

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

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

Response from Thompsons Solicitors
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Executive Summary

In the following pages Thompsons responds to the government's consultation in detail.

Our headline points are as follows:

- The government's proposals would affect 1 million injured people every year, 95% of all personal injury claimants, removing their right to access free or affordable independent legal advice.
- While the government says its proposals are designed to tackle a perceived problem with so-called 'fraud' in 'whiplash' claims, this is a dangerous con – a fig leaf being cynically deployed to create a false impression. The consultation document proves that the government wants to impose a baseless increase in the small claims limit to 500% of its current level, for all personal injury claims, whether they occur on the road, in the workplace, or anywhere else.

This cannot be justified on any technical, legal, moral or economic grounds. It is not supported by evidence and not backed by senior members of the judiciary.

- That the government is even proposing including employers' liability claims within an extended small claims limit demonstrates its fundamental misunderstanding of the issues. Even according to the government's own rationale, including employers' liability in a small claims limit increase cannot be justified.
- The consultation paper and supporting impact assessment produced by the government confirm that these proposals would mean an effective transfer of wealth from government and state institutions already under budgetary strain, to highly profitable insurers and their grossly overpaid chief executives.

Using the government's own figures (which are a gross underestimate) these proposals would see the NHS lose at least £9m per year, and on the same figures the Treasury (and, therefore, public services including schools and the NHS) would lose at least £135m per year.

In return, insurers will be gifted an additional £200m per year (again, an underestimate given it is based on an assumption that they will pay back 85% of the savings they will make as a result of the changes to their policy holders, an assumption that is completely at odds with the industry's past behaviour).

Introductory Remarks

1. Presented as a way of tackling a (so-called) 'fraud crisis' and a 'compensation culture' that at least two government reports¹ have found to be a perception rather than a reality, the changes in this consultation represent the end of the well-established 'polluter pays' principle of English law. Those who have sustained entirely genuine injuries face being put off from bringing a claim and being under-compensated should they do so.
2. While the government officially announced this consultation on 17 November 2016, the fact that press releases from Aviva and other insurance bodies were being sent out (embargoed) to media to welcome the news the day before, is a graphic illustration of the Ministry of Justice's (MoJ) approach to negotiating personal injury reform. The ultimate long term goal of a long running campaign, led by the Association of British Insurers (ABI) and vocally supported by its higher profile members, to take professional claimant lawyers out of the process in personal injury claims and further shift the balance of power away from the accident victim and towards the insurer-backed defendant, is about to be delivered. The losers will be injured people and society.
3. The concocted 'crisis' in whiplash claims is being used as a fig leaf for massive, wholescale reforms to personal injury that ultimately have little to do with fraud or road traffic accidents, and in fact represent the biggest shift in the already asymmetric relationship² between claimant and defendant, rolling back generations of established law. The changes are so dramatic and so one sided that they expose the government's motivation as being, in truth, nothing to do with fraud or reducing the cost of insurance to the consumer, and everything to do with seizing an opportunity to give a billion pound gift to their insurer friends at the expense of fair compensation for injury victims.
4. Whiplash is the purported focus of the consultation, but the inclusion of a proposal³ that the small claims limit should be increased from £1,000 to £5,000 in all personal injury claims, not just road traffic accidents (RTAs), so as to include injuries in the workplace and elsewhere, despite no real attempt to justify it, reveals the real target.
5. There is no basis whatsoever for workplace accident and disease claims – employer's liability (EL) cases – in particular to come into the scope of these changes, for the following ten reasons:
 - i. The consultation paper fails to set out any rationale for including employment injuries in what is billed as a reform of whiplash claims.
 - ii. None of the three main points to justify the changes apply to work injury cases. Firstly it is said this is needed to stop fake whiplash claims. But this has nothing to do with accidents at work as there is no suggestion of fake claims by injured employees.
 - iii. Secondly, the consultation paper claims that whiplash case numbers have increased in the last 10 years. Again this does not justify including work injury claims which have fallen over the same period.
 - iv. Finally it is suggested that the proposals would benefit the public by driving down motor insurance premiums. But there is no suggestion (and neither can there be) that including workplace injuries in this will benefit the public in any way. It will only benefit employers and their insurers.

¹ Most recently by Lord Young in 'Common Sense Common Safety' (15 October 2010), including: 'The problem of the compensation culture prevalent in society today is, however, one of perception rather than reality.' (p19, emphasis added) – https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60905/402906_CommonSense_acc.pdf

² A problematic relationship which Lord Justice Jackson himself has raised when he said 'personal injuries litigation is the paradigm instance of litigation in which the parties are in an asymmetric relationship' (p184, Review of Civil Litigation Costs: Final Report – <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>)

³ Page 5 of the consultation document

- v. Lord Justice Jackson in his 2009 Review of Civil Litigation Costs recommended against any increase in the small claims limit until inflation justifies an increase to £1,500. Inflation does not yet justify that change.
 - vi. The Transport Select Committee recommended against any increase in the small claims limit in 2013. They considered access to justice was likely to be impaired and insurers would use legal professionals to contest claims. Nothing has changed since then, other than in favour of insurers through the introduction of the Portal and fixed costs.
 - vii. The government says that the majority of road injury victims will not be affected by the changes they propose, as the vehicle they are travelling in normally has legal expense insurance. That is not the case for injured employees.
 - viii. Lord Justice Jackson and others accept injury victims are in an 'asymmetric relationship' with their opponents. These proposals will pit unrepresented workers against multinational insurers and their lawyers. Nor does it help industrial relations or productivity to prevent injured employees from seeking legal redress where their employers have broken the law.
 - ix. In the consultation paper, the government accepts that workplace injury cases are legally and factually more complex than road traffic claims (see paragraph 91 of the consultation).
 - x. Injury at work claims through the courts are the only legal enforcement of legislation on health and safety at work in almost all employment injury cases. These proposals would end that means of enforcement at a stroke.
6. As outlined, the proposals contained in the consultation are opposed by the judiciary. The last time the issue of an increase to the small claims limit was assessed by a senior judge, Lord Justice (LJ) Jackson in his December 2009 Review of Civil Litigation Costs decisively rejected the proposal. Jackson LJ recommended that the only future increase required to the PI small claims limit would be to reflect inflation since 1999, proposing that 'the present limit stays at £1,000 until such time as inflation warrants an increase to £1,500'⁴.
7. Since 2009, we have seen the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) remove recoverable success fees and ATE insurance from almost all PI claims, and the introduction of the RTA Portal and its expansion horizontally and vertically to cover almost all PI claims up to a value of £25,000.
8. The impact of LASPO on insurers' funds has been dramatically enriching. On the Association of British Insurers' own figures motor insurers have saved at least £8bn⁵ in claims costs over the last five years, yet overall premiums are higher now than they were in 2010⁶.
9. As recently as January 2016, Jackson LJ said in his speech to the Insolvency Practitioners Association (IPA) that 'the fixed costs regime for fast track personal injury cases is working reasonably well'⁷. Jackson LJ's recommendations from 2009 therefore hold true today and, crucially, the criteria set out by the Senior Judge leading the government's reform agenda for a change to the small claims limit have yet to be met.

⁴ See Section 3 page 183 <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>

⁵ Cumulative saving on claims costs by net written premium from 2010 to 2015 (latest publicly available ABI figures) – <https://www.abi.org.uk/~media/Files/Documents/Publications/Public/2013/industry%20data/Annual%20General%20Insurance%20Overview%20Statistics%20-202015.xlsx> (tab 4)

⁶ See AA British Insurance Premium Index – <http://www.theaa.com/newsroom/bipi/car-home-insurance-news-2016-q3-bipi.pdf> (p10)

⁷ Page 4 <https://www.judiciary.gov.uk/wp-content/uploads/2016/01/fixedcostslecture-1.pdf>

10. Other jurisdictions, with a similar legal system and principles to England and Wales, have in recent years considered in detail whether to increase the small claims limit (or their equivalent) and then reached the decision to keep PI out of the small claims track. One notable example is Scotland. Here, the small claims limit was raised in 2007 but the Cabinet Secretary for Justice Kenny MacAskill excluded all personal injury from it, principally on grounds of complexity. In the press release announcing the increase the cabinet secretary also highlighted the need for PI claimants to instruct solicitors and obtain medical and other expert evidence.
11. The Scottish Government's thinking here was assisted by research which showed that unrepresented PI victims were at a significant disadvantage. The paper's findings included:
 - i. Personal injury claimants found it difficult to assess the legal basis of their claim without legal advice
 - ii. Small claims procedure was responsible for limiting the availability of legal advice and assistance to personal injury claimants
 - iii. Advice agencies [i.e. not professional solicitors] were unable to provide personal injury claimants with legal advice and assistance
 - iv. Unassisted personal injury litigants were often unaware of the legal basis of their action and found preliminary hearings both intimidating and unhelpful
 - v. Unassisted personal injury litigants found it difficult to pursue their action at full (proof) hearings, and were rarely successful when they did so
 - vi. Unassisted claimants were particularly vulnerable in personal injury litigation because they were more likely to come face to face with litigation and reparation specialists in court.
12. Even when, in 2014, the Scottish courts system was reformed, PI was still treated with special attention. The Court Reform (Scotland) Act 2014 created a new procedure called Simple Procedure to replace Small Claims and Summary Causes for cases with a value of less than £5,000. PI cases proceed under Simple Procedure but have special rules which ensure that (unlike other Simple Procedure cases) full legal costs are payable on block fee basis similar to awards of costs in the Fast Track. In addition, employers' liability cases were excluded entirely from the 'simple procedure' on the grounds of their complexity and the strongly asymmetric nature apparent in them (between employee and employer).
13. These changes would therefore leave people injured in England or Wales at a serious disadvantage to those injured in Scotland (who will continue to be legally represented and fairly compensated). It could leave Scottish workplaces far safer than those in England and Wales and it would create an unfairness for Scottish workers should they be injured in England and Wales.
14. Further evidence of senior judicial opposition in England and Wales to the government's proposals can be found in Lord Justice Briggs' 'Civil Courts Structure Review: Interim Report' (January 2016) where he identified personal injury as being one of the few remaining 'significant areas where the cost of legal representation does not lead to the result that individuals are forced either to litigate in person or to forgo access to justice'.⁸

⁸ Paragraph 5.45 – <https://www.judiciary.gov.uk/wp-content/uploads/2016/01/CCSR-interim-report-dec-15-final-31.pdf>

