CHARTERED INSTITUTE OF LEGAL EXECUTIVES

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

A response by
The Chartered Institute of Legal Executives

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1. Summary of recommendations

1.1. The claims that are subject to reforms should be limited to 'whiplash', and the current soft-tissue definition should not extended beyond its original remit without clarification or redefinition. (4.1. – 4.8.)

1.2. Severity, as well as duration, of injury should be the main factors to decide the levels of compensation for pain, suffering and loss of amenity. (4.9. – 4.15.)

1.3. The duration threshold at which claims should be considered as 'minor' should be no more than 3 months, not the proposed 6 or 9 months. (4.16. – 4.17.)

1.4. Under no circumstances should the legal right to compensation for injury caused by the negligence of a third party be removed. (5.1. – 5.8.)

1.5. Fixed awards for 'minor' whiplash claims would mean the loss of much needed judicial discretion, and lead to potential over-compensation in some cases. (5.9. – 5.11.)

1.6. The proposed fixed compensation for 'minor' injuries is derisory, unfair, and if introduced should be in line with independent judicial guidelines. (5.12. – 5.15.)

1.7. Mental health issues should not be treated as ancillary or inconsequential, and compensation for psychological injury should be appropriately assessed and compensated for with propriety and compassion. (5.16. – 5.17.)

1.8. A prognosis approach should continue to be used for assessing the severity and duration of injuries. (5.18. – 5.21.)

1.9. A fixed tariff for compensating pain, suffering and loss of amenity should not be introduced. The proposed figures are too low to be considered at all fair; severity of injury (or exacerbation of existing conditions) has not been considered, and there is no provision for inflationary increases. (6.1. – 6.9.)

1.10. Judges should have the maximum leeway to recognise and compensate for exceptional circumstances. (6.10. – 6.15.)

1.11. The small claims limit for personal injury claims of any sort should not be raised. It will harm access to justice, worsen inequalities of arms, encourage exaggerated claims, and lead to potential turmoil in an already over-stretched court system. (7.1. – 7.)

1.12. Offers made without medical reports (pre-med offers) should be banned. (8.1. – 8.2.)

2. Introduction

2.1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx represents around 20,000 members, which includes approximately 7,500 fully qualified Chartered Legal Executive lawyers. This includes approximately 3,700 members of all grades who work in personal injury.

2.2. CILEx continually engages in the process of policy and law reform. At the heart of this engagement is public interest, as well as that of the profession. Given the unique role played by Chartered Legal Executives, CILEx considers itself uniquely placed to inform policy and law reform.

2.3. As it contributes to policy and law reform, CILEx endeavours to ensure relevant regard is given to equality and human rights, and the need to ensure justice is accessible for those who seek it.

2.4. This response includes contributions from some of CILEx's members working in the field of personal injury for both <u>claimants and defendants</u>. CILEx liaised with members of the CILEx Personal Injury Specialist Reference Group, and conducted a survey of members.

3. General points

3.1. The overall impact of these proposals will be to remove innocent injured persons of their right to fair compensation, and to deprive them of the independent legal advice they need to be able to enforce their legal rights. It will exacerbate the inequality of arms we already see between claimants and defendants, and it sets a dangerous precedent for future reforms.

3.2. We are concerned that this consultation has been launched without a fuller exploration of alternatives to the draconian measures on offer that would have the potential to achieve the desired policy outcomes without punishing genuine victims.

3.3. In responding to these proposals, CILEx has operated from the following main principles.

3.4. <u>All persons have a right to recover damages when injured by a negligent third party.</u>

- 3.4.1. If you can receive compensation for a delayed flight or train, you should be entitled to claim for damages if injured by someone else.
- 3.4.2. The right to be compensated when someone else has injured you is well established in English and Welsh law.
- 3.4.3. The decision as to what damages should be awarded should be made on the facts of the case. This is therefore best left to independent judges and the guidelines they set for themselves based on the cases that have come before them.

3.5. Long term injuries are not 'minor' claims

3.5.1. A 'minor' injury involves a bruise or sticking plaster. Defining an injury that lasts half a year or more as 'minor' is demonstrably wrong.

3.5.2. For the purposes of assessing whether an RTA soft tissue injury is 'minor', the duration limit should be no more than 3 months.

3.6. Denying compensation erodes the purpose of mandatory insurance

3.6.1. Motorists are required by law to hold insurance policies to ensure innocent victims are fairly compensated in the event the policy-holder causes an accident.

3.6.2. To remove compensation for pain, suffering and loss of amenity is to erode this basic tenet.

3.7. A tariff is a blunt tool which overlooks the complexities in injury cases

3.7.1. The current 'limits' systems allows for judges to make a balanced assessment within a widely understood framework.

3.7.2. Awarding damages on a tariff system risks overcompensating some, or exaggerating others to move into a higher tariff band, rather than awarding damages based on the facts of the case.

3.8. The small claims track is for faulty goods or unpaid invoices, not road traffic injuries.

3.8.1. The small claims track exists to offer a route to settle cases that are so straight forward as to mean that neither party would normally require legal representation.

3.8.2. This assumes an equality of arms between the sides, that on the most part the facts are not disputed, and that relatively small amounts of money are being claimed for – it is in these specific circumstances that legal costs are not normally afforded.

3.8.3. Ordinary people should not be deprived access to legal advice, particular in cases that have such potential complexity as those subject to this consultation.

3.9. Tackling fraud is best achieved by targeting fraudsters, not honest claimants.

3.9.1. Genuine claimants will be penalised through these proposals. The recommendations of the Insurance Fraud Taskforce represent a more targeted way of tackling fraudulent or exaggerated claims.

3.9.2. They include; improving data sharing, clamping down on cold-calling, and discouraging pre-med offers.

3.10. The proposals are unlikely to result in the expected consumer benefits

3.10.1. The Government asserts that the proposals will lead to an average £40 a year reduction in insurance premiums for motorists.

3.10.2. We find this unlikely given than there is no mechanism to require insurers to pass on any savings, and any possible requirement risks being largely unenforceable.

3.10.3. Other changes occurring alongside these proposals implicitly wipe out any savings, including;

3.10.3.1. The increase in Insurance Premium Tax announced in the 2016 Autumn Statement which many in the industry say will be passed on to consumers)

3.10.3.2. Some of the proposals around controlling credit hire costs have the capacity to increase BTE insurance policy premiums (para 131 of the consultation).

3.10.3.3. Any expectation that policy holders will be able to secure access to legal advice by ensuring they obtain legal expenses insurance cover as part of their policy would likely result in a further increase in BTE insurance premiums.

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

Question 1: Should the definition in paragraph 23 be used to identify the claims to be affected by changes to the level of compensation paid for pain, suffering and loss of amenity from minor road traffic accident related soft tissue injury claims, and the introduction of a fixed tariff of proportionate compensation payments for all other such claims? Please give your reasons why, and any alternative definition that should be considered.

Question 2: Should the definition at paragraph 23 be extended to include psychological trauma claims, where the psychological element is the primary element of a minor road traffic accident related soft tissue injury claim? Please provide further information in support of your answer, including if relevant, how this definition could be amended to effectively capture this classification of claim.

4.1. The definition referred to is;

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

4.2. The scope of the document from which the definition originates, the Pre-Action Protocol[1], contextualises this definition significantly. For example, this definition only applies to claims where 'if proceedings were started, the small claims track would not be the normal track for that claim.'[2]

4.3. As identified in paragraph 22 of the consultation document; *"The definition was specifically designed to identify the relevant low value RTA related soft tissue injury claims to be used in the MedCo IT Portal for sourcing initial medical reports."*

4.3.1. When deciding which claims should be subject to changes to compensation, it would be flawed to rely on an administrative definition designed for sourcing particular types of reports – this would in effect be the administrative tail wagging the policy dog, rather than the other way around. It is important to ensure that the definition settled on is clear, specific and appropriate as it is a key point from which flows consumers' eligibility for compensation.

[1] https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-low-value-personal-injury-claims-in-road-traffic-accidents-31-july-2013

[2] The Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. Para 4.1.

4.4. Divorcing this definition from its original context makes it too broad and inappropriate. We would therefore recommend that this definition is not extended beyond its original remit without clarification or redefinition.

4.5. Furthermore, extending the definition of a 'soft-tissue injury' to include primary psychological injury would render the definition confusing. A psychological injury is not a physical injury, and should be defined and considered separately if it constitutes a substantial part of the claim.

4.6. According to the stated aims of these proposals[3], the intention is to tackle whiplash claims specifically. It is our view therefore that the reforms should be restricted to compensation for whiplash claims only, and not broader soft-tissue claims, and that this should be made explicit using a clear, specific and appropriate definition.

