



## PERSONAL INJURIES BAR ASSOCIATION

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### **PIBA response to the consultation Reforming the Soft Tissue Injury ('whiplash')**

#### **Claims Process**

##### **Executive Summary**

1. The Government seeks views on its proposed reforms, based upon various assumptions, which PIBA challenges. In particular:
  - (a) It is not accepted that there is a problem with the level of damages recovered for low level whiplash injuries. They are in line with other injuries and modulated by the courts and Judicial College guidelines.
  - (b) The proposed reforms will do nothing to reduce the problem of fraudulent/exaggerated claims; indeed, they are likely to increase the problem.
  - (c) The implication, inherent in the proposals, that the increase in whiplash claims is down to an increase in fraudulent claims is unsupported by evidence. Such evidence as there is shows that the number of claims has reduced since the advent of major reforms in 2013. The real problem that the Government needs to target is one of 'cold calling', an issue not addressed in these proposals.
  - (d) PIBA does not anticipate the proposed reforms will lead to a reduction in the overall cost of litigating minor claims at all, given the reforms will inevitably lead to a rise in the number of litigants in person and concomitant increased costs on insurers in case handling and increased burden on the court service.

- (e) PIBA sees no evidence to support the assumption the reforms will be economically neutral for lawyers and anticipates they will lead to a reduction in taxable revenue.
  - (f) PIBA has no confidence at all in the suggestion that consumers will benefit by way of reduced insurance premiums when the Government has adduced no evidence that it will enforce any failure by insurers to pass on savings and when insurers have signally failed to pass on savings following the substantial reforms to personal injury litigation in 2013.
2. PIBA objects to the Government's proposal to tamper with the long held principle that damages for a civil wrong are assessed by the courts. Removal of the right to claim damages would constitute a breach of claimants' human rights. So, too, would the imposition of a tariff, itself set at an artificially low level by comparison with other injuries.
  3. The Government has paid insufficient regard to the rights of genuine claimants when conflating, in one group of reforms, minor, fraudulent and exaggerated claims. PIBA objects to the Government's assertion that it should be reducing the number of minor claims made insofar as those are claims by individuals injured as a result of the negligence of another. The proposals are discriminatory.
  4. If, contrary to the above, there is to be a tariff system, it should be limited to whiplash injuries arising out of road traffic accidents for injuries lasting up to 12 months, with a stepped tariff award for PSLA up to £3,000. This could dovetail with a parallel rise in the SCT limit to £3,000 for all cases. This would cover about 80% of those cases targeted by the Government and serves the Government's aims.
  5. If the SCT limit is raised to £5,000, this should be only for road traffic claims.
  6. Wide-ranging measures were implemented in 2013 to reduce costs and significant steps were taken in 2015 to combat exaggerated and fraudulent claims. These should be permitted to 'bed down' so that their full effect can be evaluated in due course.
  7. The time allowed for consultation was unnecessarily short, given the breadth of the consultation.

## **PART 1**

**Question 1: Should the definition in paragraph 23 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.**

8. As the title of the Consultation suggests, the Government wants to address whiplash injuries. PIBA considers the proposed definition is too broad and instead suggests a definition that will address the Government's concerns.
9. The Government's proposed definition only requires two factors:
  - (a) Occupant of a motor vehicle; and
  - (b) A soft tissue injury is the primary injury caused.
10. This definition would capture non-whiplash and more serious injuries that our members have experience of dealing with such as:
  - (a) Serious abdominal injuries caused by the restraining effect of a seatbelt that may require internal surgical exploration/repair of internal organs.
  - (b) Scarring injuries including facial scarring caused by impact with dashboard or effect of airbag, seatbelt scarring (see above, or glass laceration injuries).
  - (c) A sprained thumb or injury to a wrist caused by the jarring impact from a steering wheel or gear stick.
  - (d) Ligamentous injuries to the lower limbs caused by impact with the interior of a vehicle.
  - (e) A standing bus passenger who falls over during an accident and sprains ankle.
11. The proposed definition does not adequately give effect to the Government's intention to change the way whiplash claims, which involve injuries to the spine (cervical, thoracic and lumbar) and shoulder, are dealt with. Further, an absence of a sufficiently

specific definition will give rise to uncertainty for litigants and inevitable satellite litigation.

12. The inclusion of “psychological injury” is also too wide. PIBA is not sure whether the Government means this to include recognisable psychiatric disorders such as Post Traumatic Stress Disorder, or just minor travel anxiety and upset that frequently accompanies injuries arising out of road traffic accidents.
13. The guidance in the Judicial College Guidelines (13<sup>th</sup> Edition) in Chapter 4 for psychiatric and psychological damage “*covers those cases where there is a recognisable psychiatric injury*”. In order to merit an award of damages for pain, suffering and loss of amenity, particularly without an accompanying physical injury, a report from a psychiatrist or psychologist, is required which diagnoses a recognisable psychiatric disorder using the ICD-10 (International Statistical Classification of Diseases and Related Health Problems published by the World Health Organisation) or DSM V (Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition published by the American Psychiatric Association) classifications such as Post Traumatic Stress Disorder, Specific Phobia or Adjustment Disorders.
14. Judges are used to awarding damages to claimants who suffer a physical injury accompanied by short-lived travel anxiety that does not meet the clinical levels for diagnosis of a recognisable psychiatric disorder and therefore falls out of Judicial College Chapter 4 levels. Claims solely in respect of shock or travel anxiety (i.e. not recognized psychiatric injury) in the absence of physical injury do not attract an award of compensation at all. Chapter 13 of the Judicial College Guidelines for Minor Injuries includes cases where there is some travel anxiety associated with minor physical injury.
15. PIBA considers that the latter kind of travel anxiety could be included within the definition but *not* recognized psychiatric disorders which are injuries requiring expert psychiatric or psychological evidence, and often psychiatric or psychological treatment. Travel anxiety and minor psychological upset following a road traffic accident fits well into the definition of a secondary element of a road traffic accident related injury claim.

16. Therefore, PIBA proposes an alternative definition for the injuries that the Government wishes to introduce a fixed tariff of compensation for, or remove the right to compensation for pain, suffering and loss of amenity for entirely:

*“a ‘whiplash injury claim’ means a claim brought by an occupant of a motor vehicle who has suffered soft tissue injury to the spine and/or shoulder which may be accompanied by psychological symptoms not meeting the criteria for a recognised psychiatric injury”*

17. The proposed definition does not specifically deal with multiple injuries. PIBA considers that multi-site spine and shoulder injuries can be viewed as one injury for the purposes of these reforms. The proposed definition makes that clear.
18. This definition would not capture the kind of minor seatbelt bruising that resolves within a few weeks. However, this kind of bruising is often apparent and can be objectively proved, unlike whiplash claims that depend, to an extent, on the subjective account of the claimant. Further, such claims would currently fall within the small claims limit, as is, or as increased.

**Question 2: Should the definition at paragraph 23 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.**

19. No.
20. Contrary to the assertion that diagnosis of psychological trauma is generally based on a subjective description of symptoms, as well as a clinical interview with the claimant, psychiatrists and psychologists refer to diagnostic criteria contained in DSM V and/or ICD-10 and use their clinical judgment. Unlike soft tissue injuries, it is often the case that, although psychological symptoms have been suffered, the opinion of the psychiatrist or psychologist is that there is no diagnosis of a recognised psychiatric disorder.
21. If the psychological element is the primary element of the claim, this is likely to be because a psychiatric or psychologist’s report has been obtained and a recognised

psychiatric disorder diagnosed. Such disorders could vary from Post Traumatic Stress Disorder (classified as DSM V 309.81, ICD-10 F43.10) to a Specific Phobia (DSM V 300.29) for example.

22. Psychiatric disorders vary in nature, severity and duration and usually require some treatment in order to resolve. Complicated issues of pre-existing psychiatric history often arise. They are not suitable for inclusion within these reforms.

