



Ministry
of Justice

Reforming the Soft Tissue Injury (‘whiplash’) Claims Process

A consultation on arrangements concerning
personal injury claims in England and Wales

November 2016



Reforming the Soft Tissue Injury ('whiplash') Claims Process

A consultation on arrangements concerning personal injury claims in England and Wales

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

November 2016



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About this consultation

- To:** Stakeholders with an interest in reforming the personal injury claims process to disincentivise minor, exaggerated and fraudulent claims, which contribute to the high cost of motor insurance premiums paid by all motorists.
- Duration:** From 17 November 2016 to 6 January 2017
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- Response paper:** A response to this consultation exercise is due to be published by Friday 7 April 2017 at: <https://consult.justice.gov.uk/digital-communications/reforming-soft-tissue-injury-claims>

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Reforming the Soft Tissue Injury ('whiplash') Claims Process

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Foreword



The government is bringing forward a package of measures to crack down on minor, exaggerated and fraudulent soft tissue injury ('whiplash') claims stemming from road traffic accidents (RTAs).

The reform package announced in this consultation will save the industry around £1bn a year, which will be passed on to consumers through reduced motor insurance premiums. Millions of motorists could save an average of £40 on their annual car insurance from these proposals to tackle the unacceptable number of claims.

The government recognises that this is a complex area, and that claims are brought for a number of reasons. Yet the number of whiplash claims is 50 per cent higher than a decade ago, even though our roads are among the safest in Europe and fewer accidents are being reported.

At the moment there is simply too great a financial incentive to make such claims. The average payment for a minor whiplash claim is £1,850, and the cost of dealing with them is out of all proportion to any genuine injury suffered.

This consultation paper proposes that compensation for pain, suffering and loss of amenity (PSLA) for minor whiplash claims will either be removed entirely or replaced by a fixed sum. These two alternative proposals should be evaluated individually, in their own right, and also as part of a package with the other measures in the paper.

Those measures include introducing a tariff of payments for PSLA in more significant claims, raising the small claims limit in personal injury claims from £1,000 to £5,000 and banning the settling of whiplash claims without a medical report from an accredited medical expert.

Despite the proposals in relation to PSLA, all claimants will still be able to receive compensation for other forms of loss, including medical costs or the loss of earnings, regardless of the policy adopted by the government following consultation.

The proposals are aimed squarely at tackling the compensation culture which has grown up around whiplash claims in recent years. That culture is fuelled by a substantial industry of sustained nuisance cold-calls and targeted advertising which encourages motorists to make claims when little or no injury has been suffered.

The government believes reform is crucial if motorists' faith in the system is to be maintained. Leading insurers have already undertaken to pass on savings to consumers and we will consider taking further action if future premiums do not reflect the reduction in costs.

Driving down the overall number and costs of bringing civil claims – in particular, personal injury claims – has been a priority for this government and its predecessor since 2010.

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Given the impact on millions of consumers, the government understands that a wide range of stakeholders will be interested in the reforms set out in this document. Ministers and officials will continue to meet representatives from across the personal injury sector.

I would urge all of you to read this important consultation and its accompanying impact assessment, and consider and respond to the proposals it contains.

A handwritten signature in black ink, reading "Ken of Elie". The signature is written in a cursive, slightly slanted style.

LORD KEEN OF ELIE QC

Executive summary

1. The government is bringing forward a new reform programme to tackle the high number and cost of personal injury claims, and in particular RTA related soft tissue injury claims, the vast majority of which are whiplash claims. The package includes four measures to:
 - a) tackle the high numbers of minor RTA related soft tissue injury claims by either:
 - i. removing compensation for PSLA;¹ or
 - ii. reducing compensation for PSLA by setting a fixed amount payable (£400 or £425 if there is a psychological element) for these types of claim.
 - b) reduce compensation for PSLA for other RTA related soft tissue injury claims where recovery takes longer than for those covered by measure (a) above through the introduction of a set tariff of compensation;
 - c) raise the small claims limit for all personal injury claims to £5,000, (by reference to the value of the PSLA element of the claim). This would have the effect that the legal costs of such claims would no longer be recoverable from defendants in the majority of soft tissue injury claims, although certain costs arising from litigation (for example the costs of issuing the claim) and a number of disbursements (for example the cost of the medical report) could still be claimed by a successful claimant; and
 - d) ban pre-medical offers to settle RTA related soft tissue injury claims, so in future claims could not be settled without medical evidence provided by MedCo² accredited practitioners.
2. The measures to remove PSLA for minor RTA related soft tissue injury claims and to raise the small claims limit for personal injury claims were announced by the then Chancellor in his Autumn Statement in November 2015. The additional measures supplement those reforms and are aimed at providing claimants with proportionate compensation and greater certainty as to the value of their claim as well as reducing the number of claims settled without adequate challenge or proper medical evidence.
3. Measures (a), (b) and (d) will require primary legislation and the government intends to legislate as soon as parliamentary time allows. The government will bring forward proposals for primary legislation refined in the light of responses to this consultation. One example of the detail to be decided is the question of what is meant by a 'minor' claim in paragraph 1(a) above, which the government proposes should be determined by the duration of the injury. The definition of 'minor' is dealt with in Part 1 of this consultation document.

¹ Pain, suffering and loss of amenity is a term used to cover specific elements of compensation following an accident. The pain and suffering element compensates for all past, present and future physical and psychiatric symptoms. The loss of amenity element compensates for loss of enjoyment of life or a reduction in ability to perform everyday tasks.

² MedCo is an industry owned 'not for profit' company which oversees the improvement in medical reporting standards through the accreditation of medical experts, and which also operates the IT Portal used to independently source initial fixed cost medical reports in support of RTA related soft tissue injuries.

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4. Measure (c) requires changes to the Civil Procedure Rules (CPR). There will also need to be amendments to relevant Pre-Action Protocols including the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents.
5. The government's reform package is targeted at reducing the cost to motorists arising from minor claims as well as tackling exaggerated and fraudulent claims. The insurance industry estimates that RTA related soft tissue injury claims cost the industry around £2bn a year. A large proportion of this cost is passed on to motorists through increased premiums. Whichever option is pursued following consultation to tackle minor RTA related soft tissue injury claims, as set out in Part 2 of this document, the government's impact assessment estimates that the new reform programme could lead to around £1bn in savings to the insurance industry. The government expects the vast majority of these savings to be passed on to consumers through reduced premiums.
6. The government recognises that this is a complex area and that claims are brought for a number of reasons. There is, however, too great a financial incentive to make claims. Also, the level of challenge by defendant insurers can often be too low since there is a strong disincentive for insurers to devote time and expend costs in contesting these claims given the relatively small sums involved in each individual claim. The number of RTA related personal injury claims remains more than 50% higher than 10 years ago. This is despite extensive improvements in vehicle safety and a decline in the number of reported accidents.
7. The government's reform package seeks to tackle the incentives on both sides in order to reduce the significant costs associated with personal injury claims. The reforms will make sure that those genuine claimants who suffer more enduring injuries receive compensation which is proportionate to the level of injury sustained. The reforms will not affect compensation for other items of loss such as vehicle damage, loss of earnings and/or cost of any treatment required.
8. The government is also taking the opportunity, through this consultation, to gather views from stakeholders on a number of other related issues affecting the personal injury sector as set out in detail in Parts 6 and 7 of this document. These are:
 - i. Implementation of certain recommendations made by the Insurance Fraud Taskforce;
 - ii. Credit hire;
 - iii. Early notification of claims;
 - iv. Rehabilitation;
 - v. Recoverability of disbursements; and
 - vi. Introduction of a Barème type system
9. We would encourage respondents to consider these issues as well as the specific measures set out in paragraphs 1 to 3 above.
10. The government considers these reforms to be a coherent package (albeit to be refined as necessary in light of consultation responses) that is needed to tackle the complex problem presented by RTA related soft tissue injury claims. However, we would also encourage you to consider each of the measures not only as a package but with others and also individually.

Introduction

1. The government is consulting on a number of reforms relating to the personal injury claims process aimed at disincentivising minor, exaggerated and fraudulent RTA related soft tissue injury claims. The cost to motorists arising from dealing with these claims is out of proportion to the level of injury suffered and contributes to the high cost of motor insurance premiums.
2. In the light of responses to this consultation, the government will refine the measures requiring primary legislation for inclusion in a bill for consideration by Parliament. The remaining measure (the increase in the small claims limit) will be refined for implementation through changes to the Civil Procedure Rules.
3. The consultation is aimed at all stakeholders with an interest in the personal injury claims process, and in particular those involved in the process for minor RTA related soft tissue injury claims in England and Wales. A Welsh language consultation paper will shortly be made available at: <https://consult.justice.gov.uk/digital-communications/reforming-soft-tissue-injury-claims>.
4. The accompanying Impact Assessment (IA) indicates that motor insurance policy holders, insurance companies, and claimants for personal injuries arising from RTA are likely to be particularly affected by the reforms, where insurance policy holders are expected to receive the majority of savings. The proposals are likely to lead to additional costs or savings for a number of service providers including (but not restricted to) personal injury lawyers, medical experts and medical reporting organisations, as well as for charities, the voluntary sector, and the public sector. More information on this IA can be found at Part 10 of this consultation and copies of this IA are available here: <https://consult.justice.gov.uk/digital-communications/reforming-soft-tissue-injury-claims>. Comments on the IA and the specific questions it contains are very welcome.
5. Copies of this consultation paper are being sent to:
 - Access to Justice Action Group
 - Association of British Insurers
 - Association of Regulated Claims Management Companies
 - Association of Her Majesty's District Judges
 - Association of Medical Reporting Organisations
 - Association of Personal Injury Lawyers
 - Association of Professional Claims Managers
 - Association of Regulated Claims Management Companies
 - Bar Council
 - British Chambers of Commerce
 - British Retail Consortium
 - British Insurance Brokers Association

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British Medical Association
British Orthopaedic Association
Chartered Society of Physiotherapy
Citizens Advice
City of London Police – Insurance Fraud Enforcement Division
Civil Court Users Association
Civil Justice Council
Civil Procedure Rule Committee
Claims Portal limited
Claims Standards Council
Confederation of British Industry
Council of Her Majesty's Circuit Judges
The Credit Hire Organisation
Disability Rights UK
Equality and Human Rights Commission
Federation of Small Businesses
Forum of Complex Injury Solicitors
Forum of Insurance Lawyers
General Medical Council
Insurance Fraud Bureau
The Law Society
Local Government Association
MedCo Registration Solutions
Motor Insurers Bureau
Motor Accident Solicitors Society
Personal Injuries Bar Association
Thatcham – Motor Insurance Repair Research Centre
Trades Unions Congress
Transport for London
Welsh Government

6. This list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the issues covered by this paper and the IA.

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

Background

7. This government, like its predecessor, is committed to tackling the high number and cost of low value RTA related soft tissue injury claims, the vast majority of which are whiplash claims. That is why over the last six years ministers and officials have met a wide range of stakeholders to discuss the continuing high number of such claims, and the impact they have on the cost of motor insurance. Over this time we have introduced several reforms to reduce costs and return some much needed balance to the system.
8. The 'Jackson'³ reforms were implemented on 1 April 2013 through provisions in Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. These measures have reduced the costs of civil litigation in general, and personal injury in particular, through reforms to the way 'no win, no fee' conditional fee agreements work and the introduction of a ban on the payment and receipt of referral fees in personal injury cases. Additional reforms were introduced alongside these measures to reduce the fixed recoverable costs available to lawyers dealing with personal injury claims, to ban both lawyers and claims management companies from offering financial and other inducements to bring claims, and to give the courts powers to dismiss in their entirety claims which are fundamentally dishonest.
9. A further suite of reforms was implemented on 6 April 2015 to improve the standard and independence of initial medical reports used in support of low value soft tissue injury claims resulting from RTAs. The 'MedCo' Portal was introduced through amendments to the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. 'MedCo' is an industry owned 'not for profit' company which oversees the improvement in standards through the accreditation of medical experts, and which also operates the IT Portal used to source initial, independent fixed cost medical reports.
10. Despite these measures, the volume of RTA related personal injury claims in the UK has remained static over the last three years and is over 50% higher than 10 years ago (460,000⁴ claims registered in 2005/06 compared with 770,000⁵ registered in 2015/16). This increase over the last decade has coincided with a decrease in RTAs reported to the police from around 190,000⁶ in 2006 to around 142,000⁷ in 2015.