4.6.1. For example, this can draw upon the Clinical Knowledge Summary definitions published by the National Institute for Health and Care Excellence (NICE). These summaries are developed by an independent body (Clarity Informatics), and are designed to summarise the evidence on the treatment of specific health conditions. It includes two categories of whiplash;

- *Acute whiplash injury follows sudden or excessive hyperextension, hyperflexion, or rotation of the neck affecting the soft tissues. It typically causes neck pain and headache, resulting from rear-end or side-impact motor vehicle collisions.*
- *Late whiplash syndrome is characterized by symptoms that persist for more than 6 months after an acute whiplash injury, including neck pain and stiffness, persistent headache, dizziness, upper limb paraesthesia, and psychological symptoms.*[4]

4.7. Surveyed CILEx members identified the following amendments or clarifications which require consideration in the definition applied to these proposals:

4.7.1. To avoid capturing other sorts of injuries that do not fall within the aim focus of this consultation, such as to the knee, ankle or wrist, the definition should be explicitly limited to 'whiplash'.[5]

4.7.2. Whilst it may be appropriate in some cases for secondary psychological injuries to be handled in the same claims process as physical injuries, major or substantial psychological injury should be defined and considered separately. Where a psychological injury represents a significant part of the claim it should be independently

[3] Para 22: "The vast majority of RTA related soft tissue injury claims are whiplash claims, which are the main claims the government is particularly keen to address through these new reforms."

[4] https://cks.nice.org.uk/neck-pain-whiplash-injury#!topicsummary

[5] A Chartered Legal Executive from Stockport specialising in civil litigation said the consultation definition needed changing "to reflect the fact that the intention was supposed to be for the Medco Portal to apply to "whiplash" injuries - this definition is much wider and may capture a claim where, for example, a claimant has a soft tissue injury to their knee or ankle which might cause initial problems with mobility etc. and the restrictions on medical evidence provided for "soft tissue" claims is completely inappropriate."

assessed with a psychological report, in the same way as a medical report would be required.[6]

4.7.3. If the definition is not limited to whiplash claims alone, it may need to account for circumstances where multiple soft-tissue injuries are sustained in a single incident, and this too should be accounted for when assessing severity and compensation levels.[7]

4.7.4. Consideration should be given for how these amended rules will apply to non-occupants of vehicles suffering whiplash sustained in an RTA, i.e. pedestrians, cyclists, motorcyclists, etc.

4.8. We have attempted to refine these amendments into a usable definition below, however any revised definition should be consulted upon widely.

4.8.1. *'A whiplash claim' means a claim brought by an injured party in a road traffic accident where the significant physical injuries follow sudden or excessive hyperextension, hyperflexion, or rotation of the neck affecting the soft tissues. It encompasses claims where there is a minor psychological injury arising from the same incident that is secondary in significance to the physical injury.*

4.8.2. *This does not include claims where psychological injury arising from the same incident constitutes a major or substantial part of the claim. These shall be assessed and compensated for separately.*

Question 3: The government is bringing forward two options to reduce or remove the amount of compensation for pain, suffering and loss of amenity from minor road traffic accident related soft tissue injury claims Should the scope of minor injury be defined as a duration of six months or less? Please explain your reasons, along with any alternative suggestions for defining the scope.

Question 4: Alternatively, should the government consider applying these reforms to claims covering nine months' duration or less?
Please explain your reasons along with any alternative suggestions for defining the scope.

4.9. 62% of surveyed CILEx members disagree or strongly disagree that duration alone is a sufficient measure for defining 'minor' RTA soft tissue claims.

4.9.1. Members expressed reservations regarding the unique nature of cases, and the need to consider the severity as well as duration of injuries.

[6] A CILEx member from Newport specialising in personal injury said "Psychological injuries of greater significance than such soft tissue injuries ought to be diagnosed by a properly trained psychiatrist. To include them within this definition I think would lead to a watering down of any investigations into what could potentially be a significant psychological injury."

[7] A Manchester-based Chartered Legal Executive said "It presumes one injury site. Say you injure your neck, back, arm and leg. You still get the same award as just a minor neck injury. It is incompatible with the PSLA of the actual injury."

4.9.2. Whilst some CILEx members commented that persistent injuries can have a relatively low impact towards the end of the injury-term, there remained a consensus that it is difficult to justify that injuries lasting for periods of months rather than weeks could be classed as 'minor'.

4.10. Whilst injury duration will have a strong bearing on the level of general damages compensation, it is not the only factor. In defining what is considered a 'minor' claim, and therefore what compensation should be awarded, factors of both duration and severity should be considered in as far as they relate to pain, suffering and loss of amenity.

4.11. If a fixed tariff is pursued then quantifying severity as well as duration will be important to ensure each claim is set at the right level, and to avoid conflation of dissimilar cases. Just as a prognosis for the duration of an injury can be quantified in weeks or months, by applying widely used metrics or categories a similar quantification of pain, suffering or loss of amenity may be achievable in some or all circumstances.

4.12. Whilst any standard system that aims to quantify a subjective measure will have its flaws, applying a consistent measure or metric would bring benefits.

- It will place the assessment of PSLA damages on a more quantifiable basis, rather than a subjective assessment.
- It will enable comparison of similar cases and levels of compensation.
- It will allow for more rigorous analysis and assessment for the development of future policy.

4.13. Below are three specific examples of methods that could be used to quantify severity that we would ask the Government to consider, and could be used alongside duration as a way of quantifying the full extent of an injury.

4.13.1. The Short Form-36 (SF-36)[8] is a widely used questionnaire that measures Quality of Life (QoL). It focuses on physical functioning, but also measures role limitations due to physical health, role limitations due to emotional problems, energy/fatigue, emotional well-being, social functioning, pain, and general health.

4.13.2. The Örebro Musculoskeletal Pain Questionnaire (ÖMPQ)[9] is a screening tool that predicts long-term disability and failure to return to work when completed four to 12 weeks following a soft tissue injury. Developed in New South Wales, Australia, it is used to predict those who will recover (with 95 per cent accuracy), those who will have no further sick leave in the next six months (with 81 per cent accuracy), and those who will have long-term sick leave (with 67 per cent accuracy).

[8] http://www.rand.org/health/surveys_tools/mos/36-item-short-form.html

[9] https://www.aci.health.nsw.gov.au/__data/assets/pdf_file/0004/212908/Orebro_musculoskeletal_pain_questionnaire_Final.pdf

4.13.3. The Whiplash Disability Questionnaire (WDQ)[10] is a 13-item questionnaire designed to measure disability associated with whiplash-associated disorders (WAD). Also developed in Australia, the questionnaire addresses pain levels, personal care, role performance (at work, study or home duties), as well as mobility, social and leisure, and other measures.

4.13.4. Elements of other measures may be worth reviewing for their applicability and suitability, such as Ropan-Logan-Tierney, or the Nottingham Health Profile.

4.14. Metrics such as these could be incorporated into independent medical reports, though any such metric will need to account for the presence of additional symptoms, including cases where a pre-existing injury or condition is exacerbated or aggravated as a result of third party negligence.

4.15. If the Government proceeds with a fixed tariff of general damages based on measures of duration alone – without including quantified PSLA measures – then the need to retain judicial discretion will be crucial to ensure that compensation awards continue to be fair and based on the merits of the case at hand, and the effect that the injury has on the given individual's life.

4.15.1. Maintaining fairness of the justice system is crucial to the rule of law and public confidence in our courts. Far from an abstract concept, these proposals as currently offered risk eroding this fairness even further, through arbitrarily attributing the same level of compensation for potentially very different cases.

4.16. We turn now to the duration threshold before which cases will be considered as 'minor'. By any reasonable definition, an injury whose effects last half a year or more is not a minor injury.[11] Such injuries, suffered through no fault of the claimant, can dramatically impact upon an individual's life, and one can rightly expect to be fairly compensated for one's pain, suffering and loss of amenity. The application of a fixed tariff based on rigid criteria risks denying access to justice for individuals with genuine claims, suffering genuine loss, pain and discomfort through no fault of their own.

4.17. More than three quarters (78%) of CILEx members when surveyed said the duration threshold for 'minor' claims should be set at less than 6 months. 63% said it should be less than 3 months. 23% said it should be at 1 month (4 weeks).