**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.**

23. As per Chapter 13 of the current Judicial College Guidelines (13<sup>th</sup> Edition), minor injuries are defined as of short duration with complete recovery within 3 months. PIBA supports that definition.
24. However, as per our answer to Question 11 below, in the event that a tariff is to be introduced, our proposal is that it should apply to PSLA for whiplash injuries arising from RTAs (as defined above at Q1) and that this should apply to such injuries with a maximum duration of 12 months.
25. The Judicial College Guidelines have existed since 1992. They reflect and categorise the awards that the courts are making nationwide to assist with consistency in the level of awards. The Guidelines are provided to all of the judiciary and have become a vital tool that all personal injury practitioners are familiar with. As an indication of the level of damages being awarded by the courts for RTA related soft tissue injuries the following may assist:

<b>TABLE A</b>		
Judicial College Guidelines 13 <sup>th</sup> Edition (2015)		
Chapter 13 – Minor Injuries		
Injury	Without 10% uplift	With 10% uplift
Injuries where there is complete	A few hundred	A few hundred

recovery within seven days	pounds to £525	pounds to £580
Where there is complete recovery within 28 days	£525 to £1,050	£580 to £1,160
Where there is complete recovery within three months	£1,050 to £1,860	£1,160 to £2,050

<b>TABLE B</b>		
Judicial College Guidelines 13 <sup>th</sup> Edition (2015)		
Chapter 7(A)(c) Minor Neck Injuries (the categories for shoulder and back injuries are in similar terms to neck injuries)		
Injury	Without 10% uplift	With 10% uplift
Where a full recovery is made within three months.	A few hundred pounds to £1,860	A few hundred pounds to £2,050
Where a full recovery takes place between three months and a year. This bracket will also apply to very short-term acceleration and/or exacerbation injuries, usually less than one year.	£1,860 to £3,300	£2,050 to £3,630
Where a full recovery takes place within a period of about one to two years. This bracket will also apply to short-term acceleration and/or exacerbation injuries, usually between one to two years.	£3,300 to £6,000	£3,630 to £6,600

26. It is the collective experience of PIBA members that awards of about £2,000 are being made in respect of injuries for 3 months' duration and of about £2,500 for six months' duration of symptoms.

**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.**

27. No. The reasons are already stated in the answer to Question 3 above.
28. PIBA would sound a note of caution in relation to the definition of "minor" injuries and the extent to which this should form part of the government's reforms.
29. For less serious injuries the duration of symptoms can be the most important factor. However, the longer an injury continues to affect a person, the more variation there can be between individual claimants; some claimants may experience modest symptoms throughout, others may not.
30. For example, a definition incorporating up to 9 months of symptoms would include cases where the injury is of a severity that causes a person to be certified as unfit to work by his or her GP. After 28 weeks such a person would no longer be entitled to statutory sick pay from his or her employer and would be at risk of unemployment due to incapacity. This does not sensibly fit with the common sense meaning of "minor".



## PART 2

**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.**

31. PIBA considers that removal of the right to compensation for pain, suffering and loss of amenity (in respect of any type of injury claim) is wrong and that legislation enacted to achieve this end would be incompatible with claimants' Article 6 rights and/or A1P1 rights. The question of whether the proposed reforms pursue a legitimate aim is open to debate; granting an immunity against action to road traffic insurers in these circumstances cannot, on any sensible view of the matter, be said to constitute a proportionate step to advance the Government's aim. Indeed, the consultation paper appears implicitly to recognise this, hence the more recent alternative proposal that there should be a tariff.
32. The proposal also removes, without any good or sufficient reason, the right to be compensated in full, the bedrock of compensation in civil claims, following a civil wrong that causes damage<sup>1</sup>.
33. It would be particularly nonsensical to remove the right to claim compensation for bodily injury when the following rights to compensation exist:
  - (a) Flight delay compensation: up to 600 euros per passenger for delays over 4 hours;
  - (b) Train delay compensation: entitlement to compensation for a delay of 15 minutes or more;

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<sup>1</sup> Lord Blackburn in *Livingstone v Rawyards Coal Company* (1880) 5 App.Cas. 25 at 39 "I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation"

- (c) Injury to feelings awards: awards of compensation in the range of £500 to £6,000 (*Da’Bell v NSPCC* [2010] IRLR 19 EAT) that are made by the Employment Tribunal for a one-off act of discrimination.
34. The Government’s proposals to remove compensation from a single category of claimant is equally hard to justify when a claimant with a claim of similar seriousness that did not fall within the Government’s definition of minor injury would be able to recover. PIBA simply does not understand how the intended aim, namely of reducing car insurance premiums, can be said to justify removing an existing right. If that were so, such a rationale could be applied across the spectrum in an act of social policy engineering which would ride roughshod over a range of existing rights.
35. PIBA would add that it does not accept *at all* the premise that removing the right to recover PSLA awards would lead to a reduction in car insurance premiums. The Government appears to be proceeding on the basis of no more than statements of intention by road traffic insurers; yet experience has shown that premiums have *not* reflected the *massive* reduction in civil litigation costs following the introduction of the Jackson reforms through LASPO and the Portal increase to £25,000.
36. Furthermore, at the heart of the Government’s concerns appears to be the increase in the size of claims made following cold calling. The proportionate response, in those circumstances, is to legislate so as to limit or remove cold calling, not to block the right of an injured party to recover compensation for a civil wrong, a right of such antiquity as to require the most potent policy factors to suppress.

**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.**

37. PIBA objects to the introduction of a fixed sum for “minor claims” as defined in Part 1 in principle (the right to be compensated in full<sup>2</sup>) and the Government’s reasoning does not withstand scrutiny for the reasons set out below.

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<sup>2</sup> *Livingstone v Rawyards Coal Company* (1880) 5 App.Cas. 25 supra

### **Basic premise**

38. The Government's stated aims in Part 1 of the Consultation Paper is to tackle the alleged high number of RTA related soft tissue injuries as well as fraudulent and exaggerated claims. It is said that RTA related personal injury claims in the UK are over 50% higher than 10 years ago, yet reported accidents have decreased. Comparison is also made with other EU countries.

### **The statistics**

39. The DWP data showing the number of PI claims registered with CRU are as follows:

**TABLE C**

#### **PI Claims registered with CRU**

	<b>Clinical Negligence</b>	<b>Employer</b>	<b>Motor</b>	<b>Other</b>	<b>Public</b>	<b>Liability not known</b>	<b>Total</b>
2015/16	17,895	86,495	770,791	11,388	92,709	2,046	981,324
2014/15	18,258	103,401	761,878	12,972	100,072	1,778	998,359
2013/14	18,499	105,291	772,843	14,467	103,578	2,123	1,016,801
2012/13	16,006	91,115	818,334	17,695	102,984	2,175	1,048,309
2011/12	13,517	87,350	828,489	4,435	104,863	2,496	1,041,150
2010/11	13,022	81,470	790,999	3,855	94,872	3,163	987,381
2009/10	10,308	78,744	674,997	2,806	91,025	3,445	861,325
2008/09	9,880	86,957	625,072	3,415	86,164	860	812,348
2007/08	8,876	87,198	551,905	3,449	79,472	1,850	732,750
2006/07	8,575	98,478	518,821	3,522	79,841	1,547	710,784

## TABLE C

### PI Claims registered with CRU

	Clinical Negligence	Employer	Motor	Other	Public	Liability not known	Total
2005/06	9,321	118,692	460,097	3,232	81,615	1,465	674,422

40. The implication from the assertions as paragraphs 1 to 20 of the Consultation document is that the increased volume of RTA PI claims is due to fraud and exaggeration.
41. However, the statistics set out above show that:
- (a) Motor claims have fallen since 2012/2013 (when the last reforms were brought in) to below 2010/2011 levels. This is likely to have occurred as result of the fixed costs reforms.
  - (b) Clinical negligence claims have almost doubled in the last ten years. There is no suggestion that this is due to fraud.
  - (c) Claims described as “other” have more than tripled. There is no suggestion that this is due to fraud.
42. The figures stated in the Evidence Base document included with the Impact Assessment states<sup>3</sup> that RTA PI claims that relate to soft tissue and neck and back injuries that received a financial settlement in 2014/2015 were 545,000 and the reforms (i.e. occupant of a car with soft tissue injury less than 2 years) will apply to about 523,000 of these.
43. CRU data for that period shows that there were 751,437 settled motor claims in 2014/2015<sup>4</sup>. Consequently the reforms will affect about 70% of all PI RTA claims.