³ Lord Justice Jackson undertook a review of civil litigation costs in the light of concerns that they had become too high. His final report was delivered in January 2010. Jackson LJ made a number of which were accepted by the government. The reforms were intended to make costs more proportionate, and discourage unnecessary or unmeritorious cases.

⁴ <http://webarchive.nationalarchives.gov.uk/20080107205404/http://www.dwp.gov.uk/cru/performance.asp>

⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/516771/cases-registered-cru-2014-15.csv/preview

⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/461863/ras10013.xls

⁷ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/497176/ras45004.xls

Vehicle Safety

11. Research published by the Insurance Fraud Taskforce⁸ shows that, although there are on average 79% more cars per kilometre on our roads than in other EU countries, there are proportionately fewer fatal or serious accidents. This makes the UK one of the safest places to drive in Europe.
12. In France the compensation system is based around the provision of objective evidence from fully independent medical experts, and payments are awarded in line with fixed guideline amounts published in a table of damages. In 2004 a cross European study⁹ showed that France had significantly fewer minor cervical trauma ('whiplash') claims than the UK, despite having a similar number of vehicles on the road. Although more recent figures for France are not available in terms of the number of claims, we do know that French insurance premiums remain 40% lower than the average in England and Wales.¹⁰
13. Since 2006 there have also been significant advances in vehicle safety, with an increasing number of new vehicles featuring integrated seat and head restraints specifically designed to minimise injuries from low speed RTAs. Further advances in safety in the last few years include energy absorbing car design and the introduction of automatic collision detection systems which can take control of a vehicle's steering and braking systems to avoid low speed impacts.
14. Similar advances in vehicle safety have also been introduced in other jurisdictions where they have contributed to reductions in both accidents and injuries. For example in Finland, the number of injuries reported following RTAs peaked in 2008 when there were around 8,000 injuries. Since then, the figures have been steadily falling to around 6,800 reported injuries following RTAs in 2013, with increased vehicle safety design cited as a contributory factor in the reduced figures.¹¹ These advances in safety should also lead to lower RTA related soft tissue injury claims volumes overall in England and Wales, particularly as the number of cars on the road with these safety improvements increases.

The Issue

15. The number of soft tissue injury claims made in England of Wales remains too high. There are a number of reasons for this, including the difficulty in identifying and assessing soft tissue injury claims. This means that claimants will usually know more about whether there is an injury, and if so how severe it is, compared with defendants. This asymmetry of information, plus the availability of compensation at levels many claimants clearly regard as significant, means there are substantial financial incentives for claimants to bring cases regarding relatively minor injury, or to exaggerate the severity of their injury. By either removing or reducing the availability of PSLA these incentives would be considerably reduced.

⁸ <https://www.gov.uk/government/groups/insurance-fraud-taskforce>

⁹ www.svv.ch/sites/default/files/document/file/CEA_HWS-Studie_englisch.

¹⁰ Paragraph 2.37, Insurance Fraud Taskforce Report:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/494105/PU1817_Insurance_Fraud_Taskforce.pdf

¹¹ http://www.trafi.fi/filebank/a/1385544081/aacede60b181fe7444e0cd3d57ddfc51/13667-Trafi_Tieliikenteen_turvallisuuskatsaus_2013_eng.pdf

16. In addition, under the current arrangements, successful claimants do not bear the cost of bringing a claim which, instead, is paid by unsuccessful defendants. But, because it is very hard to disprove RTA related soft tissue injury claims, defendants who contest such claims are likely simply to increase their total costs without substantially increasing their chances of success. Hence, in such circumstances, and especially for lower value claims, it may be more cost effective for defendants to accept liability without contesting the claim and to pass the costs involved on to motor policy insurance holders.
17. Thus, in lower value cases, shifting cases to the small claims track where legal fees are not recoverable – as is the government's intention – would mean that claimants would now have a direct financial interest in decisions about pursuing their claim in that they would be responsible for their own costs. It is also worth noting that under the new proposed tariff (see Parts 2 and 3 of this document for further detail) all claims with a prognosis period of 12 months or under would automatically transfer to the small claims track, regardless of whether the measure to increase the small claims limit was implemented at the same time.
18. The current system also allows the parties to settle RTA related soft tissue injury claims without the claimant presenting medical evidence to the defendant. Costs of investigating the claim (and challenging it in court) can often incentivise defendants to settle without this information, with a settlement being seen as a more commercially viable option. This has led to a situation where medical reports are not always used to support claims, which can in turn incentivise minor, exaggerated or fraudulent claims. Therefore, mandating the need for a medical report to evidence claims would help deter claims of this nature in future.
19. The present round of reforms will build on the previous reforms set out above to address the ongoing issue of minor claims where the compensation paid is out of all proportion to the injury suffered. In particular, they are targeted at RTA related soft tissue injury claims, where, in some quarters, it has become culturally acceptable for claims to be made for very low level injuries, sometimes fraudulently.
20. The level of compensation and costs paid as a result of the high number of soft tissue injury claims has a wider cost to motorists through increased motor insurance premiums. Since motor insurance is compulsory, this has an impact on all motorists in England and Wales. Raising the small claims limit for personal injury claims, alongside banning pre-medical offers, will also provide disincentives and will remove significant costs from the process. These measures are also likely to encourage better consideration of the merits of individual claims by defendants.

Definition of RTA related soft tissue injury claims

21. It is important to be clear which claims these reforms will affect. The government is keen to hear the views of respondents on whether the definition below effectively facilitates the government's objectives for these reforms.
22. In 2014, the government worked closely with a group of expert stakeholders from across the personal injury sector to develop a definition for inclusion in the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (RTA PAP). The definition was specifically designed to identify the relevant low value RTA related soft tissue injury claims to be used in the MedCo IT Portal for sourcing initial medical reports. The vast majority of RTA related soft tissue injury claims are whiplash claims,

which are the claims the government is particularly keen to address through these new reforms.

23. The definition has proved effective in identifying the relevant claims for the purposes of MedCo and the government proposes to also use it for these reforms. It is:

'RTA PAP 16(A) soft tissue injury claim' means a claim brought by an occupant of a motor vehicle where the significant physical injury caused is a soft tissue injury and includes claims where there is a minor psychological injury secondary in significance to the physical injury'.

24. It is our view that, subject to the point below regarding psychological injury, using the existing definition is a sensible and pragmatic approach, and that developing a new definition would only cause unnecessary confusion. Therefore the government proposes that it is used as the basis for these reforms. (We have used it in determining the data, and the analysis of that data, which appears in the Impact Assessment which accompanies this consultation).

Question 1: Should the definition in paragraph 17 be used to identify the claims to be affected by changes to the level of compensation paid for pain, suffering and loss of amenity from minor road traffic accident related soft tissue injury claims, and the introduction of a fixed tariff of proportionate compensation payments for all other such claims?

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

Extension of definition to include psychological claims as a primary injury

25. When looked at in more detail there are two broad groups of RTA related soft tissue injury claims covered by the definition above. The first group comprises claims where the injury being claimed for is solely a soft tissue injury from an RTA, whilst the second also includes psychological trauma as a secondary element of the claim.
26. The current definition of "soft tissue injury claim" includes a claim for minor psychological injury if that injury is secondary in significance to the physical injury sustained but does not cover psychological injury where this injury is considered to be the primary injury. The government has been monitoring the number of claims which include a 'psychological' element and has found that the number of claims in this group is currently very low. That said, between 2012 and 2015, data from Claims Outcome Advisor¹² suggests that the number of claims where psychological injuries were included as a secondary injury increased by around 5%.
27. Anecdotal evidence from the insurance industry suggests that there are currently very few low value claims where the psychological injury is considered to be the primary injury. This is, however, a potential area for future claims inflation / displacement following implementation of the new reforms. Like RTA related minor soft tissue injuries, diagnosis of psychological trauma is generally based on a subjective description of symptoms with a causal link to an RTA injury asserted. Compensation

¹² COA data captures part of 20 different insurer's claims data, at least 5 of which are one of the top 20 leading insurers based on gross written domestic premiums in 2014.

awarded for PSLA in relation to claims for psychological trauma are generally at similar levels to those awarded in soft tissue injury claims.

28. Extending the definition of claims affected by the reforms to those claims where the psychological injury is the primary element of a RTA related soft tissue injury claim, which can be done via changes to the RTA PAP, is consistent with the government's aim to cut the costs of low value claims. The same arguments for the RTA related soft-tissue injury claim reforms are broadly applicable to those for low-value 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.

Definition of 'minor' claims

29. In order to implement effective reform to the area of minor RTA related soft tissue injuries, it is necessary to decide what is meant by 'minor'. Ultimately, the value of a claim is determined to a substantial degree by the initial diagnosis and the likely prognosis as to how long the claimant is likely to be affected by symptoms associated with their accident. Therefore, in the government's view the most appropriate way to assess the nature of the injuries to be encompassed by these measures is to look at and make judgements according to the length of time the claimant is likely to be injured.
30. In considering this issue, the government has looked at two options on which we are seeking the input of stakeholders. They are:
- i. Injury duration of up to and including six months. This is the government's preferred option. The government believes this option provides the most proportionate balance between limiting the compensation payable to individuals versus the costs to motorists. The average amount of compensation awarded for a RTA related soft tissue injury of up to and including six months (with or without psychological claims) is around £1,800.
 - ii. Injury duration of up to and including nine months. The government has considered whether the definition of minor claims should be up to and including nine months. The average amount of compensation awarded for RTA related soft-tissue injury claims of less than or equal to nine months (with or without psychological claims) is around £2,100.
31. On balance, the government is of the view that a definition of 'minor' as 'up to and including six months' would be an appropriate way forward. We believe that a period longer than six months would have a disproportionate effect on genuine claimants with more significant injuries.

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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.

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.

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

32. The government has stated on numerous occasions its intention to tackle the continuing high number and cost of minor RTA related soft tissue injury claims. Despite previous government reforms, minor, exaggerated or fraudulent claims for personal injury following low speed RTAs have continued to be a problem. The number of RTA related personal injury claims remains more than 50% higher than 10 years ago. This is despite extensive improvements in vehicle safety and a decline in the number of reported accidents.
33. We remain committed to ensuring that claimants with more significant RTA related soft tissue injuries will still be able to receive an appropriate level of compensation for the pain and suffering they have experienced. Further details on how the government intends to do this can be found in Part 3 of this consultation.
34. As part of its package of reforms to tackle the continuing high number and cost of RTA related soft tissue injury claims, the government is considering two options to deal with minor claims as defined in Part 1 of this consultation document. The details of these options are set out below.