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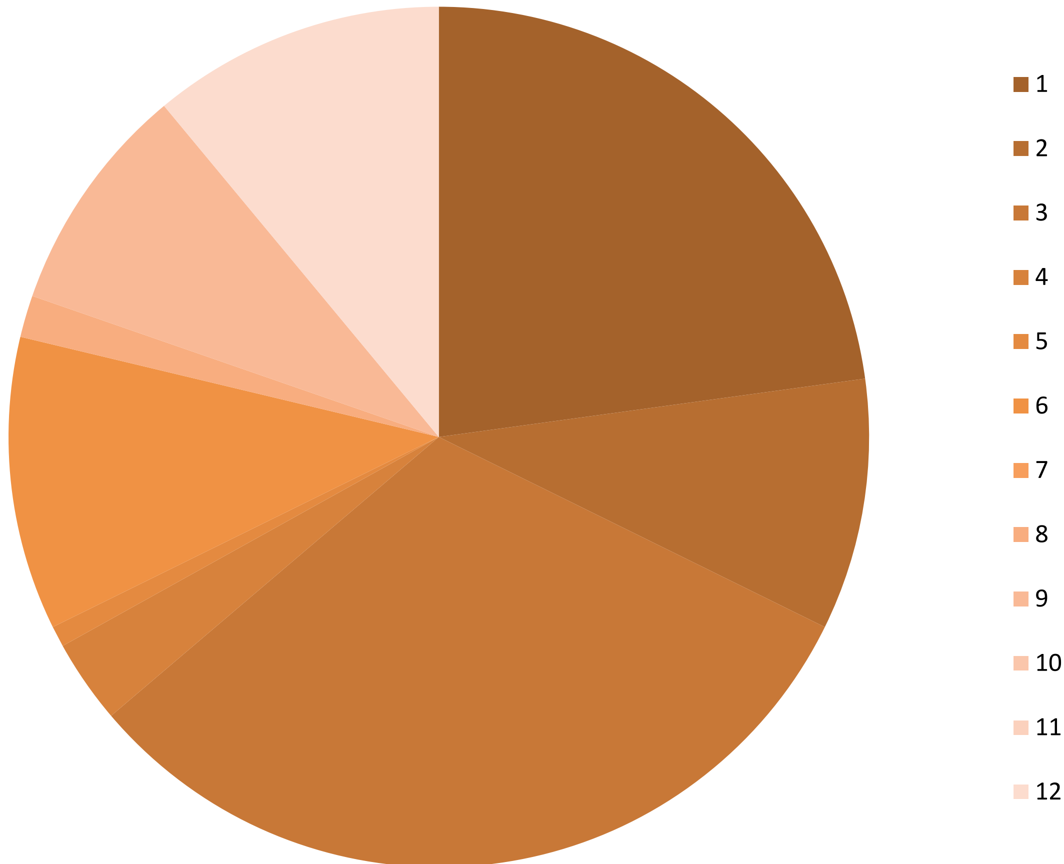
[10] https://www.researchgate.net/profile/Ken_Niere/publication/6979727_The_Whiplash_Disability_Questionnaire_WDQ/links/5660c02a08ae4931cd599d0f.pdf?origin=publication_detail

[11] It is important to recognise that whilst the whiplash definitions used by NICE (para 4.6.1. above) differentiate between acute whiplash and late whiplash syndrome (which lasts beyond 6 months) - they in no way imply that acute cases of whiplash are minor in nature. This is only for diagnostic purposes to distinguish between cases that last beyond half a year.

4.17.1. Respondents cited that 'minor' is better measured in weeks rather than months[12], and emphasised the significant impact on quality of life that these injuries can have[13].

4.17.2. Other respondents proposed a different measure, saying that an injury could be classed as minor if no time off work or medical treatment/physical therapy is required.[14]



CILEx member survey, Dec 2016

'Duration in months of where the threshold for 'minor' claims should be set.'

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[12] A Chartered Legal Executive in Merseyside said *"4 weeks disruption to one's life would have much less impact than beyond. For short periods such as 1 month family and friends may be willing to assist and help out, work may be understanding, colleagues might be prepared to take up the slack - beyond that long term changes due to injury and limitations that they place upon victims can be massively disruptive to the life of victims and those they live and work with."*

[13] An Affiliate CILEx member in Leeds said *"I think 3 months is reasonable to be considered minor and is probably a period of time during which people wouldn't consider treatment. After this time the injury starts to frustrate people given the length of time they are suffering pain, they usually have multiple medical appointments which disrupts their daily life and it is generally a significant period of time to be suffering from pain caused by someone else's negligence."*

[14] A CILEx Fellow from London said *"Account should be taken of any time taken off work; any time spent receiving "active" medical treatment, e.g. physiotherapy etcetera."*

Another from Manchester said *"I think many practitioners would accept that an injury causing minor symptoms for up to 8 weeks can be classified as minor assuming there is no time off work, no need for treatment/medical attention etc."*

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

Question 5: Please give your views on whether compensation for pain, suffering and loss of amenity should be removed for minor claims as defined in Part 1 of this consultation?
Please explain your reasons.

5.1. 94% of surveyed CILEx members disagree with removing PSLA compensation from minor claims, with 78% strongly disagreeing.

5.2. A large portion of respondents highlighted that this encroaches on a long standing legal principle that a person is entitled to reparations if harmed through negligence by a third party. If enacted, this would erode a fundamental principle that many citizens believe to be self-evident; if someone injures you, you have a right to redress.[15]

5.3. Removing general damages from RTA in particular claims poses a fundamental question about the role of mandatory insurance for motorists. Motorists are required by law to hold insurance policies to ensure innocent victims are fairly compensated in the event the policy-holder causes an accident. To remove compensation for pain, suffering and loss of amenity is to erode this basic tenet – allowing insurers to raise premiums on careless drivers without compensating their victims.[16]

5.4. Respondents highlighted that genuine claimants would be penalised by this measure, and others in the consultation.[17]

5.5. A number of CILEx members highlighted issues of fairness and comparable compensation. For example, if months of pain and suffering were caused by a vehicle collision in a train station car park, this proposal would mean less compensation is permitted than if the train they were waiting for was 30 minutes late.[18]

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[15] A CILEx member based in Leeds said *"This removes a long established principle of law of tort and an individual's right to redress and access to justice."*

[16] A CILEx Fellow specialising in personal injury from Stafford said *"I fail to see why we have insurance to protect us against third party claims only to then preclude people from bringing a certain type of claim. If a person is injured through no fault of their own and due to negligence of another, they should have the right to bring a claim."*

[17] A Chartered Legal Executive from Grimsby said *"Genuine claimants should not be prevented from pursuing a claim. They should be fairly compensated. More effort needs to be taken to ensure fraudulent claims are identified and dealt with and savings in premiums should be passed to the general public."*

[18] A CILEx member from Newport said *"I cannot see how it can be just to deny the right to compensation for injuries caused by another's' negligence on the basis that the injury is 'minor'. We are not a society that would permit the theft of small items based purely upon their value and so I cannot see why we should allow certain injuries to go uncompensated simply because they are minor."*
Likewise, a personal injury Chartered Legal Executive from Liverpool said *"The notion that you can obtain more in compensation for a late train than you would for being injured for 6 months is difficult to fathom and totally unfair."*

5.6. Many respondents raised concerns on grounds of the proposed definition or duration as currently specified. Many felt that too many claims would be caught up in the proposals because the definition or the duration were too broad.[19]

5.7. It also introduces a dangerous precedent, whereby the practice of non-compensation may be extended to other areas in future. In such circumstances, innocent persons injured in circumstances other than RTAs would not be compensated for pain, suffering or loss of amenity.[20]

5.8. CILEx is concerned with the veracity of the evidence used to inform the consultation.

5.8.1. One of the main premises of the proposed reform is to reduce the number of soft tissue related claims which the Government say is too high. Yet OECD figures say that the number of claims has plateaued.[21]

5.8.2. The consultation paper itself acknowledges they have been 'steady state' for a number of years, but says they are still higher than 10 years ago (para 6). Yet (as identified by the Department for Transport[22]) miles travelled by road in Britain over the last 5 years has increased and, as the IA acknowledges (para 1.9), there are 79% more cars per kilometre on Britain's roads than in other EU countries. Against the backdrop of those statistics, the premise looks less certain, and certainly a much blunter instrument to crack a more nuanced problem.

5.8.3. If the real problem is actually that the level of fraudulent claims needs to be tackled, then perhaps more focused proposals to address that should be developed.

Question 6: Please give your views on whether a fixed sum should be introduced to cover minor claims as defined in Part 1 of this consultation? Please explain your reasons.

5.9. 71% of surveyed CILEx members disagree with introducing a fixed sum for minor claims, with more than half (54%) strongly disagreeing.

5.9.1. Members regard a fixed sum as not having the sufficient flexibility needed to accommodate for the unique and different cases that fall within these proposals.

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[19] A Graduate CILEx member from Sunderland said "What they are classing as minor injuries I.e. less than 6-9 months can still have a great and damaging effect on people's lives such as those who have lost earnings and require treatment. It would greatly disadvantage those who are injured through no fault of their own."

