Executive Summary

1. This Memorandum provides the Ministry of Justice’s written evidence to the Transport Select Committee’s inquiry, announced on 15 March 2013, into reducing the number and costs of whiplash claims. This evidence informed the Government’s consultation paper ‘Reducing the number and costs of whiplash claims’ published in December 2012. The Government intends to take account of the recommendations of the Committee’s inquiry before publishing its response to consultation.

2. Fraudulent, exaggerated and unnecessary insurance claims place a significant financial burden on each and every motorist. The Government is determined to reduce the number of such claims as part of its general strategy of supporting reductions in the cost of living and the cost of insurance premiums.

3. Government figures show that between 2006 and 2011 the number of reported road traffic accidents fell by 20%. Over the same period, there was a 60% rise in road traffic accident personal injury claims. 2012/13 figures show a small decrease in the number of whiplash claims and the Government is committed to working with stakeholders to continue this trend. Whiplash injuries have been estimated by the industry to account for nearly £2bn of compensation payments a year, equivalent to 20% of the typical car insurance premium.

4. The Prime Minister held an insurance summit on 14 February 2012 to discuss the increasing cost of motor insurance premiums with the insurance industry. Between December 2012 and March 2013, the Ministry of Justice consulted on specific measures to reduce the number and costs of whiplash claims. The consultation considered two main areas for potential change: first, moving to independent medical panels, appointed or accredited by the court, to improve the diagnosis of whiplash injuries. Secondly, options for the level at which the Small Claims track threshold should be set for road traffic accident related whiplash claims and all road traffic accident personal injury claims to help ensure that we have the right incentives to challenge fraudulent or exaggerated claims.

5. In a wider context, the Government has also introduced, from 1 April 2013, substantial reforms to civil litigation funding and costs in the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012, which take forward Lord Justice Jackson’s recommendations. These changes to conditional fee agreements and the banning the payment and receipt of referral fees in personal injury cases will make a significant difference to the costs involved in civil litigation and the current culture of claims.

6. The Government expects the insurance companies to act on the commitment they made at the Prime Minister’s summit in February 2012 to pass on to consumers and businesses industry estimated savings of approximately £1.5-£2bn that could come from the reforms on both legal fees and future changes to whiplash claims.

7. The Government welcomes the Transport Committee’s inquiry into whiplash. It looks forward to hearing the Committee’s recommendations and the ideas of other
interested parties to put alongside the Government’s proposals for reducing the number and cost of whiplash claims.

Is the Government correct in describing Great Britain as the “whiplash capital of the world”?

8. Available data indicates that whiplash claims are more prevalent in the UK than other European countries, although there have been no worldwide studies completed in this area. A European study from 2004\(^1\) suggests that the UK recorded a high proportion of motor claims with bodily injuries compared with most other European countries (around 17% compared to around 9% in France) and of these claims the highest proportion related to cervical trauma (broadly whiplash) - around 76% in the UK compared with around 30% in Spain and around just 3% in France. See table 1 below:

<table>
<thead>
<tr>
<th>Country</th>
<th>Number of claims (bodily + material)</th>
<th>Bodily injury</th>
<th>Cervical trauma compared with the number of bodily injuries</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>420 000</td>
<td>12% or 50 000</td>
<td>No data available</td>
</tr>
<tr>
<td>Switzerland</td>
<td>300 000</td>
<td>10% or 30 000</td>
<td>approx. 33% or 10 000</td>
</tr>
<tr>
<td>Germany</td>
<td>3 960 000</td>
<td>10.7% or 424 000</td>
<td>approx. 47% or 200 000</td>
</tr>
<tr>
<td>Spain</td>
<td>2 320 000</td>
<td>10.8% or 250 000</td>
<td>approx. 32% or 80 000</td>
</tr>
<tr>
<td>Finland</td>
<td>88 839</td>
<td>13% or 13 574</td>
<td>approx. 8.5% or 1000</td>
</tr>
<tr>
<td>France</td>
<td>2 500 000</td>
<td>9% or 225 000</td>
<td>approx. 3% or 6 750</td>
</tr>
<tr>
<td>Italy</td>
<td>4 700 000</td>
<td>18% or 846 000</td>
<td>approx. 60% or 558 000</td>
</tr>
<tr>
<td>Netherlands</td>
<td>600 000</td>
<td>5% or 48 000</td>
<td>approx. 40% or 19 200</td>
</tr>
<tr>
<td>Norway</td>
<td>165 578</td>
<td>9.1% or 15 000</td>
<td>approx. 53% or 8 000</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>2 900 000</td>
<td>17% or 493 000</td>
<td>approx. 76% or 375 000</td>
</tr>
</tbody>
</table>

9. As stated previously, government figures show that between 2006 and 2011 the number of reported personal injury road traffic accidents fell by around 20%. Over a similar period (2006/07 to 2011/12), there was around a 60% rise in road traffic accident personal injury claims. In 2012/13 there was a small fall (of around 1%) in the number of claims compared to 2011/12.

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10. Both Government and insurance industry figures also indicate that the majority of all road traffic accident personal injury claims are for whiplash injuries. Although, in 2012/13 the overall number of motor claims where injuries were described as whiplash fell to around 480,000 from around 540,000 in the previous year.