Option 1: Removal of compensation for PSLA for all minor RTA related soft tissue claims

35. The government announced in November 2015 further reforms to tackle the high number and cost of these claims. The announcement included a measure to remove the right to compensation for PSLA from minor RTA related soft tissue injuries to address the significant costs of dealing with these claims. The government is of the view that the level of compensation awarded to claimants is out of all proportion to the level of pain and suffering actually experienced by most people following a low speed RTA.
36. Implementation of such a measure would mean that all those whose claims fell within its scope would no longer be able to receive compensation for PSLA. This does not mean these claimants would not be eligible for some form of compensation, as they would still be able to claim compensation to cover any expenses incurred such as medical treatment or loss of earnings.
37. The removal of compensation for PSLA for minor RTA related soft tissue injury claims will tackle the incentives for the high volume of such claims, and drive down the cost associated with dealing with them. This would be of benefit to consumers through reduced motor insurance premiums.

Option 2: Introduction of a fixed sum of compensation for minor RTA related soft tissue injury claims

38. The government is committed to reducing the number and cost of minor RTA related soft tissue injury claims, which is why we announced the measure to remove compensation for PSLA for these claims in the 2015 Autumn Statement. The government believes there are respectable arguments for taking this radical approach. However, following the announcement, we are aware through discussions with stakeholder representative groups that there has been considerable concern and debate amongst some stakeholders about the total removal of compensation for these claims and whether the government's objectives could be met through an alternative approach.
39. The government recognises that whilst the amount of compensation paid to claimants for these minor claims is currently too high for the amount of pain and suffering endured, there may be a case that those with genuine injuries (albeit minor ones) should receive some compensation for PSLA.
40. This has led to the development of an alternative option to reduce the costs of these minor claims yet still provide genuinely injured claimants with a fixed sum of compensation. This option complements the government's plan to introduce a new system of fixed tariff compensation payments for more significant injuries, as set out in Part 3 of this document.
41. As with the measure to apply a fixed tariff to more significant injuries, the fixed sum for minor claims will help control costs by providing more certainty to insurers as to the cost of the compensation attached to each claim. It will also protect against under-settlement by making claimants aware in advance of the appropriate level of compensation that they are due. This is especially important if claimants choose to progress their claim themselves through the small claims track.
42. Consideration has been given to the appropriate level of compensation to be awarded to minor claims. The Judicial College Guidelines (12th edition) indicate that compensation for PSLA for minor RTA related soft tissue injury claims should start at £200. The government has considered this and we propose that the fixed sum for minor claims should be set at £400 (or £425 if a claim also contains a psychological element). We would, however, be interested in the views of stakeholders on the figure(s) suggested.

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.

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.

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.

Process for assessing injury duration

43. Supporting medical evidence obtained by the claimant will be vital in assessing how the claim will be handled. There are two approaches to how the process for obtaining medical evidence could proceed, depending on which of the above options is decided upon.
44. The government has worked hard with all sectors of the personal injury industry to introduce greater independence and improve standards in medical reporting. The implementation of the MedCo reforms has enabled systems to be put in place to monitor a wide range of management information, supported by the introduction of a specific accreditation system for medical experts. Data on the length of prognosis periods is currently being studied along with behavioural changes in relation to the production of medical reports. This will help MedCo with its robust enforcement programme to ensure that prognosis periods are accurate. MedCo will continue to monitor medical reports in support of RTA related soft tissue injury claims following the implementation of these reforms.

Diagnosis approach

45. The 'diagnosis approach' could be used if the government decided to proceed with the option of removing compensation for PSLA from minor claims. This option would require claimants to wait until the end of the prescribed period (e.g. six months) before obtaining a supporting medical report through the MedCo Portal. An examination at this point would enable the medical expert to assess whether the claimant was still suffering from pain or other symptoms related to injuries sustained in their earlier RTA. The medical report would then be used to decide whether the claimant was entitled only to claim for non-PSLA losses, or was alternatively eligible for the new fixed tariff compensation scheme for more significant injuries.
46. In order to control costs associated with the claim, only the cost of the six month medical report would be recoverable. If the claimant chose to seek a medical report any earlier than this, the cost of that earlier report would not be recoverable. In addition, the requirement to have a medical examination at a specific point may have a positive impact on the practice of claims being brought at the end of the limitation period.
47. This approach would help to control the large number of minor claims currently made. It has become too easy to take forward a minor, exaggerated or even fraudulent claim, and claimants are still being encouraged to make such claims. It could also have a positive impact by helping to promote a much needed change to the culture of claiming in England and Wales. This would provide certainty as to when, following an accident, the medical evidence should be sought and when the claim (if any) would start.
48. However, there could be circumstances in which waiting six months would not be helpful to a claimant. A requirement for the claimant to pay for an earlier report (if one were needed before six months) could be viewed as disproportionate for claimants

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seeking necessary rehabilitation or who are unable to work and are seeking payment for loss of earnings given that such a report may in any event be required to evidence the claim for these losses (which remain recoverable). In addition, as well as deterring minor, exaggerated and fraudulent claims, such a requirement could also act as a disincentive for genuinely injured claimants.

Prognosis approach

49. The second option is based on a 'prognosis' approach to medical evidence. This would be similar to the approach currently used for obtaining medical evidence in support of RTA related soft tissue injury claims. This option could work with both the introduction of the new tariff system for minor (and more significant) RTA related soft tissue injury claims and with the option to remove compensation for PSLA from minor claims.
50. Under the prognosis model, claimants would continue to be required to seek a medical report to support claims through the MedCo Portal at a suitable time following the start of the claims process. Industry data indicates that the most common period for seeking a medical report is between three and six months after the RTA has occurred. As happens now, this report will assess any injury and provide a prognosis on its likely duration.
51. The benefit of this approach is that claimants who have an injury duration of six months or less would not be delayed from seeking the necessary medical evidence to support their claim, either for recoverable losses such as the cost of treatment or loss of earnings or for compensation for PSLA (depending on the final decision on which option should be pursued). In addition, introducing a requirement to have a medical examination at a specific time is likely to have a positive impact in tackling the issue of claims being brought at the end of the limitation period, often without medical evidence.
52. This approach would also continue to support the previous government's reforms to improve the standards and independence of medical reporting in support of medical claims. The MedCo system is collecting useful data, and analysis of this data on average prognosis periods for RTA related soft-tissue injury claims has begun. As MedCo's management information data becomes richer, it will become easier to identify outliers and problem areas and in particular whether these relate to particular medical experts or Medical Reporting Organisations (MROs). The government is supporting the work of MedCo and will make sure it has the appropriate tools to identify and manage this issue through its expert and peer review committee and sanctions for any abuse of the system.
53. The difficulty with this approach arises from the potential for pressure to be applied to inflate prognosis periods to just beyond the period defined as covering 'minor' road traffic related soft-tissue injury claims. For example, if the definition of 'minor' is set at up to and including six months, there is a question as to how many claims would end up with a prognosis period of seven months, thereby qualifying for compensation under the new tariff system. As noted above, the analysis of management information by MedCo will be an important safeguard in this area. The introduction of a tariff for claims as set out in Part 3 of this consultation document will also be a potential mitigation against such claims inflation.

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.

Question 9: If either option to tackle minor claims (see Part 2 of the consultation document) is pursued, please give your views on whether the 'Prognosis' approach should be used.

Please explain your reasons.

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

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

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

54. A tariff of predictable damages was recommended by Lord Justice Jackson in his 2010 report 'Review of Civil Litigation Costs: Final Report'. Jackson LJ referred to the various computerised calibration systems already in operation, principally used by defendants in calculating awards for general damages in low value claims. A working group was set up by the Civil Justice Council to consider this but work was not progressed, largely due to differences between defendants and claimants on the rates used to inform the calibration.
55. The introduction of a tariff system is also consistent with how a number of other jurisdictions, such as Italy, France, Spain, Sweden, Norway and Finland have approached the issue of RTA related soft tissue injury claims. These jurisdictions all use variants of a table of predictive damages, and there have been positive impacts from their use on both the number of claims made and on the cost of motor insurance premiums.
56. In Italy there was a growing problem with RTA related soft tissue injury claims which, as in England and Wales now, were having a detrimental effect on the cost of motor insurance. Premiums in Italy increased by 18% between 2002 and 2009, against an average of 7% across the rest of Europe. Since the introduction in 2012 of a new fixed compensation tariff based system, the number of claims in Italy has started to fall with a consequential fall in motor insurance premiums. In 2013 premiums reduced by 6%, which was followed by a further 6.5% reduction in 2014.¹³
57. Paragraph 35 sets out the government's view as to what the appropriate level of compensation for PSLA for minor RTA related soft tissue injury claims should be if that option were to be pursued. Consideration has also been given to what would be an appropriate amount of compensation for soft tissue injuries suffered as a result of a RTA where the injury duration is over six months. There needs to be a method for developing the necessary increments which is linked to the increasing seriousness of the injuries suffered. The government is of the view that this is best done in three month increments for an injury duration of greater than six months and not more than 18 months,¹⁴ and a further six month increment for injuries of a duration of up to two years. This allows for an even progression up the scale dependent on the severity of the injury.
58. The following tables and charts provide further detail on the new tariff for more significant RTA related soft tissue injury claims. The first line of injury duration of up to and including six months relates to the policy in Part 2 of this consultation document to remove the payment of compensation for PSLA for RTA related soft tissue injuries with a duration of up to and including six months. By way of context the tables provide information on the median for compensation currently paid out in relation to claims

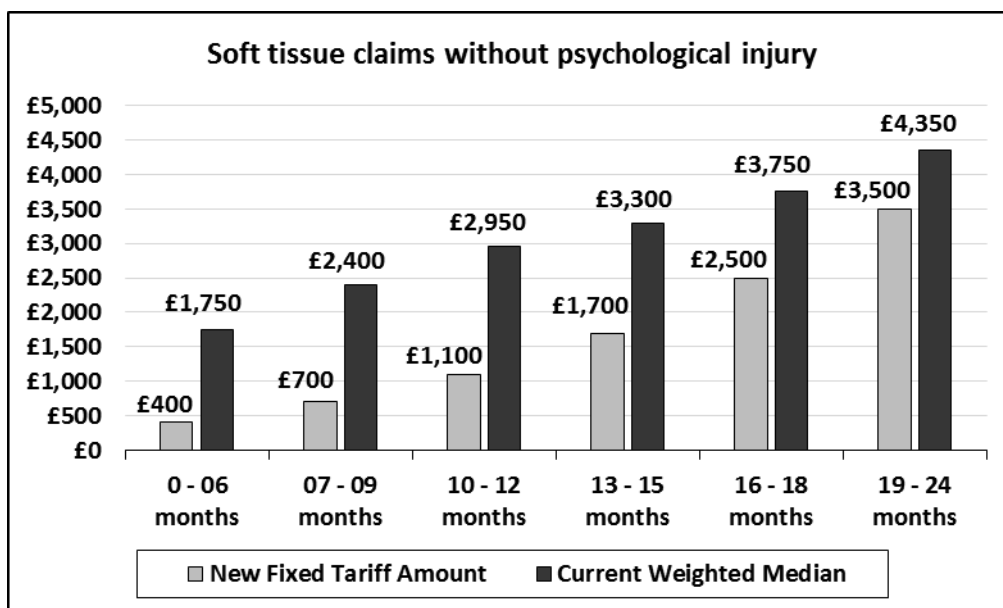
¹³ Page 88, European Motor Insurance Markets Report - November 2015 (<http://www.insuranceeurope.eu/sites/default/files/attachments/European%20motor%20insurance%20markets.pdf>)

¹⁴ E.g. 7-9 months in table 1, which refers to an injury duration of greater than 6 months but not more than 9 months.

which are solely for RTA related soft tissue injuries, and also information on claims for RTA related soft tissue injuries which have psychological damage included as a secondary element of the claim.