[20] An Associate CILEx member from Whitstable said: *"Removing compensation for general damages in 'minor' RTA will result in some injured parties suffering pain through no fault of their own and receiving no means of redress, in particular this will affect those with pre-existing conditions which are exacerbated as a result of a minor collision. Furthermore, removing general damages from any element of any accident claim of any type, potentially paves the way for a full scale removal of general damages at some point in the future."*

[21] http://www.oecd-ilibrary.org/transport/road-safety-annual-report-2016_irtad-2016-en

[22] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/567098/prov-road-traffic-estimates-oct-2015-to-sep-2016.pdf

5.9.2. A fixed award based on duration removes any discretion to allow for the unique factors in a case, severity, exceptional circumstances, or the impact on a person's life.[23]

5.10. Of the 21% of surveyed members who agreed with a fixed sum, they acknowledged that it would simplify claims and reduce litigation costs. However many specified caveats or conditions, including:

5.10.1. The level of compensation being higher and fairer than currently proposed.[24]

5.10.2. A higher sum being introduced as a 'cap' or 'limit', rather than a fixed sum that will result in over-compensation in some cases.[25]

5.10.3. The fixed sum is based on severity as well as duration.[26]

5.10.4. There is a regular review process established to prevent fixed sums becoming outdated.[27]

5.11. There was however a general consensus that a fixed sum would be preferable to removing damages altogether, as it would at least in part address the concerns raised in 5.2. and 5.3. above.

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[23] A Chartered Legal Executive from Canterbury strongly disagreed *"…because every person is different and the effects of an injury may be more pronounced on one person as opposed another. The JC Guidelines give a suitable 'bracket' for minor injuries to be dealt within already."*
Another Fellow from Manchester said *"This will lead to unjust results. Many victims of injuries will be undercompensated. One size does not fit all. This is completely contrary to long established legal principles which support access to justice for all victims of injury and I have seen no evidence of any good reason for such change."*

[24] Two CILEx members from Manchester said: *"I am not against a fixed tariff in principle, but the figures should be reasonable and in line with current Judicial College guidelines."* and *"As long as reasonable tariff are agreed say in line with Judicial College Guidelines tariff."*

[25] A CILEx Personal Injury student from Cardiff suggested *"An upper limit could be set, but there should be movement on valuations dependent on individual circumstances and it should not be capped at a low figure."* And a Chartered Legal Executive from Liverpool said *"Every case has to turn on its own merits as this way some people would be over compensated and others under compensated."*

[26] A Cardiff-based Chartered Legal Executive said *"If minor injuries are between a few days and a few months there will be a huge disparity in the remuneration of individuals. The purpose of tort is to restore the individual to their positon before the accident. How can this be justified by giving a fixed level to an individual with neck pain with minimal restriction for 1 month, and an individual who had severe neck pain with large loss of amenity for 6-9 months?"*

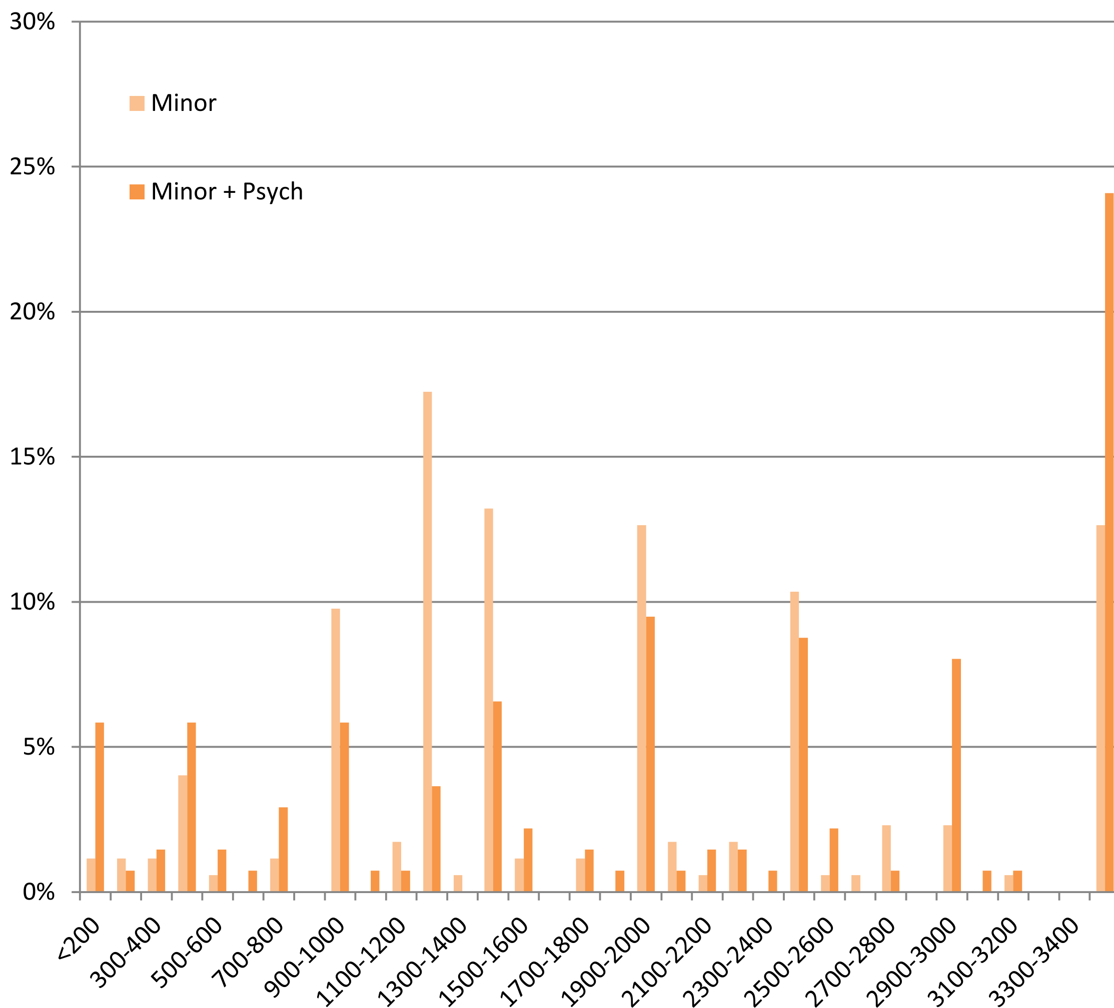
[27] An Associate CILEx member specialising in civil litigation said *"If fixed tariffs are to be introduced they need to be considered and fixed in consultation with expert medical practitioners, who as lawyers we rely on for their expertise in assessing the level of injury before we can assess the level of general damages, they need to take into account current guidelines, and not guidelines that go out of date just as any new scheme comes into existence, and there needs to be a mechanism for reviewing and adjusting any fixed level of general damages on an annual basis."*

Question 7: Please give your views on the government's proposal to fix the amount of compensation for pain, suffering and loss of amenity for minor claims at £400 and at £425 if the claim contains a psychological element. Please explain your reasons.

5.12. CILEx does not support 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.

5.13. These values are significantly below the average compensation paid to injured persons, levels of which have been established in common law over time, and are now reflected under the independent Judicial College Guidelines.

5.14. We surveyed CILEx members specialising in personal injury for what they would consider to be an appropriate fixed sum for PSLA if compensation for 'minor' RTA soft tissue claims were set at a fixed level. The responses fell more closely in line with the established guidelines.



CILEx member survey, Dec 2016
'Fixed sum value for 'minor' claims, and 'minor' claims with a psychological element.'

5.14.1. The average figure recommended was £1,951. [28] This indicates that to be considered a fair level of compensation, the £400 figure in the consultation is too low by nearly a factor of five.

5.14.2. Only 6 respondents recommended the figure be below the £400 level consulted on. Other respondents giving low figures specified that they did so based on a more realistic duration threshold for 'minor' claims.[29]

5.15. There were however several reservations expressed.

5.15.1. Members repeated their concerns about a the threshold that would be applied to these claims, the 'one-size fits all' approach to PSLA damages due to the individual nature of cases,[30] and the need to consider severity[31].

5.15.2. There was a general view that any fixed figures should more closely correlate with current guidelines.[32]

5.16. When asked what uplift there should be when 'minor' claims contain a secondary psychological element, CILEx members recommended an average £138 uplift, which again indicates that the £25 figure consulted on is too low, this time by greater than a factor of five.

5.16.1. There was a noticeable coalescing of responses at the higher end of the scale, with more than twice as many members recommending fixed sums at the highest level than in any other bracket.

5.17. However some significant concerns were raised about this exercise, including concerns already raised above.

5.17.1. Members regard the superficial £25 increase to reflect psychological injury as something that further stigmatises mental health issues as less important than physical ailments.[33]

5.17.2. Members assert that assessment of psychological injury should be done properly and thoroughly.[34]

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[28] The maximum value allowed by the survey, in accordance with the Judicial College Guidelines.

[29] A CILEx Fellow from Birmingham specified: "Assume whiplash injury less than 4 weeks, say £500"

[30] A Chartered Legal Executive said *"This is the only way to reduce the number of victims of injury who will be undercompensated, although it will not eliminate those cases. It will result in others being overcompensation. One size does not fit all. This is why it is entirely unworkable."*

[31] A CILEx student from Cardiff said "It must take into account that some people's injuries are more significant than others and shouldn't be capped at a low sum."