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<sup>3</sup> At paragraph 7.11, page 88

<sup>4</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/516772/settlements-recorded-cru-2014-15.csv/preview](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/516772/settlements-recorded-cru-2014-15.csv/preview)

That means 30% do not relate to soft tissue injuries and would include cyclist and pedestrian claims. The Government has provided no statistics to show that RTA PI claims relating to soft tissue, neck and back injuries have increased.

44. The Government also states that the number of reported RTAs have fallen. This data is unreliable because of under-reporting. In particular, minor road traffic accidents are regularly not reported to the police – see PIBA’s 2013 response to the Consultation Paper CP17/2012 “Reducing the number and costs of whiplash injuries” at Appendix A.
45. In any event, there is always going to be a lower amount of reported accidents to claims for injury because of the difference between the number of people and vehicles involved in each accident.

### **Why have motor claims increased?**

46. As set out above, motor claims are not increasing and have in fact fallen to below 2010/2011 levels.
47. There are a number of potential reasons why motor claims in the UK have increased since 2005:
  - (a) In the 2005 to 2015 period the population of the UK has grown by about 5,000,000<sup>5</sup>.
  - (b) Average life expectancy in the UK has increased by about 3 years from 2005 to 2015<sup>6</sup>.
  - (c) According to the Department of Transport, the estimated number of driving licence holders in England has increased from 28.8 million in 2005 to 32.2 million in 2015<sup>7</sup>, an increase of 12%. However, these recent figures may be an underestimate as a FoI request dated 14.01.15 to the DVLA garnered a response that there were an estimated 45.5 million active driving records as at 30.09.14.

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<sup>5</sup><https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/timeseries/ukpop/pop>

<sup>6</sup><https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/lifeexpectancies/datasets/nationallifetablesunitedkingdomreferencetables>

<sup>7</sup> DoT National Travel Survey 2015 Table NTS0201

- (d) The DoT also confirms that there has been an increase in older licence holders<sup>8</sup>.
  - (e) In line with this, the number of registered vehicles on the road has increased from 33,070,500 in 2005 to 36,467,500 in 2015, an increase of 10%<sup>9</sup>.
  - (f) At the same time, the overall length of the UK road network has shown a tiny increase from 241,139 miles to 245,878 miles i.e. 2%<sup>10</sup>.
48. Consequently, since 2005 the number of drivers, especially older drivers, and cars on the road have increased. Yet the overall length of the UK road network has only increased by a much smaller percentage.
49. Given these statistics, the higher numbers of accidents is not unusual or unexpected. Attempts to explain the increase being due to fraudulent or exaggerated claims being advanced are contrary to the available evidence and not accepted.

#### **Comparison with other EU countries**

50. Comparison with other EU countries to establish that the UK is out of line in respect of the number of accidents and injuries is misrepresented in the Consultation paper. In paragraph 11 of the Consultation document, the Government relies on ‘*research published by the Insurance Fraud Taskforce*’. It states that this “*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*”.
51. The consultation document fails to acknowledge the full quote from paragraph 2.37 of the Insurance Fraud Taskforce’s final report January 2016<sup>11</sup> which reads:

*“There are some specific physical factors, for example World Bank research has found that the UK has 79% more vehicles per kilometre of road compared with the EU average, **increasing the likelihood of low velocity accidents with relatively minor injuries.**” (our highlighting).*

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<sup>8</sup> DoT National Travel Survey 2015

<sup>9</sup> DoT Table VEH 0102 TSGB 0903

<sup>10</sup> <http://www.roadusers.org.uk/chapters/uk-road-network/>

<sup>11</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/494105/PU1817\\_Insurance\\_Fraud\\_Taskforce.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/494105/PU1817_Insurance_Fraud_Taskforce.pdf)

52. Consequently, the statistics the Government itself relies upon establishes the reason why the UK cannot be compared to other EU countries. These statistics also confirm the reason why the UK has a greater number of minor accidents leading to minor injuries than other EU countries.

### **Other reasons for a fixed tariff**

53. The other reasons given by the Government for a fixed tariff sum for soft tissue injuries are identified as:

- (a) minor, exaggerated or fraudulent claims for personal injury following low speed RTAs have continued to be a problem (para 52);
- (b) the amount of compensation for these claims (minor RTA related soft tissue injury claims) is currently too high for the amount of pain and suffering endured (para 39);
- (c) a fixed tariff controls costs by providing more certainty to insurers as to the cost of the compensation attached to each claim (para 41);
- (d) it will protect against under settlement by making claimants aware in advance of the appropriate level of compensation that they are due (para 41).

54. PIBA considers that these reasons are unsupported by any evidence. Further the Government's aims would not be achieved by the imposition of a fixed tariff. PIBA will deal with each reason in turn below.

### **Minor, exaggerated or fraudulent claims**

55. As a matter of principle, PIBA objects to the conflation of minor claims with fraudulent and exaggerated claims. There is a significant difference between genuine claims that result in low level injury, and fraud, which is a criminal offence.

56. PIBA members have experience in representing both claimants and defendants in fraudulent, exaggerated claims and claims where causation of any injury is put in issue by insurers due to the low velocity nature of the impact. There is no evidence supplied in the Government's consultation paper to support the proposition that introduction of a fixed sum or tariff would address these issues. A person set on committing a fraud

is, one would have thought, not going to be put off by the fact that, if successful, he or she will recover pursuant to a tariff rather than assessment.

57. PIBA warned in previous consultations that the imposition of qualified one way costs shifting and the Portal would encourage fraudulent claims because it would be more cost-effective for insurers to pay out on claims than challenge them<sup>12</sup>. PIBA warns again that introducing a fixed sum for injury will encourage fraud and exaggeration further.
58. For example, if, as is alleged, whiplash claims are entirely subjective, with no objective signs of injury to be detected, then there is an obvious risk that some claimants will describe their symptoms to a medical expert as lasting for a longer duration of time in order to obtain damages at a higher band or to escape the fixed tariff of damages altogether. Further, with a low fixed sum introduced for minor injuries, there is even less incentive for insurers to challenge potentially fraudulent claims.
59. PIBA suggests that a more effective way to prevent fraudulent or exaggerated claims from being advanced is to more closely regulate the Claims Management Companies and the industry within which they operate. Persistent methods of marketing by CMCs can entice the vulnerable and the opportunistic to advance claims which are not true or to exaggerate valid claims. The practice of insurance companies in making pre-medical offers for low value claims encourages this behaviour.

The amount of compensation is too high for the kind of pain and suffering experienced

60. There is no evidence provided to support this bald and worrying assertion, nor logically could there be. Soft tissue injuries affecting the spine often cause referred symptoms to other parts of the body as the pain travels along the neural pathways leading from the spinal cord. Such pain is always going to be subjective. There is no evidence provided that this pain is more or less than other injuries such as a broken leg.
61. The level of awards made for personal injuries is currently set by the judiciary by reference to established brackets of damages identified in the Judicial College

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<sup>12</sup> See Appendix A



Guidelines. Experienced judges determine the award of damages for pain, suffering and loss of amenity, having considered the relevant evidence, heard submissions from both parties and assessed the effect of injuries upon each individual claimant. The Government is, in effect, suggesting that the JC Guidelines have ‘got it wrong’. It is of considerable concern to PIBA that the Government should consider itself better placed to make this assessment than the judiciary.