15. In his ‘Final Report’ (July 2016), Briggs LJ came to similar conclusions:‘a fixed or budgeted recoverable costs regime, backed by Qualified One-way Costs Shifting (“QOCS”) plus uplifted damages has, in the sphere of personal injury (including clinical negligence) litigation been a powerful promoter of access to justice, in an area where the playing field is at first sight sharply tilted against the individual claimant, facing a sophisticated insurance company as the real (even if not nominal) defendant’⁹.
16. The current state of affairs in the small claims limit in personal injury is, therefore, widely seen as desirable. The government’s reforms, if enacted, would do precisely what Briggs LJ warns against and Jackson LJ opposed: active encouragement of many more litigants in person or, for many injured people scared to go it alone or of the cost consequences of engaging a lawyer, simply going without access to justice entirely. Why is the government proposing these reforms despite the weight of senior judicial opinion against them?
17. The government’s proposals also fail on wider economic grounds. If enacted they would mean a direct transfer of wealth from the taxpayer and injured people to the executives and shareholders of insurance companies. According to the government’s own impact assessment, the NHS would incur a cost of ‘around’ £9m per annum¹⁰. This is at least £45m over the course of a parliament, significant in the context of a health service already under severe financial pressures.
18. Moreover, this estimate is almost certainly a gross underestimate: it is based on an ‘illustrative assumption’ that 20% of outpatient cases have an injury duration of six months or less. Yet the government accepts that the data on the injury duration or treatment of patients already requiring outpatient treatment (upon which its assumptions are based) do not exist and that ‘information is being sought on this as part of the consultation’¹¹. How can a government propose a policy without any meaningful evidence to support its assumptions?
19. The proposals also fail on the grounds of basic fairness. If the small claims limit is increased, nearly 1 million people¹² injured – not just on the roads but anywhere, including at work – will lose the right to free or affordable, independent legal advice. The only beneficiaries will be insurers, their shareholders and their senior executives. The obvious imbalance of power already existing between claimants and insurance-backed defendants will be made even more acute. Litigants in person offer even greater opportunities for the defendants to leverage the asymmetry recognised by Jackson LJ to their financial and legal advantage. If the small claims limit were extended to include employer liability cases as is proposed, a quite extraordinary injustice would have been perpetrated against working people.
20. Thompsons commissioned an independent representative survey of the general public to find out the public’s views on some of the underlying assumptions behind the government’s proposals. Responses included:

On insurance company CEO pay:

“Too many fat cats in these companies every insurance company is making millions every year they also have to pay dividends to shareholders when people try to claim they try to give low offers anyway”

“I am horrified that Insurance Company Bosses get paid so much at our expense”

“It surprised, shocked and dispirited me that CEOs of insurance companies earn that much (i.e. a LOT)”

“... pay outs have been going to company fat cats not to all the fraudulent claims we are always being told about.”

⁹ Paragraph 6.29, see also paragraphs 6.30 and 6.31 <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>

¹⁰ Paragraph 2.33 of the Impact Assessment

¹¹ Paragraph 2.32 of the Impact Assessment

¹² Page 39 of the Impact Assessment

21. £1,000, let alone £5,000, is a lot of money to anyone but especially dinner ladies or nurses or street cleaners, as well as the most vulnerable on zero-hours contracts or on the minimum wage. Are these not the very people who the prime minister pledged to work for when she first spoke on the steps of Downing Street? The “just about managing” were meant to be supported by a government “driven, not by the interests of the privileged few”. Is this proposition evidence of a prime minister true to her word when she vowed to “think not of the powerful” and “listen not to the mighty” but [to] you [people ‘just about managing’]?¹³
22. This extraordinary hike in the small claims limit would mean a boost to the powerful and the privileged few, with those at the opposite end of the societal pendulum left to fight insurance companies on their own or paying most – if not all – of their compensation to lawyers.
23. All available evidence shows that, whatever the challenges of fraud may be, there is no suggestion of any issue with fraud in work injury cases. On the roads it appears to be having a negligible impact on the commercial success of motor insurers. If fraud is a strategic risk rather than a convenient distraction, why is it never mentioned in the annual shareholder reports of insurers, including Admiral and Axa? Their failure to mention fraud is in direct contradiction of their fraud narrative and would appear to be a breach of the Financial Reporting Council’s (FRC) requirements of publicly-listed companies in the disclosure of ‘material information’ in financial reporting (as set out in the FRC’s ‘Guidance of Strategic Reports’, June 2014).
24. If insurers were being overwhelmed by fraudsters out to game the system, how have they been able to continue to pay their chief executives eye-watering remuneration figures? Direct Line’s chief executive, Paul Geddes, enjoys a salary of £4.82m¹⁴. Aviva’s Mark Wilson is taking in £5.67m¹⁵.
25. If fraud was such a problem, then why in 2015 did Admiral increase its UK motor insurance profit before tax by 11% to £443m and why have Direct Line and Admiral between them paid out £1.65bn in dividends in the last three years? Meanwhile, as always, it is the policy holder who loses out – premiums have risen by 17.2% in the last year alone¹⁶.
26. There is no evidence to suggest that insurers will pass on the savings that a further improvement in their operating conditions would bring. Over the last five years, motor insurers have saved at least £8bn in claims costs¹⁷ due to previous legislative changes¹⁸ yet premiums are higher than they were in 2010¹⁹.
27. Given this, a few meaningless pledges to pass on savings from a change in the small claims limit from a couple of insurers hold little weight. With the chancellor’s Autumn Statement announcement to increase Insurance Premium Tax by 2%, some insurers and several commentators have already started to suggest that the industry cannot now follow through on its pledges. Notably the RAC told its policyholders in its commentary on the Autumn Statement that: ‘...while the reforms are welcome, the organisation is concerned that they will not achieve savings for motorists as only a small number of insurers have so far committed to passing the savings on’²⁰.

If a reduction in premiums is one of the government’s motivations for implementing these reforms, then it should guarantee savings not rely on the good will of an industry whose past behaviour suggests that public relations pledges from a couple of insurers aren’t worth the paper they are written on. And (in any event) it should also explain what this has got to do with workplace injury cases.

¹³ <https://www.gov.uk/government/speeches/statement-from-the-new-prime-minister-theresa-may>

¹⁴ <http://www.directlinegroup.com/~/media/Files/D/Direct-Line-Group-V2/documents/directors-remuneration-report-2015.pdf>

¹⁵ <http://www.aviva.com/reports/2015ar/>

¹⁶ <https://www.confused.com/on-the-road/cost-of-motoring/what-the-price-index-means-for-you>

¹⁷ Cumulative saving on claims costs by net written premium from 2010 to 2015 (latest publicly available ABI figures) – <https://www.abi.org.uk/~/media/Files/Documents/Publications/Public/2013/industry%20data/Annual%20General%20Insurance%20Overview%20Statistics%20-%202015.xlsx> (tab 4)

¹⁸ The implementation of the Legal Aid, Sentencing and Punishment of Offenders Act (2013) led to legal fees for whiplash-type third party injury claims reducing by 65% and a reduction of 12% in the frequency of bodily injury claims – <https://www.actuaries.org.uk/news-and-insights/media-centre/media-releases-and-statements/data-institute-and-faculty-actuaries>

¹⁹ See AA British Insurance Premium Index <http://www.theaa.com/newsroom/bipi/car-home-insurance-news-2016-q3-bipi.pdf> (p10)

²⁰ <http://www.rac.co.uk/drive/news/motoring-news/the-autumn-statement-how-will-it-affect-motorists/>

28. The government is on record as stating it will not intervene in the market to force insurers to pass on savings²¹ and in its press release announcing the consultation it says motorists 'could' see 'about' £40 in premium reductions. Hardly the most robust language and there is no suggestion the public will benefit in any way from including work injuries in these ill-thought out proposals.
29. A welcome pledge to eliminate pre medical offers aside, these reforms put all the burden onto the claimant side – solicitors and the injured party. They obviate nearly all responsibility of insurers themselves to take substantial action on fraud by taking away the rights of the genuinely injured. To quote Lord Falconer's comments at the recent ABI conference, they "throw the baby out with the bathwater"²²
30. The power is in the insurers' hands to refuse to pay out if they think a claim is fraudulent or exaggerated. Better still, they can report their suspicions to the police. Yet in the most recent figures it was shown that insurers pay out on 99% of all motor claims²³. Rather than clear up their own systems to root out dodgy claims, insurers are hitting all injury victims, including those injured at work, using whiplash as a fig leaf. And the government is actively conniving in that.
31. The reality is that there is no 'crisis'. Much of Lord Keen's foreword to the consultation paper focuses on a belief that whiplash claims are at high and increasing levels. But not only is this false, it is of no relevance to workplace injury claims which have been falling for many years.
32. Figures from the government's own Compensation Recovery Unit (CRU) shows that the total number of injury cases has dropped by 6% since 2013²⁴ and whiplash injuries have gone down from 571,111 in 2011 to 335,365 in 2016 (a roughly 40% decrease)²⁵. And as the government seems to prefer looking at the figures over 10 years, the same CRU figures show that workplace injury claims have fallen by 12% in the last decade.
33. Perhaps it is not surprising, given the tenacity and influence of the insurance lobby, that ministers and their advisers shaping this consultation have been persuaded to swallow its lines on whiplash. But to ignore robust statistical evidence at their disposal and use those same flawed lines to justify an attack on victims of workplace injuries who have nothing to do with whiplash cases, seems shoddy at best and callously indifferent at worst.
34. Finally, aside from the inadequate content, aims, evidence base and justification for the government's proposals, we also question the method of the consultation itself. Consultees have been given just seven weeks, spanning the Christmas and New Year period, to respond to a lengthy consultation of 31 substantial questions and an additional series of questions relating to an impact assessment running to almost 100 pages.
35. Given that the proposal included within the consultation includes reforms which would overturn fundamental tenets of English law and dramatically change the legal process for injured people, we would have assumed that a longer period of at least 12 weeks would have been appropriate and more in keeping with the government's own Consultation Principles, especially as it has taken the government itself more than a year to produce this consultation from its heralding in the Autumn Statement 2015 and it has allowed itself more than 13 weeks to consider the submissions it receives and to respond.²⁶

²¹ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-12-16/20373/>

²² Association of British Insurers Motor Conference, 18 October 2016 – see <http://www.legalfutures.co.uk/latest-news/tory-mps-lobby-truss-get-whiplash-reform>

²³ <https://www.abi.org.uk/News/News-releases/2016/01/There-when-it-matters-ABI-publishes-insurance-claims-success-rates-for-the-first-time>

²⁴ <https://www.gov.uk/government/publications/compensation-recovery-unit-performance-data>

²⁵ <https://www.lawgazette.co.uk/news/government-figures-reveal-whiplash-claims-in-freefall/5056776.article>

²⁶ In particular: 'Judge the length of the consultation on the basis of legal advice and taking into account the nature and impact of the proposal' (emphasis added) https://www.gov.uk/government/.../20160111_Consultation_principles_final.pdf

Response to Consultation Questionnaire

Responses to Part I – Identifying the issues and defining RTA related soft tissue injuries

Summary of Part I

- We disagree with the proposal to remove damages from those injured by the unlawful actions of others.
- The government does not define what a 'soft tissue injury' is and wrongly lumps all such injuries together, whether they are 'whiplash' injuries or otherwise.
- The government shows its misunderstanding of the issues by describing injuries as 'significant' while simultaneously trying to treat them as 'minor' injuries.
- The government's heavy handed proposals would overturn a basic and long established principle of English law – that the 'polluting party' pays when they are found to be at fault.
- The government unfairly implies that medical professionals cannot be trusted to diagnose injuries accurately.
- The government is wrong to base the severity of an injury purely on its duration. Instead, the government should appreciate the complexity of such injuries and the numerous factors that contribute to their severity.