[32] A Chartered Legal Executive working for a defendant insurer said "If we are taking about a 9 month soft tissue injury, JC Guidelines suggest approx. £3,200. I fundamentally disagree that less compensation should be paid - as this flies in the face of judicial guidance which is suggestive of an upward increase in compensation." Another member, from Leeds, said *"I think that the valuations given in the JC Guidelines should be used when creating a fixed scale. These are the guidelines used when valuing personal injury claims and they should not simply be disregarded."*

[33] A personal injury specialist from Grimsby said *"To set a £25.00 limit on psychological issues is offensive to those suffering the same. It is minimising the severe nature that mental health can play upon a person's life. Psychological issues can impact heavily upon a person's mental health. If people feel they are being offered such an offensive amount then they will feel that their injury is "taboo" and not considered a "real" injury."*

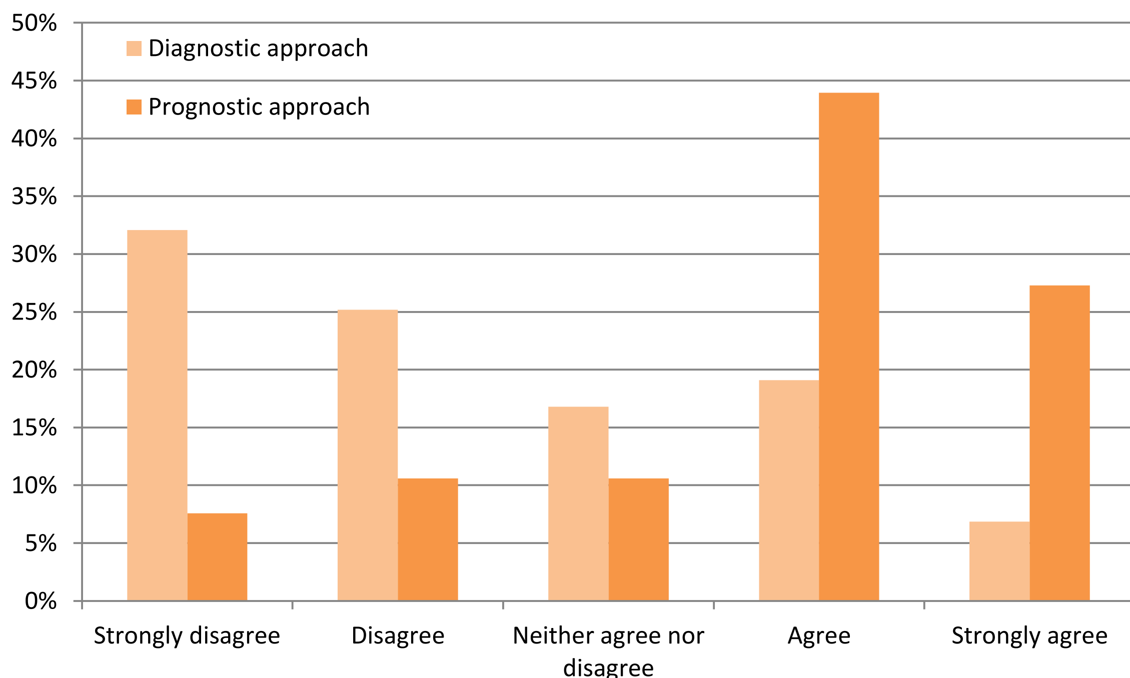
Question 8: If the option to remove compensation for pain, suffering and loss of amenity from minor road traffic accident related soft tissue injury claims is pursued, please give your views on whether the 'Diagnosis' approach should be used.
Please explain your reasons.

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

5.18. CILEx supports the use of the 'prognosis' approach over a 'diagnosis' approach. The prognostic approach is the more commonly used method in assessing PI claims, enabling medical reports to be sourced closer to the time of the accident meaning a reduced dependence upon a claimant's description of past symptoms and speedier access to treatment enabling swifter recovery for the claimant.

5.19. CILEx members surveyed favour a prognostic approach to a diagnostic approach by a significant margin.

5.19.1. 71% of respondents agree with using a prognostic approach, compared to a majority who disagreed (57%) with using a diagnostic approach.



CILEx member survey, Dec 2016
'Favourability of a diagnosis approach to a prognosis approach.'

[34] "Psychological injuries are complex. Damages should not be limited, rather the medial evidence perhaps should be more thorough to deal with diagnosis of the same."

5.20. Feedback on the diagnostic approach included:

5.20.1. It would build unnecessary delay into the system by requiring claimants to wait for a proscribed period before seeking reparations. This delay could leave injured persons out-of-pocket whilst faced by additional costs due to their injury.[35]

5.20.2. A specified examination threshold may incentivise claimants to exaggerate or imply that symptoms are prolonged.[36]

5.20.3. It could lead to claimants receiving less than what they are rightfully entitled to.[37]

5.21. Feedback on the prognostic approach included:

5.21.1. It allows for assessment whilst symptoms are evident, which will be less susceptible to fraudulent claims.[38]

5.21.2. The system is structured in a way that makes prognosis a more suitable method.[39]

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.

5.22. No evidence has been presented to indicate that this is a widespread problem in need of government intervention.

5.22.1. The Impact Assessment itself suggests[40] that some late claims are those where pre-med offers are made due to the limited usefulness

[35] A CILEx Fellow from Manchester said *"As other losses rely on a medical i.e. treatment, earnings, care etc, the Claimant will be out of pocket for 6 months in the hope that they may or may not qualify."*

[36] A Chartered Legal Executive specialising in person injury said *"If claimants knew that demonstrating on-going injury at the 6 month point would determine whether they could claim or not it may encourage claimants to exaggerate injuries during the medical examination."*

Likewise a CILEx Fellow from Newcastle said *"This approach is littered with potential problems. If clients knew that they would get nothing/next to nothing for a prognosis period less than 6 or 9 months then there is an incentive for a client to exaggerate an injury. There is no such incentive now as, under the present system, there is no minimum limit for recovering compensation and as legal fees are recoverable for all cases with a value over £1,000.00 then only a maximum of 25% can be taken from the clients damages."*

[37] A CILEx Graduate member from Halifax said *"Having no one evaluate the Claimant before, say, six months, would mean a lot of under-settling when otherwise an expert would notice, say, an underlying problem that was exacerbated"*

[38] An Associate member from Beccles said *"Claimants are assessed whilst injured, discouraging fraud, with the option to be reassessed if the prognosis is not borne out."*

[39] A Chartered Legal Executive specialising in RTA personal injury said *"The prognosis approach is one that is presently used in personal injury cases and should remain as such, irrespective of any proposed forms, as it is the approach experts are used to determining the nature and extent of a client's injuries. It also one used for valuing injuries in conjunction with the JSB Guidelines and appropriate case law. There has never been a suggestion that damages are inflated. In addition the principle of MEDCO was for accredited medical experts to be monitored to show genuine prognosis periods."*

[40] Pg 49 - 2.145(iii)

of such evidence. The proposed ban on pre-med offers will address this.

5.23. It is important to consider that the statutory limit allows for claims up to the end of the limitation period for good reason. There can be a variety of reasons why claimants may not bring claims in the immediate weeks or months following an accident.

5.23.1. It may take time for the injury to settle, or there may be other more pressing issues, such as caring responsibilities, scheduling treatments, or making financial arrangements to cover additional costs.

5.23.2. The preparation of a claim itself can be time consuming, and allowing a window for effective case preparation reduces litigation costs and court time.

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

Question 11: The tariff figures have been developed to meet the government's objectives. Do you agree with the figures provided? Please explain your reasons why along with any suggested figures and detail on how they were reached.

6.1. Due to each individual claim being unique in nature and specific in detail, CILEx members are concerned about introducing a fixed tariff for RTA claims that overlooks this complexity.

6.2. Furthermore, CILEx is not convinced that these proposals will meet the government's objectives as defined in the consultation.[41] A fixed tariff that applies to all soft-tissue claims will inadvertently affect injuries other than whiplash.

6.3. Members have told us that maintaining the current 'limits' system allows for the appropriate flexibility when considering compensation, as opposed to the rigidity of fixed damages which may result in over-compensation for some claims, or may compel injured parties to exaggerate borderline claims in order to maximise compensation. It allows no discretion to be applied to allow for the fact that similar injuries affect different people in different ways.

6.4. The suggested figures appear to have been arrived at without using defined criteria, and are at the lower end of the range allowed for in the Judicial College Guidelines. Pursuing with the proposed figures would be to arbitrarily value awards at dramatically reduced levels of compensation owed to innocent injured parties.

6.5. Whilst CILEx members largely feel the current guidelines are suitable, it is clear that other options have not been considered in the consultation that would retain a degree of discretion within the process for claims to be considered on their individual merits (such as a range of caps on PSLA compensation payments that are more in line with current judicial guidelines).