#### Controls costs by providing certainty to insurers

62. Once the nature of an injury has crystallised because, for example, the claimant has recovered, the value of that injury is usually discernible through the tools already available such as the Judicial College Guidelines.
63. Since 1992 the judiciary, practitioners and lay people have had access to guidelines in respect of the awards of general damages for pain, suffering and loss of amenity in the form of the Judicial Studies Board (now Judicial College) guidelines. The Guidelines do not, of course, fix the level of compensation. That is for the judiciary to do. Instead, they reflect the levels of awards being made nationwide, collected from various sources.
64. Some insurers ignore the Judicial College Guidelines (and consequently increase costs) by using calculators such as Collosus that record details of settlements, not court assessed awards. These settlements are usually lower than court assessed awards because they do not bear accurate resemblance to the level of pain and suffering experienced, but reflect the value of settlement in itself and the pressures on claimants to settle their claims such as their next holiday costs or credit card bill.
65. PIBA members have much experience of insurers refusing to settle for reasonable amounts by reference to the Judicial College Guidelines, of the case then going before a judge for assessment and of the insurers having to pay higher awards and higher costs as a result.

#### Protects against under-settlement

66. The “one size fits all” tariff approach is unjust and will not protect against under-settlement. The proposal to fix a sum for all soft tissue injuries up to six months

would mean that the claimants with injuries with significantly different severities would receive the same award. For example, the same level of award would be received by:

- (a) The young man with some intermittent aching in his neck for one month but it doesn't interfere with hobbies or work.
- (b) The working mother who has to take time off work for 1 month, cannot properly look after or pick up her children for 1 month, undergoes a course of 8 physiotherapy sessions, has to take regular painkillers and suffer side effects of those with symptoms for six months.

- 67. A fixed tariff does not allow for the varying severity and consequences of each injury to be taken into account which will lead to the majority of claimants being either under- or over- compensated.
- 68. Furthermore, a tariff, such as that proposed by the Government, which sets the fixed award at figures clearly below the Judicial College guidelines can hardly be said to avoid under-compensation. Quite the reverse. It enforces under-compensation.
- 69. There is also the risk of injuries being 'pigeon holed' and not being properly identified, evaluated and compensated. For example, many chronic pain cases initially start off as a minor soft tissue injury and could be settled for a fixed amount, particularly if the small claims track limit increases and the cost of legal advice is irrecoverable in proceedings.

## **Conclusion**

- 70. The senior judiciary, who are the most experienced to comment on the valuation of general damages for pain, suffering and loss of amenity, have consistently spoken of the individual nature of the assessment of damages:

*Lord Donaldson of Lynton: Paradoxical as it may seem, one of the commonest tasks of a judge sitting in a civil court is also one of the most difficult. This is the assessment of general damages for pain, suffering or loss of the amenities of life. Since no monetary award can compensate in any real sense, these damages cannot be*

*assessed by a process of calculation. Yet whilst no two cases are ever precisely the same, justice requires that there be consistency between awards.*<sup>13</sup>

Lord Bingham, then Master of the Rolls: *It [The Guidelines] does not seek to force all cases into an ill-fitting strait-jacket. It does not ignore the obvious fact that no two cases, even if they involve the same injury, are the same. It recognises that injuries vary in severity and may affect different claimants in differing ways and to differing degrees.*<sup>14</sup>

71. In summary, PIBA has strong concerns about the Government's proposal. We consider that there is no evidence or justification for imposing an "ill-fitting strait-jacket" upon our current system and the proposals are wrong in principle.
72. We are also concerned about the potential for the Government's proposal to damage access to justice by those with significant underlying conditions in consequence of complex injuries being 'pigeon holed' as minor and therefore not being subject to the scrutiny they deserve.

**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.**

73. As a matter of principle, PIBA considers that the sums proposed are too low. In PIBA's view and for the reasons given above, the Government's definition of 'minor' is controversial. In the event that the Government imposes a tariff on claims as defined in Question 1, PIBA's suggestions are set out in answer to Question 11. Further and in any event, we would make the following points below.
74. It is incorrect to state that the Guidelines indicate that compensation for PSLA for minor RTA related soft tissue injury claims should start at £200. We refer to tables A and B previously set out which indicate that awards made for minor and spinal injuries

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<sup>13</sup> Foreword to the first edition of Judicial Studies Board Guidelines

<sup>14</sup> Foreword to the second edition of the Judicial Studies Board Guidelines

start at “a few hundred pounds”. The Guidelines are derived from the level of awards being judicially assessed nationwide.

75. The suggested level of £400 reflects the kind of award that would currently be made for a few days, probably less than a week, of pain, suffering and loss of amenity. Reported cases at this level are rare because these kinds of claims do not reach judicial assessment because they are usually resolved by settlement.

76. Some reported cases in Kemp & Kemp of awards up to £1,000 PSLA for soft tissue injuries in the last 5 years are attached at Appendix B and are summarised below:

<b>TABLE D</b>					
<b>Reported cases of awards of £1,000 or less PSLA for soft tissue injuries 2011 - 2016</b>					
Name	Date	Judge	Facts	Award	Updated award for inflation
<i>R (A Child) v Fardell</i>	2011	DJ Mort	3 year old child suffered a soft tissue injury to his abdomen and shock which all resolved within a week.	£500	£555
<i>Spencer v Onceriu</i>	2013	DJ Lloyd Jones	60 year old man suffered 3 weeks of pain caused by a laceration to his tongue.	£750	£788
<i>Paines v Howells</i>	2014	DDJ Sherlock	Man suffered a 3 week whiplash injury to his neck	£800	£828
<i>Reeves v Herreras</i>	2012	DJ Harrison	Woman who suffered pain in her neck and lower back for 4 weeks.	£900	£970
<i>P (A Child) v Service</i>	2014	DJ Brooks	1 year old girl who suffered from some back symptoms	£1,000	£1,034

<b>Insurance Company</b>			for 2 weeks.		
<b>G (A Child) v Alliance Boots PLC</b>	2011	DJ Ellington	12 year old boy had a 3 week neck injury.	£1,000	£1,126

77. Contrary to what is suggested in the consultation paper, awards of damages for short-lived injuries have not changed greatly, allowing for inflation, since the small claims limit was set at £1,000 in 1991.

78. The suggested sum of £400 would be equivalent to a judicial assessment of the pain, suffering and loss of amenity for a one to two week whiplash injury some 20 to 25 years ago, once adjusted for inflation. For example, some reported cases of soft tissue awards in Kemp & Kemp of that time are attached as Appendix C and are summarised below:

<b>TABLE E</b>					
<b>Reported cases of awards of £1,000 or less PSLA for soft tissue injuries 1990 - 1997</b>					
Name	Date	Judge	Facts	Award	Updated award for inflation
<b>Johnson v Sidaway</b>	1997	DDJ Torrane	Man with 24 hours of symptoms in his neck.	£250	£422
<b>Charnick v Russell</b>	1997	DJ Hall	Man with one week whiplash injury to the neck	£250	£423
<b>Wright v</b>	1990	HHJ	51 year old man with two weeks of neck pain and	£200	£436

<i>Cole</i>		Smythe	stiffness and chest bruising.		
<i>Chadwick v Cunningham</i>	1993	DJ Robinson	Seat-belt bruising that resolved in two weeks.	£350	£656
(1) <i>Knight</i> (2) <i>Knight v Hooper</i>	1993	DJ Stonham	Awards each for two claimants with two week whiplash injuries.	£400	£746
<i>Kyffin v Crighton</i>	1996	Morgan J	Whiplash injury to neck and back with full resolution after 2 weeks 3 days	£500	£877
<i>Tilbury v Soundlab</i>	1996	DJ Gold	Whiplash injury to neck causing pain for one week and twinges for a further two weeks	£500	£877
<i>Yates v Dowdeswell</i>	1995	DJ McCullagh	Whiplash injury to the neck lasting for 8 days	£500	£883
<i>Lobo v Hamilton</i>	1993	DJ Catlin	Two week whiplash injury	£500	£937

79. Therefore, the suggested sum of £400 represents the sort of figure that, for the last 25 years or so, has been assessed by the judiciary as adequate for a whiplash injury not lasting more than two weeks. To apply this figure to cases where the injury suffered has caused symptoms for up to six months, with no consideration of the severity or impact of those symptoms on the individual, is unjust.