Table/Chart 1 – RTA related soft tissue injury claims without psychological injury:

Injury Duration	Current weighted median compensation payment for PSLA, without psychological injury (based on industry data)	Judicial college guidelines amounts (12th edition)	New Tariff amounts
0–6 months	£1,750	£200 to £3,520	£400
7–9 months	£2,400	£1,705 to £3,520	£700
10–12 months	£2,950	£1,705 to £3,520	£1,100
13–15 months	£3,300	£1,705 to £6,380	£1,700
16–18 months	£3,750	£1,705 to £6,380	£2,500
19–24 months	£4,350	£1,705 to £6,380	£3,500

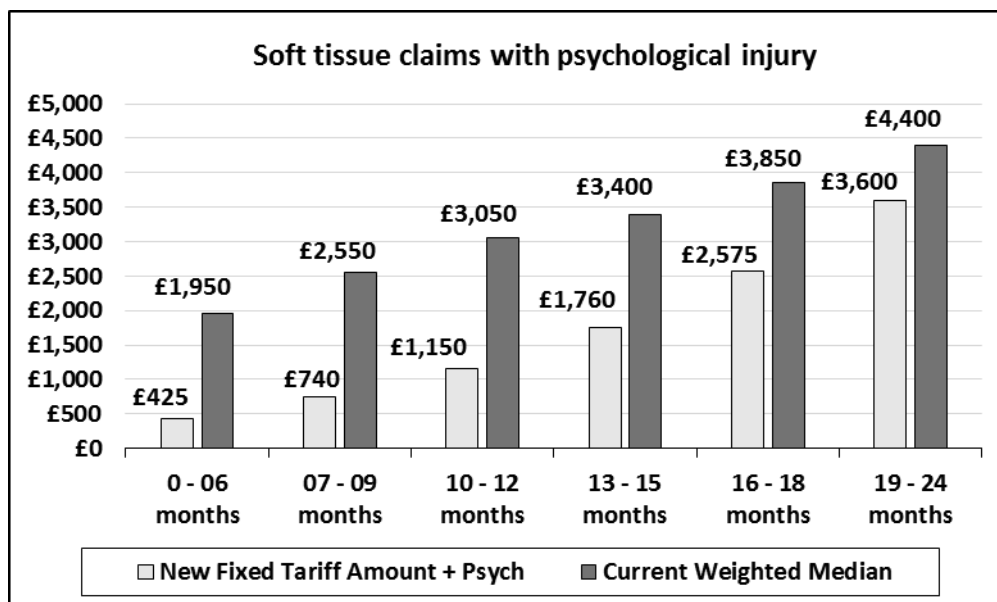


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Table/Chart 2 – RTA related soft tissue injury claims with psychological injury:

Injury Duration	Current average payment for PSLA, with psychological injury (based on industry data)	Judicial college guidelines amount (12th edition)	New Tariff amounts		
			New tariff amount	Psych damages awarded	Tariff with psych
0–6 months	£1,950	£200 to £3,520	£400	£25	£425
7–9 months	£2,550	£1,705 to £3,520	£700	£40	£740
10–12 months	£3,050	£1,705 to £3,520	£1,100	£50	£1,150
13–15 months	£3,400	£1,705 to £6,380	£1,700	£60	£1,760
16–18 months	£3,850	£1,705 to £6,380	£2,500	£75	£2,575
19–24 months	£4,400	£1,705 to £6,380	£3,500	£100	£3,600



59. Consideration has been given to whether the tariff should state single figures or if it should contain some flexibility through use of a range or band (as is currently the case for the Judicial College guidelines). The government believes that it would provide greater clarity to claimants and protection against potential under-settlement or over-settlement, as well as minimising scope for disputes about quantum, if a single figure were provided rather than a broad band.
60. The amounts available to claimants under the this tariff have been calculated to reflect the government's policy aim of reducing the overall costs of dealing with RTA related soft tissue injury claims. They also take into account the premise that claimants with more significant injuries should receive compensation which is proportionate to the pain and suffering they have experienced.
61. The amount of compensation available under the new system curves upwards in a series of fixed increments which enable the system to move proportionately from £400 for minor injuries (or £0, if the option to remove PSLA from minor claims is pursued) to £3,500, (£3,600 with a psychological element to the claim) for more serious injuries.

62. The weighted median PSLA damages that are currently paid out (second column of the tables above) are based on actual compensation payments made, derived from data received from the Claims Outcome Advisor¹⁵ (COA) and Colossus¹⁶ (CSC). These companies have developed systems for insurers to evaluate what the settlement should be by drawing on a number of factors including previous settlements and the wider market in order to minimise pay-out variance.¹⁷
63. The median difference in PSLA damages for claims without and with psychological injuries ranges from a £200 difference to £0, when considering what claimants currently receive for different injury durations. The proposed tariff also allows for an increasing amount of PSLA damages to be awarded for psychological injuries as the injury duration increases, ranging from £25 for minor injuries (or £0 if the option to remove PSLA from minor claims is pursued) to £100 for more serious injuries.
64. The government is considering whether an exceptionality provision should also be included in this proposal. Such a provision would provide the judiciary with the ability, upon application, to apply an uplift to the amount payable to a claimant by up to 20% in exceptional cases, for those claims where the injury duration is more than six months. This is consistent with other EU jurisdictions such as Italy. We would therefore also be interested in the views of stakeholders as to how such a provision could be introduced. Should set circumstances where it is applied be enshrined within legislation or should the judiciary be given the discretion to apply it in appropriate circumstances?
65. It is the government's view that either reducing or removing compensation for PSLA for minor RTA related soft tissue injuries, and the introduction of a fixed tariff of compensation for more significant claims, provide a proportionate approach to compensating PSLA for soft tissue injury in RTA cases and a fair balance against the interests of consumers paying motor insurance.

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

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

Question 12: Should the circumstances where a discretionary uplift can be applied be contained within legislation or should the Judiciary be able to apply a discretionary uplift of up to 20% to the fixed compensation payments in exceptional circumstances?

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

¹⁵ COA data captures part of 20 different insurer's claims data, at least 5 of which are one of the top 20 leading insurers based on gross written domestic premiums in 2014.

¹⁶ CSC's data captures part of 5 different insurers' claims data, at least 3 of which are one of the top 20 insurers based gross written domestic premiums in 2014.

¹⁷ There is no overlap between insurers using COA and CSC so the datasets have been combined using weighted averages.

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

66. The third measure in the reform programme, and the second of the two announced by the then Chancellor in his 2015 Autumn Statement, is to raise the small claims track limit for personal injury (PI) claims to at least £5,000, by reference to the value of the PSLA element of the claim. The aim of this measure is to reduce the costs of litigation in relation to low value personal injury claims.
67. The small claims track limit is £1,000 for PI claims and housing disrepair claims. It has not been increased since 1991 and the level is out of step with the limit in place for all other small claims, which is set at £10,000. The focus of this consultation is on PI and the limit for housing disrepair claims is not in scope of these reforms.

The small claims track limit – background

68. All defended civil claims are allocated to one of three tracks: the multi-track, the fast track or the small claims track. A number of factors are considered when a claim is allocated to one of these three tracks. These include the monetary value and the nature and the complexity of the claim. The PI small claims limit only relates to the PSLA element of the claim. Any compensation claims for other issues such as loss of earnings, rehabilitation or treatment are in addition to any PSLA claimed.
69. The fast track deals with claims exceeding the small claims limit (for non-personal injury claims) of £10,000 up to the value of £25,000 with the multi-track used for cases where the value of the claim is more than £25,000. The aim of the small claims track is to provide an informal setting to solve disputes in a simple, straightforward, accessible manner. Hearings are often conducted with parties sitting around a table rather than in a formal courtroom setting. The legal costs of these claims are not generally recoverable from the losing party, although some disbursements can still be recovered.
70. The procedure for the small claims track was first introduced in 1973 based on a judge's statutory power to refer a case to arbitration. The original limit for the value of these cases was £75. By 1991 the limit had been increased to £1,000 for all claims. In 1995, following Lord Woolf's interim report, the small claims limit was increased to £3,000 for cases other than PI and housing disrepair claims.
71. In 1999 the small claims limits were examined again, as the rise to £3,000 for all claims other than PI and housing disrepair claims was generally considered to have been successful. The then government decided to increase the limit to £5,000 for all claims except PI and housing disrepair. Arguments were made at this time by PI lawyers that this type of claim could be complex and that some claimants might have difficulty in assessing the value of their claims. The then Lord Chancellor felt that PI claims with a value below £1,000 were being dealt with fairly but decided that the limit should not be raised further for this type of claim. Similar arguments were raised in relation to housing disrepair cases.
72. The Better Regulation Task Force (BRTF) examined the small claims procedure and published a report *Better Routes to Redress* in 2004. They considered that claimants acting in person were more than capable of bringing a claim against a represented

defendant and that there was an argument for raising the limit for PI claims in the small claims track. The report said that research carried out on a potential rise from £3,000 to £5,000 for non-personal injury claims showed two positive and significant points. The first was that the increase would not result in the dramatic increase some had feared in the volume of litigated cases in the small claims track. The second was that both litigants in person and the judiciary had expressed approval of the small claims process.

73. In 2005 the Constitutional Affairs Select Committee (CASC) looked at the small claims limit. Their report "*The courts: small claims*" was published in December 2005 and focused on whether claimants needed legal representation in PI claims. It found that at the higher end of the scale the majority of claimants were capable of acting as litigants in person. CASC also found that many types of PI claim that originally fell under the small claims limit no longer did so due to compensation levels increasing whilst the small claims limit had remained at the same level over the same period.
74. The question of whether to raise the small claims limit for PI claims was considered again by the government in 2007, but following a consultation it was decided to streamline the PI process rather than increase the limit. The most recent increase to the small claims limit came in 2012, when the limit for all claims except PI and housing disrepair was increased to £10,000.
75. A further consultation covering the small claims limit was launched in December 2013. Following analysis of both the responses to the consultation and the report by the Transport Committee into the impact of RTA related soft tissue injury claims on the cost of motor insurance, the government decided that, despite there being good reasons to raise the limit, it would defer any increase and instead concentrate on implementing reforms to improve the independence and quality of medical evidence in RTA related soft tissue injury claims. These reforms have now been implemented through the introduction of the MedCo IT Portal and its accreditation scheme for medical experts.