![Motor personal injury claims recorded by Claims Recovery Unit (DWP) 2008/09 to 2012/13](chart)

11. Data published by the Association of British Insurers (ABI) estimates that the current total cost to the insurance industry of whiplash claims to be around £2 billion per year in compensation and legal fees. This compares to a cost to the industry of around £700m in 2003. The ABI estimates that fraudulent motor claims worth £441 million were detected by the industry in 2011. According to industry figures the level of undetected fraud is currently considered to cost the industry around £1 billion a year.

12. In individual terms, there are a number of factors unique to each customer which affects the final car insurance premium he or she pays. The ABI estimates that on average approximately 20% of the cost of an average car insurance premium relates to the cost to the industry of dealing with whiplash claims. On the ABI figures, this equates to approximately £90 per car insurance premium (the average cost of a car insurance premium in 2011 being £440).

13. It is not possible to quantify what proportion of this cost relates to genuine, fraudulent, exaggerated or unnecessary personal injury claims. The statistics indicate the possible extent of the issue with rising whiplash claims. For example, there has been an increase in the number of claims per accident in recent years, and insurance industry data previously showed that there were around 2.7 claims for whiplash damages made for every accident reported. The above data suggests that this figure may now be above 3 claims per accident.
14. The total cost of dealing with a personal injury claim is generally calculated by combining the damages awarded with the legal costs and other additional costs such as vehicle repair or credit hire. Various sources suggest that the average claim is around £2,500\(^2\), and there is evidence that suggests the majority of claims are less than £5,000\(^3\). According to the ABI 2012 key facts brief, the average cost of dealing with a claim is £4,527.

15. The cost of litigation in relation to these claims appears to be high relative to the compensation paid. An ABI report indicates that in motor claims of less than £5,000, for every £1 paid in compensation around 88p is paid to claimant lawyers\(^4\).

16. These figures in this section have been provided by members of the insurance industry and have not been verified by the Government. They should be considered indicative only.

Are the proposals put forward by the Government, in relation to medical evidence of whiplash and incentives to challenge fraudulent or exaggerated claims likely to reduce motor insurance premiums and, if so, to what extent?

17. Whiplash is a complex issue and a range of actions from all stakeholders will be required for significant impact to be made on the number of current claims being made.

18. There is currently a societal problem with consumers believing that making a claim for compensation where none is necessary is acceptable because ‘everyone is doing it’. However, insurance fraud is not a victimless crime; every fraudulent and exaggerated insurance claim that goes unchallenged means the premium of each motorist increases.

19. Concerns have been raised that the current system for claiming for whiplash injuries following a road traffic accident can encourage less meritorious claims. The increase in claims has had a significant impact with all drivers having to face unnecessary higher motor insurance premiums.

20. The Ministry of Justice consultation document sought views on the creation a specialist accredited medical panel for whiplash injuries and on whether to increase the small claims threshold for personal injury claims arising from road traffic accidents from £1,000 to £5,000.

21. The Government is of the view that small value whiplash claims can be relatively straightforward and that the cheaper, simpler Small Claims track is a more suitable venue for them than the more expensive Fast track. Raising the threshold for personal injury claims from £1,000 to £5,000 would allow the majority of whiplash claims to be heard in

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\(^3\) Data for a sample of RTA personal injury claims from one commercial source indicates that the median claim is for around £2,600. These data relate to three types of case only and only to a very small proportion of the total number of cases. Whether the data is representative of wider cases brought has not been verified.


\(^4\) ABI, Tackling whiplash Prevention, Care, Compensation. November 2008
the Small Claims court rather than the Fast track. The purpose of the Small Claims track is to provide an informal and low cost route for litigants to resolve disputes in a simple, straightforward way that is accessible and proportionate to value of the claim.

22. It would also allow defendants to challenge unnecessary or exaggerated claims in a more cost effective way than before. It will act as a deterrent to such claims if insurers challenge the level of damages being claimed rather than offering to settle for costs reasons, in a court track where claimants are responsible for paying their own legal costs (unlike the Fast track, parties cannot recover costs from the losing side).

23. It is not possible to quantify the number of claims that would be discouraged through improvements to the medical assessment process or through changes to the small claims threshold for personal injury claims. It is also unclear how the wider changes to the civil litigation landscape will affect case volumes and costs. The Government believes, however, that the reforms to civil litigation costs and the proposals in the recent consultation will have a significant impact on the costs incurred by insurers in personal injury claims. As a result, the Government expects legal costs to fall and insurers should to start passing on those savings to their customers through lower premiums.

What is the likely impact of the proposals on access to justice for claimants who are genuinely injured

24. The Government is committed to preserving access to justice for the genuinely injured. But that does not mean allowing exaggerated, misrepresented or fabricated claims to go unchallenged.

25. The question of raising the small claims threshold for damages for personal injury claims was last looked at in 2007, when strong arguments were made for raising the limit to address high legal costs. Respondents to the consultation also raised concerns that raising the limit would have an adverse effect on access to justice. The final decision taken at the time was not to raise the limit but to take forward proposals to improve and streamline the claims process itself. This led to the current pre-action protocol and portal scheme. However, with the continuing rise in whiplash claims since then, and the impact these are having on the cost of motor insurance premiums, we believe the time is right to revisit this issue alongside the wider changes taking place in the civil litigation landscape.

