value limits. Another suggested that the element of costs attributable to investigating liability should be removed or a form of 'banding' could be introduced for higher value cases. Three respondents suggested that nothing should be changed.

In the light of the views of the majority of respondents and in order to bring the position into line with the civil claims procedure (where no costs are recoverable under the Small Claims Track) the Agreement will no longer guarantee a minimum of £500 for low value claims within the definition of the Small Claims Track. In such cases there will be no costs entitlement.

Question 16

Do you agree with our proposal that the Untraced Drivers' Agreement should be amended to make it clear that the MIB will include interest as if the claim was before a civil court? If not, please explain why not?

The 2003 Agreement provides (clause 9) that the MIB is to pay interest on the compensation payable "in an appropriate case" but the MIB is not required to pay it until one month after the date they receive the police report (see clause 4(3)) or would have received this if it had been requested promptly. Under the Agreement, if the MIB determines that a claimant is entitled to an award it is required to include interest equivalent to the amount a Court would have awarded.

Most agreed with our proposal; with the MIB believing that the trigger point in the Untraced Drivers' Agreement for interest on damages should be the date of the formal award and for special damages the date of the accident. Another thought that the principles in civil

proceedings should be replicated as far as possible. A couple did not accept that interest should be paid on every single award. The Agreement follows the MIB's proposal.

The Agreement will require the MIB to pay an award for death, personal injury and property damage equivalent to the amount which a court would have awarded to the claimant, which would include interest.

SECTION 4. GENERAL ISSUES

Question 17

Do you agree that we should remove clauses 5(2)(d) and 6(3)(d) of the Untraced and Uninsured Agreements respectively. If not, why not?

Ten respondents agreed with the proposal and five respondents commented on the proposal as explained in the published summary of responses.

The Uninsured Agreement 1999 excludes compensation for those who knowingly enter an uninsured vehicle which is subsequently responsible for an accident. This exclusion is allowed under EU law and the Agreement does not change this. However, we removed the provision in this clause in the Uninsured Drivers Agreement 2015, which raises an evidential presumption against the claimant in circumstances which are overly complicated and virtually never applied. We do the same in the new Agreement.

Question 18

Do you agree that we should introduce a definition of 'crime' in the Uninsured Agreement like that in the Untraced Agreement? If not, please explain why not?

As explained in our Government response to the consultation on 3 July 2015 there have been developments on this issue since so a definition of 'crime' is no longer needed as the Court of Appeal held that the exclusion of compensation where a passenger knew or ought to have known that the vehicle was being used in the course or furtherance of a crime was contrary to European law.

This provision was omitted from the 2015 Uninsured Drivers' Agreement as was the provision which excluded claims where the passenger knew or ought to have known that the vehicle was being used as a means of escape from or avoidance of lawful apprehension. The like provisions in the Untraced Agreement were removed by means of a Supplementary Agreement (the Fifth Supplementary Agreement) dated 3 July 2015 and will not be included in the new Untraced Agreement.

Question 19 (both agreements)

If there are any grounds why the Agreements should not be changed to reflect that the Lord President has powers to appoint arbitrators in Scotland, let us know.

There were no objections to the proposal that the Scottish panel of arbitrators should be appointed by the Lord President. A 4th Supplementary Agreement to the Untraced Agreement dated in 2015 provided that the Lord President makes the appointments to the

Scottish panel for arbitrators under the Untraced Agreement. The Agreement gives the power to the Lord President accordingly to appoint arbitrators to the Scottish panel which will be appointed for cases in rotation.

Other Changes not dealt with expressly in the Consultation

As mentioned in the introduction to this paper there have been various other changes made to the 2003 Untraced Drivers Agreement as well as changes to the Uninsured Agreement by means of a Supplementary Agreement, to bring them into line with EU law. In each case, these changes make the Agreements more generous to potential claimants. The Untraced Agreement has been completely restructured and minor drafting improvements have also been made.

Significant changes include:-

1. The removal of the terrorism exclusion ((clause 5 (1)(d) in the 2003 Untraced Agreement) which bars compensation for death, personal injury or property damage caused by, or in the course of terrorism. An equivalent clause (clause 9) in the Uninsured Drivers Agreement 2015 has also been removed by a Supplementary Agreement to the Uninsured Drivers Agreement signed on 10 January 2017.
2. The 2003 Untraced Drivers' Agreement included a bar on property damage compensation for drivers of vehicles who are uninsured and are victims of accidents caused by untraced drivers. This exclusion is not included in the new Agreement. As a result these victims will be entitled to compensation. The same bar in the Uninsured Drivers Agreement has been removed by the Supplementary Agreement to the Uninsured Drivers Agreement signed on 10 January 2017.
3. The 2003 Agreement has a bar on claims where a claimant has not reported the accident to the Police within 14 days for personal injury or death and five days for property damage. We consider these requirements are too restrictive so in the new Agreement the claimant, if he has not already done so, will need to report the accident to the police where reasonably requested by the MIB to do so. In addition the claimant should cooperate with the police in any subsequent police enquiries. The claimant will have a right of appeal to an arbitrator if he thinks the request of the MIB was unreasonable.
4. We have reviewed the definition of significant personal injury which was incorporated into the 2003 Agreement by a Supplementary Agreement of 15 April 2011, to ensure it meets the underlying objective of the provision in EU law (avoiding fraudulent claims). In the new Agreement, the MIB will not be liable for any claim, or part of a claim, in respect of property damage caused by or arising out of the use of an unidentified vehicle, unless a claim for significant personal injury has been paid in respect of the same event, whether to the claimant or any other individual claimant and the loss incurred in respect of property damage exceeds the specified excess of £400, which has increased from £300 in the 2003 Agreement.

The revised definition of "significant personal injury" is:

"personal injury resulting in death, 2 nights or more of hospital in-patient treatment, or 3 sessions or more of hospital out-patient treatment"

This should enable victims of an accident in which someone receives payment for a significant personal injury diagnosed after the accident to be eligible for compensation for property damage. Likewise it will enable more people to claim property damage compensation by reducing the number of qualifying days for inpatient treatment for a significant personal injury, and for the first time allow injuries requiring three or more sessions of hospital outpatient treatment to qualify too. The new criteria were arrived at after discussion with a broad range of medical experts.

Next steps

The Agreement and the Supplementary Uninsured Drivers Agreement will both come into force on 1 March 2017 and apply to accidents which happen on or after that date. Both Agreements will be published on the MIB website (www.mib.org.uk/making-a-claim) along with guidance notes to assist those wanting to make a claim.