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 claims?

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

36. There is no definition offered in paragraph 17. We assume the definition on which a view is being sought is actually at paragraph 23. The definition at paragraph 23 comes from the Road Traffic Accident (RTA) protocol. It is, firstly, circular: 'soft tissue injury claim means a claim...where the significant physical injury caused is a soft tissue injury...'. Secondly, given its reference to a 'significant physical injury', it is very difficult to see how this definition could form a sound basis for removing damages.
37. We strongly disagree with the proposal to remove damages from those injured by the unlawful actions of others and with the grounds upon which the government proposes this change.
38. The definition does not work. It lumps all soft tissue injuries together, whether they are 'whiplash' injuries or otherwise, without actually defining what a 'soft tissue' injury is. Whiplash is a specific injury and if whiplash is the aim of the government's reforms then it should be specifically targeted rather than the reforms impacting on all soft tissue injuries. It is clear from the Impact Assessment (paragraph 1.4) that the proposed reforms would apply to all neck and back soft tissue injuries, as well as 'whiplash' type injuries.
39. That the definition is ill-thought-through is demonstrated by its description of the injuries in question as 'significant', despite the whole position of the government being that injuries to be taken into the small claims track through an increase in the small claims limit are 'minor'.

40. It is simply wrong to imply (in paragraph 17) that claimants currently do not have a direct financial responsibility for their claims as, in fact, there are numerous costs penalties applicable in relation to the conduct of the claim, non-acceptance of reasonable offers and so on. The risk of being responsible for their own costs is part of the current system and incentivises reasonable behaviour by both parties.
41. In the Impact Assessment it is stated that a ‘negative externality’ is part of the economic rationale for government intervention (paragraph 1.18). It is argued that, because it can be challenging for defendants to disprove soft tissue injuries, it may be cheaper for defendants to accept liability without contesting the claim. This is wrong on a number of levels. It is wrong to imply that soft tissue injuries are too difficult to diagnose. Medical experts do this as a matter of everyday routine. When defendants wish to challenge medical opinions, they can do so and they often do, either by putting questions to the claimant’s expert or obtaining their own expert evidence. It is also wrong to imply that defendants are, in some way, powerless and unable to do anything other than pay out when they are quite able – if they believe a claim to be without medical, or other, merit – to challenge it.
42. The government’s rationale does not stack up. To tackle the ‘information failure’ identified (in Impact Assessment paragraph 1.17 and 1.19), the government could easily focus its intervention solely on the issue of medical reporting, rather than on heavy handed proposals which overturn a basic tenet of English law – that the ‘polluter pays’ principle was supported by Lord Justice Jackson when he spoke of the ‘asymmetric relationship’ between the injured and the insurance industry²⁷ and underpinned when the move to increase the small claims limit was rejected in Scotland²⁸.

Question 2: Should the definition in 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.

43. No. The definition should not be extended, if anything it should be narrowed (as addressed above).
44. In the consultation, it is asserted that ‘diagnosis of psychological trauma is generally based on a subjective description of symptoms’ (paragraph 27). As with soft tissue bodily injuries, the government seems to be implying that psychological trauma resulting from an RTA may not be a ‘real’ injury. To do so undermines the professionalism of independent medical experts, as well as accepted medical theory. The implication that a psychological injury is based on an imprecise process and science is not explained or justified. This implication cannot be condoned.

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?

45. It is absurd to attempt to set parameters based on either six or nine months’ duration as neither is a good outcome for the injured party. In either case, the claimant will get nothing, or a derisory amount at best, in return for what may be nearly a year in pain. The government is also seeking to oversimplify the inherently complex personal injury (PI) claims process.

²⁷ <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf> p.184

²⁸ Thompsons Solicitors ‘Reforming the Soft Tissue Injury (‘whiplash’) Claims Process’ Consultation Response – Executive Summary, p.4

46. It is wrong to judge ‘severity’ of an injury solely on its duration, as the consultation seeks to do. What is as pertinent is the level of symptoms and also the specific impact of the injury on a person – its effect on their working and personal life as well as how long that impact lasts. For example, a back injury to a factory worker or manual labourer may prevent them from working. The loss of amenity is therefore much greater than an equivalent injury for a person with a sedentary occupation and the level of compensation should be evaluated accordingly. The same applies to the hobbies and recreations of the injured person – the impact of the same injury will be very different for a claimant who regularly exercises or competes in sporting activities compared to a less active person.
47. In relation to minor neck injuries, for instance, the Judicial College Guidelines (JCG) 13th edition state:
- “This bracket includes minor soft tissue injuries. Whilst the duration of symptoms will always be important, the level of award will also be influenced by factors such as:
- the severity of the neck injury;
 - the intensity of pain experienced and the consistency of symptoms;
 - the presence of additional symptoms in the back and/or shoulder and/or referred headaches;
 - the impact of the symptoms on the injured person’s ability to function in everyday life and engage in social/recreational activities;
 - the impact of the injuries on the injured person’s ability to work;
 - the extent of any treatment required;
 - the need to take medication to control symptoms of pain and discomfort.”
48. Within that bracket, the JCG recognise the wide spectrum of injury and suggest awards of between “a few hundred pounds to £2,050” for cases which resolve within three months and, at the other extreme, awards of up to £6,600 for injuries which have led to more significant disability for a period of up to two years.
49. These are only guidelines, and in the existing system there is also of course scope for the individual impact of injury on the particular claimant to be considered by a judge who will be able to calibrate the award of general damages more precisely to achieve a fair result. This mechanism was scrutinised for instance in Gurtej Pawar v JSB Haulage Ltd [2016] EWCA Civ 551 where a recorder’s decision was approved by the Court of Appeal: “In placing the appellant’s case in [bracket 7 (A)] b (i) [of the JCG] the recorder took account of the serious nature of the injuries but was bound to place it at the lower end of the bracket given the pre-existing degenerative changes. There may be situations where even where symptoms have been accelerated, the seriousness of the injury is such as to take the award up to the top of category (i) but this is not such a case.”
50. The JCG are praised by Jackson LJ in his foreword to the latest version, noting that the book “now constitutes a well-established and authoritative work on the levels of general damages in personal injury cases. It is certainly the first port of call for me whenever I have to assess, or re-assess, general damages in such cases. This is probably true for all judges and practitioners in the field.” Whilst they are always going to be under review, there has been no serious suggestion by the judiciary or independent commentators that the system they underpin is not functioning effectively and fairly.

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

51. No. If either of these pernicious options must be chosen, the scope of the minor injury should be as narrow as possible.

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

Summary of Part 2

- Compensation for pain, suffering and loss of amenity (PSLA) should not be removed for so-called ‘minor’ claims.
- Independent experts – judges – currently set the level of compensation and this system should be retained rather than enable politically motivated ministers to dictate compensation levels.
- The government’s assumption 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’ is entirely unsubstantiated and ignores the very significant injuries that many RTA victims sustain.
- The government offers no evidence whatsoever to support its statement that the removal of PSLA would benefit motorists through lower insurance premiums. It is a statement of hope that bears no relation to the commercial behaviour of insurers.
- To fix the amount of compensation for PSLA at £400 and at £425 if the claim contained a psychological element is entirely arbitrary, lacks any explanation and would be insulting to injured people if enacted.
- The vast majority of injured people claim promptly and solicitors do not encourage late claims. The current three year limitation period helps to ensure there is no ‘compensation culture’.

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?

52. Compensation for pain, suffering and loss of amenity should not be removed for what are wrongly and dismissively described as ‘minor claims’.
53. Already, claims involving injuries which are truly minor attract no damages at all under the principle of *de minimis non curat lex*. A claim must involve an actionable injury as the insurers were able to successfully argue in the pleural plaques case of Rothwell²⁹.
54. At paragraph 39 of the consultation paper, it is stated that the amount of compensation paid for ‘minor’ claims is ‘currently too high’. Yet the level of compensation is set by judges and has been accepted as fair, or indeed as being too low³⁰, for decades. A government, with political motivations, substituting its judgment for that of independent judges sets a dangerous precedent: if this is the bottom end and the starting point for assessing damages, massive reductions here will surely drag all other damages down too.
55. The 2012 Legal Aid, Sentencing and Punishment of Offenders Act (Part 2) incorporates recommendations 9, 14 and 94 of the Final Report on Civil Litigation Costs by Sir Rupert Jackson. These recommendations form part of a coherent package of reforms, one element of which was that general damages should rise by 10%.

²⁹ Johnston v Nei International Combustion Ltd; Rothwell v Chemical & Insulating Co Ltd & Ors; Topping v Benchtown Ltd (Formerly Jones Bros Preston Ltd); Grieves v Ft Everard & Sons & Ors [2007] UKHL 39

³⁰ See <http://www.lawcom.gov.uk/wp-content/uploads/2016/08/No.140-Damages-for-Personal-Injury-Non-Pecuniary-Loss-A-Consultation-Paper.pdf>

56. As Lord Diplock said in *Wright v British Railways Board* [1983] 2 AC 773 ('Wright'), 785A-B, the Court of Appeal 'with its caseload of appeals in personal injury actions' is 'generally speaking, the tribunal best qualified to set guidelines for judges trying such actions, particularly as respects non-economic loss'. Lord Woolf MR said when giving the judgment of the court in *Heil v Rankin* [2000] EWCA Civ 84, [2001] QB 272 ('Heil'), para 5, 'it is clear that Lord Diplock also intended the Court of Appeal to have the responsibility for keeping guidelines up to date'.
57. As Lord Woolf MR went on to explain, such an exercise should be carried out by reference to the 'existing legal principles as to the assessment' of damages, which, in the case of general damages, involves the task 'of converting into monetary damages the physical injury, deprivation and pain and to give judgment for what it considers to be a reasonable sum' – see *Heil*, paras 20 and 23, quoting Lord Pearce in *H West & Sons Ltd v Shephard* [1964] AC 326, 364.
58. At paras 28-9 of *Heil*, Lord Woolf MR then emphasised 'the continuous responsibility of the court' both 'to set damages', and 'to keep the tariffs up to date'. He then emphasised that changes could be justified by 'changes which take place in society', and should by no means be confined to changes in the value of money. Again this reflects what Lord Diplock said in *Wright*, 785C, that 'guidelines should be altered if circumstances relevant to the particular guideline change'.
59. These observations make it clear that the court has not merely the power, but a positive duty, to monitor, and where appropriate to alter, the guideline rates for general damages in personal injury actions.
60. The consultation document makes several cumbersome and unsubstantiated statements in relation to this element of the proposals. To suggest, sweepingly, 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' (paragraph 35) is entirely unsubstantiated.
61. We have seen numerous examples of RTAs causing injuries which most right-minded people would not consider 'minor' but would, should the small claims limit be increased, be treated as such. The use of the term 'minor' to describe car crashes (such as the one illustrated below) and the injuries caused as a result shows a disturbing level of ignorance or callous disregard about the experience of many claimants.