Current small claims track cases

76. There are many cases that are already dealt with in the small claims track, largely by litigants in person, and this has been the case for a number of years. These include claims for compensation up to £10,000 for the provision of faulty services or for non-payment of invoices.
77. Claimants in the small claims track have lower costs than those in the other court tracks. They do not normally need to appoint a solicitor to act on their behalf so they do not need to pay any solicitor's fees on top of the court fees.
78. Claimants using the small claims track will have to pay court fees, although these are not onerous and can be remitted in part or in full if the claimant is on a low income, receives benefits or has no savings.¹⁸ Further reductions are also available for issuing a claim online. If the claim does not settle before the hearing – as many claims do – a hearing fee is payable, though this can also be remitted. However, if the claim settles prior to the hearing date in favour of the claimant, or if they win the claim, then all or

¹⁸ <https://www.gov.uk/get-help-with-court-fees>

part of the hearing fee can be recouped. If the claim goes to a hearing and the claimant is representing themselves, the judge will make sure that the claimant fully understands the hearing procedure.

The case for change

79. It is the government's view that low value RTA related PI claims are not so complex that claimants routinely require legal representation to pursue them. As such, we think that it is appropriate for these claims, including RTA related soft tissue injury claims, to be dealt with in the small claims track rather than the fast track, as is currently the case for the majority of such claims. Since the small claims limit was set in 1991 there have been increases in the amount of compensation payable for these claims. It should also be noted that, as explained above, the value of the claim is only one of a number of factors to be considered when allocating a case to the appropriate court track; if a claim is more complicated the court has the discretion to move it to another track, such as the fast track.
80. It is also notable that lawyers are often not used for such claims in many other European jurisdictions. For example in Finland, lawyers are only involved in low value RTA related soft tissue injury claims if specifically ordered by the court. In France there are two small claims courts in which RTA related soft tissue injury claims may proceed. The Juges de Proximité is for claims under €4,000 (£3,570¹⁹) and the Tribunaux d'instance is for claims under €10,000 (£8,925), neither of which requires legal representation.
81. In Norway most of the claims for minor personal injury are handled without the involvement of a solicitor. However, if a claimant prefers to be represented by a solicitor, they can choose to instruct one. In such cases, their insurance will usually cover what are deemed as reasonable expenses. There is no market in Norway for conditional fee agreements so there are no 'no win no fee' solicitors in operation there.
82. Raising the small claims limit to cover PSLA claims of at least £5,000 will not preclude claimants from engaging legal representation, but would mean that they would in future be responsible for paying for their own legal costs if they choose to seek legal representation. The government is of the view that there is increasingly more information available to claimants to take forward claims without necessarily needing to seek legal representation.
83. For example, guidance for litigants in person and for making small claims has been published by both the Civil Justice Council and the Bar Council, these documents can be found here:
 - <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CJC/Publications/Other+papers/Small+Claims+Guide+for+web+FINAL.pdf>
 - http://www.barcouncil.org.uk/media/203109/srl_guide_final_for_online_use.pdf
84. As already explained, the limit has not been raised for PI claims since 1991 and in that time the level of compensation paid for PI claims has increased, with the result that fewer cases fall under the small claims limit than was previously the case.

¹⁹ Exchange rate correct as of 8 November 2016

85. The effect of raising the small claims limit for these claims is that legal costs would no longer be recoverable, thus reducing the cost of these claims and meeting the government's objectives to disincentivise minor, exaggerated and fraudulent claims. The government believes raising the small claims limit is a sensible, pragmatic and proportionate measure to be taken forward as part of a wider reform package to tackle the high number and cost of these claims.
86. Increasing the small claims limit for PI claims does not require primary legislation and can be achieved through changes to the Civil Procedure Rules. Supporting changes will also be required to allow for the recoverability of the fixed cost of a MedCo accredited medical report by the claimant and to ensure that all claims are supported by such a medical report.

Scope of the increase

87. In light of the announcement made in the 2015 Autumn Statement the government has considered the level of the small claims limit, and in particular whether the increase should be to £5,000 or higher. In addition, we have considered whether the limit should be raised for all PI claims in addition to RTA related soft tissue claims. Discussions have also been held with key stakeholder groups on this issue, including representatives from the Motor Accident Solicitors Society, the Forum of Insurance Lawyers, the Law Society, the Association of Personal Injury Lawyers, the Association of British Insurers and the Personal Injury Bar Association.
88. The government is considering two options for raising the small claims limit, its preference being to raise the limit for all PI claims.

Option 1 – raising the limit for all PI claims

89. Raising the limit for all PI claims would bring into scope a wider range of cases including employers' liability and public liability (EL and PL) claims²⁰ as well as low level clinical negligence claims. This is the government's preferred option as it would keep the range of limits for different types of claim at a minimum whilst continuing the current uniformity of approach for PI claims, albeit at a higher level. PI claims are usually considered as a separate type of claim and specialism in law.
90. Raising the small claims limit for all PI claims would be consistent with the government's aims to disincentivise minor, exaggerated and fraudulent claims and remove unnecessary costs from the claims process. Some local authorities and large commercial organisations receive numerous claims relating to slips and trips. The issues for these claims are not on the same scale as the problem with RTA related soft tissue injuries, largely due to the fact that more objective evidence is available in a large number of these claims. This is, however, another area where we may see claims displacement following the implementation of the new reform programme. In addition, for commercial reasons defendant organisations can also sometimes offer settlements rather than appropriately challenging claims in this category of claim.
91. A number of EL and PL claims, as well as clinical negligence claims, are more complicated than low value RTA related soft tissue injury claims, for example because

²⁰ Public liability (PL) claims relate to "slips and trips". Employer's liability (EL) claims cover workplace accidents and diseases.

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causation and liability may be in question. In addition, claims where there are multiple minor injuries can be complex and unsuitable for the small claims procedure. However, as set out above, the value of the claim is only one of a number of factors to be considered when allocating a case to the appropriate court track and, if a claim is particularly complicated, the court has the discretion to move it to another track. More data is being sought from respondents on this issue, and additional questions covering this are included in Part 10 of this consultation.

Option 2 – raising the small claims limit for RTA related PI claims only

92. An alternative approach would be to raise the small claims limit for RTA related PI claims only. The government has indicated its concern that there is a particular issue with minor, exaggerated and fraudulent RTA related soft tissue injury claims, and raising the small claims track limit for RTA claims would ensure that this measure was consistent with the overall reform agenda.
93. However, raising the limit for a specific type of PI claim would create greater uncertainty as this would create multiple procedural thresholds and systems for dealing with PI claims, many of which are similar in nature irrespective of the original source of the accident (i.e. a broken leg is a broken leg no matter if the fracture is the result of tripping or from a minor RTA). The government is therefore not minded to pursue this approach.

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.

Level of the small claims track limit

94. As previously stated, the small claims limit for PI claims has not been increased since 1991. It is difficult to deny, therefore, that an increase is long overdue. Additionally, the introduction of conditional fee agreements in 1998 meant a significant increase in the number of claims brought since the limit was last changed. It can be argued that it is not the complexity of the claims but the availability of costs recovery in the fast track which has become the overriding factor in how these claims are handled.
95. The government has concluded that now is the right time to move forward with raising the limit for PI claims. A decision is required on what type of claim should be covered and whether the increase should be to £5,000 or higher. In discussions with stakeholder groups prior to the publication of this document, representatives from MASS, APIL and the Law Society put forward the view that if the small claims limit were to rise it should be in line with inflation.
96. However, a number of factors need to be considered when setting the level for PI claims. Increases to PSLA awarded to claimants are also influenced by other factors, including such things as the 10% uplift added to claims following the implementation of LASPO. Additionally, there is the fact that fewer claims currently fall into the small claims track than when the limit was introduced in 1991. Increasing the limit in line with inflation would bring more claims within scope, but not all of them. There is also the issue of whether we would see the value of claims increase in order to ensure that more claims were kept in the fast track.

97. The level for the small claims limit for PI claims relates only to the PSLA element of the claim and not to the total value of the claim. Consistent with this, it is intended that the increase should apply only to the PSLA element of the claim. In considering the level of the increase, and to build in an element of future proofing, the government has considered whether the limit should be raised further, for example to £7,500 or even to £10,000, given that the limit for all other claims is £10,000. However, the government has decided that an increase to £5,000 is a proportionate response to the issues identified at this stage, and the accompanying impact assessment uses this figure. We would, however, welcome views from stakeholders on whether the small claims limit should be increased beyond £5,000, and, if so, to what level.

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?

Litigants in Person

98. Raising the small claims track for PI claims is likely to increase the number of Litigants in Person (LiPs) pursuing claims in that track. The government considers that most minor PI cases are straightforward enough to be brought without the need for legal representation. The small claims track is designed for cases to be brought without lawyers. In addition, the value of the claim is only one of a number of factors to be considered when allocating a case to the appropriate court track and if a claim is particularly complicated the court has the discretion to move it to another track. There is now also a considerable amount of guidance available to LiPs from a range of sources relating to bringing claims in the small claims court and representing themselves.
99. Other EU countries have procedures in place to support claimants in resolving their soft tissue injury claims without legal representation. As mentioned earlier, this tends to be achieved by setting out clear guidelines on the claim value along with good quality independent medical evidence. Countries such as Finland, Spain, Sweden and Italy have set formulas, tariffs or tables of fixed damages that set out the amount claimants are awarded.
100. PI lawyers have contended that claimants need to use lawyers for PI claims as the general public do not have the competence needed to issue court proceedings without help. The government accepts that some claimants may not fully understand the process but there is a significant amount of help and support available to all claimants who act in person. As well as the guidance documents mentioned at paragraph 76, there are leaflets and web based guidance available from www.gov.uk which have been designed with litigants in person in mind. They give a step by step overview of the small claims track and the requirements of each party, with advice on eligibility of cases for the small claims track and how to prepare for a hearing. The Judge also has a role to ensure there is fairness in the proceedings for both the claimant and defendant.
101. In addition, many car and home insurance packages offer Before the Event (BTE) insurance which, in the event of an accident and injury, provides the policy holder with assistance in the form of panel law firms offering legal advice, or help with paying

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disbursements. The analysis in the accompanying impact assessment assumes that any increased BTE costs will be passed on in the form of higher premiums, although the government would expect and encourage the providers of such policies to offer competitive packages to consumers.

102. Most minor PI claims result from RTA, in the vast majority of which the issues of causation and liability are admitted early in the process – those claims which proceed to court hearings do so in order to settle issues of quantum. The government would argue that these low value PI claims are in general no more complex than the other types of claim routinely dealt with in the small claims court, and this would be particularly the case if taken in conjunction with the new fixed compensation tariff scheme described above. These other types of claim can be double the value of the new £5,000 limit for PI claims, and they tend to be more adversarial with issues such as disputed contractual terms and alleged breaches of agreements often in dispute throughout the process.
103. The government is considering the issue of the potential for claims management companies (CMC) and paid McKenzie Friends²¹ to re-enter the PI market in response to these reforms in general, and the increase in the small claims limit in particular. These types of organisation can offer services to claimants whilst operating with lower overheads than many PI lawyers. During the last consultation on this issue, a CMC trade association wrote to the government to argue that this would happen if the small claims limit were increased. We are interested in respondents' views in relation to whether or not this would be helpful in providing support to otherwise unrepresented litigants.

Question 15: Please provide your views on any suggested improvements that could be made to provide further help to litigants in person using the Small Claims Track.

Question 16: Do you think any specific measures should be put in place in relation to claims management companies and paid McKenzie Friends operating in the PI sector?

Please explain your reasons why.