6.6. In the event that a fixed tariff or similar system is introduced, CILEx would expect to see the following considerations made:

a) the figures were set at the right levels to ensure PSLA is fairly compensated (the tariff levels in the consultation are currently too low to be considered at all fair),[42]

b) severity as well as duration are factors in setting a tariff, and exceptional circumstances uplifts are allowed for in all appropriate circumstances,[43]

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[41] Para 22: "The vast majority of RTA related soft tissue injury claims are whiplash claims, which are the main claims the government is particularly keen to address through these new reforms."

[42] A CILEx Fellow from Liverpool said *"Every other economic element of society increases through inflation etc, why should compensation for innocent victims be reduced to levels less than historical awards. The governments approach is misguided, the way to tackle fraud is through different avenues."*

c) inflationary increases are allowed for, to avoid arbitrary adjustments at later dates,[44]
d) duration of injury is assessed using a prognostic rather than diagnostic approach (see 5.18. – 5.21. above), and
e) if an accident exacerbates an existing injury/condition, this should be accounted for in the prognosis to estimate the duration until the victim returns to the condition they were in at the time of the accident.[45]

6.7. CILEx members were surveyed for their assessment on where tariff levels should be set <u>if</u> they were to be introduced based on duration alone[46].

6.7.1. Whilst there was widespread opposition to the introduction of a tariff, when averaged and rounded off, these figures reveal a trend towards a £500 increment for every 3-month period of injury. On top of a base rate of £1,400 for sustaining an acute whiplash injury this equates to a reasonable £40 compensation for each additional week of injury, with an additional £300 increment if the injury is sustained for over a year.

Injury duration	Current weighted median	JCGs (12th ed.)	Consultation tariff amounts	CILEx members' levels (approx.)
<3 months	£1,750	£200-£3,520	£400	£1,400
3-6 months				£1,900
7-9 months	£2,400	£1,705-£3,520	£700	£2,400
10-12 months	£2,950		£1,100	£2,900
13-15 months	£3,300	£1,705-£6,380	£1,700	£3,700
16-18 months	£3,750		£2,500	£4,200
19-24 months	£4,350		£3,500	£4,600

CILEx member survey, Dec 2016
'Average tariff levels if introduced on duration alone.'

6.8. As noted in 5.14. and 5.16. above, the figures in the consultation are significantly lower than those on average deemed appropriate by CILEx members.

[43] A Chartered Legal Executive from Cardiff said *"I don't believe they should be fixed amounts. As previously advised, each and every claim should be assessed subjectively within a reasonable bracket. The Judiciary has been sufficiently capable of deciding and dealing with dishonesty and in awarding damages based upon the evidence placed in front of it. It is fundamentally wrong to remove the judiciary from the process to allow an insurance company to run rough shod over people making a claim and decide without a chance to disagree with an award or a level of award based on their circumstances.*

[44] I.e. as in footnote 42.

[45] A Chartered Legal Executive from London specialising in clinical negligence said *"No case is ever the same, provisions would need to be considered for pre-existing injuries, age, disability etc."*

[46] The survey allowed for respondents to set their desired levels within the Judicial College Guideline figures outlined in the consultation document. Respondents were therefore unable to select values above £3,520 for injuries lasting up to 12 months.

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.

6.9. A fixed tariff system does not give any flexibility or discretion in the award of general damages, therefore necessitating robust allowances for exceptional circumstances.

6.10. CILEx is concerned that exceptional circumstances, by their very nature, are difficult to anticipate. We therefore recommend that it should be left to judicial discretion to recognise and apply any additional allowance for exceptional circumstances.

6.11. We also recommend that they be given sufficient leeway to use their expertise, and knowledge of the particulars of the case at hand, to assess the right level of award without unnecessary limitations. This would require that they not be overly restricted in the circumstances in which they are able to apply discretionary uplifts, or that they be arbitrarily limited to 20%.

6.12. However, in the event the Government were to legislate a prescriptive list of exceptional circumstances, CILEx members recommend that the following be included;

- Generic exceptional circumstances (to allow for unforeseen circumstances, and to avoid an overly arbitrary or inflexible set of criteria),
- Severity of injury/incident (if severity is not taken into account as we recommend above, and can include issues such as the nature of treatment, i.e. if the victim needed to be taken to hospital)
- Where vulnerability is a factor (i.e. where the claimant is a child, elderly, disabled, pregnant, etc)
- If the victim becomes economically inactive for a period (i.e. the claimant has been signed off work, but where this is not accounted for under specified damages [loss of earnings])
- Impact on specified circumstance (i.e. if the injury impacts upon a major event, such as a wedding, funeral, or examinations)

6.13. Some members also indicated that an awards uplift may be applicable as an incentive towards ADR or an early settlement.

6.14. Similarly, an uplift could be applied if there is unreasonable delay in payment on the part of the defendant as an incentive to avoid delayed reparations.

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

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

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

7.1. CILEx does not believe that the small claims track limit should be raised for personal injury claims or for road traffic accident cases. This change would restrict access to justice for genuine claimants, as many will not be able to cover the cost of their own legal representation, as those costs will not be recoverable from the other side.[47]

7.1.1. 87% of CILEx members surveyed disagree with the proposal to raise the small claims limit for all PI claims, and 86% disagree with it being raised for RTA related PI claims.[48]

7.1.2. 95% of respondents disagree with the limit being raised above £5,000 (82% strongly disagree).[49]

7.2. The resultant inequality of arms could result in claimants appearing as litigants in person without legal representation against defendant insurance companies fully resourced by a legal team's advice and support.[50] Even

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[47] A Chartered Legal Executive from Spalding said *"Unless there is some costs benefits built in many Claimants will deal with claims without legal representation and in all probability struggle with the process."*

[48] Respondents were not convinced of the need to distinguish between the access to justice needs of claimants suffering from injuries resulting from different circumstances. One member from Beccles said *"Injury is injury; why should the claimant not involved in an RTA have easier access to legal services than an RTA claimant?"* Another from Cheltenham said *"Why differentiate? It does not matter where or how you have been injured. The proposals have nothing to do with RTA fraud. That is clear."*

[49] Members expressed near universal concern about the potential consequences of the limit rising above £5,000, with many saying even modest increases would have disastrous consequences. One member from Newcastle said *"The figure is too high. A straightforward claim where damages are not high may not need representation, but on the current level of £1000 there are still cases which need representation. I have case running to trial that has legal points to be argued and the injury is of a minor nature, but still worth more than £1000. The claimant would not be able represent himself at trial against Counsel that would be appointed by the Defendant."*

[50] A CILEx Fellow from Bristol said *"£5000 can be a significant amount of money to many and limiting legal representation will reduce access to justice and the ability for these claimants to recover what they are entitled to, especially in light of insurers tactics of offering significantly reduced amounts."*
Another Fellow specialising in personal injury said *"A claim for £5,000 could include a claim for loss of earnings (not all employers pay sick pay), which is a significant loss for someone on a low income. There should be equality of arms between victims and insurers."*

relatively small claims can involve complex issues of liability and causation that such claimants will be ill equipped to manage.[51]

7.2.1. Those litigants in person therefore also risk clogging up yet further our already under-pressure courts.[52] This assumes that there will be those who feel confident and well resourced enough to cover other upfront costs such as court fees[53] and (as discussed later) the medical report fee for example.[54]

7.2.2. Those claimants that do soldier on are at such a disadvantage that there is a very real risk that they will obtain under-compensation even if successful.[55] Others will inadvertently pursue entirely unmeritorious claims, as they have not had the benefit of legal advice in relation to their claim.

7.2.3. Legal professionals working for defendants tell us they prefer dealing with claimants with legal support to litigants in person, as cases are handled more swiftly and with greater professionalism.[56]

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[51] A PI specialist from Newport said "*Certain claims such as those involving accidents at work or slips and trips on the highway will involve a significant level of legal knowledge to establish who is at fault (if anyone) for the injury caused. It cannot be just to put this burden on lay people which would be the likely outcome since it would not be profitable for firms to do this work if fees were not recoverable."*

An Associate member from Sheffield said *"Claimants would not be able to argue complex issues such as contrib, ex turpi (MOT issues) or similar without assistance. It is wrong and removes access to justice for a vast number."*

A Chartered Legal Executive from Wolverhampton said *"To base complexity on value only is misguided, the legal issues between the parties are a more significant issue as they will define whether a layperson can adequately argue the issues or not. In most cases I believe this is simply placing judges in an impossible position of protecting lay people from defendant lawyers predatory approach to such litigation, helping lay people argue their points and staying impartial. The increase simply destroys access to justice."*

Another member from Southport put it succinctly: "A case below this level often have complex liability arguments and this would deny access to justice."