62. In one example³¹, a bus driver was badly injured and taken by ambulance to hospital after his bus was involved in an RTA which left it embedded in the front of a shop (see image below). The driver sustained severe bruising to his head and body, particularly his left leg, along with intense swelling. The swelling to his left leg was so bad he was in line for surgery to release a build-up of fluid.

The driver said: "The scene of the accident was devastating, the front of the shop was completely destroyed and a number of passengers were left hurt and panicked. The injuries I sustained were very painful and, even now, a year later, I have still not fully recovered from all of them."



63. Not for the first time, the government also states (paragraph 37) that the removal of compensation for PSLA would benefit consumers through reduced motor insurance premiums yet provides no evidence for this. In its press release to announce these proposals, the Ministry of Justice led with the suggestion that the reforms 'could' save consumers 'about' £40 per year. Given premium reduction is one of the main 'carrots' for consumers about to be robbed of their right to free legal advice, it is surprising that such vague language is being used.
64. It is noteworthy that when plans to increase the small claims limit were first set out in the 2015 Autumn Statement, a reduction of £50³² was referred to and no explanation has been given for this now being £40. Significantly, in response to a Parliamentary Question, the government has stated³³ that it will not intervene in the market to force insurers to pass on savings to their consumers. So, the 'promise' is only as good as the insurers' word and given their own figures show they have made a cumulative saving of at least £8bn over the last five years yet premiums are higher now than they were in 2010³⁴ (and have risen by 17% in the last year alone³⁵), their word seems to mean very little.

³¹ <http://www.thompsons.law.co.uk/road-traffic-accidents/proposed-changes-small-claims-limit-sparks-complaints.htm>

³² <https://www.gov.uk/government/news/spending-review-and-autumn-statement-2015-key-announcements>

³³ Parliamentary question 20373 <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-12-16/20373/>

³⁴ As per the AA British Insurance Premium Index, Car Insurance Shoparound Average Trends – <http://www.theaa.com/newsroom/bipi/car-home-insurance-news-2016-q3-bipi.pdf> (p10)

³⁵ <https://www.confused.com/on-the-road/cost-of-motoring/what-the-price-index-means-for-you>

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

65. No, a fixed sum should not be introduced. See our previous response regarding judges' assessment of severity and compensation.

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.

66. £400 is an extraordinarily low figure, representing a 78% reduction on current Judicial College Guidelines figures. It is entirely arbitrary and we are bemused as to the process which led the government to reach this figure. It is reminiscent of the shady backroom deal done between the government and insurers to amend LASPO to impose legal costs on mesothelioma sufferers³⁶. We already have a fair and robust system for setting compensation – that is by the Judicial College Guidelines and overseen by the Court of Appeal and that, not just any arbitrary panel, should be the determinant.

67. To provide an uplift for psychological injury of just £25 is so low as to be insulting.

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 reasons on whether the 'Diagnosis' approach should be used.

[and]

Question 9: If either option to tackle minor claims is pursued, please give your views on whether the 'Prognosis' approach should be used.

68. While a 'prognosis' approach would be marginally preferable, neither this approach nor the 'diagnosis' approach would be appropriate. We should stick to the system already in place and working effectively.
69. A 'diagnosis' approach would have negative consequences for claimants who need a medical report earlier than six months in order to pay for rehabilitation or to recoup loss of earnings. Its implications for claimants on low incomes, or in informal or temporary work who cannot easily afford to be out of work would be severe.
70. The consultation paper expresses concern that the 'prognosis model' would allow for doctors to inflate prognosis periods to beyond the period defined as covering 'minor' RTA related soft tissue injury claims. This is an unwelcome, unwarranted and unsubstantiated attack by the government on the integrity of doctors.

³⁶ <http://www.thompsons.law.co.uk/personal-injury/government-deal-insurers-comes-to-light.htm>

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.

71. We challenge the premise of this question: we have seen no evidence of claimants illegitimately or problematically bringing late claims and the government certainly has not produced any.
72. In our experience, the vast majority of injured people claim promptly and solicitors do not encourage late claims. The three year limitation period for personal injuries actually helps to ensure there is no ‘compensation culture’ as it encourages sensible, properly thought through action, rather than a race to make claims more quickly than would be advisable.

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

Summary of Part 3

- We do not agree with the tariff figures proposed, in part because they are based on a misunderstanding of severity – one based purely on injury duration.
- For psychological injuries, the maximum uplift of £100 demonstrates a callous indifference to people who may have a serious injury, such as clinical depression, lasting up to two years.
- Damages in all cases should be based upon the assessment of judges.
- The proposal to enable a 20% judicial discretionary uplift is derisory.

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

73. We do not agree.
74. The consultation document claims the proposed tariff system provides ‘an even progression...dependent on the severity of the injury’ (paragraph 25). We restate our concerns over the duration of an injury being the principle measure of severity and therefore of compensation. We also disagree that the proposed increments are appropriate. They would see swingeing reductions on current levels of damages – as set, appropriately, by judges – from 78% in the lowest band to 20% in the highest band.
75. We restate our concern that the proposed tariff amounts in relation to psychological injuries would be insulting to the victims of those injuries. Even in the highest band, claimants would receive just £100 uplift for the psychological element of an injury lasting up to two years. These are not appropriate levels of damages for injuries that are long-lasting and often severe.

76. It is noticeable throughout the consultation paper that the government is avoiding making clear exactly what kinds of injuries would be affected by its proposals. In the case of psychological injury, at paragraph 63 it is stated that the award could increase to £100 for the vaguely-titled ‘more serious injuries’. It is relevant to bear in mind that to receive compensation for psychiatric injury, the claimant must show that their condition goes well beyond sub-clinical anxiety or stress and that they have suffered a recognised psychiatric disorder. An example of this kind of injury might be clinical depression, which can have long lasting and serious effects on the injured person and their family. Who but the most callously indifferent could think that £100 is adequate compensation for such human suffering? Those who have sustained such an injury would not consider it ‘minor’ and we argue that any reforms to the tariff should be based on impact in its widest sense, not just by simplistically measuring duration.
77. At paragraphs 55 and 56 the government is attempting to justify its proposed tariff by comparing it to jurisdictions in Europe. However, our expertise in running claims in foreign jurisdictions tells us that the government is guilty of cherry picking and misusing comparisons to its advantage. Aside from the fact that not all the European examples cited use tariff systems like the one being proposed for England and Wales, it is also true that the systems in Spain, Italy, France and others would still produce much higher levels of award than being proposed on page 21 of the consultation paper.
78. In citing examples from Europe, the government, either through ignorance or wilful disingenuity, is not comparing like for like. In other jurisdictions, for example, no fault schemes prevent innocent victims suffering as a result of the application of tariff systems (a protection that is not being proposed in the government’s plans). It seems that the government is unwilling to commit to a full no fault system but, in so doing, would be giving people the worst of both worlds – a system which restricts and narrows compensation and pushing claimants into Before The Event (BTE) systems run by insurers. When a critical comparative analysis is applied it is clear that the government’s proposed system would provide worse outcomes than others operating in Europe.
79. We note at paragraph 62 that the government has used data from the insurers’ in house Colossus and Claims Outcome Advisor (COA) systems. This is highly flawed and should not be used as the basis for such serious changes in the tariff of payments.
80. Colossus data is not remotely independent. It is data provided by insurers themselves who have a clear financial imperative to drive down the damages they pay. They have consistently refused to share it or discuss it with claimants. The government should review its tariff figures using data collected by the courts system or another independent source. Even in the consultation document (footnote 16), the flaws of Colossus are made clear where it is stated that the data captures part of (just) five different insurers’ claims data, of which “only three are one of the top 20 insurers” [sic] based on gross written domestic premiums. There is therefore a high risk that the data provided is simply that selectively provided by insurers. Even where Colossus data is combined with COA data, this still provides an imperfect picture of the insurance data available whilst failing to provide any balance by way of judicial or claimant data.
81. It is noted that there is no provision for an inflationary increase in the tariff as it stands. At present, judges are able to adjust awards to reflect cost of living increases. There must be a similar mechanism built into any tariff system or the (already tiny) awards proposed will dwindle away.

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.

82. The basis for this question is shaky as, in practice, the majority of claims will never get before a judge. We argue that all cases should be based upon damages as assessed by judges.
83. As per our comments at paragraphs 47-50, that the Judiciary should be able to set compensation at its discretion. We see no reason why that discretionary uplift should be limited to 20% as the Judiciary is in the best possible position to recommend a level of compensation appropriate for the circumstances of each individual case.
84. This is, again, a fig leaf measure transparently designed to apply a veneer of fairness to a fundamentally harsh and unjust denial of proper compensation. 20% of a derisory sum is not any genuine mitigating factor. And how could it be worth the candle for an unrepresented claimant to pursue an uncertain appeal for the sake of at best a few hundred pounds? Perhaps that is exactly the thought behind the proposal?

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

Summary of Part 4

- *The small claims track limit should not be raised at all.*
- *Nor should the limit be raised for all personal injury cases, including employers' liability cases. This cannot be justified and even the consultation paper itself objectively fails to do so.*
- *Senior and influential members of the judiciary have consistency recommended that there is no case to include all personal injury cases into the small claims track.*
- *The Transport Select Committee's 2013 recommendation against increasing the small claims limit is still valid today, yet the government has failed to show how circumstances are now different to make a change appropriate.*
- *To bring all PI cases into the small claims track would hit the people 'just about managing' the hardest; those whom the prime minister claimed to represent when she took office.*
- *Employers' liability cases are very different to RTA cases and are wholly inappropriate for the small claims track.*
- *It is wrong for the government to state the small claims limit has not been changed for 25 years and therefore this line of argument for making a change now should be ignored. A 1999 review of the threshold led to a substantial effective increase as the method for calculating the threshold changed.*
- *Increasing the small claims limit would increase the number of Litigants in Person. As well as implications for the smooth running of the justice system, this would impair access to justice and further exacerbate the already highly asymmetric relationship between claimant and insurer-backed defendant.*
- *The government should ban Claims Management Companies from personal injuries cases.*

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

85. The small claims track limit should not be raised for the reasons already set out in detail in the Introductory Remarks above.
86. In particular, it most certainly should not be raised for all personal injury cases including EL. That is a change which the consultation paper does not even begin to attempt to justify.
87. The government concedes the flaws in its own proposal, which is hardly surprising given the views of Jackson and Briggs (LJ). Just 12 months ago (January 2016), Jackson LJ said in a speech to the Insolvency Practitioners Association that 'the fixed costs regime for fast track personal injury cases is working reasonably well'³⁷. In Briggs LJ's Civil Courts Structure Review he noted that PI was one of the few remaining 'significant areas where the cost of legal representation does not lead to the result that individuals are forced either to litigate in person or to forgo access to justice' (interim report)³⁸ and that a fixed recoverable costs regime in PI has 'been a powerful promoter of access to justice' (his final report)³⁹.
88. It is the very people 'just about managing', for whom the prime minister (when she stood on the steps of Downing Street in July) and the chancellor, in his latest Autumn Statement, pledged to work, who have already borne the greatest costs of the government's changes to civil legal aid and family law. As Briggs LJ alludes to, personal injury represents a rare haven of democratic justice. If it is to be destroyed on the whim of the government at the behest of the insurance lobby, what is left for the average working person in a system that is meant to work equally for all?
89. These most senior of judges also explain how personal injury victims are in an 'asymmetric relationship' with their opponents. If employers' liability cases were included in the small claims track, the government would be pitting unrepresented workers against multinational insurers and their lawyers. Preventing injured employees from seeking legal redress where their employers have broken the law would not help industrial relations or productivity.
90. The consultation paper mentions the Transport Select Committee's (TSC) 2013 investigation (paragraph 75) and notes that at that time the government decided against increasing the small claims limit. Yet the government has not explained what facts have changed since that investigation to prompt its latest proposals.
91. The 2013 TSC report⁴⁰ rightly argued that access to justice is likely to be impaired, particularly for those who do not feel confident to represent themselves in what will be, to many, a complex and intimidating process (their paragraph 50). Nothing has changed since that report and it is still the case today.