²¹ A McKenzie friend assists a litigant in person in a court of law in England and Wales. They don't need to be legally qualified and tend to be lay advisors who provide moral support for litigants, take notes, help with case papers and give advice on the conduct of a case. McKenzie friends cannot conduct litigation, address the court or sign court documents, their services are usually free, but paid McKenzie Friends are becoming more common.

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

104. The final measure of the reform programme is to ban defendants from making offers to settle RTA related soft tissue injury claims without a medical report, a practice which is also known as making 'pre-medical offers'. This measure builds on changes to the Civil Procedure Rules introduced in 2014 to discourage the use of such offers in RTA related soft tissue injury cases.
105. It has been argued that this type of offer is used to control the costs of the claims process. The argument is that it is not commercially viable to challenge low value PI claims in the fast track. It is not known exactly how many such settlements are made each year, but anecdotal evidence indicates that around 10% (in excess of 50,000 cases) of all RTA PI claims are currently settled without a medical assessment.
106. There is also anecdotal evidence that a proportion of claimant solicitors request such offers on behalf of their clients to close the claim quickly and maximise the profit made from the claim. This can lead to under-settlement for claimants and possible future litigation if the accident actually causes serious long term health issues to a client whose lawyer did not arrange for an appropriate medical examination and report.
107. However, the government's particular concern is that the use of pre-medical offers by insurers can encourage minor, or even fraudulent claims to be made, especially if an insurer gets a reputation for settling rather than investigating claims. This contributes to the unwelcome perception that some insurance claims, particularly minor soft tissue injury claims, represent "easy money". The government believes therefore that this practice must be stopped
108. This issue was considered by the Insurance Fraud Taskforce (IFT) whose report was published on 18 January 2016²². The IFT recommended that the Association of British Insurers should encourage their members to end the use of such offers, commenting that the practice had the potential to undermine work to tackle fraud.
109. Some insurers have said, when explaining their use of pre-medical offers, that they make these offers because the quality of medical evidence is not good enough. However, the IFT also noted "the substantial work undertaken by MoJ to reform in this area with the establishment of MedCo" and went on to say that this "has made the medical evidence process much more robust. In this context, the Taskforce considers there is a strong case for insurers to reduce the number of pre-medical offers".
110. The third circumstance in which such offers are made relates to claims made towards the end of the statutory limitation period of three years. In these claims insurers state that the medical reports are an unnecessary expense. In most cases any injury has long since healed and all a medical expert can do is confirm that an accident almost three years ago could have resulted in a soft tissue injury as described by the claimant.

²² <https://www.gov.uk/government/groups/insurance-fraud-taskforce>

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There is some substance to this argument and consideration could be given to whether an exemption to the prospective ban for this category of claim should be made.

111. Otherwise, the government is firmly of the view that following an RTA where an injury has been sustained – in particular, a soft-tissue injury – a medical report should be completed by a MedCo accredited medical expert before an offer to settle is made. Previous government reforms in this area include fixing the cost of medical reports at £180, making it a requirement for all medical reports used in support of RTA related soft tissue injury claims to be obtained via MedCo from an accredited medical expert, and discouraging the use of pre-medical offers through changes in the CPR.
112. In introducing a ban it is important to be clear on the scope of such a ban. The government proposes that a ban on pre-medical offers should apply only to RTA related soft tissue injuries. We have considered whether the ban should be extended to all PI claims, partly to ensure consistency in approach, but we believe it is debatable how much extra benefit there would be in such an extension.
113. This, however, is with the possible exception of some EL/PL claims where anecdotal evidence indicates that claimants following a slip or trip incident can be subject to such offers from supermarkets or local authorities. The reason they do this is again related to cost: it is currently often cheaper to settle a claim than investigate it and many major retailers have budgets set aside to settle claims speedily. The arguments set out above relating to settlement driving claims could also be made here, although the numbers involved are significantly lower.
114. Other measures detailed in this consultation document will remove a number of drivers of this behaviour, but they will not eradicate it. The government is committed to reducing the number of minor, exaggerated and fraudulent claims as well as protecting genuinely injured claimants with more significant injuries from the potential for the under-settlement of claims. This is why we intend to legislate and bring in an effective regulatory ban.

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

Please explain your reasons why.

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

Enforcement of the ban

115. In introducing a ban the government has considered how it would best be enforced. The government proposes to discuss these issues in more detail with the relevant regulators, and in particular the Solicitors Regulation Authority (SRA) and the Financial Conduct Authority (FCA). As part of this consultation exercise the government would welcome views on the best way to enforce the ban and whether the relevant regulators have sufficient powers to enforce it effectively.

Question 19: How should the ban be enforced?

Please explain your reasoning.

Part 6 – Implementing the recommendations of the Insurance Fraud Task Force

116. The Insurance Fraud Taskforce (IFT) was set up in January 2015 to investigate the causes of fraudulent behaviour and recommend solutions to reduce the level of insurance fraud in order ultimately to lower costs and protect the interests of consumers. The IFT was made up of representatives drawn from the insurance sector along with key consumer organisations. The IFT published its final report on 18 January 2016 with 26 recommendations²³, seven of which were for the government. In a written ministerial statement published on 27 May 2016, the government welcomed the report and accepted the seven recommendations addressed to it.
117. One of these recommendations, for action to be taken in relation to nuisance calls, is being taken forward by the Department for Culture, Media and Sport, while the recommendations in relation to Claims Management Regulation are being taken forward by HM Treasury and the Ministry of Justice as part of their response to the Brady review of claims management company regulation.
118. Of the remaining five recommendations, two (Recommendations 10 and 17) are being considered in this consultation document, as well as a recommendation from the IFT's Personal Injury Working Group in relation to Qualified One Way Costs Shifting (QOCS) and the late withdrawal of claims. Recommendation 10 concerned 'late exaggerated or fraudulent claims', including a proposal for introducing predictable damages. That recommendation is being addressed by proposals elsewhere in this consultation, including Part 3 on predictable damages. Recommendation 17 (mandatory notification of referral sources) and the QOCS recommendation are addressed below.
119. Recommendation 17 of the IFT final report was that the government 'should consult on introducing a mandatory requirement for referral sources to be included on the claims notification form (CNF)'. Claims should only proceed where CNFs are complete and insurers should share data with the Solicitors Regulation Authority and the Claims Management Regulator (if they suspect claimant representatives of breaching the referral fee ban).
120. This proposal is aimed at reducing fraud by identifying the referral sources of claims (so that defendants are aware when claims come from an organisation which is suspected of dealing with fraudulent claims). This can be done in a straightforward way by amending the CNF to include a mandatory field to be used by claimants or their representatives to identify the source of the claim. This will be beneficial to all parties including the appropriate regulators.

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

Please give reasons.

²³ <https://www.gov.uk/government/groups/insurance-fraud-taskforce>

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121. The IFT's Personal Injury Working Group made a recommendation in relation to QOCS and the late withdrawal of claims. All members of that Group (including claimant and defendant representatives) were concerned that the current arrangements allow for the late withdrawal of fraudulent claims with impunity, although these claims may put the defendant to considerable expense which they will not be able to recover. Part 38.4 of the Civil Procedure Rules (CPR) sets out the rules on qualified one way costs shifting (QOCS). QOCS applies in PI cases and in essence departs from the general costs provision because a losing claimant is not required to pay a successful defendant's legal costs.
122. The concern identified by the IFT is that claims can be withdrawn at a late stage, prior to trial, in order to avoid a finding at trial of fundamental dishonesty. Such a finding would remove the claimant's costs protection such that the claimant would become liable for the defendant's costs. The existing rules allow a defendant to apply to the court to set aside the notice of discontinuance, and the IFT recommendation is instead that claimants should have to seek the courts permission to discontinue if they wish to do so less than 28 days before the trial.

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.

Part 7 – Call for evidence on related issues

123. This consultation document seeks views on the detail of a number of reforms affecting PI cases as set out above. However, it is also an opportunity to seek stakeholder views on a number of further areas of interest to the government. These are:

- i. Credit Hire;
- ii. Early Notification of Claims;
- iii. Rehabilitation;
- iv. Recoverability of disbursements; and
- v. Introducing a Barème type system.

124. The government is not minded to undertake reform immediately in these areas but will reflect carefully on responses to this consultation and decide how best to proceed. We would be very interested in views and supporting evidence from stakeholders.

i. Credit Hire

125. As this document has made clear, the government's new reform programme is about more than tackling fraud – it is also aimed at dealing with the costs arising from minor claims and addressing the wider compensation culture. Credit hire affects insurers, credit hire organisations and claimants, and, like RTA soft tissue injury claims, the costs associated with credit hire affect all motorists through increased insurance premiums. The government has therefore decided to look again at the issues around credit hire.

126. There have been a number of previous studies and inquiries into this sector by the then Office of Fair Trading, which ultimately resulted in a full market investigation, report and recommendations by the Competition and Markets Authority (CMA). Despite the work done by the CMA, we believe that more can and should be done, and that it would be helpful to use this consultation paper to seek further views on potential remedies to the problems found in this sector.

127. Under Section 145(3)(a) of the Road Traffic Act 1988, following a RTA in Great Britain, the insurer of the driver who is at-fault for the accident is responsible for the costs of reinstating the non-fault driver to the position they were in before the accident. If the accident results in the non-fault driver's vehicle being temporarily unavailable due to repairs, the at-fault driver is also responsible for compensating the non-fault driver for the temporary loss of use of their vehicle. Accordingly, it is within the non-fault driver's rights to recover the reasonable costs of car hire, as long as the need for a Temporary Replacement Vehicle (TRV) can be established.

128. Non-fault drivers should typically be provided with replacement vehicles that are equivalent to their own vehicle for a duration that is considered necessary. Arrangements for repairs and the provision of a replacement car are usually made by the non-fault party's insurer who may refer the claim to a Claims Management Company (CMC) or a Credit Hire Company (CHC).