[52] A Chartered Legal Executive from Liverpool said *"A claim for £5000 can be a minor fracture or a two year back injury - if all claimants were left to pursue claims then the courts would be back logged and no justice would be afforded to any claimants."*

[53] A Fellow specialising in personal injury said *"You are penalising people and stopping them from accessing justice when they otherwise would. The individual would have to pay the court fees even though they could be recovered at conclusion and that would stop people from pursuing claims let alone not being confident in the process. The court staff would need to be more available to help and they refuse to let you take documents to the court counter for sealing so they certainly aren't going to have time to deal with a queue of 20 litigants in person."*

[54] A personal injury specialists said "*Everyone should be entitled to legal representation. Raising the limit risks only those who are already sufficiently wealthy having access to justice."*

[55] A Chartered Legal Executive from Bournemouth said "(*The) claimant will not be on an even footing and may not understand what they are entitled to claim for."*

A Graduate member from Liverpool added *"Claimant unable to obtain correct level of compensation without legal advice. Insurers can undermine less savvy claimants."*

[56] A defendant lawyer from Manchester said *"As a defendant lawyer, I already deal with litigants in person and they would require a significant amount of assistance. These claims often result in increased costs and court time due to the likelihood that a LIP is unable to conduct the litigation effectively without representation. My experience is that a number of claims end up struck out due to the LIP's failure to comply with court directions - again this is an access to justice issue."*

One respondent said increasing the limit would "*… cause an adverse delay in processing of claims and will raise litigation and incur further costs. Credibility issues will be raised as to why the claimant did not raise the claim*

7.2.4. There is a real risk that, in the absence of any other legal advice, claimants will be drawn to unscrupulous claims management companies and be encouraged to pursue less meritorious claims, a scenario the proposals presumably specifically wishes to prevent.[57] It also has the potential to allow for more exaggerated claims, as professional legal advisers are often able to advise against them being pursued. Tackling fraudulent or exaggerated claims requires more focussed proposals aimed at specifically eradicating practices such as cold calling.[58]

7.2.5. In addition, this could affect the health of the supplier side of the market; CILEx has more than 3,700 members specialising in personal injury who fear that this measure would result in significant job losses.[59]

7.3. Throughout the consultation there is a false premise at play that wrongly conflates low value claims with fraudulent ones. They are not the same and genuine claimants with meritorious claims risk having access to justice and proper redress denied through misdirected attempts to prevent fraud.[60]

7.4. In the Government's 2013 response to its consultation on whiplash, it said; *"The Government accepts that currently extending the Small Claims limit may have an adverse effect on genuine victims of RTA injuries. In particular, the Government will seek to ensure that adequate safeguards are developed to protect genuine claimants from any detrimental effects relating to access to justice or to the under-settling of claims from any future rise in the limit."*[61]

7.4.1. No such safeguards are offered in the current consultation. Having previously recognised the importance of protecting genuine claimants, it is surprising and disappointing to see the proposals in their current form.

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sooner. Accident circumstances will not be fresh to the claimant should they have to wait for 2 years or more to then bring their claim."

[57] A litigation specialist from Birmingham said *"Claimant's may become increasingly reliant on CMCs to bring claims."*

[58] A CILEx member warned *"We will see inflated claims for damages and costs instead. Perhaps even more fraud."*

[59] An insurance fraud specialist from Birmingham said *"The majority of whiplash claims fall into this bracket. It would become uneconomical to run such cases on the Small Claims Track. If Claimant firms turn their back on the market then Claimants will be denied adequate access to justice. …If the changes are implemented, I feel the bottom will drop out of the PI market and genuine Claimants will be denied access to justice. …I believe the changes would be the "straw that breaks the camel's back" in a market that has already been squeezed tremendously over the last 10 years or so."*

[60] A CILEx Fellow from Chesterfield said *"There are more genuinely injured people than there are fraudulent claimants. Why should they suffer when they have been injured through not fault of their own? They have a right to access justice, this proposal takes that away."*

[61] Para 42. https://consult.justice.gov.uk/digital-communications/reducing-number-cost-whiplash/results/whiplash-response.pdf

7.5. Some CILEx members acknowledge though that the small claims limit has not been raised for some time, and that a small increase may be appropriate for some cases such as faulty goods or unpaid invoices.[62]

7.5.1. The Bank of England's inflation calculator values £1,000 from 1991 as worth £1,936.58 in 2015.[63] Whilst a sudden near-doubling of the small claims track limit would be undesirable, it would be preferable to a five-fold increase as suggested in the consultation.

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.

7.6. Given the potential level of complexity involved[64], it is CILEx's view that the small claims track is not appropriate for Personal Injury cases at all, more suited as it is for disputes in relation to faulty goods, unpaid invoices, etc.[65]

7.6.1. This is inferred in the current Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents[66], assuming as it does that even low value RTA claims should not normally be dealt with in the small claims track.

7.7. In the event though, there are litigants in person currently pursuing claims in the small claims track against resourced defendants. In such cases consideration may be given to require the represented party to communicate

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[62] One respondent said *"The limit should not go as high as £5,000. If the limit is to increase it should be to around £2,000 which would still be a 100% increase."*

[63] As noted by a Chartered Legal Executive from Skelmersdale, saying *"£5000 is still too high. Injury worth £1000 in 1991 now worth £2000."*
The tool only calculates up to 2015 currently.
http://www.bankofengland.co.uk/education/Pages/resources/inflationtools/calculator/index1.aspx

[64] A CILEx members specialising in RTA PI said "*At present a £5,000.00 claim is usually a claim for approximately a 18 month prognosis for a soft tissue injury. An 18-month injury can have a severe impact on an individual. Some may require months off work and may require several medical reports before concluding the medical evidence. I do not believe it would be cost effective for many law firms to take on claims with a value between £3000.00 and £5000.00, as the work involved for very little recovery of costs would not be worthwhile. This would leave many Claimants without adequate representation. For example I have recently settled a claim for approximately £5,000.00 general damages where the Claimant had had a GP report with a 6 month prognosis, did not recover so went to see an Orthopaedic Consultant who gave a 12 month prognosis. In addition, the Claimant had psychological symptoms for a short period of time and was examined by a Psychologist. The claim took in the region of 18 months to settle and almost 20 hours work was undertaken. Whilst some claims may not be sufficiently complex, the majority require a lot of work."*

[65] A Chartered Legal Executive from Southampton said *"Comparing to the SCL for other types of claim is pointless as in those other types of claim it is usually two relatively evenly matched opponents, it NEVER is in PI. The Defendants always are insured and have funds for expert legal representation."*

[66] https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-low-value-personal-injury-claims-in-road-traffic-accidents-31-july-2013 4.1 of the PAP recognises that the small claims track is not the most suitable for personal injury claims

as clearly and accessibly as possible with the unrepresented party using the least amount of legal jargon possible.[67]

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

7.8. CILEx members expressed concerns with regard to the regulatory weight and quality assurance concerns surrounding CMCs and MFs.

7.9. It is CILEx's view that injured claimants, and defendants, require professional legal advice due to the potentially complex nature of PI claims, and that circumventing this requirement causes more risks and issues than it does benefits.

[67] A member from Cardiff suggested *"Regulation placed on insurers to ensure that all correspondence is sent to Claimant's in a clear and accessible format. There is the likelihood that insurers will abuse the process and Claimant's will be misguided into accepting less than they are entitled to."*

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

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

8.1. CILEx agrees that there should be a ban on pre-medical offers in road traffic accident related soft tissue injury cases. The measure has the potential to reduce costs and deter speculative claims. Given that claims without medical reports generally achieve lower settlements, it could also ensure appropriate levels of compensation to genuine claims and prevent under-settling for some claimants. As access to legal representation will reduced by the other proposals, this may be the only way in future that some litigants in person will get an indication of the severity of their injury and value and validity of their potential claim.

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

8.2. The general view of CILEx members surveyed was there should not be any exemptions to the ban. Possible exceptions to that which were offered for consideration included the terminally ill, children and vulnerable claimants in certain circumstances.

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

8.3. Enforcement of the ban should focus around encouraging appropriate behaviours amongst insurers. The solution may therefore be a regulatory one perhaps involving the FCA.

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

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

9.1. CILEx members surveyed on balance favoured the Claims Notification Form being amended to include the source of referral of claim as it enables greater transparency and the ability to prevent fraud particularly at the hands of unscrupulous CMCs. However, there were concerns expressed in relation to the maintenance of confidentiality and relevance in every case. As with other proposals in this consultation, the general view is that other more focused initiatives should be developed if the primary aim is to reduce numbers of fraudulent claims rather than this type of piecemeal reform.

Question 21: Should the Qualified One-way Costs Shifting provisions be amended so that a claimant is required to seek the court's permission to discontinue less than 28 days before trial (Part 38.4 of CPR)?
Please state your reasons.

9.2. The majority of CILEx members surveyed disagreed that Qualified One-way Costs Shifting provisions should 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). There are a variety of reasons for this. Some feel that the experience in PI cases where they currently apply demonstrates that insurers tend not to operate in the spirit of the QOCS provisions in any case, by making Part 36 offers to disapply QOCS. If this proposed change was made, they would do the same here. Others point out that such a proposal takes no account of the scenario in which defendants often supply late evidence causing the claimant to discontinue late when they should have in fact been supplied that evidence sooner. The proposed change risks claimants being ambushed at a late stage in the proceedings by defendants adopting that tactic.