³⁷ Page 4 <https://www.judiciary.gov.uk/wp-content/uploads/2016/01/fixedcostslecture-1.pdf>

³⁸ Paragraph 5.45 – <https://www.judiciary.gov.uk/wp-content/uploads/2016/01/CCSR-interim-report-dec-15-final-31.pdf>

³⁹ <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>

⁴⁰ <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmtran/117/117.pdf>

92. In its report, the TSC also argued that increasing the limit for whiplash claims might create a gap in the market for claims management firms (their paragraph 51). Given the government's consistent and justified attack on the activities associated with claims management companies, such as cold-calling and spam text messages, it seems surprising, in the extreme, that they should reconsider any policy which might encourage their activity.
93. We support an outright ban on all CMCs in personal injury cases.
94. It is clear that employers' liability cases are very different types of case to RTAs (see the detailed reasons and also the ten points set out in the Introductory Remarks). For these reasons EL cases should not be included in any proposed extension to the small claims track. We indicated in the introduction that there would be an impact on health and safety at work if EL were brought into any expanded small claims track. Quite simply, this would create an enforcement desert. The effectiveness of health and safety at work legislation and monitoring has already been hugely diminished by cuts to HSE budgets, cuts to trade union facility time, and the removal of civil liability for breaches of regulations through Section 69 of the Enterprise and Regulatory Reform Act. Given the Health and Safety Executive (HSE) is only able to look at fatalities and the most serious injuries in the workplace, it is primarily left to solicitors to enforce the persistent, daily breaches of health and safety law that the HSE cannot reach. Policing health and safety legislation is too late if it is only being done when major and fatal injuries occur. Removing solicitors from the process would remove a crucial safeguard for vulnerable workers and would be a charter for the most irresponsible employers in the least unionised workplaces whose only incentive to keep workplaces reasonably safe at the moment is to avoid claims and increased insurance premia.
95. In relation to lower-value clinical negligence (CN) claims, the government suggests at paragraph 89 that the small claims limit might also be raised for such claims despite its acceptance at para.91 that such claims are more complicated. We would submit that CN cases, like EL claims, form a very different class of case to RTAs. Significant differences include:
- i. the far greater complexity of liability issues in CN cases even of lower value. Such claims might, for instance, include fatal claims for babies who die shortly after birth.
 - ii. the strenuous way in which these claims are defended
 - iii. the extent, complexity and cost of expert reports including reports required to establish breach of duty which a LiP would need to fund himself in the small claims track
 - iv. the lack of BTE cover for CN
 - v. the lack of any evidence for fraudulent or exaggerated CN claims.

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?

96. It is simply untrue that the small claims limit has not been raised for 25 years. And, even if it were true, this would not be a reason to change it now. Any alteration should be justified by up to date evidence and not simply on the grounds of being 'long overdue' (paragraph 94).
97. As Jackson LJ confirmed in his Final Report, the relevant reference point is 1999, not 1991⁴¹. A review of the threshold took place in 1999 with the introduction of the Civil Procedure Rules (CPR). This led to a substantial effective increase in the small claims limit in that the method of calculating the threshold was changed so that instead of the total value of the claim, only general damages (for pain and suffering) were taken into account in calculating if a case had a value of, or greater than, £1,000. Any claim with general damages of less than £1,000 has fallen into the small claims track since 1999.
98. We refer to the position of Jackson LJ that the small claims limit for personal injury claims should not be increased unless/until an index-linked increase from the 1999 baseline justifies an increase to £1,500. Applying the Consumer Prices Index (CPI) measure of inflation used by the government to £1,000 from 1999 would give a figure of £1,413⁴² in 2016 which is still below the £1,500 Jackson LJ referred to. Accordingly we agree with the position that no increase to the small claims track limit is justified at this time.
99. We are appalled that the government is even considering increasing the small claims limit in PI cases above £5,000. We have set out in detail why an increase to £5,000 is wholly wrong. It follows that any further increase will make a bad outcome for working people much worse.

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.

100. We agree with the consultation paper (paragraph 98) that raising the small claims limit is likely to increase the number of litigants in person (LiPs), but we disagree with the government's apparent view that this does not represent a problem.
101. While the small claims track may be designed to be navigable for LiPs (paragraph 99), the fact remains that personal injury cases – which may fall into the small claims track if the government makes the changes it proposes – are complex and clearly unsuitable for LiPs.
102. PI cases usually involve complex issues of causation, liability and evidence and are too complex for most people to handle without help from a solicitor.

⁴¹ <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>

⁴² See <http://www.whatsthecost.com/cpi.aspx>

103. Similarly, EL cases frequently involve complex issues of liability and causation and require detailed knowledge of the different Regulations governing Health and Safety Law. For example, Thompsons represented the claimant in the case of *Smith v Northamptonshire County Council [2009] UKHL 27*⁴³ in the House of Lords where legal argument took place over the interpretation and application of the Workplace Regulations. This is typical of the sort of complex issues arising in EL cases. All knowledgeable parties acknowledge that EL cases involve issues of significantly greater complexity than, for example, those RTA cases involving a straightforward 'rear end shunt'. In EL and PL cases insurers rarely admit liability within the pre action protocol period and, when they do, they frequently raise arguments of contributory negligence which have no basis in fact or law, but which require further investigation which can only be properly carried out with the support of a solicitor.

104. If the government had thought to consult the judiciary, it would have realised that an increase in LiPs would have implications for the courts system and contribute to dysfunctionality. Lady Justice King, in her judgment on *Agarwala v Agarwala*, called for extra powers to curb the activities of litigants in person who inundate the courts with communications⁴⁴. In the postscript, King LJ said:

'The refusal of either party to accept any ruling or decision of the court has meant that the court staff and judge have been inundated with emails, which they have had to deal with as best they could, with limited time and even more limited resources.'

[...]

*'Whilst every judge is sympathetic to the challenges faced by litigants in person, justice simply cannot be done through a torrent of informal, unfocussed emails, often sent directly to the judge and not to the other parties. Neither the judge nor the court staff can, or should, be expected to field communications of this type.'*⁴⁵

105. The comments of the former lord chief justice, Sir John Thomas, still ring true:

*'All my colleagues who do cases with litigants in person say it significantly added to the time [the case takes]. The saving you get by not having lawyers has to be counter-balanced by the increase you have to have in court time'*⁴⁶

106. It is surprising, therefore, that the Impact Assessment ignores the likelihood of an increased number of litigants in person impacting upon the resources of the courts and tribunals system. On one hand the assessment says that the financial impact on HMCTS would be cost neutral (paragraphs 2.30 and 2.47). On the other it estimates that the policy would create an additional 20,000 LiPs. Yet nowhere is the impact of these extra LiPs on the courts system assessed.

107. There is, undoubtedly, some information available for LiPs (as stated in paragraph 100). But no amount of paperwork will make up for the reality of taking a case through a legal process, possibly including representing yourself in a courtroom. No number of self-help guides will rebalance the inherent asymmetry of power between the well-resourced defendant and the LiP going it alone.

⁴³ <http://www.bailii.org/uk/cases/UKHL/2009/27.html>

⁴⁴ As report in the Law Society Gazette – <https://www.lawgazette.co.uk/law/judge-calls-for-lip-powers-after-court-bombarded-with-emails/5059119.article>

⁴⁵ <http://www.bailii.org/ew/cases/EWCA/Civ/2016/1252.html>

⁴⁶ <https://www.lawgazette.co.uk/litigants-in-person-putting-pressure-on-courts-system--lci/5040663.article>

- I108. Insurers clearly feel the same, which is no doubt why they do not entrust the defence of claims to their insured policyholders acting as LiPs. This is blatant hypocrisy by insurers. They suggest that claimants be left alone to act as LiPs whilst themselves refusing to do the same for their insured defendants. Instead they use experienced claims handlers and invariably instruct solicitors and counsel in litigation.
- I109. While the consultation document makes passing reference to the role of a judge in ensuring fairness, this ignores the fact that the LiP has to get the case before a judge in the first place – only a tiny minority of cases make it to a judicial hearing. The LiP is often overwhelmed by the process and the expertise of the defendant's team and many capitulate well before the case gets to the courtroom. It also ignores the fact that English judges in the system do not take an inquisitorial approach, unlike in other European jurisdictions. While they seek to ensure fairness, their role is not to actively investigate the case for the LiP, present the case for him/her or to step into their shoes to scrutinise the defendant's case.
- I110. The consultation document, at paragraph 80, seems to be applying the argument that the precedent of taking lawyers out of the system has been set in jurisdictions such as France. Yet it is not clear here if the government is really suggesting that, in the case of the Juges de Proximité and the Tribunaux d'instance, people must pursue their claims without legal representation. If so, this would be a falsehood. It also ignores the importance of the right to 'reasonable' compensation under the European Union which helps to encourage suitable levels of damages, irrespective of the particular system being used. The UK's departure from the EU would mean this would be lost and, on the basis of these proposals, would be unlikely to be replaced.
- I111. At paragraph 99 it is stated that 'Other EU countries have procedures in place to support claimants in resolving their soft tissue injury claims without legal representation'. This may be true but it should not be concluded from this that the use of lawyers in the EU is uncommon. In fact the opposite is true: the use of lawyers is the norm. Rather than trying to justify its proposals with cherry-picked comparisons to European systems (ironic given the process of separating UK systems from the EU's), the government should accept the fact that, if its proposals were enacted, injury victims in England and Wales would suddenly suffer very badly in comparison to measures of access to justice and fairness seen elsewhere in Europe and elsewhere in the UK.

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?

- I112. We support a complete ban on claims management companies in PI.
- I113. We would not encourage the use of McKenzie Friends in PI in any significant capacity. They are unqualified, unregulated and uninsured. They have no rights of audience, cannot represent parties to proceedings and are no substitute for a professional solicitor.