26. Improving standards and the way medical assessments are handled are beneficial to all involved in personal injury work. Stakeholder sessions with representatives from the claimant, defendant and medical sectors indicated broad areas of agreement from all parties around the area of independent medical accreditation. We do not believe these or the Governments other proposals on whether the Small Claims threshold for personal injury claims should be increased will compromise access to justice for claimants.

27. The Government recognises that there are risks in such proposals. Some genuinely injured parties may be discouraged from claiming or from challenging a potentially low offer to settle. There is also a potential problem of 'inequality of arms'. Claims for injury following a road traffic accident will usually be brought by an individual seeking compensation for alleged injury from a defendant (usually an insurer). Given the limits on cost recovery, the claimant is more likely to be self-represented under the Small Claims
track than the Fast track. Whilst the Small Claims track is designed with facilitating access to justice by self-represented litigants at its core, there is a risk that claims will not be presented with equal skill as the defendant may have legal representation.

28. However, the purpose of the Small Claims track has always been to provide an informal and low cost route for litigants in person to resolve disputes in a simple, straightforward way that is accessible and proportionate to value of their claim. The judiciary has a responsibility to ensure that self represented litigants are not at a disadvantage and understand what is required of them and when. In addition, no win no fee conditional fee arrangements will still be available for those with genuine injuries.

29. Significant advice and support is provided to self-represented litigants, including by Her Majesty’s Courts and Tribunals Service. The Civil Justice Council has produced new guidance on how to bring a small claim for litigants in person, which is free to download from the Judiciary website (http://www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/cjc). Many people also have included in their insurance policy ‘legal expenses’ cover, a form of before the event (BTE) insurance cover. Following the implementation of the Government’s reforms to civil litigation and costs, we expect a number of new innovative BTE insurance products to be developed for this market.

Are there other steps which the Government should be taking to reduce the cost of motor insurance?

30. We welcome the Transport Committee’s call for ideas on what more Government can do to reduce the cost of motor insurance premiums. However whilst Government can set the framework, including the legislative boundaries within which lawyers and others work, it can only do so much. It is for others, for individuals and lawyers, claimants and defendants to also step up to the plate with innovative ideas and ways all parties can work together to reduce the number and cost of fraudulent, exaggerated and unnecessary claims.

31. The Government has taken firm action to reduce the costs associated with civil litigation. There have been far too many claims being brought in to the legal system inappropriately, and once in the system they are being resolved too late at a high and disproportionate cost. Since the Prime Ministers insurance summit in February 2012 the Government has:

- introduced Continuous Insurance Enforcement, making it illegal to own an uninsured vehicle unless has a registered statutory off road notification
- consulted on increasing the penalties for uninsured driving
- implemented (on 1 April) Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (including fundamental reform of conditional fee agreements and a ban on the payment and receipt of referral fees)
- banned claims management companies from offering upfront cash incentives or other gifts to people who bring claims to them
- consulted on proposals to reduce the number and cost of whiplash claims
32. The reforms implemented on 1 April 2013 will remove incentives for excessive litigation, and will make a significant difference to the costs involved in civil litigation and the culture of claims. In addition, the Department of Transport will also shortly be publishing a Green Paper on measures designed to help reduce premiums for young drivers, who pay more in insurance claims than any other group of drivers.

33. In addition, the Competition Commission is also currently investigating the motor insurance sector and is looking at the provision of credit hire and vehicle repair services. Uncontrolled costs in these areas can add a considerable extra cost to an insurance claim, which is ultimately passed on to consumers through higher premiums. The Government will consider carefully the results of this investigation and any recommendations made by the Competition Commission for improvements in this sector.

34. In terms of whiplash, the Government would like to see insurance companies addressing the behaviours which encourage excessive and unnecessary claims within their own business models. Following the referral fee ban, lawyers can also be more active in checking claims are genuine before agreeing to represent clients to challenge claims.

35. The Government is keen to ensure that the number of unnecessary, exaggerated or fraudulent claims - which have led to high premiums and contributed to the growth of a compensation culture - fall. Since the Prime Minister’s summit in February 2012 there has been a vigorous debate in the media about the issues around the high number of personal injury claims in England and Wales. Also during this period the Insurance Fraud Enforcement Division⁵ of City of London Police, have made a significant impact on identifying and tackling insurance fraud.

36. The numbers of claims are now decreasing, but it is vital that all involved in this industry continue to work together to ensure that not only do the genuinely injured receive the compensation they deserve, but that those making unnecessary, exaggerated or fraudulent claims are effectively deterred from doing so. Greater co-operation between the insurance industry and claimant lawyers is vital to this process, and the Government encourages the sharing of data on potential fraudsters. Such co-operation is crucial to help to stop fraudulent claims at source.

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⁵ http://www.cityoflondon.police.uk/CityPolice/Departments/ECD/IFED/
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1. It is a good idea to train and certify medical experts who are reporting in whiplash claims. PIBA supports this.

2. There are many research papers and precedents for making the medico-legal filter better (for instance the Quebec Task Force in the mid 1990s).