80. As set out in the answer to Question 1, the definition of “psychological injury” requires greater precision. If the psychological symptoms suffered are not of the

severity to meet the criteria of a psychiatric disorder then a small increase to the award would be fair. However, if a psychiatric injury is diagnosed then this would not be appropriate.

81. If the Government is to proceed with its proposal to fix the amount of compensation for pain, suffering and loss of amenity, the sums should match what is currently awarded by the judiciary (as reflected in the Judicial College Guidelines). PIBA comments further on the practical issues this raises below.

**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.**

82. PIBA considers that the ‘Diagnosis’ approach will not progress the Government’s aims. If, as the Government suggests, the diagnosis of whiplash injuries is entirely subjective and a doctor is reliant upon a claimant’s description of symptoms, then there will be no way to determine whether a claimant who states to the doctor at the six month stage that his symptoms are still continuing is being truthful or not.
83. Therefore, the ‘Diagnosis’ approach will not control exaggerated or fraudulent claims – it will positively encourage them.
84. Waiting six months after an accident as suggested for the ‘Diagnosis’ approach would prevent early rehabilitative treatment which is often the most effective in treating soft tissue injuries. If there is no medico-legal examination until six months, there will be no recommendation for treatment and therefore no funding provided by an insurer.

**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.**

85. PIBA considers that the ‘Prognosis’ approach is preferable and refers back to the answer given for Question 8 on the disadvantages of the ‘Diagnosis’ approach.

86. Basing damages on prognosis deals more appropriately with a system based on recovery period rather than type of injury. It is also more consistent with the fundamental principles of awarding damages i.e. full compensation for the whole period of injury.
87. However, if the prognosis proves inaccurate a claimant should be permitted to up-date medical evidence prior to settlement.

**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.**

88. No. There are many reasons why a claim may be issued at the end of the limitation period particularly if liability is in dispute and evidence is being gathered.
89. Even if a claim is brought towards the end of the limitation period, the medical evidence is usually obtained earlier than the end of the limitation period because these claims generally start in the Protocol. Therefore, a set time for medical evidence to be obtained is unlikely to have any effect on the timing of when claims are brought.
90. In any event, PIBA questions the assertion that there is a *practice* of claims being brought at the end of the limitation period in lower value claims. Even if there was such a practice, the limitation period for personal injury claims provides 3 years within which a person can bring a claim. A person is entitled to bring it at any point within that 3 year period. Claimants should not be criticised for bringing it within the period within which they are legally entitled to bring it. Bringing a claim at 2 years 11 months does not mean that the claim is fraudulent.
91. In paragraph 51 it is suggested that there is an “*issue of claims being brought at the end of the limitation period, often without medical evidence.*” There is no evidence provided to support these assertions.
92. It is rare for personal injury claims to be served without any medical evidence as it is mandatory to serve a report where there is reliance on the evidence of a medical



practitioner<sup>15</sup>. If a medical report is not served the defendant would inevitably issue an application for an “unless” order and the claim would be at risk of being struck out<sup>16</sup>.

93. Therefore, there is a well-established process in place to deal with this issue, if in fact it is an issue at all.

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<sup>15</sup> CPR 16PD.4.3

<sup>16</sup> and in a soft tissue injury claim “the claimant may not proceed unless the medical report is a fixed cost medical report” (CPR 16PD.4.3A)

### PART 3

**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.**

94. PIBA does not agree with the figures provided in the Tables for the reasons set out below. PIBA gives its proposal for tariff figures (without prejudice to objecting to a tariff in principle) that tie in with the proposed small claims limit in Part 4 of the consultation and are derived from the Judicial College Guidelines.

#### The current weighted median figures

95. PIBA considers that the Government's proposed figures are too low; they do not, but should, reflect the level of awards made by the courts.

96. The consultation states that: *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* (paragraph 30.1. Consultation). This figure appears at page 19 (row 5) of the Impact Assessment; it apparently derives from a single comment from AXA to the Transport Select Committee in 2013 that insurers typically make offers of £1,600 to £2,000 in claims for whiplash where no medical evidence has been obtained.

97. PIBA makes the point that this is not an "award" of damages. Further it is not a calculated figure. It is not assessed on the basis of medical evidence, duration of injury etc. It is just the figure which, it is alleged, is typically offered by insurers with some success in acceptance take-up.

98. As stated above, the making of pre-medical offers is counter-productive to discouraging fraudulent or exaggerated claims and can lead to higher damages being paid than is justifiable with the benefit of medical evidence and legal/judicial input.

99. The figure of £1,750 is used in the tables as the *"current weighted median compensation payment for PSLA, without psychological injury (based on industry data) for an injury duration of 0 – 6 months*. 0 to 6 months is a wide range and taking

an average of “up to 6 months injury” is not helpful. An injury which lasts for one week is currently worth less than £580, and a one month injury less than £1,160 (see Table A).

100. PIBA does not know the parameters of the survey used to produce this figure. Using data only from Collosus and Claims Outcome Advisor is also flawed. The Impact Assessment acknowledges that this has only captured about 35% of all motor claims in 2015<sup>17</sup>.
101. This data also refers to settlements, not court awards. Settlement figures have to be treated with caution as they are likely to underestimate the true value of claims. Claims that are settled by insurance companies usually settle for less than would be awarded on judicial assessment because an early settlement without needing court proceedings has a value in itself.
102. This figure is also out of line with the figure of £1,850 which appears in the table at page 18 (row 3) of the Impact Assessment as “*the median gross PSLA damages awarded for soft tissue injuries of 6 months is around £1,850*”. This is apparently the figure for a six month injury – not the median for the group of injuries ranging from 0 months to six months.
103. The figures in the table for current weighted median compensation are out of line with:
  - (a) Reported court awards, available from Kemp & Kemp, Lawtel Personal Injury and Butterworths.
  - (b) The vast experience of PIBA members who attend hearings, on behalf of both claimants and defendants, where damages, for both major and minor injuries, are assessed. In their experience, the figures in the tables are significantly underestimated.
  - (c) The Judicial College Guidelines (13<sup>th</sup> Edition) which reflect the level of awards made nationwide set out in Tables A and B.

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<sup>17</sup> Paragraph 7.7 Page 87 Evidence Base

### The Judicial College figures

104. The figures, stated to be the Judicial College Guidelines 12<sup>th</sup> Edition, are not only out of date (the 13<sup>th</sup> Edition was published in June 2015) but are also wrong as the figures do not include the *Simmons v Castle* 10% increase in pain, suffering and loss of amenity.

### The proposed new tariff figures

105. The main principle in assessing compensation, including for injury, is that “full compensation” should be provided. As far back as 1880 Lord Blackburn in *Livingstone v Rawyards Coal Company* [1880] 5 App Cas.25 at p99 stated:

*“... where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong.”*

106. Prior to the 10% increase imposed by the Court of Appeal in *Simmons v Castle* [2013] 1 WLR 1239, the last major overhaul of damages for pain, suffering and loss of amenity was in *Heil v Rankin* [2001] QB 272. The Court was then considering the Law Commission’s view that damages for pain, suffering and loss of amenity were too low. Lord Woolf referred to this principle and said at paragraph 23:

*“There is no simple formula for converting the pain and suffering, the loss of function, the loss of amenity and disability which an injured person has sustained, into monetary terms. Any process of conversion must be essentially artificial.”*

107. The Court emphasised the need for the judiciary to carry out value judgments and keep the level of damages under review, giving the following guidance in paragraph 27:

*“The compensation must remain fair, reasonable and just. Fair compensation for the injured person. The level must also not result in injustice to the defendant, and it must not be out of accord with what society as a whole would perceive as being reasonable.”*