9.3. There is an even greater issue should the reforms result in reduced access to legal representation: litigants in person will be vulnerable, not knowing how to deal with insurers when they raise 'fundamental dishonesty' as they are able to do at any point and therefore may discontinue perfectly legitimate claims due to the absence of advice. To an extent, QOCS is also designed to afford the claimant protection and if the defendant has made no offers then the claimant should be able to withdraw without consequences.

9.4. CILEx members also questioned the consultation paper suggestion that "current arrangements allow for the late withdrawal of fraudulent claims with

impunity", as, however, this is categorically not the case. Practice Direction 44 12.4(c) (Section II) states "where the claimant has served a notice of discontinuance, the court may direct that issues arising out of an allegation that the claim was fundamentally dishonest be determined notwithstanding that the notice has not been set aside pursuant to rule 38.4". In these circumstances, allegations of fundamental dishonesty can still be tested by a Defendant without the notice of discontinuance being set aside. This rule effectively circumvents the 28 day rule in CPR 38.4(2).

9.5. There are also views that the proposed change could add to the burden of the courts which are under pressure and unlikely to be able to deal with such applications within 28 days. Court timetables may mean that 7-14 days would be a more reasonable timeframe. The change may also affect behaviours at the 28 to 35 day stage of proceedings; defendants may choose deploy evidence near or at the 28 day point to pressure the claimant with the threat of losing QOCs, particularly by introducing fundamental dishonesty at that point.

10. Part 7 – Call for evidence on related issues

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).

10.1. CILEx supports the premise that unnecessary costs should, where possible, be removed from the system because they are detrimental to consumers, ultimately being passed on to them as they are through higher premiums. However, any changes to credit hire arrangements should not be at the expense of the non-fault party either in terms of their ability to choose a suitable TRV, or in terms of actual costs to them.

10.2. The First Party Model does have the capacity to both limit the choice of the non-fault parties and increase their costs, if the policy holder's own insurance has to be used regardless of who is at fault, and will likely to lead to an increase in premium costs.

10.3. The Regulatory Model arguably would create a framework which mostly protects consumers but risks being heavy-handed, slow to implement and costly in itself.

10.4. The Competitive Offer Model seems reasonable but, as the consultation paper itself acknowledges, may not be realistic in terms of the turn-around time and pressure placed on at-fault insurers at a point where the priority has to be to get the non-fault party back on the road. That pressure could translate into a curtailment of the non-fault party's choice of TRV which again would not be desirable.

10.5. Arguably, the Industry Code of Conduct solution therefore offers the most practical initial prospect of creating an environment within the industry that manages the potential for TRV costs to reach levels excessive enough to increase premium costs to the detriment of all insureds. Effectiveness of this model though would require ongoing monitoring to ensure it was being adhered to and therefore truly effective.

Question 23: What (if any) further suggestions for reform would help the credit hire sector, in particular, to address the behaviours exhibited by participants in the market?
Please provide the factors that should be considered and why.

10.6. No comments to offer.

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

10.7. Much of the search, selection and management of motor insurance policies is conducted by consumers online, often through price comparison websites and/or (subsequently) directly via the websites of insurers themselves.

10.8. Once created policies are increasingly electronic-only with consumers viewing, claiming, and managing the policies, their renewal or related queries securely online. With that digitally-enabled environment, it must be possible for greater clarity to be provided to consumers in relation to their rights and arrangements around the provision of a TRV should they need it, including the links between their insurer, credit higher companies and legal advisers they may use in those circumstances.

10.9. Such information should be presented plain clear language, perhaps accompanied by FAQs or scenarios/examples of best practice and the increasing prevalent webchat function should consumers have related queries.

10.10. The requirement for insurers to make this provision should be included in any Industry Code of Conduct, should that option be chosen following this consultation.

Question 25: Do you think a system of early notification of claims should be introduced to England and Wales?
Please provide reasons and/or evidence in support of your view.

10.11. Whilst CILEx has no definite view about the introduction of a system of early notification of claims in England and Wales, we are concerned that the potential level of risk in relation to such a process is recognised. As stated elsewhere in this response, soft tissue injuries vary in their severity and the effect that they have on individuals' lives. Similarly, the effects of such injuries can develop at different speeds and it would be patently unfair if a genuine claimant was unable to pursue a claim for a real medically verifiable consequential condition simply because an arbitrary limitation period was inadvertently breached. In addition, this could lead to a pattern in which such a risk becomes generally known, positively incentivising people to notify a claim early in order to not fall foul of any limitation period should their condition deteriorate in the future. In such circumstances, those claimants

could be the target of unscrupulous Claims Management Companies who want to encourage them to pursue their claims, particularly should they also have no access to legal advice in the future.

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

10.12. The response to Question 25 above is also relevant here. The effects of such injuries do not develop at an even pace; deterioration can set in both immediately but after a period of time has elapsed. Introducing a requirement on potential claimants to seek medical treatment disincentivises those for whom the condition does not in their view reasonably require medical intervention at that point (which given the overall tenor of the Government's proposals is presumably to be encouraged) and arguably incentivises, as the paper itself acknowledges, individuals to go through with making an actual claim.

10.13. The consultation paper and Impact Assessment also explicitly look at the effects of the proposals on the NHS as an Affected Organisation. Requiring potential claimants to seek medical treatment also risks increasing the pressure on the NHS. The IA, for example, refers to the likelihood of fewer claimants attending A&E as a mitigating factor to the risk of increased costs falling to the NHS by it being unable to recover costs of any treatment supplied from the at-fault insurer in the event that the small claims limit is raised. However, that mitigation would be wiped out should this requirement be introduced.

Question 27: Which of the options to tackle the developing issues in the rehabilitation sector do you agree with (select 1 or more from the list below)?
Option 1: Rehabilitation vouchers
Option 2: All rehabilitation arranged and paid for by the defendant
Option 3: No compensation payment made towards rehabilitation in low value claims
Option 4: MedCo to be expanded to include rehabilitation
Option 5: Introducing fixed recoverable damages for rehabilitation treatment
Other:
Please give your reasons.

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

10.14. None of the options offered are perfect and there may be others that are as or even more effective. Option 1 is attractive because the value/type of vouchers issued would presumably be linked to the medical reality of the condition being treated and break any financial incentive to simply make the referral for the sake of it for financial gain rather than the claimant's wellbeing. However, that arrangement also makes it difficult to see how it would work in practice; it is not clear how the vouchers would match the rehabilitation required. Getting that right could introduce bureaucracy and therefore cost into the process.

10.15. Options 2 and 3 seem inappropriately falling on defendants and claimants respectively. Defendants would be incentivised to limit claimants' choice of rehabilitation to keep costs down which could reduce the quality and choice of that treatment available. For claimants to have to fund rehabilitation in relation to a medical condition not of their making would be seen to be unfair. Option 5 would, as the consultation paper itself acknowledges, be difficult to set as rates reflecting the range of potentially required rehabilitation would be hard to identify.

10.16. Option 4 expansion of MedCo seems a logical way to proceed but this undertaking would take time to develop and implement. There may be other options to consider therefore such as liaising with regulators, for example the SRA, to make specific regulatory provision to prohibit solicitors referring all their rehabilitation work to providers they either own or have a direct financial link.

Question 29: Do you agree or disagree that the government explore the further option of restricting the recoverability of disbursements, e.g. for medical reports?
Please explain your reasons.

10.17. CILEx has reservations about the passing the onus from the defendant to the claimant. The £180 fixed MedCo report costs would act as disincentive to many genuine claimants. As with many of the proposals in this consultation, the government's premise is that such a measure would disincentivise those seeking to exploit the system by making a fraudulent claim. As with those other proposals, that this will deter genuine claimants from getting the redress they deserve, for a situation they are in that is not of their own making, seems to be considered a price worth paying to achieve this. CILEx disagrees.

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.

10.18. CILEx believes that many of the same issues apply to any 'Barème' type scheme as apply to the introduction of a tariff system.

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

10.19. Overall, CILEx is of the view that the main aim of these reforms is to tackle fraudulent claims which add costs to the system and keep the level of claims artificially high. As previously stated, CILEx's view is that the proposals instead will deny access to justice for genuine claimants who have been injured through no fault of their own. This is not a price worth paying to try and reduce fraudulent claims. Instead, the government should develop other focused proposals that are specifically designed to do just that.

10.20. In terms of other possible reforms, the view of CILEx members surveyed was that the fixed costs regime has gone a long way to bringing the costs of civil litigation under control. Any further reforms might consider fixed damages structure for very minor RTA whiplash injuries only. Anything further than this risks unfair restriction of access to justice for genuinely injured people and undermines the basics of the law of tort.

Please contact the individual below for further contributions that may be required from the answers provided.

For further details

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