3. PIBA members have sharp end experience of defeating and weeding out fraudulent claims. The current system is effective for weeding them out. It is the Portal introduced in 2010 which has made it easier for fraudulent claimants to pollute the system.

4. The evidence on which the MOJ rely to suggests that there has been an increase in fraudulent claims in England and Wales is deeply faulted and lacks credibility. There may be other evidence, we have not been shown it.

5. The MOJ’s proposal to increase the Small Claims Limit to deal with fraudulent claims is:
   
   [1] discriminatory against the poor, the elderly and the mentally disadvantaged and the uneducated,
   [2] unworkable,
   [3] based on a fundamental misunderstanding of the Small Claims process,
   [4] will create a barrier to access to justice for injured people.

6. PIBA propose better deterrence of fraudulent claimants by the following methods:
   
   [1] The Government should publicise the likely consequences of being found fraudulent by a court.
   [2] The police should be encouraged to follow up cases in which a claim has been dismissed on the basis that it was dishonest and the judge has referred the case to the DPP.
   [3] The procedure for committal for contempt should be made quicker and cheaper.
The Supreme Court decision in *Summers v Fairclough Homes Ltd* [2012] UKSC 26 should be publicised.

Medical Records should be disclosed in all whiplash cases.

**RESPONSE TO PART 1 OF THE CONSULTATION: THE ISSUE**

MOJ proposition [1]: the increase in RTA PI claims is caused by an increase in fraud and exaggeration

1. PIBA have analysed the evidence put forward by the MOJ on which the MOJ have made the assumption that the increase in whiplash claims is due to an increase in fraudulent and exaggerated RTA PI claims.

2. The authors of both the Consultation Paper and the Impact Assessment recognise that there is insufficient evidence to support the assertion that there has been an increase in fraudulent and exaggerated claims.

3. It is illogical that the MOJ has chosen to consult on methods to reduce the number of fraudulent/exaggerated whiplash claims before gathering and reciting sufficiently credible evidence to be satisfied on the balance of probabilities that the number of fraudulent/exaggerated whiplash claims is increasing.

4. The Consultation is based fundamentally upon the asserted fact that there is an increase in the number of RTA injury claims and there is a decrease in the number of reported RTAs. The reason which is put forwards by the MOJ for this anomaly is a growth in fraudulent/exaggerated whiplash claims.

5. The MOJ then assert as a fact that this growth is not mirrored in other jurisdictions and raise this as further support for the “fraud” explanation.

6. PIBA have analysed the evidence put forwards by the MoJ in support of these assertions and warn that it does not stand up to any proper scrutiny.

**The fall in the number of reported accidents**

7. The MoJ points to a 20% fall in the number of reported road traffic accidents over the 4 years between 2006/2010. They then note that there has been an increase in whiplash claims during that period and conclude that the increase must be due to fraud.

8. However, the “reported RTAs” information published by the Department of Transport comes from the STATS19. This is data which the Department of Transport itself has concluded is unreliable because it is tainted by massive under-reporting when compared with hospital A&E data. This is confirmed in the Department of Transport’s Road Safety Research Data Report No 69 2006 which states:

   “… there is general recognition and acceptance that the STATS19 record is an underestimation of the actual number of road traffic accident casualties. This has been acknowledged for some time and studies have been undertaken which provide estimates of this shortfall, but the issue is how constant over time are the levels of under-recording, misclassification and under-reporting, especially of serious accidents, to the police. And, if they are not constant, by how much have they changed so that the implications can be assessed to inform road safety policy and practice to the end of this target period.”
9. The authors of the MOJ Impact Assessment acknowledge that there is no evidence of trends in relation to unreported accidents. Non reporting of accidents is prevalent in all countries (see page 25 of the International Transport Forum Report IRTAD Road Safety 2010). Even the best performing countries recognise a shortfall in crash reporting, including even fatal crashes. In its 2010 Report, “Safety on roads: What’s the vision?”, the Organisation for Economic Co-operation and Development recognised that there are serious data deficiencies in relation to non-fatal (and non injury) collisions.

10. For minor RTAs, where no fatality or serious injury has been caused, most are not reported to the police. Even if a telephone report is made the police often do not attend the scene so the “reported figures” relate to more serious RTAs, are grossly unreliable and potentially irrelevant.

11. *The Road Safety Research Report No. 69 2006* recognised that there had been changes in healthcare practice with a reducing tendency to admit casualties if their injuries can be dealt with by an outpatient department. This would lead to a reduction in the number of reported crashes at hospitals.