108. The bedrock principle of “full compensation” has not changed. The proposed figures are based on an unsupported assertion that compensation for RTA related soft tissue injuries is too high. There is no medical or any other evidence in support of this assertion.
109. Further, the proposed figures seek to bring damages for an injury lasting up to six months down to the level of £400 that even 25 years ago was judicially assessed as appropriate for a one to two week whiplash injury. As the Judicial College Guidelines show, the courts have kept control on the levels of damages being made. Those levels of damages are clearly set out in the Judicial College Guidelines which are publicly available.
110. Damages are awarded to reflect the fact that an individual has suffered pain, suffering and/or loss of amenity as the result of a wrong inflicted by another party. Such damages must be meaningful. We note that the JC Guidelines suggests that damages for anyone who has suffered any injury (beyond *de minimis* injuries) begin at a few hundred pounds. This, in our view, is a vital recognition of the fact that the person has suffered some loss and that such loss deserves compensation.
111. Imposing a tariff for injuries lasting for up to two years is intended to deal with minor, fraudulent and exaggerated injuries. Injuries that are serious enough to continue on for over a year are likely to involve other factors that need to be taken into account such as effect on work, hobbies and everyday life which will affect each individual award. Injuries lasting two years are not minor on any definition. PIBA’s starting point is that injuries lasting more than 12 months are significant and that these should *not* be dealt with as part of this reform.
112. There is also the inconsistency between the proposed figures in the tariff which go up to £3,500 and the rest of the Judicial College Guidelines and the proposed Small Claims track limit increase. The Guidelines suggest that a neck injury lasting more than two years would merit an award of over £6,600 (Table B). If a claimant is going to be fraudulent or exaggerate their claim, there will be a large incentive to describe symptoms lasting for two years and one month, bringing their claim out of the tariff, into the Fast Track costs-bearing regime and almost doubling the amount of compensation they will receive. This reform will not achieve the Government’s

objectives and it will discriminate unfairly against genuine claimants with soft tissue injuries.

113. Further, the tariff does not address the issue of multiple injuries. Often a claimant will suffer injuries to neck and back. Although that may be viewed as a single injury to the spine, the tariff does not take into consideration that the claimant also suffers an impact injury to, for example, a knee in the accident. Ordinarily this would be valued as a separate injury but discounted to reflect overlap in the award for pain, suffering and loss of amenity for matters such as: the initial shock of the accident; medical treatment; need for painkillers etc. PIBA is unsure from paragraph 91 of the Consultation whether the Government's intention is to exclude multiple injuries from the tariff.
114. The Government's proposed figures do not provide "full compensation" for injury. What is fair, reasonable and just is being exchanged for arbitrary figures for the benefit of the insurance industry in circumstances where there is no proposal by the Government to monitor, regulate or enforce lower insurance premiums.

PIBA's proposals without prejudice to their objections to a tariff system

115. For the reasons set out above, PIBA does not consider that a tariff system is appropriate. However, to answer the question asked by the Consultation, PIBA sets out some alternative figures below in Table F below.
116. Features of PIBA's proposals are:
- (a) As already set out in its answer to Question 3, PIBA considers that, if there has to be a definition of minor soft tissue injury, then this should apply to injuries of less than 3 months;
  - (b) Further, as already set out in its answer to Question 1, PIBA considers that this tariff should apply to soft tissue whiplash injuries to the spine and/or shoulder caused to occupants of motor vehicles only;
  - (c) PIBA agrees that increases by 3 month increments should then be applied;

- (d) PIBA considers that a fixed tariff should not apply to injuries that continue for more than 12 months. These injuries are likely to be more serious;
- (e) According to the Table at p 90 of the Evidence Base, about 80% of the claims that the Government seeks to control by these reforms would fall within PIBA’s proposals for a tariff for injuries of 12 months or less. These proposals, therefore, serve the Government’s objectives.
- (f) PIBA makes no allowance for multiple soft tissue injuries departing from the tariff or for uplifts for extra injuries.
- (g) Likewise, PIBA makes no extra allowance for psychological symptoms such as travel anxiety (only if there is no recognised psychiatric disorder) – this is a single catch-all tariff.
- (h) The top band of £3,000 for injuries of 10 to 12 months is not significantly lower than the current awards made for injuries over 12 months **importantly** so as to dissuade exaggeration of injuries to, say 13 months.

<b>TABLE F</b>					
<b>PIBA’s proposals for fixed tariff of damages up to 12 month</b>					
<b>Injury duration</b>	<b>Current average level of PSLA</b>	<b>Judicial Guidelines</b>	<b>College</b>	<b>PIBA proposal</b>	<b>Government proposal</b>
<b>0 to 3 months</b>	£1,500	A few hundred pounds to £2,050		£1,000	£400
<b>4 to 6 months</b>	£2,250	£2,050 to £3,630		£1,500	£400
<b>7 to 9 months</b>	£2,750			£2,250	£700
<b>10 to 12 months</b>	£3,500			£3,000	£1,100

**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.**

117. No. Whilst PIBA are in favour of the judiciary retaining as much discretion as possible, PIBA does not support using words such as ‘exceptional circumstances’.

118. PIBA believe that were an uplift of 20% to be applied at the sole discretion of the court, the term to justify such an uplift should be ‘if it is just to do so in all the circumstances of the case’. This phrase is much more in line with the ‘discretionary’ nature of the uplift.



## PART 4

### **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.**

119. If the Government's proposed tariff capping of 12 month whiplash injuries at £1,100 is adjusted to £1,000 PIBA's response would be that raising the small claims track limit for all personal injury cases is not necessary. For the same reason, PIBA absolutely objects to the small claims limit being raised at all in the event that the Government's tariff is brought into force.
120. In direct answer to Question 13, PIBA's response is that if its submission for a fixed tariff up to £3,000 for a 12 month whiplash injury is accepted, there could be a concomitant rise in the small claims track limit to £3,000 for all personal injury cases.
121. However, in the event that the Government raises the small claims track limit to £5,000, PIBA considers there has to be a distinction made between road traffic accident cases and all other personal injury cases.

#### Allocation to Small Claims Track

122. Claims are only allocated to one of the three tracks: multi, fast or small if a claim is issued and defended (CPR 26.1). Therefore, claims where liability is not disputed and there is no real argument put forward on damages, for example if a default judgment is obtained, will not necessarily be allocated to a track. A disposal hearing is merely listed where the court assesses quantum. Costs are in the discretion of the court.

#### The current Small Claims Limit for PI <£1,000

123. The last rise in the small claims limit for personal injuries was 25 years ago in 1991 when it increased to £1,000. An inflationary increase would mean that would be approximately £2,000 today.
124. The Government states that there have been increases in the amount of compensation paid since 1991 and so fewer cases fall within the limit. However, no evidence has been provided to support this statement.

125. The evidence provided by PIBA shows that there has not been an increase in awards for minor injuries in excess of inflation since 1991. The cases that would be allocated to the small claims track on the grounds of value now are the same kind of cases that would have been allocated to the small claims track in 1991:

- (a) The figures in the Guidelines (Table A) indicate that a soft tissue injury of probably up to three weeks would currently fall below £1,000.
- (b) Soft tissue injuries of about three weeks or less currently merit awards of up to £1,000 (Table D);
- (c) Soft tissue injuries of about three weeks or less merited awards of up to £1,000 in the 1990's (Table E).

#### Recoupment of hearing fees

126. Contrary to its assertion in paragraph 78 that hearing fees are recoupable if the claim settles, the Government has recently published forthcoming rule changes that mean that hearing fees will not be refunded in cases that settle 28 days or less before the hearing.

#### The kind of cases that would be caught by a rise in the small claims track limit to £5,000

127. Please see Table G which is at Appendix D. This has a table of injuries that would be included in the Small Claims Track if the limit is raised to £5,000. These injuries include bony injuries such as fractures, internal injuries requiring surgery and injuries with permanent consequences including scarring.