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

Summary of Part 5

- The proposed ban on pre-medical offers should apply to all cases.
- The tactical use of pre-med offers by insurers, to encourage early and low settlements, is one of the main sources of unfairness in the personal injury claims process and a significant perpetuating factor of the idea that there is “easy money” in whiplash claims.
- The insurers should be held accountable for their actions and take responsibility for any fraud they do encounter. If they doubt the veracity of a claim they must challenge it or report it.

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

I14. No. The ban on pre-med offers should apply to all cases. It is an abhorrent practice, for all the reasons the government sets out in its consultation paper. That it even needs to consult on something so obviously appropriate as a ban is perplexing.

I15. The tactical use of pre-med offers by insurers encouraging early (but low) settlements is one of the main sources of unfairness in the personal injury claims process. The insurers have been crying “fraud” in their campaign but have continued the practice of pre-med offers which can only encourage the idea that there is “easy money” in whiplash claims. We agree with the comments in paragraph 107 of the consultation document. We want fraud eradicated and would therefore welcome a ban on pre-medical offers in RTA related soft tissue injuries as proposed. If insurers doubt the veracity of a claim, they must challenge it. The government’s current plan seems to reward the insurers for their indolence or incompetence in failing to root out and challenge what we believe to be the very small number of fraudulent or exaggerated claims.

I16. The ban should not be confined to RTA cases but should extend to all PI cases.

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

I17. No. There should be no exemptions for all the reasons we set out below.

Question 19: How should the ban be enforced?

I18. Enforcement should not be difficult. In the absence of a formal settlement agreement based upon an independent medical report, the insurer should be debarred from relying on the settlement as concluding the case. This means a claimant would still be able to bring his/her claim in the courts and disregard the pre-medical settlement. We would recommend that, in those circumstances, the defendants should not be able to set off any previous pre-medical settlement against the court judgment or later settlement. This will act as a suitable disincentive to insurers and prevent them from continuing this abhorrent practice.

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

Summary of Part 6

- The referral source should not be included on the Claims Notification Form.

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

I19. We do not agree with the referral source being included on the CNF. This proposal seeks to deal with disreputable CMCs supporting fraudulent or exaggerated RTA claims. This has nothing to do with unions supporting genuine workplace injury victims. The answer to the CMC problem is to ban CMCs from PI, not to punish unions or other innocent parties.

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)?

I20. This is not necessary. The relevant rules on QOCS are found in Practice Direction 44.13 and 44.17.

I21. A person attempting to make a fraudulent claim cannot discontinue with impunity in accordance with Practice Direction 44. If a claim is found to be dishonest, the court has powers to determine attributable costs. As such there are already ample powers to deal with this issue. No problem has been suggested or identified in using these existing provisions.

Responses to Part 7 – Call for evidence on related issues

Summary of Part 7

- No evidence is provided to show that late claims notification is a problem.
- A system of early claims notification is unnecessary and requiring it would only hit the vulnerable (potential) claimant or force people to bring a claim quickly and before they have fully considered their options.
- On restrictions over the recoverability of disbursements, the suggestion that a fee of £180 for a medical report should be paid by the claimant in order to deter minor claims is shocking. We strongly disagree.

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).

I22. We are not generally involved in credit hire issues and would only comment that, like vehicle repairs, it is a further example of insurer-led poor practice.

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?

I23. We have no further comment to make.

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

I24. We have no further comment to make.

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

I25. No. In our experience, this is not a problem. The burden of proof is on the claimant to prove his/her claim and if he/she can still do so, within the time period allowed by the Limitation Act, he/she should be entitled to bring that claim.

I26. The idea of an early notification system is simply an attempt to refuse genuine claims or force people into bringing claims even if they prefer to take some time to think through the possible implications. In many non-unionised workplaces, injury victims are frightened to claim against their employer until they leave that employment. Requiring early notification as proposed would once again hit the most vulnerable.

I27. Insurers have generated huge volumes of claims through their own early notification processes and must not be allowed to transfer to any other party the details of a person injured in an accident.

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 claims should be presumed to be ‘minor’.

I28. The outcome of this reform would be that, if you do not seek immediate medical treatment for an injury, there would be a “rebuttable presumption” that your claim is minor. That is absurd. It seems to add an unnecessary layer of complexity to claims to defeat a supposed problem of late notifications for which no evidence of its existence has been advanced. The consultation document accepts at paragraph 138 that this may not be workable, may in fact encourage claims which would not otherwise have been made and unnecessarily burden an already squeezed NHS. We agree. For example, we already see in CICA cases examples of people attending their GPs, not because of medical necessity but because the system requires it.

I29. We would suggest that people should be given time to consider the severity of their injuries and to decide in the fullness of time whether in fact they wish to make a claim. People should use the NHS for medical reasons, not as a compulsory step in order to enforce their legal rights.

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:

I30. We oppose all these options. Our view is that it should be left to courts to control costs by awarding reasonable damages for the cost of treatment necessitated by injuries caused.

I31. The consultation states there is “[a]necdotal evidence” (paragraph 142) that relationships between solicitors and insurers with private rehabilitation organisations are ‘being exploited to exaggerate the rehabilitation needed in order to increase the profit from the claim’. Regrettably, it is a theme of this consultation to rely on anecdotal evidence, conjecture and prejudice rather than providing any facts to support its thrust. If defendants consider that rehabilitation is being exploited, they can – and should – make the appropriate reference and applications to stamp this out.

I32. All rehabilitation must be independent and only used if recommended by a doctor or medico-legal expert.

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

I33. As above, we have seen no evidence that this is a significant problem.

I34. As with the issue of PI fraud generally, insurers could deny claims, refuse to pay out, and report them to the police if they suspected fraud or exaggeration. Insurers could be much more open and transparent about the real level of fraud they are seeing and, as previously stated, we also encourage a ban of CMCs in PI.

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?

I35. The suggestion that the fee of £180 for a medical report should be paid by the claimant in order to deter minor claims is shocking. We strongly disagree.

I36. Aside from the practical fact that a claimant will not often know how ‘minor’ (or otherwise) their claim is until they have seen the medical report, given that the awards for general damages in RTA cases are going to be slashed under these proposals, and other injury victims will be left unrepresented or with increased deductions from their damages to pay lawyers, requiring the claimant to pay an unrecoverable amount which might be half the damages award, appears to be a straightforward attempt to drive victims away and leave them with nothing from a rigged system.

I37. It is again striking that no thought has been given to the position of children and other protected parties in this proposal. Must a child pedestrian knocked down by a drunk driver now fund their own medical report without any prospect of recovering its cost even when he/she has proved their claim against the driver’s insurer?

I38. This callous and unnecessary approach is reminiscent of the government's application of fees at the Employment Tribunal, a policy which has effected a severe drop in the number of cases taken to the Tribunal – down by 9,000 per month since the introduction of tribunal fees in July 2013⁴⁷. We hope this government is not inspired by this policy and the attitude taken by the then business minister, Matthew Hancock, when he admitted⁴⁸ that the policy was simply a tactic to reduce claim numbers, irrespective of the merit of those claims.

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.

I39. Applying a 'Barème' type would be a major change to the British approach to law and would be a significant shift away from a common law system of assessing damages. It is ironic that the government may be considering this despite, in most other ways, seeking to cut ties between UK and European systems.

I40. In Europe, Barème also comes hand in hand with an inquisitorial system, rather than the adversarial approach inherent in English law. The government seem to be considering removing the flexibility of judicial oversight by UK judges and moving to a rigid system based on a Napoleonic civil code without the European judicial system that underpins that.

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

I41. Costs can be kept at a reasonable level by incentivising early settlement. This in turn can be achieved by giving teeth to the pre-action protocols and ensuring that costs are staged appropriately so as to encourage defendants to engage with claimants early in the claims process. Conversely, defendants who prolong disputes unnecessarily should pay the appropriate costs.

I42. We suggest the following practical reforms of the PI process:

- i. Compulsory pre-action settlement discussions
- ii. Claimants' Part 36 offers with teeth to include substantial additional damages
- iii. Unambiguous rules to ensure compliance with pre-action protocols and to enable consistent enforcement of those rules by the courts
- iv. The burden of proof should be reversed where the protocol response on liability is delayed
- v. Streamlining the litigation process by simplifying the procedures for directions and witness statements.

⁴⁷ http://www.thompsonstradeunionlaw.co.uk/information-and-resources/lelr/weekly-496.htm#huge_drop_in_tribunal_cases

⁴⁸ In a speech to the Federation of Small Business in March, 2014.

I43. While the government has at times relied, inaccurately, upon comparisons with European systems to justify its proposals, there are some lessons it could learn from other systems. These include:

- i. Strict liability, such as in France where a passenger always has a right of action against the driver of the vehicle they were in at the time of the accident. This means the costs of tracing the third party driver are avoided and passengers do not add to court time and costs.
- ii. Protected status for vulnerable victims, such as pedestrians and cyclists (as in Germany and the Netherlands for example). In most cases, strict liability for these injury victims against a motorist (albeit with clearly defined exceptions), reduces the need for detailed forensic examination and reconstruction of the accidents in the majority of such cases and reduces time and costs as a result.

I44. Finally, and consistent with some of the key points we have made throughout this consultation response:

- i. CMCs in PI should be banned
- ii. Pre-medical offers should be banned – all PI cases should involve medical reporting
- iii. The practice of insurers releasing claims information to third parties should be banned
- iv. Enforcing full transparency of the level and type of ‘fraud’ really being experienced by motor insurers to be driven by the government and upheld by regulators
- v. A fair, objective, evidence based approach to reforms of the claims process. An end to insurers driving the agenda based on their lobbying budgets, cosy relationships with government, media campaigns and unsubstantiated attacks on injury victims.

Responses to Part 10 – Impact Assessment

145. We would make the preliminary point that the period allowed to respond to the consultation has been unreasonably and wrongly limited to 33 working days.
146. This contrasts with the other consultations ongoing at the same time which are not remotely as far reaching in the changes they propose as this consultation and yet, on average, 57 working days have been allowed to respond.
147. This suggests the government is paying lip service to the concept of genuine consultation as set out in the government's own Consultation Principles. The result is that we have had far too little time to address the questions in detail and to gather the appropriate data to allow us to provide evidence-based responses.
148. The result will be that the government will be making policy without any solid evidential foundations or genuine balance.
149. The answers below are given subject to that overriding caveat.

I – 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.