**The 60% increase in the number of RTA PI claims from 2006 to 2010**

12. The DWP data shows that the number of PI claims registered with the CRU were as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Clinical Negligence</th>
<th>Employer</th>
<th>Motor</th>
<th>Other</th>
<th>Public</th>
<th>Liability not known</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011/12</td>
<td>13,517</td>
<td>87,350</td>
<td>828,489</td>
<td>4,435</td>
<td>104,863</td>
<td>2,496</td>
<td>1,041,150</td>
</tr>
<tr>
<td>2010/11</td>
<td>13,022</td>
<td>81,470</td>
<td>790,999</td>
<td>3,855</td>
<td>94,872</td>
<td>3,163</td>
<td>987,381</td>
</tr>
<tr>
<td>2009/10</td>
<td>10,308</td>
<td>78,744</td>
<td>674,997</td>
<td>2,806</td>
<td>91,025</td>
<td>3,445</td>
<td>861,325</td>
</tr>
<tr>
<td>2008/09</td>
<td>9,880</td>
<td>86,957</td>
<td>625,072</td>
<td>3,415</td>
<td>86,164</td>
<td>860</td>
<td>812,348</td>
</tr>
<tr>
<td>2007/08</td>
<td>8,876</td>
<td>87,198</td>
<td>551,905</td>
<td>3,449</td>
<td>79,472</td>
<td>1,850</td>
<td>732,750</td>
</tr>
<tr>
<td>2006/07</td>
<td>8,575</td>
<td>98,478</td>
<td>518,821</td>
<td>3,522</td>
<td>79,841</td>
<td>1,547</td>
<td>710,784</td>
</tr>
</tbody>
</table>

13. This data proves that RTA claims registered through the CRU rose by 60% but it also proves that clinical negligence claims rose by 58% (and employers’ liability claim dropped by 11%).

14. The MOJ has not concluded that the rise in clinical negligence claims is due to an increase in fraud yet it has done so for RTA claims.

15. Further, if the MoJ believe there has been a rise in fraudulent claims generally, this does not explain the decrease in employers’ liability claims.

16. PIBA submits that these figures alone do nothing to support the MOJ’s conclusion that there has been a growth in fraudulent RTA claims or fraudulent claims generally.

**The MOJ rely on the asserted fact that in the UK: 2.7 claims for whiplash are made for every reported RTA. This is higher than the figures in Germany, Spain and France.**
17. The source for this assertion is a report by an Association of Swiss Insurance Companies. The report was presented in 2002 and compared whiplash claims across Europe. It contained the following conclusions which the MoJ has ignored:

i) “With the exception of Norway which did not reply …all countries in which there are victims associations indicate that they benefit from the assistance of doctors and lawyers.” (page 21)

ii) Countries should concentrate on improving medical evaluation of Whiplash cases.

iii) Italy had the highest number of claims (4.7 million); then Germany (3. 960 million). The UK was third with a significantly lower 2.9 million claims.

iv) The average cost per whiplash claims in the UK was the in the lowest group out of all the countries: 2,878 euros. It compared very favourably with the 2,500 in Germany and 2,625 in France and 16,500 in Netherland and 35,000 in Switzerland.

v) UK did have the highest % rate of MCT (Minor Cervical Trauma) claims (76% of injuries).

The high % of MCT claims in the UK needs some examination. It is the MOJ’s responsibility to do so in advance of making changes in law or procedure which may deprive victims of their rights to compensation against tortfeasors.

However, the Association of Swiss Insurance Companies conclusions did not take into consideration the large number of cars on this small island. In 2002, when the questionnaires for this report were completed, the UK had 30,403,000 vehicles with a total roads length of 245,000 miles (see the Department for Transport’s Road Length Statistics, Statistical Release, June 2011) or 398,350 km. France had roughly the same number of vehicles 35,396,000 but 3 times the length of roads at 1,000,960 km. In the UK there were 2.9 million RTAs in 2002 and there were only 2.5 million in France. The vast majority of the latter were serious (with only 3% whiplash). These figures only serve to show that most of the crashes in the congested roads in the UK were low speed and most of those in France were more serious. They do not prove fraud.

Submissions: The MOJ’s conclusions are not supported by the evidence presented.

18. PIBA members deal with many fraudulent and exaggerated claims each year and have great experience in doing so. PIBA accept from this personal experience that RTA claims involving whiplash are made and some are fraudulent. The current Fast Track and Multi Track system, if used properly, leads to such claims being struck out or defeated and to costs orders being recovered from the fraudulent claimant because ATE insurance is in place and because two way costs shifting exists.

19. In 2009 PIBA raised written and very real concerns when the Portal was proposed on the basis that the Portal would encourage fraudulent claims. This is because the Portal is a cheap, quick system which does not allow the Defendants to gather their own medical evidence and does not encourage the medical experts who are reporting for the Claimant to do a proper, professional job, to obtain the Claimant’s pre-accident medical notes and to weed out fraudsters and exaggerators. The MOJ pressed ahead and implemented the Portal and has wholly ignored the effect of the portal on RTA whiplash claim figures. Note the massive increase in RTA claims between 2009-2010: 674,997 and 2010-2011: 790,999 = 17%. The increase the year before the Portal was introduced was 8%.
20. PIBA submits that the evidence relied upon by MOJ in this Consultation and in the Impact Assessment goes nowhere near substantiating the conclusion which the MOJ has drawn: that there has been an increase in whiplash claims against a backdrop of declining RTAs or that there has been an increase in fraudulent RTA PI claims.

21. The MoJ does not appear to have considered other reasons to explain an increase in genuine whiplash claims, such as a general increase in public awareness of their ability to claim for whiplash due to television advertisements and claims farmers.

22. The MOJ has put forwards no credible evidence of an increase in fraudulent claims (as is acknowledged by the Consultation).