#### Challenging the case for an increase to the small claims limit

128. The Government's case for change hangs on the following reasons:

- (a) Access to justice is preserved because:
  - These cases are not so complex so legal representation is not required
  - The court still has a discretion to move the case to another track

- Other countries operate a small claims system with success
  - There is more information available to litigants in person
- (b) The Government seeks to achieve these aims because:
- It will reduce the costs of claims
  - It meets the Government's objective to dis-incentivise exaggerated and fraudulent claims

129. Attached to this Response at Appendix A is PIBA's response dated 01.03.13 to the previous consultation on raising the small claims limit. PIBA repeats and amplifies those submissions in this Response under the two main themes:

- (a) Increasing the small claims limit will reduce access to justice for legitimate victims of personal injury; and
- (b) The Government's aims identified above are unlikely to be achieved by raising the small claims limit.

#### Access to Justice

130. Access to justice for victims of injury will inevitably be reduced. Most claimants will be reduced to being litigants in person as the cost of obtaining advice and representation, for which the claimant will have to bear the cost, would be prohibitive in the context of the damages sought to be recovered. The consequences include:

- (a) Claimants will have to *personally* obtain and pay for copies of their medical records from their GP and hospital/s.
- (b) Claimants will have to *personally* identify, instruct and pay for medical expert/s and organize the medical evidence themselves.
- (c) In cases where liability or causation is in issue (e.g. low velocity cases), Claimants may need to *personally* identify, instruct and pay for expert engineering evidence.

- (d) Claimants as litigants in person will not know how to instruct their experts, what questions to ask their experts nor whether to challenge defendant expert evidence that they do not agree with.
- (e) Cases valued up to £5,000 can be complex: either due to liability or quantum issues, or both. It is incorrect to state that because they are valued under £5,000 they are straightforward. PIBA refers to the types of injuries listed in Table G.
- (f) Claimants will not necessarily be able to identify whether their claim falls within the tariff, or should it cease to be within it, that this has occurred. Claimants will not know what offers to make or accept.
- (g) Claimants will *personally* need to provide notice to the insurer to comply with the provisions of Road Traffic Act 1988, s.152 if they are to have an opportunity of recovering damages awarded from the insurer<sup>18</sup>.
- (h) Insurance companies have unfettered access to funds to pay for lawyers to instruct experts, ask experts questions, draft pleadings and attend hearings. This means that there will not be equality of arms and would be contrary to the Overriding Objective for parties to be on an Equal Footing.
- (i) It is said that there is much information on procedure available. Whilst some may be able to understand, digest and follow the guidance the majority of litigants will be unable to do so. The Civil Justice Council's Guide is 30 pages long. The Bar Council's Guide to Representing Yourself is 72 pages long.
- (j) There is no information available to claimants as to the prospects of success in liability contested cases that they may bring, or points on medical evidence such as when causation of injury is contested in acceleration/exacerbation cases (common in sub-£5,000 cases) or in low velocity claims.
- (k) The current Portals will have to be adapted to be used by litigants in person. There are no proposals set out as to how or when these will be adapted.

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<sup>18</sup> Road Traffic Act 1988, s.152 (1) No sum is payable by an insurer under section 151 of this Act (a) in respect of any judgment unless, before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings ...

### Comparison to other European jurisdictions

131. Comparison is made to other European jurisdictions where it is said that it is notable that lawyers are not often used for RTA related PI claims. It is not possible to compare the legal system in England to that of, say, France.
132. For the last 30 years France has the Loi Badinter which has created an autonomous regime of liability without fault for road traffic accidents. Therefore there are very few disputes on liability.
133. Further, France has an inquisitorial legal system which is amenable to use by litigants in person, in contrast to the adversarial legal system that we have in the United Kingdom where litigants in person will be pitched against lawyers to argue their case.

### The proposals are discriminatory

134. For those for whom English is not their first language<sup>19</sup>, or who have learning or other disabilities<sup>20</sup> the Government's proposals will discriminate against them due to their inability to conduct litigation in person, and irrecoverable legal costs mean they will not be able to instruct a lawyer.
135. Further, the Government's proposals will unfairly discriminate against the elderly<sup>21</sup> and those not in work<sup>22</sup> who will not have a claim for a loss of earnings that may otherwise cause the action to be allocated to the Fast or Multi-track.

### Effect on the administration of Justice & other court users

136. The courts are struggling with the volume of cases in the civil justice system in consequence of the large numbers of litigants in person. The consequences of Legal Aid, Sentencing and Punishment of Offenders Act 2012 are well documented<sup>23</sup>.

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<sup>19</sup> those with another main language made up 7.7% of the population in the 2011 Census ONS Language in England and Wales: 2011 dated 4.3.13

<sup>20</sup> there are 5.7 million adults of working age with a disability in 2011/12 Disability prevalence estimates 2011/12 Office for Disability Issues and Department for Work and Pensions dated 16.1.14

<sup>21</sup> the over 65s make up 18% of the UK population Table 4 ONS Overview of the UK Population dated 25.6.15

<sup>22</sup> the unemployed make up 4.8% of the UK population ONS Unemployment rate dated 14.12.15

<sup>23</sup> see Section 6 of the Justice Committee - Eighth Report Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 dated 4.3.15

137. Subjecting an already overloaded system of justice to more litigants in person will take up more court/judicial time as well as increase costs and delay that will adversely affect other litigants.

Government's aims will not be achieved

138. Increasing the small claims track limit will not achieve the Government's aims of reducing the costs of personal injury litigation.

139. Without the benefit of legal advice, some litigants in person will press on with hopeless claims, generating more work for insurers. Insurers will still instruct lawyers to attend hearings as they do currently for small claims track cases. With litigants in person involved, there are likely to be interlocutory hearings before a case comes to a final conclusion. Final hearings are likely to be longer.

140. Contrary to what the Evidence Base of the Impact Assessment says at paragraph 2.93 at p.38, it is no longer the case in any personal injury claim a successful party "is generally" able to recover their costs from the unsuccessful party. For defendants, this was removed for all personal injury cases with the introduction of Qualified One Way Costs Shifting over three years ago. The effect will be that defendants will likely continue to incur costs if they use lawyers, the costs of which will be unrecoverable from claimants in most circumstances.

141. Cases in which fraud and exaggeration are alleged are unlikely to be suitable for the small claims track and will be re-allocated. Evidence in small claims hearings is not usually given on oath and paragraph 8.1(d) of Practice Direction 26 states that where there is an allegation of dishonesty the case will not usually be suitable for the small claims track. The rules on allocation would need to be amended to make sure that these cases leave the small claims track. Therefore, fraud and exaggeration cases will likely be allocated to the Fast Track where fixed costs will apply, as is the case at present.

142. In order to avoid allocation to the Fast Track, insurers are unlikely to challenge cases under £10,000 in order to keep them within the Small Claims Track and not pay costs. This will have the effect of **increasing** fraud and exaggerated claims as these claims will routinely be settled rather than contested.

143. PIBA submits that the proposed reforms are not needed at this stage. The recent reforms including QOCS, removal of recoverable CFA uplifts & ATE premiums, reduction and extension of fixed costs at extremely low figures (to between £200 and £750 for RTA cases under £5,000 dependent on when concluded) have already reduced the number of motor claims being made to below 2010 levels.
144. In terms of recoverable legal costs for legally assisted claimants, these were significantly reduced from 1.7.13; further the reach of fixed recoverable costs was expanded to include employer and public liability cases in addition to RTAs. CFA uplifts and ATE premiums ceased to be recoverable for new CFAs and policies incepted after 1.4.13 thereby significantly reducing recoverable costs.
145. Whilst increasing the small claims track will reduce the small amounts of fixed costs currently recovered by claimants, the small sums saved by insurers are likely to be offset by insurers having to deal with litigants in person. Further, the public interest and utility of continued representation of claimants by legal representation in lower value personal injury cases outweighs any likely public benefit to be derived.
146. PIBA submits that insufficient time has been allowed to let the extensive 2013 reforms to take effect and further reform of personal injury cases as proposed by the Government is not warranted.