129. However, the CMA found that as a consequence of tort law, cost liability lies with the at-fault party in an accident whereas cost control lies with the non-fault party, leading to a separation of cost liability and cost control. Further, the party paying for the service is not the party receiving the benefits and therefore does not face ordinary budget constraints, which can lead to additional costs. This is because the at-fault party has no right to choose the provider of services for the non-fault driver or to specify the terms of services and consequently cannot control the cost.
130. Accordingly, there is a real issue in that there is no incentive for the non-fault insurer or a credit hire company to keep costs low since costs are largely paid by the at-fault insurer. This has led to inflated charges and hire periods and has contributed to the rise in overall insurance premiums of between £3 and £10 per policy. If this issue is not tackled now, there is potential for these charges to escalate, resulting in insurance premiums rising further.
131. The government is interested in the views of respondents to this consultation on a number of options to control costs within the credit hire market. These are:
- a) **First Party Model** – under the first party model, the provision of a TRV would be provided by the policy holder's own insurer, regardless of who is at fault for the accident. The policy holder would therefore be required to use their own insurance cover. Such a change would require primary legislation and would remove the separation of cost control and cost liability. In addition, the CMA noted that such a model may result in increased premium costs in the future to cover the routine use of the policy, although price competition between insurers may mitigate this risk.
 - b) **Regulatory Model** – a regulatory model would involve the introduction of formal regulation of TRV providers. It would provide effective controls for the behaviours which cause frictional costs (i.e. direct and indirect costs associated with financial transactions); permit the capping of rates for TRV provision; and enable a ban on referral fees for TRV claims to be introduced. Many argue that regulation is the minimum solution required to help tackle the problem of credit hire as it would provide the right level of power to control costs. This model would introduce objectivity into the process but it would take time to prepare the necessary primary and secondary legislation.
 - c) **Industry Code of Conduct** – the industry owned code of conduct would be reinforced to set out values, ethics, objectives and responsibilities for the sector. 'The code' could build on action already taken by the industry e.g. the ABI's General Terms of Agreement (GTA). The code would allow businesses to regulate themselves and each other through the establishment of clearly defined and agreed guidance for interactions that can be used alongside the industry's own ethical guidelines. The government believes that if such an approach is taken the core principles to be embedded into the code would include elements based on behaviour, honesty, impartiality and reporting. This may help to cut costs, for example it could help to ensure that non-fault drivers only use a TRV for as long as they need one rather than using a TRV that is substantially beyond their requirements for a longer period of time. This model may allow the at-fault insurer to challenge the non-fault insurer's costs to make sure the final cost is reasonable and justified. This would need cross industry support if taken forward, and the government would need to continue to monitor adherence to the code, with a view to further action if required.
 - d) **Competitive Offer Model** – this model would allow the at-fault insurer in effect to get their own quote, which could be used to challenge the cost of the TRV from

the non-fault insurer. This would help to keep costs at a minimum by reducing the period in which the non-fault driver's vehicle is off the road and could also give the at-fault insurer the opportunity to provide a suitable replacement vehicle at a more competitive cost than under current credit hire terms. However, there may be issues around the time it would take for at-fault insurers to turn this around, especially since credit hire claims are time sensitive. There are also questions around how much the non-fault claimant would have to be involved in the process which may lead to unnecessary stress and could result in poor customer satisfaction.

132. Another area in which the CMA identified the scope for further action was in educating consumers about the cost of dealing with credit hire claims, price comparison and a general improvement in the way information is communicated. This could help to make sure that claimants better understand their legal rights and would increase the level of transparency that is needed in this area, particularly in relation to fixed costs for groups of vehicles and length of hires. A second point relates to the transparency of credit hire agreements themselves, with many consumers unaware of the terms and conditions of the agreement they have signed. This can lead to the situation where a driver who was not at fault in an accident is unexpectedly held liable for paying a large bill for the period of 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?

ii. Early notification of injury/intention to claim

133. In considering ways to address the problems with minor and exaggerated RTA related soft tissue injury claims in England and Wales the government has spent time looking at other European jurisdictions. One of the ideas implemented in a number of Scandinavian countries is the practice of early notification of claims. Therefore, the second area on which the government is seeking views and/or evidence from stakeholders is in relation to whether a system of early notification of claims should be introduced.

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134. Sweden, Norway and Finland all currently operate systems in which the claimant must seek and prove they had medical treatment within a short period of time (for example, in Sweden it is within 72 hours of the accident). However, in comparison with England and Wales these jurisdictions are lightly populated with fewer vehicles and therefore fewer accidents per head. They also generally operate on first party insurance models and the courts allow insurers access to claimants' medical records.
135. We have considered whether early notification of claims would help to reduce the number of fraudulent and minor claims in England and Wales. The process of how notification is made would have to be considered but early notification would include notifying the relevant insurer of the claim within a set time-period.
136. It could be argued that early notification is counter-intuitive to the aims of the government's reforms as, once registered, claimants would inevitably be encouraged to pursue their claim. However, a requirement for early notification could help deter late claims which are arguably the claims most likely to be exaggerated and the ones in which most evidential difficulties may arise.
137. Closely aligned to the issue of early notification is the question of whether claimants should seek medical treatment within a set period of time after the accident. It is generally agreed that the onset of symptoms from a RTA related soft tissue injury will be within the first week and there have been suggestions that claimants should have to make contact with a medical professional within the first few weeks, for example within four weeks of the accident, with the aim of reducing the number of fraudulent and exaggerated claims made. There could then be a rebuttable presumption that the claim would be 'minor' if no medical treatment was sought in that time. The benefit of this approach would be to maximise the availability of contemporaneous medical evidence to support a claim.
138. However, the feasibility of this approach would need to be carefully considered with stakeholders, especially colleagues in the Department of Health and NHS England, as it could create significant logistical problems and be an unwelcome additional burden on the NHS for which it is not currently resourced.

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

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

Question 26: Please give your views on the option of requiring claimants to seek medical treatment within a set period of time and whether, if treatment is not sought within this time, the claim should be presumed to be 'minor'.

Please explain your reasons.

iii. Rehabilitation

139. Rehabilitation is not necessary or appropriate in every case as many claimants recover without the need for additional rehabilitation. Rehabilitation (if required) is normally organised by the claimant's solicitor or by the defendant's insurer. The claimant has to agree to the rehabilitation and the defendant insurer funds it.
140. If rehabilitation is needed following a personal injury, it may be available through the NHS via pain or back clinics. However, this may not be the most convenient option for

some claimants. The alternative is the private sector, which can be very expensive for the defendant but may speed up the recovery of the claimant and thus reduce the overall cost of the claim. Claims Outcome Advisor²⁴ data suggests that instances of rehabilitation have increased since implementation of the Jackson reforms in 2013 when the fixed recoverable costs available to solicitors for processing a PI claim were reduced.

141. Concerns have been raised by a number of sources about emerging issues with rehabilitation, in particular the potential for fraud. During open stakeholder sessions held by the Ministry of Justice in 2015, as part of its MedCo Review, a number of stakeholders approached officials to raise the issue of unethical links, similar to those already being tackled by MedCo. It was asserted that a situation was developing where some solicitors own and refer all their work to their own rehabilitation providers, akin to the practice of owning and referring all their medical report writing in soft tissue injury cases to their own medical reporting organisation.
142. In addition, it has also become common for solicitors and insurers to have contracts with private rehabilitation organisations to provide their clients with rehabilitation following a personal injury. Anecdotal evidence has been put forward to indicate that such relationships are being exploited to exaggerate the rehabilitation needed in order to increase the profit from the claim.
143. The MedCo model was adopted in order to introduce greater independence and break the direct financial links between solicitors who request MedCo medical reports and the medical reporting experts and organisations who provide them. MedCo was not however set up to – and does not currently prevent – solicitors from referring all of their rehabilitation work to providers which they either own or with which they have a direct financial link.
144. Genuine injury victims are likely to seek treatment if they are in pain. Rehabilitation is suitable for some but not all of those who suffer an injury following a RTA. So it is important that such rehabilitation is not routinely ordered for financial purposes, but rather that it is only sought on the recommendation of a medical expert. There is even a risk that an underlying medical condition could be adversely affected by the rehabilitation sessions, resulting in a detrimental impact on the claimant.
145. There are diverging views as to the best way to tackle this issue, with some insurers arguing for the payment for rehabilitation to be made through vouchers rather than cash to remove the financial incentives. Others argue that the issues relate to a lack of independence in the market i.e. firms of solicitors or MROs which own rehabilitation providers. The government would like to hear the views of stakeholders on the issue of rehabilitation, particularly on the options for action:
 - a) **Option 1: Rehabilitation vouchers** – which could only be redeemed for rehabilitation sessions received/attended. The rehabilitation provider would then be paid for only the actual vouchers used by the claimant, not for the number of sessions scheduled. This would help prevent phantom rehabilitation claims, but

²⁴ COA has developed a system for insurance companies to input details about personal injury claims, which evaluates what the settlement should be by drawing on a company's previous settlements & the wider market to minimise pay-out variance.

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may be complex to administer as the rehabilitation provider could only be paid after the insurer has proof that the rehabilitation treatment has occurred.

- b) Option 2: All rehabilitation arranged and paid for by the defendant** – some claimants and insurers have suggested that private treatment/rehabilitation should be arranged through the defendant's side, possibly providing the claimant with a choice of a small number of providers. This would help speed up access to treatment and allow greater independence and transparency of the process.
- c) Option 3: No compensation payment made towards rehabilitation in low value claims** – this option would mean the claimant would need to fund any rehabilitation costs themselves. The cost of rehabilitation is currently recoverable through the payment of other compensation for losses incurred (this is commonly referred to as special damages), the availability of which the government has already made clear it does not intend to restrict, and further primary legislation would be required to implement such a change.
- d) Option 4: MedCo to be expanded to include rehabilitation providers** – the MedCo system could be extended to cover rehabilitation services in addition to medical reporting services. The addition of rehabilitation providers would need to be considered carefully, including the identification of the legislative route required to implement changes in this area.
- e) Option 5: Introducing fixed recoverable damages for rehabilitation treatment** – this may help prevent unnecessary claims. There could, however, be difficulty in setting the overall rates as different claimants would be likely to have different rehabilitation needs. Thought would need to be given to whether the damages would be set per session or by fixing an upper value limit which could not be exceeded.

Question 27: Which of the options to tackle the developing issues in the rehabilitation sector do you agree with (select 1 or more from the list below)?

Option 1: Rehabilitation vouchers

Option 2: All rehabilitation arranged and paid for by the defendant

Option 3: No compensation payment made towards rehabilitation in low value claims

Option 4: MedCo to be expanded to include rehabilitation

Option 5: Introducing fixed recoverable damages for rehabilitation treatment

Other:

Please give your reasons.

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

iv. Recoverability of disbursements

146. The government is committed to reducing the overall costs associated with low value RTA related soft tissue injury claims. Raising the small claims limit for personal injury claims will go some way towards achieving this aim. However, even in the small claims court some disbursements remain recoverable from the defendant, increasing the costs of the claim. Therefore consideration could also be given to whether further restrictions could be put in place in this area.

147. For example, such consideration could be given to restricting the recoverability of initial MedCo medical report costs. Rather than the assumption that the defendant would nearly always pay for the provision of medical evidence, the onus would be transferred to the claimant. The current fixed cost of £180 may not be a deterrent to the genuine claimant with more significant injuries, although it might act as a deterrent on claimants considering bringing a minor claim, as their likely compensation for PSLA would, under the proposals in this consultation document, either be removed or reduced. It might also act as a deterrent for those seeking to exploit the system. In these circumstances consideration could also be given to the level of the fixed cost medical reports.
148. We would be interested in the views of stakeholders on whether further action should be taken in the area of the recoverability of such 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.

v. A potential future option – a points-based / Barème approach

149. We are seeking stakeholder views as to whether a system similar to the ones used in other jurisdictions such as France, Spain and Italy, which are commonly known as points based or 'Barème' type systems, could potentially be developed in the UK to handle these types of claim. It is important to note that the government is not intending to introduce such a system for England and Wales at this time, and that the purpose of this section is to act as a 'call for evidence' to seek input from respondents on such a proposal.
150. A number of European jurisdictions operate variations on a 'Barème' system. This is a way of categorising the injuries suffered (often alongside other evidence such as the level of damage to the vehicle or the speed of the crash) using a scale with points awarded which equate to differing degrees of injury/incapacity. The 'points' award is then used to cost the damages paid to the injured claimant.
151. Spain introduced a full revision of its 'Baremo' system in January this year. Claims are assessed against three main categories namely compensation for death, serious injuries and temporary injuries. RTA related soft tissue injury claims are covered by the last of these. Basic compensation for bodily injury is listed in legislation, in what is known as a medical 'Baremo' that contains an overview of the potential injuries including psychological and physical damage. The medical 'Baremo' also includes the classification, description and assessment of the individual injuries. The degree of disability is measured in points, with 100 representing the highest possible rating. A specific formula is then used to calculate the damages.
152. This type of system has not been considered previously in England and Wales due to the current negotiated settlement process. However, bearing in mind the government's intention to introduce a fixed compensation tariff system this is an area that could be considered for the future.