23. The evidence presented does not substantiate the MOJ’s assertion that there has been a rise in fraudulent claims.

24. Despite the assistance, resources and financial power of the ABI and the insurance industry, inter alia given on 14 February 2012 at the Downing Street summit mentioned in the Impact Assessment, the MOJ has been unable or is unwilling to present credible evidence of an increase in fraud in the consultation document or the impact assessment.

25. PIBA submits it is inappropriate and unnecessary for new measures to be implemented to address an issue that is not proven to exist on the balance of probabilities.

RESPONSE TO PART 2 OF THE CONSULTATION: BETTER MEDICAL EVIDENCE

An Independent Medical Panel

26. PIBA agrees that a system should be devised and implemented so that medical practitioners are required to undergo training focused on Whiplash Injuries and certification before they can provide reports in RTA whiplash cases.

27. Any system should be devised with input from lawyers specialising in personal injury, medical referral agencies and the Royal Medical Colleges as well as representatives from the insurance industry. The system should set out the training that should be undertaken by medical practitioners before they can be certified to provide medical reports in RTA whiplash cases. There are a great deal of high quality research papers on whiplash and a list of them is appended hereto in Appendix 1. A classic example of one of the review papers is that by McClune & Waddell\(^1\) at appendix 3.

28. There are also high quality forms for assessing whiplash provided by inter alia the Quebec Task Force on Whiplash in the mid 1990s:\(^2\) see Appendix 2.

29. The training must be in addition to the experts’ general medical training and qualifications and should cover the following:

• All major past and current research papers on whiplash.
• The need for careful analysis of the likely impact speeds and mechanism of the

\(^1\) Emerg Med J 2002;19:499–506;

accident.

- Post-accident evidence of actual symptoms.
- Guidance on when it is appropriate or necessary to obtain medical notes for a proper diagnosis or to verify the Claimant’s symptoms.
- Guidance on the need to consider whether a claim is genuine rather than [as at present] the assumption that the patient is to be believed.
- Guidance on how to distinguish genuine from fraudulent or exaggerated claims or symptoms so that medical practitioners are able to express concerns about whether a claim is genuine. However, any positive finding of fraudulent behaviour should remain a matter for the courts to determine and medical practitioners should not be expected to adopt the role of arbiters of fact. Accordingly, medical practitioners should only express concerns, doubts and highlight discrepancies. They should not be expected to determine whether or not the Claimant is telling the truth.
- Guidance on assessing evidence of damage (if any) to the vehicles involved, which should be sent to the medical practitioners when preparing their reports (if available). If there is no discernable damage to the vehicles then the training should provide guidance on how the medical expert should approach this when reaching a diagnosis.
- Guidance on when it is appropriate for a GP to provide the initial report and when it is necessary for a more specialist medical practitioner, such as an orthopaedic surgeon or neurosurgeon, to do so.

30. PIBA also considers that the Portal rules should be amended so that:
   a) Only certified medical practitioners are permitted to provide medical reports in whiplash cases.
   b) Medical practitioners should not be permitted to provide a medical report in relation to a claimant to whom they have provided treatment, unless they are exceptional reasons for doing so. This will alleviate the issue of treating medical practitioners being reluctant to decline a diagnosis of whiplash. It is also good practice that treating practitioners do not provide medical reports for legal proceedings, as conflicts of interest can arise.

31. Medical report fees should be fixed with a review of the fees every 2 years. There should be different level of fees for GPs from those for Surgeons. Additional fees should be paid for a review of the medical records which might not be required in all cases, e.g. a child claimant where there is no suspicion of fraud.

32. PIBA thinks it would be appropriate that certified medical practitioners are required to undertake refresher training at regular intervals to ensure they remain up-to-date with any relevant developments and policies. The frequency and extent of such refresher training will need to be considered by those charged with setting up the scheme.

**Accreditation Scheme vs National Call-Off Contract**

33. PIBA supports an accreditation scheme as the most appropriate model. The accreditation scheme should allow doctors, groups of doctors and medical reporting organisations to apply for accreditation so long as each medical practitioner providing reports has attended and passed the necessary training.

34. The training required for accreditation should be provided to each medical practitioner by the independent organisation set up to run the accreditation scheme and not, for example, by the medical reporting organisations seeking to accredit their members. This would help to ensure consistency and quality in the standard of the training.
35. PIBA does not see any good reason to support a national call-off contract model over an accreditation scheme. Claimants and insurers should still be entitled to select the medical practitioners of their choice, subject to those practitioners being accredited. A national call-off contract would be unnecessarily restrictive and may prevent access by all parties to their medical practitioners of choice. It may also create difficulties in relation to ensuring sufficient coverage of medical practitioners accredited with preparing medical reports.

Peer Review
36. PIBA does not believe it would be necessary or proportionate to include an element of peer review into every assessment. Fraudulent or exaggerated claims only make up a small minority of whiplash claims. In the majority of cases, it is likely there will be no or little concern about the claim being fraudulent or exaggerated and requiring a peer review in every case would unnecessarily and disproportionately increase the cost of the scheme.

37. PIBA would support peer review in a random sample of assessments each year to ensure quality control of, and consistency within, the scheme. The lawyers and medical practitioners involved in devising the scheme should also consider whether it would be useful for there to be an automatic peer review in cases where fraud or exaggeration of symptoms is suspected.