150. We note that the proposal to remove all compensation for “minor RTA related soft tissue injuries” will, on the government’s own assessment, cost injured people between £413m and £760m, and will financially benefit insurers by between £532m and £953m.
151. We believe that these and the other figures relied upon below are likely to be underestimates, potentially gross underestimates, given that they are based on insurer data from COA and CSC databases which are designed to apply downward pressure on damages.
152. We strongly disagree that there is any realistic prospect of the insurers passing on 85% of the savings which they will make to consumers.
153. The government’s apparent faith that insurers will do so is stated⁴⁹ to be that:
- (i) *The motor insurance industry is competitive on price and we believe insurers will have no choice but to pass on the savings, or risk being priced out of the market.*
 - (ii) *A group of leading insurers have all committed to passing on these savings, with two insurers making a public commitment to pass on 100% of the savings.*
 - (iii) *This assumption is in line with a report published by the Competition and Markets Authority (CMA), where they applied an assumption of 80-90% pass through of revenue from insurers to lower premiums. Upon publication this assumption was not contentious (other assumptions did receive considerable feedback) which suggests this is a reasonable assumption to make.*

⁴⁹ p15 of the Impact Assessment

154. Taking those points in turn, for (i):

- See paragraphs 202 to 208 below. The clear evidence is that, in fact, that insurers have pocketed the vast majority of savings made.
- The RAC doesn't agree⁵⁰.
- Insurers have already benefitted hugely from the changes to injury claim processes over the last decade including the introduction of the RTA Portal, its horizontal and vertical expansion to claims up to £25,000 including EL/PL claims and the banning of recoverable success fees and ATE insurance premiums⁵¹. Data from the Association of British Insurers (ABI) shows that motor accident claims costs in 2015 were 30% lower than in 2010⁵².
- Between 2010 and 2015, insurers have (on the ABI's own data) saved at least £8bn yet overall premiums are higher now than in 2010⁵³ and have just increased in the last 12 months by over 17%⁵⁴
- The government has said, in response to a Parliamentary Question 20373⁵⁵, that they will not seek to intervene to ensure insurers pass on future savings relying on the proven false assumption that the market is competitive.
- The insurers have a duty to maximise profits for their shareholders. We cannot therefore agree that it is a reasonable assumption that they will voluntarily hand huge sums of money to their customers especially when they have failed to do so in the past.
- If the market were truly competitive then one would not expect to see the levels of profit, dividend payments and remuneration packages that the industry delivers⁵⁶. The margins would be far tighter.

155. For (ii):

- By the government's own admission there is a split already between a 'group of leading insurers who have committed to passing on these savings' and then 'two...who will pass on 100% of the savings'.
- This is incredibly opaque and reveals the paucity of the commitments the government is hanging onto.
- Who are the companies in each group? Where are the written commitments? Why have only two insurers said they will pass on 100%? Why, given their evidenced failure to pass on savings before should either group be believed?

⁵⁰ <http://www.rac.co.uk/drive/news/motoring-news/the-autumn-statement-how-will-it-affect-motorists/>

⁵¹ These changes are set out at p9-10 of the Impact Assessment

⁵² The difference in net claims incurred between 2010 and 2015 – <https://www.abi.org.uk/Insurance-and-savings/Industry-data/Free-industry-data-downloads> (tab 4)

⁵³ As the AA British Insurance Premium Index demonstrates – <http://www.theaa.com/newsroom/bipi/car-home-insurance-news-2016-q3-bipi.pdf>

⁵⁴ <https://www.confused.com/on-the-road/cost-of-motoring/what-the-price-index-means-for-you>

⁵⁵ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-12-16/20373/>

⁵⁶ Profits, dividends and senior executive pay figures for Direct Line and Aviva are reported here: <http://www.directlinegroup.com/~/media/Files/D/Direct-Line-Group-V2/documents/directors-remuneration-report-2015.pdf>

<http://www.aviva.com/reports/2015ar/>

156. And for (iii):

- No reference is provided for the CMA report which supposedly made this assumption. If the reference is to the 2014 report into private motor insurance then it is likely that the group responding to this assumption was made up wholly of insurers. See below at paragraph 204.

157. Of course, none of this is relevant to EL/PL claims which have simply been included in with RTA despite a complete lack of justification for so doing.

158. We accept that RTA soft tissue claims are likely to remain at roughly the same level without changes although we note here that the 'crisis' figures relied on by the government to 'justify' the changes do not stand up. The government says whiplash numbers have increased by 50% over the last decade but ignore the more recent figures from the government's Compensation Recovery Unit which show that whiplash claims have actually fallen by nearly 60% over the last five years⁵⁷ as set out in paragraph 32 of our Introductory Remarks.

159. It is entirely unclear which direction claims volumes will take if the changes are implemented as some of them may actually increase the scope for CMCs to push unmeritorious claims which would currently be weeded out of the system by solicitors.

160. It is absurd to suggest that the lawyers, medical experts and CMCs involved in representing claimants now will simply "find alternative [equivalent] economic activities" in the future. On the contrary, there will be significant damage to local economies as law firms pull out of personal injury work altogether and downsize as a result, especially in more deprived areas of the country.

161. The assumption of claims inflation betrays a lack of trust in the medical profession's ability to provide accurate, fair assessments of injury. The concept of claims inflation is an invention by insurers which is wholly without foundation. The value of a claim is established either by the insurers through settlement or by the judiciary at an assessment of damages. Whatever figure the claimant may put on a claim, the costs payable are based on the sum recovered. A claimant who seeks to inflate a claim to secure access to a higher track will either be prevented from doing so by the court at the tracking stage or will be penalised by the court at the costs stage. Either way the costs recovered will be determined by reference to the sum recovered, not the sum claimed. It is simply fiction to suggest that claimants are permitted to subjectively inflate the value of their claim and then recover costs by reference to the inflated value and not the correct value as determined by the settlement or by the court.

162. We note the following comment in the Impact Assessment at p13:

BTE lawyers: Panel law firms are a subset of claimant lawyers who represent claimants under BTE policies. Panel law firms are those that are favoured by defendants (insurers), as those who will not try and unduly inflate claims. They also provide a claims screening service for insurers.

163. We doubt that lawyers acting under BTE policies would go along with this definition but the comment itself is a revealing insight into a future where the government is content for independent lawyers to be removed from the system with the result that insurers will have unfettered control of both sides of the compensation process. In the future endorsed by the government, insurers will have as opponents either LiPs or, at worst, lawyers whom they favour. This is wholly wrong and grossly unfair to injury victims.

⁵⁷ <https://www.lawgazette.co.uk/news/government-figures-reveal-whiplash-claims-in-freefall/5056776.article>

164. We note and disagree with the assumption (p14 of the Impact Assessment) that:

It has been assumed that claim recoveries for soft tissue injuries requiring an ambulance or being admitted to hospital as an in-patient will not be affected by this proposal, because these injuries are likely to be on the more severe scale and so claims for these injuries will continue. Therefore the impact on out-patients only is considered, this has been agreed with Department of Health (DH).

165. We do not have access to empirical data on this issue however we believe that the government's calculation (at p21 of the Impact Assessment) is not based on any either. We invite the government to demonstrate that our belief is ill founded.

166. In any event we are concerned that the government may not understand the magnitude of injuries which receive less than £5,000 for PSLA damages and how frequently such injuries require transportation to hospital by ambulance. We believe that the cost to the NHS of £9m per annum in Option 1.1(a) is likely to be a significant understatement.

167. We believe that a significant number of both RTA and work injury claims will simply not be brought. In particular, unlike those with motor insurance in which legal expenses cover is often a 'bolt on' to their policy, working people do not routinely purchase BTE cover. The government estimates in its Impact Assessment that there would be a drop in BTE funded claims of 127,000 (paragraph 2.26). While it is difficult to believe this is accurate, based as it is on mere 'anecdotal evidence' that 70% of RTA claimants have BTE funded representation (paragraph 7.56 and footnote 32), even if it were true it only applies to RTA and ignores the fact the vast majority of EL cases under £5,000 simply will not be brought. This would risk severely limiting access to justice for working people, much in the same way as the introduction of tribunal fees has resulted in the number of people taking a case to the Employment Tribunal dropping off a cliff⁵⁸.

168. We note the assumption (at p23 of the Impact Assessment) that 'Third sector advice providers could experience a small reduction in the number of claimants seeking external advice, freeing up resources to spend on advice for other individuals'.

169. In fact, without access to solicitors who can advise them on their accident and on associated matters such as benefits and medical treatment, we think it is far more likely that there will be a surge in demand for third sector providers such as from CABx as there will be nowhere else to turn. The public's reliance upon them has to be set against a well-documented devastation of provision in this sector following central and local government cuts.

⁵⁸ In the year before fees were introduced (2012/13) on average 16,000 people a month took a claim against their employer. However, by 2015/16 the average number of people taking claims dropped to 7,000 a month – a drop of 9,000 a month.
<http://touchstoneblog.org.uk/2016/11/action-tribunal-fees-key-test-theresa-mays-commitment-workers-rights/>

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.

I70. It is noted that the introduction of the proposed tariff scheme will, on the government's assessment, likely cost injured people between £385m and £784m and will benefit insurers by £504m to £771m.

I71. In relation to the other assumptions, please see our answer to Q1.1 above.

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.

I72. It is noted that the introduction of the proposed tariff scheme will, on the government's assessment, likely cost injured people between £347m and £581m and will benefit insurers by the same amount.

I73. The fact that the government is even willing to contemplate such a disparity between injured people, who will be left taking on insurers on their own, and companies whose CEOs are on £ multimillion remuneration packages, who are delivering very high profits and whose dividends are beyond the market norm, speaks volumes, we would suggest, about whose side they are on.

I74. In relation to the other assumptions, please see our answer to Q1.1 above.

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.

I75. This question relates to the proposal to increase, to 500% of its current level, the small claims track limit either for all PI cases or for RTA cases only.

I76. We do not agree at all that it will be straightforward, as the description of this option indicates, to "align the Clams [sic] Portal with the SCT costs provisions". The Portal is essentially set up for lawyers to deal with liability-admitted cases. It is wholly unsuitable for Litigants in Person (LIPs) to use.

I77. We adopt API's commentary on why the Portal won't work namely because:

- It deals with pre-litigation settlement of liability admitted claims only. Liability denied claims currently drop out into the courts system.
- The CNF and the special damages forms are designed for represented parties, and are not suitable for completion by litigants in person.
- The protocol is written for represented parties, and is not suitable for litigants in person.
- There are no direct links to the MedCo system to allow a LiP to directly instruct a medic.
- The system including the helpdesk is designed for a few hundred registered users, not a million different users a year and could not cope.
- The registration system could not support an increase from an occasional registration to a million registrations a year.

- It would need to integrate with any online court – this will not be built until 2020.
- Portals exist for RTA, EL, PL. There are currently no portals for the other areas of PI that could be caught if the government proceeds as planned.
- The system for claims over £5k would be substantially different from the system for claims under £5k. However, separate portals would not be viable due to the limited numbers of claims over £5k. A portal costs c£2m a year to run.

178. We note again the huge projected saving of £419m for insurers. Again, we have no confidence that any significant portion of this will be passed on to consumers.

179. We note the government's assumptions that BTE providers will have increased costs of £247m in relation to insured legal costs and that they will pass those additional costs on to consumers. But we also note the failure of the government to comment in any detail on this increased revenue for insurers from the sale of BTE as a product.

180. Despite its limitations – its restrictions on when people can claim, who they can use to represent them if they claim and a questionable commitment to quality assurance – the government appears to be committed to giving BTE a 'leg up'. The government provides no objective justification for this and we can only assume it is another empirically unsubstantiated commitment to insurance company enrichment. Insurers win with the reduced damages to be paid out under these proposals. They win with the reduced costs to be paid following the changes proposed and now they win again with the increased revenue from BTE policies.