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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.

Conclusion

153. This consultation document sets out a number of areas where the government is taking action to control the costs of civil litigation, in particular in relation to RTA related soft tissue injury claims.

154. It also sets out areas where further reform may be warranted in the future.

155. The government would be interested to hear the views of stakeholders on these and on any other related issues respondents would like to raise.

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

Part 8 – Legislative timetable and implementation

156. The government proposes to bring forward primary legislation for measures (a), (b) and (d) in this consultation paper as soon as Parliamentary time allows.

157. Measure (c) will be implemented through changes to the Civil Procedure Rules and related Pre-action Protocols.

158. Subject to responses to this consultation the government aims to implement these reforms as soon as possible.

Part 9 – Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

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.

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

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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.

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.

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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.

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.

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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.

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.

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Question 9: If either option to tackle minor claims (see Part 2 of the consultation document) is pursued, please give your views on whether the 'Prognosis' approach should be used.

Please explain your reasons.

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

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

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

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

Question 12: Should the circumstances where a discretionary uplift can be applied be contained within legislation or should the Judiciary be able to apply a discretionary uplift of up to 20% to the fixed compensation payments in exceptional circumstances?

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

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

Please explain your reasoning.

Question 14: The small claims track limit for personal injury claims has not been raised for 25 years. The limit will therefore be raised to include claims with a pain, suffering and loss of amenity element worth up to £5,000. We would, however, welcome views from stakeholders on whether, why and to what level the small claims limit for personal injury claims should be increased to beyond £5,000?

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Question 15: Please provide your views on any suggested improvements that could be made to provide further help to litigants in person using the Small Claims Track.

Question 16: Do you think any specific measures should be put in place in relation to claims management companies and paid McKenzie Friends operating in the PI sector?

Please explain your reasons why.

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

Please explain your reasons why.

Question 18: Should there be any exemptions to the ban?

If so what should they be and why?

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Question 19: How should the ban be enforced?

Please explain your reasoning.

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

Please give reasons.

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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.

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).

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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?

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

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

Question 26: Please give your views on the option of requiring claimants to seek medical treatment within a set period of time and whether, if treatment is not sought within this time, the claim should be presumed to be 'minor'.

Please explain your reasons.

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Question 27: Which of the options to tackle the developing issues in the rehabilitation sector do you agree with (select 1 or more from the list below)?

Option 1: Rehabilitation vouchers

Option 2: All rehabilitation arranged and paid for by the defendant

Option 3: No compensation payment made towards rehabilitation in low value claims

Option 4: MedCo to be expanded to include rehabilitation

Option 5: Introducing fixed recoverable damages for rehabilitation treatment

Other:

Please give your reasons.

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

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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.

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.

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

Thank you for participating in this consultation exercise.

Part 10 – Impact Assessment

159. The government is mindful of the importance of considering the impact of these plans on different groups. We have therefore considered the impact of all the measures in the package in line with our duties to groups who share a relevant protected characteristic under the Equality Act 2010. The Equality Act 2010 identifies the nine protected characteristics of race, gender, disability, gender identity, pregnancy and maternity, marriage and civil partnership, religion or belief, sexual orientation and age.

160. Our assessments of the potential impact of these proposals have been published alongside this Consultation Paper as an impact assessment. Further questions covering equalities considerations such as the impacts of these measures on groups with protected characteristics can be found at section 7 of Part 10.

Additional Impact Assessment Questions

161. In the Impact Assessment, we acknowledge there are some gaps in the research and statistical evidence we have been able to use to understand the potential impact of our proposals. We would welcome any further information, evidence and comment which may help to address some of these gaps in any further assessment.

162. The following questions relate to, and should be cross referenced with, the impact assessment published alongside this consultation document:

1 – Options

Question 1.1: Do you agree with the range of assumptions made in relation to Option 1.1? If not, please explain why, preferably with supporting evidence.

Question 1.2: Do you agree with the range of assumptions made in relation to Option 1.2? If not, please explain why, preferably with supporting evidence

Question 1.3: Do you agree with the range of assumptions made in relation to Option 2? If not, please explain why, preferably with supporting evidence.

Question 1.4: Do you agree with the range of assumptions made in relation to Option 3? If not, please explain why, preferably with supporting evidence.

Question 1.5: Do you agree with the range of assumptions made in relation to Option 4? If not, please explain why, preferably with supporting evidence.

Question 1.6: Do you agree with the range of assumptions made in relation to Option 5.1? If not, please explain why, preferably with supporting evidence.

Question 1.7: Do you agree with the range of assumptions made in relation to Option 5.2? If not, please explain why, preferably with supporting evidence.

2 – Pre medical offers

Question 2.1: From your experience in personal injury claims please provide further information on the issues raised on pre-medical offers in the impact assessment. In particular please provide any information you have on the:

- i. current and historical average volume of claims;
- ii. proportion of claims with legal representation, and separated by type of legal representation (for example the proportion of claimants with BTE funded legal representation, the proportion of claimants with non-BTE legal representation and the proportion of claimants that are litigants in person);
- iii. proportion of claims with special damages (and separated by type of special damages);
- iv. current and historical average settlements (total settlement, PSLA element, and special damages element, separately), stratified by claimant injury durations, if possible;
- v. current and historical average volume of late claims/how long after the accident the offer is made/accepted and the source/origin of the offers (i.e. offers made by insurer, solicitor etc.);
- vi. likely change to the above as a result of the governments intentions detailed in the consultation; and
- vii. above for road traffic accidents claims, employer liability claims, public liability claims, and clinical negligence claims.

3 – Non RTA Personal Injury claims

i) Employers Liability

Question 3.1: From your experience in personal injury claims please provide further information on the issues raised on employers' liability claims in the impact assessment. In particular please provide any information you have on the:

- i. current and historical average volume and proportion of claimants with BTE insurance;
- ii. proportion of claims with legal representation, and separated by type of legal representation (for example the proportion of claimants with BTE funded legal representation, the proportion of claimants with non-BTE legal representation and the proportion of claimants that are litigants in person);
- iii. proportion of claims with special damages (and separated by type of special damages);
- iv. current and historical average settlements (total settlement, PSLA element, and special damages element, separately), stratified by claimant injury durations, if possible;
- v. current and historical average volume of late claims/how long after the accident the claim is issued
- vi. proportion of market that has private insurance and all of the above for claims that currently have medical reports, and currently are pre-medical offers; and
- vii. likely change to the above as a result of the governments intentions detailed in the consultation.

ii) Public Liability

Question 3.2: From your experience in personal injury claims please provide further information on the issues raised on public liability claims in the impact assessment. In particular please provide any information you have on the:

- i. current and historical average volume and proportion of claimants with BTE insurance;
- ii. proportion of claims with legal representation, and separated by type of legal representation (for example the proportion of claimants with BTE funded legal representation, the proportion of claimants with non-BTE legal representation and the proportion of claimants that are litigants in person);
- iii. proportion of claims with special damages (and separated by type of special damages);
- iv. current and historical average settlements (total settlement, PSLA element, and special damages element, separately), stratified by claimant injury durations, if possible;
- v. current and historical average volume of late claims/how long after the accident the claim is issued
- vi. proportion of market that has private insurance and all of the above for claims that currently have medical reports, and currently are pre-medical offers; and
- vii. likely change to the above as a result of the governments intentions detailed in the consultation.

iii) Clinical Negligence

Question 3.3: From your experience in personal injury claims please provide further information on the issues raised on low value clinical negligence claims in the impact assessment. In particular please provide any information you have on the:

- i. current and historical average volume and proportion of claimants with BTE insurance;
- ii. proportion of claims with legal representation, and separated by type of legal representation (for example the proportion of claimants with BTE funded legal representation, the proportion of claimants with non-BTE legal representation and the proportion of claimants that are litigants in person);
- iii. proportion of claims with special damages (and separated by type of special damages);
- iv. current and historical average settlements (total settlement, PSLA element, and special damages element, separately), stratified by claimant injury durations, if possible;
- v. current and historical average volume of late claims/how long after the accident the claim is issued
- vi. proportion of market that has private insurance and all of the above for claims that currently have medical reports, and currently are pre-medical offers; and
- vii. likely change to the above as a result of the governments intentions detailed in the consultation.

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4 – BTE

Question 4.1: From your experience in personal injury claims please provide further information on the issues raised on BTE insurance in the impact assessment. In particular information please provide any information you have on the:

- i. current and historical average level of take up for RTA claims currently with medical reports;
- ii. current and historical average costs of BTE products; and
- iii. likely change to the above as a result of the governments intentions detailed in the consultation.

5 – Impact on NHS

Question 5.1: Do you have any information on the injury characteristics of individuals who seek treatment from the NHS with regard to a personal injury claims split by inpatient, outpatient and those requiring an ambulance called out. If so, please provide details such as type of treatment, injury length etc.

6 – Proportion of insurers saving passed onto consumers

Question 6.1: We would also welcome views from respondents on the assumption in the IA that 85% of insurers savings would be passed onto consumers.

7 – Equalities/Protected Characteristics

Question 7.1: Do you consider that any of these proposals will affect people with protected equality characteristics? If so, please give details.

Question 7.2: Do you consider that any of these proposals impact on the duty to have due regard to the need to advance equality of opportunity, by minimising disadvantages due to their protected characteristics? If so, please give details.

Question 7.3: Do you have any data to support or disagree with any of the proposals which you would like the government to consider as part of this consultation?

8 – Small and Micro Business Assessment

Question 8.1: Is your business a small, micro or medium sized business²⁵ which undertakes work in England and Wales in support of personal injury claims road traffic accidents, employer's liability, public liability or clinical negligence claims?

Question 8.2: What is your assessment of the impact on your business from the reforms included in this consultation?

Where possible please provide evidence in support of your comments.

²⁵ Business sizes are defined as:

- Micro business - a business with up to **10** employees;
- Small business - a business with between **9 and 49** (full time) employees; and
- Medium business - a business with between **50 and 249** (full time) employees.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Sector (e.g. Insurer, Claimant Lawyer, Defendant Lawyer, MRO, CMC, ABS, Medical Expert, Representative group, Local Authority, Government Department or other):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

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Contact details/How to respond

Please send your response by Friday 6 January 2017 to:

Scott Tubbritt
Ministry of Justice
3.50, 3rd Floor
102 Petty France
London SW1H 9AJ

Tel: 020 3334 3157

Fax: 0870 739 4268

Email: whiplashcondoc@justice.gsi.gov.uk

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

Extra copies

Further paper copies of this consultation can be obtained from the above address and it is also available on-line at: <https://consult.justice.gov.uk/digital-communications/reforming-soft-tissue-injury-claims>

Alternative format versions of this publication can be requested by either calling the Whiplash Reform Team on 020 3334 3157 or by emailing your request to: whiplashcondoc@justice.gsi.gov.uk.

Publication of response

A paper summarising the responses to this consultation will be published in 3 months' time.

The response paper will be available on-line at: <https://consult.justice.gov.uk/digital-communications/reforming-soft-tissue-injury-claims>

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

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Consultation principles

The principles that government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

<https://www.gov.uk/government/publications/consultation-principles-guidance>

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