The Cost of the Scheme
38. The cost of implementing and running the scheme should be borne by the insurers who will benefit from the scheme reducing the overall costs of obtaining medical evidence in whiplash cases and helping it to detect and challenge fraudulent and exaggerated claims.

39. It would be appropriate for medical practitioners who wish to be accredited to contribute to the training and accreditation costs.

RESPONSE TO PART 3 OF THE CONSULTATION: BETTER INCENTIVES TO CHALLENGE FRAUDULENT OR EXAGGERATED CLAIMS – EXPANDING THE SMALL CLAIMS TRACK
40. PIBA responds as follows as to the proposal that the Small Claims Track threshold should be increased:

- this would reduce access to justice for many legitimate victims of whiplash injuries;
- this is unlikely to have the effect which the government anticipates of reducing the cost of defending claims.

ACCESS TO JUSTICE
41. PIBA highlights the three risks which the government has already identified in its own proposal (paragraphs 65-67) if the SCT limit is raised.

42. A reduction in access to justice resulting from injured parties either not claiming initially or not challenging rejections of valid claims. PIBA submit that this is the likely consequence of pushing personal injury claimants onto the SCT.
43. **Discrimination:** The middle classes may be able to bring small claims, but the aged, the weak, the uneducated, the mentally disabled, immigrants with poor English and the poor will not be able to do so.

44. **Equality of arms.** Claimants in the SCT are likely to be self-represented but insurers will almost certainly instruct lawyers to defend their interests. Our experience is that self-represented litigants often struggle to advance their case effectively against professional advocates. This is all the more troubling if the claimant’s honesty is to be challenged, an issue we return to below.

45. **Under-settlement.** It is likely that individuals with valid claims will be more likely to accept settlements of less than the amount which would provide fair compensation for the injury which they have suffered.

46. These risks are not effectively mitigated either by the measures implemented to improve support for self-represented litigants or by the availability of BTE insurance.

47. **An illustration of the problems facing self-represented litigants running a whiplash claim on the small claims track:**

   - The Claimant would first have to submit a Claim Notification Form through the portal. This would require him to identify the Defendant’s insurer. The first line of the standard form CNF states “Before filling in this form you are encouraged to seek independent legal advice”. That would be a waste of time because lawyers would refuse to work for no pay.

   - If liability is denied by the Defendant’s insurers, or if the claim otherwise drops out of the RTA protocol (because, for example, the Defendant’s insurers are suspicious as to the veracity of the claim), the Claimant is then left to issue proceedings in the County Court.

   - The Claimant would then have to obtain medical evidence in support of his claim. Most self-represented litigants would not know where to start with this process and many could not afford the cost.

   - Whether or not liability is in issue, the Claimant would have to prepare for the disclosure of relevant documents and to prepare a witness statement.

   - On receipt of the medical report, the Claimant would then have to decide whether to disclose it. Sometimes Claimants with apparently minor injuries in fact go on to develop much more significant problems (chronic pain syndromes etc.). No self-represented litigant would be able to spot that possibility, whereas personal injury lawyers are generally experienced in doing so.

   - Further, a Claimant would not know what to do if they were unhappy with the medical report for good reasons.

   - The Claimant may then face a pleaded Defence alleging or insinuating dishonesty. It is unlikely that they would know what to do with this if the allegations were in fact unfounded. The inability of honest, self-represented litigants to defend themselves against an assault on their honesty is addressed in more detail below.
• If the claim gets as far as an assessment of quantum, the Claimant would then have to value his claim. He would have no guidance on this at all. He would most likely have no access to the Judicial College Guidelines, and would be unlikely to be able to use them if he did. He would have no experience of valuing claims for pain, suffering and loss of amenity and would have no means of accessing Kemp & Kemp or Current Law. If the insurers made him an offer, he would have no way of knowing whether it was adequate. In these circumstances, insurers will surely make low offers to tempt the Claimant, and the risk of under-compensation is obvious.

• If the matter proceeds to a hearing, the Claimant will have to represent himself. He will be entirely reliant on the District Judge to protect his interests during the hearing. The Defendant’s representative will cross examine the Claimant and will submit for a very low valuation of his damages. The Claimant will not know how to cross-examine the Defendant’s witnesses and will not know how to respond on quantum.

THE SMALL CLAIMS TRACK IS NOT A JURISDICTION FOR CHALLENGING FRAUD

48. PIBA rejects the suggestion that allocating whiplash claims to the SCT will allow insurers to defend claims where there is a suspicion of fraud or exaggeration. This is because:

• as soon as the defendant to such a claim puts the honesty of the claimant in issue, the case will almost certainly be allocated or reallocated to the Fast Track;

• the way in which the SCT operates in Part 27 of the Civil Procedure Rules makes it unsuitable for determining whether a claimant is being honest or not.

49. Raising the SCT limit to £5,000, either for whiplash claims or for RTA personal injury claims generally, will make the small claims track the ‘normal’ track for such claims, under an amended CPR 26.6(1)(a). However, the court on allocation is required to consider a set of specified matters when considering whether to allocate a case to its ‘normal’ track. These are listed in CPR 26.8, and include “the financial value, if any, of the claim”, “the likely complexity of the facts, law or evidence” and “the amount of oral evidence which may be required”. Significantly, the Practice Direction to Part 26 states as follows (at para. 8.1(1)(d)):

“A case involving a disputed allegation of dishonesty will not usually be suitable for the small claims track.”