181. Given the government's assumption that BTE insurers will instinctively pass on increased costs to the consumer rather than absorb them, we cannot understand why the government assumes that motor liability insurers will pass on savings rather than simply retain them.

182. The government notes that EL/PL defendants will save as they will no longer have to pay out costs in cases where PSLA is between £1k and £5k (the vast majority of cases). There is no exploration of how, given those savings (which looking at the impact of introducing fees in employment tribunals is likely to be substantial⁵⁹), these changes will not incentivise bad employers to ignore poor health and safety practices in workplaces, safe in the knowledge that injured workers will be unlikely to pursue a claim or get anything like what a court would consider their claim to be worth. Nor is there any consideration of how those changes will impact the economy and society as a whole except to say (p14 of the Impact Assessment) that:

The proposed reforms would also tackle the wider compensation culture which has grown up surrounding RTA-related soft tissue injuries, thus benefiting wider society.

183. Perhaps here the government has once more overlooked the extensive evidence referred to above that there is no compensation culture⁶⁰, and has forgotten that it is proposing an increase in the small claims limit which will apply to all PI claims, and primarily non-RTA cases as RTA cases will be caught by the existing limit due to the reduced damages recoverable for those claims under these proposals.

⁵⁹ See paragraph 137 above.

⁶⁰ Lord Young in 'Common Sense Common Safety' (15 October 2010), including: 'The problem of the compensation culture prevalent in society today is, however, one of perception rather than reality.' (p19, emphasis added) – https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60905/402906_CommonSense_acc.pdf

184. We note that the government simply does not have any figures in relation to EI/PL, stating at p44 of the Impact Assessment, for instance:

2.1.31 EL/PL Defendants: As detailed in Annex A, it has not been possible to get the detailed information needed to accurately estimate the savings to EL/PL defendants. We have requested information as part of the consultation and, if possible, will update the analysis at the final stage IA.

2.1.32 EL defendants would be expected to save a maximum of around £45m per annum in fixed recoverable legal fees and VAT, for the 46,000 EL claims qualifying for SCT provisions. PL defendants would be expected to save a maximum of around £41m per annum in fixed recoverable legal fees and VAT for the 42,000 PL claims qualifying for SCT provisions.

2.1.33 There are likely to be additional savings for EL and PL defendants in PSLA damages, special damages and medical reports for claims which no longer proceed, but it has not been possible to quantify these savings.

2.1.34 There could be a reduction in EL and PL insurance premiums, which would result in a reduction in IPT for defendants with private insurance. However, it is unknown what proportion of EL/PL defendants with private insurance (against those that defend themselves and pay for claims out of their profits or budgets), so this cannot be quantified.

185. In all our years of responding to consultations from governments of all political complexions we have never seen anything so shoddy or cavalier. This really is ‘back of an envelope’ policymaking and again suggests contempt for people injured at work and a willingness to brazenly push an insurers’ agenda with no attempt to properly analyse its impact.

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.

186. We support the requirement to obtain medical reports in all RTA soft tissue injuries and we note the assumption that this will result in significantly increased PSLA damages and special damages.

187. It follows that the government accepts as a given that insurers routinely under-settle claims before medical reports are obtained if they can get away with it. It also follows that insurers cannot be trusted to fairly compensate injury victims if they can get away with it. The government therefore must be accepting that depriving most work injury victims of representation, as it concedes will be the impact of the increased small claims limit, will mean insurers routinely under-settling those cases with unrepresented workers.

188. We note the average figure for a pre-med offer is £1,800 as opposed to £2,500 for an offer with a medical report and whilst we welcome the suggested ban on pre medical offers we are disappointed (yet again) that the government, despite conceding under-settlement to be a fact and providing evidence of it sees fit not to condemn cynical exploitation by insurers of their dominance within proceedings to the detriment of the injured party.

189. It is significant that the government in suggesting that PSLA and special damages are highly unlikely to increase overlook, deliberately or otherwise, that for this to happen the requirement to obtain a medical report would need to be implemented in isolation. However if the other suggested changes are implemented such as removal or slashing of damages and/or an increase in the small claims track limit the assumptions are unsustainable.

190. We note the assumption that 100% of the additional cost of medical reports will be passed onto consumers and see that once again the insurers are passing on 100% of costs whilst retaining 80% of savings as set out above.

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.

191. We note the enormous savings of £1.3bn per annum to the insurance industry and the £1bn cost to injured people.

We are unable to say that these figures are accurate but we agree that there will be an unprecedented transfer of wealth from injured people to the insurance industry.

192. In relation to the prospect of the savings being passed on to consumers, please see our response to Q1.1 above.

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.

193. Please see our response to Q1.6 above.

194. We have willingly provided confidential statistical data from our case holding to previous reviews by independent experts such as Professor Paul Fenn and others and we remain willing to do so again, but it is wholly unrealistic to suggest that we should provide detailed claims data in the time given and with no undertakings being offered as to confidentiality.

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.*

195. Aside from the various remarks we have made above regarding Pre-Med Offers in our full consultation response, we have willingly provided confidential statistical data from our case holding to previous reviews by independent experts such as Professor Paul Fenn and others and we remain willing to do so again but it is wholly unrealistic to suggest that we should provide detailed claims data in the time given and with no undertakings being offered as to confidentiality.

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.

196. We restate our comprehensive opposition to the application of any increase in the small claims limit to employers' liability claims, as set out in our consultation response. We would be happy to provide confidential statistical data where possible but this is wholly unrealistic in the time given and with no undertakings being offered as to confidentiality

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.

197. We have willingly provided confidential statistical data from our case holding to previous reviews by independent experts such as Professor Paul Fenn and others and we remain willing to do so again, but it is wholly unrealistic to suggest that we should provide detailed claims data in the time given and with no undertakings being offered as to confidentiality.

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.*

198. See paragraph 95 for general comment but we would also note with specific reference to clinical negligence (CN) that:

- BTE coverage is low
- vanishingly few people are equipped to represent themselves in CN cases
- most CN cases include an element of special damages
- pre-medical offers are rare, no doubt because of the complexity of liability issues in CN cases and the fact that claimants must obtain medical evidence to establish breach of duty.

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.

199. See paragraphs 167, and 179 – 181.

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.

200. See paragraphs 17, 128 and 166.

201. We would be happy to provide confidential statistical data where possible but this is wholly unrealistic in the time given and with no undertakings being offered as to confidentiality.

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.

202. We do not agree. See paragraphs 178 to 181 above.

203. There are two assumptions behind the “average of £40” per motor policy holder. Firstly, that the government says the insurers will save around £1bn by paying-out less in compensation; secondly, that the insurers will pass on 85% of this to consumers.

204. In the Impact Assessment, the evidence referenced to back up the 85% figure is a 2011 Office of Fair Trading (OFT) consultation⁶¹. The Impact Assessment references a summary of the consultation responses (page 15, paragraph 2.4) in which the OFT says there was “a reasonable degree of consensus amongst respondents to our call for evidence that the private motor insurance market is strongly competitive”. What the Impact Assessment does not say is that, apart from government departments and regulatory bodies, the respondents were all insurers, brokers or suppliers to insurers. In other words, the evidence to support the 85% figure is the insurance industry saying the car insurance market is competitive.

⁶¹ Note this is the same consultation as we refer to in paragraph 111 – the OFT was superseded by the CMA on 1 April 2014.

205. This report is from 2011, but the Association of British Insurers (ABI) publishes data for the car insurance market annually.

206. The figures show that the car insurers have benefited from a 30% drop in claims costs since 2010 and have passed on to consumers only £1 of every £5. In other words, of the actual savings made in the last five years, the insurers have passed on only 20% and pocketed 80%⁶².

207. Here are the figures⁶³:

	Net premium revenue	Claims costs
2010	£8.34bn	£8.30bn
2015	£7.82bn	£5.80bn
Decrease	- 6%	- 30%

208. The insurers have had a chance to pass on 85% savings over the last five years but have not passed these on.

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.

209. The Equality Act gives the government a statutory duty to consider the impact and any possible indirect discrimination. This has been confirmed by the government in Parliamentary Question 47209⁶⁴ and 47432⁶⁵.

210. The government accepts that their proposals to remove effective legal representation from injured people “could adversely impact children” and “could adversely impact on the mentally disabled”⁶⁶. We submit that it is not a possibility but a certainty that the proposals would adversely affect those groups, defined by the protected characteristics of age and disability. We cannot see how children or people otherwise lacking capacity to manage their own affairs would be able to obtain adequate redress when they are injured. Lawyers will only be paid for advice and representation in cases where PSLA is in excess of £5,000. That will only rarely be obvious from the outset of a claim and, as claims for children and the disabled are frequently more complex, it is likely to prove very difficult for such victims of injury to obtain advice.

211. It seems extraordinary that the government would make these proposals without adequately or at all considering how they will impact on the most vulnerable in society.

212. In addition, we have publicised, and sought comment from the ABI, the government and the Equalities and Human Rights Commission on, data produced by the former chair of the Equalities and Human Rights Commission that suggests there is an ethnic penalty operating in motor insurance⁶⁷. If any savings from the reforms are passed on, what guarantee is there that it won’t be passed on a discriminatory way reinforcing that ethnic penalty?

⁶² The ABI's own figures show a decrease in revenue of 6% 2010-2015 and a decrease in claims costs of 30% over the same period, a ratio of 1:5.

⁶³ From <https://www.abi.org.uk/Insurance-and-savings/Industry-data/Free-industry-data-downloads>

⁶⁴ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-10-07/47209/>

⁶⁵ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-10-07/47432/>

⁶⁶ Impact Assessment, p84 a5 paras 5.8 and 5.11

⁶⁷ <http://www.thompsons.law.co.uk/theethnicpenalty/documents/Ethnic-Penalties.pdf>

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.

213. Please refer to our comments in response to Question 7.1.

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?

214. The government accepts that children and the mentally disabled could be adversely affected. It seems clear to us that they will be (see paragraphs 136 and 209), as neither group could properly represent themselves as litigants in person. Imagine, for instance, the absurd injustice of a Remploy worker injured in his employment having to take on his employers in a civil action.

215. The government should consider the 'Ethnic Penalties in Motor Insurance Premiums' (July 2016) report on potential discrimination in the setting of insurance premiums, available at <http://www.thompsons.law.co.uk/theethnicpenalty/documents/Ethnic-Penalties.pdf>

8 – Small and Micro Business Assessment

Question 8.1: Is your business a small, micro or medium sized business 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?

216. No. Our headcount is over 250 full time employees.

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.

217. These changes are very serious for the financial viability of this firm and any firm conducting volume PI work. The reductions in case volumes and income will seriously impact on the firm's finances and will lead to job losses. This will also reduce the tax and National Insurance contributions made to the Exchequer by the firm and our staff. The same will apply across the sector resulting in a significant loss of public funds.