#### PIBA's proposals without prejudice to opposition to the changes proposed

147. If the Government adopts PIBA's suggested cap of £3,000 for a tariff system this would dovetail with an increase to the small claims track limit to £3,000 for all personal injury cases.
148. This proposal would keep all soft tissue whiplash claims under 12 months (which would be subject to the tariff) within the small claims track. This affects about 80% of the cases that these reforms are designed to tackle. It would also capture all other non-tariff injuries less than £3,000. This proposal also includes all personal injuries, so would include claims other than RTAs.
149. A figure of £3,000 for the Small Claims track would also increase the value in excess of the inflationary figure of approximately £2,000 and thereby provide future proofing

that the Government is concerned to achieve (paragraph 97 of the Consultation paper)<sup>24</sup>.

150. However, in the event that the Government decides to increase the small claims limit to £5,000, PIBA considers that this should be limited to road traffic cases only.
151. Cases worth up to £5,000 can include complex injuries quite unsuited for resolution in the small claims track – PIBA refers to Table G as to the kind of cases that this would include.
152. An increase to £5,000 would also catch all types of cases which are more complicated in determining liability such as: employers' liability, public liability, industrial disease, product liability, clinical negligence, sexual abuse claims, Montreal/Athens Convention cases, MIB cases and Animals Act claims.
153. These kinds of cases involve specific knowledge of statutory law and limitation periods as well as the liability regimes. Often claimants have no idea who to sue. Procedurally these cases are complicated, even for injuries under £5,000. They usually involve extensive disclosure, expert evidence, extensive witness evidence, Part 18 requests, specific disclosure applications etc.
154. In conclusion, and without prejudice to the points raised above opposing the proposals in principle, PIBA's position is that:
  - (a) There should be no increase at all to the small claims track if the proposed tariff is imposed;
  - (b) If the small claims limit is to increase, it should increase to no more than £3,000 for all personal injury claims which would coincide with PIBA's proposals for the upper limit on the fixed tariff;
  - (c) If the small claims limit is to increase to £5,000 this should be for RTA cases only.

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<sup>24</sup> about 15 years 'future proofing' at historical rates



**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?**

155. PIBA considers that the question should be “If the small claims track is to be raised, what level should it be raised to?”
156. PIBA has answered this question in its response to Question 13. The increase that is proposed is x 5 the current level. This is unjustified by reference to inflation or any other statistical analysis. As already set out, there has not been significant change in the levels of awards for short-lived injuries in the last 25 years. The types of cases that fell within the small claims track limit 25 years ago would still fall within it today.
157. PIBA therefore considers that the level should not be raised to £5,000, let alone beyond it. It notes that p.125 of the then Chancellor’s Autumn 2015 statement proposed “*removing legal costs by transferring personal injury claims of up to £5,000 to the small claims court*”. There was no suggestion that there was going to be an increase over £5,000.

**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.**

158. PIBA does not have any views on this save to repeat the need for all litigants to have access to independent legal advice and representation to ensure they are on an equal footing with legally represented and well-financed insurance companies.

**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.**

159. No. We note this issue has been subject to a separate consultation by the Lord Chief Justice<sup>25</sup>. Further, that the Ministry of Justice study undertaken by Professors Trinder, Hunter et al doubted whether an increased use of McKenzie Friends was beneficial and

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<sup>25</sup> Reforming the courts’ approach to McKenzie Friends, Consultation February 2016

whether they provide sufficient value for money to justify an increased role for those who charge fees for their services

160. PIBA comments that Claims Management Companies and paid McKenzie Friends are unqualified to provide advice on legal matters, are unregulated and uninsured. Under the current system they do not have rights of audience without the court's permission. They have no duty to the court.
161. In the experience of PIBA members these unqualified persons do not provide any useful assistance to claimants or the court in personal injury claims.
162. There are already extensive measures in place to regulate who can provide legal advice and representation, which is wisely restricted to those who are legally qualified.

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

**Please explain your reasons why.**

163. No. PIBA considers that there should be a ban on pre-medical offers as they run counter to the Government's chief aim of discouraging fraudulent or exaggerated claims from being made.

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

164. No

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

165. By amending the CPR so that any compromise would only be binding on both parties if a medical report had been obtained before the settlement. This is similar to CPR 21 which requires the court's approval of any settlement to a child or protected party before it is binding. No insurer would settle a claim if the settlement was not binding on the parties.

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

**Please give reasons.**

166. PIBA has no view on this.

**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.**

167. Yes. Late discontinuance is a problem for defendants.

168. The effect of QOCS often leads to late discontinuance of weak claims, putting the burden, and the costs burden, on defendants to make an application to set aside the notice of discontinuation if they wish to make an application to enforce a costs order.

169. Requiring the claimant to make an application for permission means that, in a non-fraud case, the defendant will likely consent and not attend the application in order to save costs. In a fraud case, the defendant will be able to attend and argue for a finding of fundamental dishonesty and/or abuse of process.

**Question 22: Which model for reform in the way credit hire agreements are dealt with in the future do you support?**

**First Party Model**

**Regulatory Model**

**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).**

170. PIBA has no view on this.

**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.**

171. PIBA has no view on this.

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

172. PIBA has no view on this.

**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.**

173. No. This is a complex issue that is not properly addressed by the Consultation document. There is already legislation governing limitation that such a proposal would overturn. PIBA considers that the current position regarding limitation is reasonable and should not be changed.

**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.**

174. In principle PIBA objects to this. There are a range of reasons why people may not seek immediate medical attention (including in claims involving significant brain injury). Certain injuries do not immediately manifest or do not manifest in full. It would be wholly inappropriate to presume that all such injuries are minor.

175. Furthermore, the majority of those injured are genuine in their belief that they will recover in a short period of time and only seek medical attention when their symptoms continue over a longer period or deteriorate. These claimants should not be penalised for being stoic.

176. In addition, people may struggle to obtain immediate medical attention, and it would be inappropriate for the Government to encourage people to use the NHS's limited resources to satisfy a 'tick box' exercise. Further and in any event, we note that there is no evidence that the NHS would be able to cope with claimants having to attend their GP, hospitals or other rehabilitation provider for treatment.

**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.**

177. PIBA does not have a view on this.

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

178. No. PIBA comments that significant steps have already been taken to combat exaggeration and fraudulent claims with, inter alia, the introduction of the MedCo Portal (from 6.4.15), QOCs 'fundamental dishonesty' exception to one way costs shifting (from 1.4.13) and the Criminal Justice and Courts Act 2015, s.57 (from 13.4.15).

179. PIBA submits that the significant measures that have been taken should be permitted to 'bed down' and for their effect to be evaluated in due course. In particular, the court's power to dismiss the valid part of a claim where 'fundamental dishonesty' is found is a powerful control and disincentive to exaggerated claims.

**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.**

180. We disagree. This suggestion will obstruct access to justice, particularly if medical reports become mandatory before an offer can be accepted. If a claimant cannot recover the cost of a medical report it has the effect of automatically reducing the compensation available for an injury by £180.

181. This would unfairly penalise legitimate victims of injuries who, under the current proposals, would lose up to nearly half of their £400 compensation by paying for a mandatory medical report.

**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.**

182. This suggestion does not properly form part of the Government’s current consultation which concerns whiplash injuries. This raises significant and wide ranging issues, going far beyond trying to crack down on minor or exaggerated soft tissue injuries. It is inappropriate to deal with this suggestion within this consultation.

183. The more serious an injury, the more individual assessment of its impact is needed. Injuries do not fit into neat categories and they affect victims differently. Age, sex, employment, hobbies all affect the level of award.

184. PIBA members have extensive experience in valuing damages for pain, suffering and loss of amenity for both claimants and defendants. The sum for PSLA is usually the least controversial head of loss in larger claims and is usually dealt with by agreement on the appropriate figure. Therefore, there is no need for the introduction of such a system.

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

185. PIBA does not have views within the scope of this consultation.

**Robert Weir QC**, Chair of the Personal Injuries Bar Association

**Jasmine Murphy, Athena Markides, Emma Corkill, Shahram Sharghy, John Meredith-Hardy**

(Executive Committee Personal Injuries Bar Association)

4 January 2017