PIBA cannot find any discussion of this provision in the consultation. It is noted that there is no proposal to rewrite Part 26 or its Practice Direction. If there was such a proposal PIBA would submit that it was deeply faulted. Forcing injured claimants into an arena where their honesty is to be tried without any legal representation is, in our opinion, a breach of their Human Right to a fair trial.

50. As explained above, in any case where the claimant’s honesty is put in issue, the case will be allocated to the Fast Track (or in some cases the multi-track). We highlight the following matters:
• any allegation that the claimant is not telling the truth in any respect has to be expressly pleaded: see *Kearsley v Klarfeld* [2005] EWCA Civ 1510;

• the Queen’s Bench Guide states as follows: “… full particulars of any allegation of dishonesty or malice [should be pleaded in a Defence] and, where any inference of fraud or dishonesty is alleged, the basis on which the inference is alleged should also be included;”

• the Court of Appeal in *Kearsley* considered that cases where a whiplash injury was disputed on the basis that a road traffic collision was insufficiently forceful to have caused it could properly be allocated to the *Multi-Track*.

51. Thus it is our view that without significantly altering the principles of allocation already established in the Civil Procedure Rules and the relevant case law, any insurer seeking to test the credibility of a whiplash claim will find that it is immediately allocated or reallocated to the fast track or the multi-track.

**The Small Claims Track is unsuitable for challenging claims thought to be dishonest**

52. It is submitted that the existing principles for allocation are fair, and CPR 26 PD 8.1(1)(d) (set out in paragraph 5 above) serves an essential purpose. We submit that expecting dishonesty to be challenged in the SCT misunderstands the way in which the SCT jurisdiction operates.

53. If the rules were amended to keep whiplash claims under £5,000 where the claimant’s honesty is in issue in the small claims track, we submit that this would be *unfair on the claimant* and *of little value to the defendant*.

54. **Unfairness to the Claimant**

Expecting a claimant to defend himself against an allegation of dishonesty in the small claims track is unfair for the following reasons:

• **The claimant is unlikely to have legal representation** because the track is not cost-bearing. Parties to litigation whose honesty is being publicly impugned should have access to professional representation wherever possible;

• **The defendant is likely to have legal representation.** Insurers will pay for solicitors and counsel to attend such hearings to cross-examine the claimant as to his honesty. This would result in a very unfair inequality of arms;

• **The rules of evidence do not apply in the SCT**, pursuant to CPR 27.8(3). Thus, insurers would be able to adduce evidence without challenge which they would not otherwise be entitled to adduce in the fast track or multi-track.

• **The claimant would have little time in which to consider the evidence against him.** In keeping with the quick and informal way in which the small claims track is designed to operate, standard directions only require the disclosure of documents and witness statements 14 days before a hearing (see Appendix B and Appendix C to the Practice Direction to Part 27). This is insufficient time for a claimant (especially an unrepresented claimant) to understand and deal with evidence adduced to demonstrate dishonesty.
• The claimant would have no time or opportunity to adduce evidence in response. Until 14 days before the hearing, the claimant would have no way of knowing the full evidential basis for the allegations pleaded in the Defence. The standard directions do not allow for a party to serve further evidence before the hearing.

55. In order to address this unfairness, Part 27 would have to be substantially rewritten. We note that the consultation does not propose any amendment to Part 27 at all. Further, amending the CPR to address these problems would inevitably make the jurisdiction more formal, and much more akin to the fast track. This would in turn make it more unfair that a litigant should be expected to navigate his way through the process without legal representation.

56. Little Value to the Defendant
There is no discussion in the consultation as to how the insurers will go about challenging claims thought to be exaggerated or dishonest. In our experience, there are 4 main ways to test whether a claimant is being truthful when he says that he has suffered a whiplash injury:

• the claimant’s medical records can be scrutinised. A defendant can check whether a claimant sought medical treatment or advice for his alleged injury, and can assess whether the medical record of any such attendance is consistent with the claimant’s account of symptoms etc..

• the claimant’s claims history can be checked, to see if he is a serial claimant, or if he has previously had claims rejected for being dishonest. Insurers have substantial databases containing such information.

• sometimes the defendant can give evidence which might call into question the honesty of the claimant’s case. The defendant might say that the impact was virtually imperceptible, or that the claimant at no point mentioned having been injured in post-accident conversations.

• the consistency of the claimant’s accounts can be assessed. The claimant will often have to describe the accident, his injury, its onset and severity etc. several times: in the claim notification form, to his medico-legal expert, in his Particulars of Claim and in his witness statement. Discrepancies between these accounts can undermine the credibility of the claimant’s case.

57. Using any of this evidence in the small claims track to challenge claims thought to be dishonest would be very difficult, for the following reasons:

• Medical records are very unlikely to be disclosed within the SCT. Part 31 (disclosure of documents) does not apply to SCT claims (by CPR 27.2(1)(b)) and the costs of obtaining them would be irrecoverable anyway.

• There would be no Statements or Truth. Statements of Truth under CPR Part 22 were intended by the Civil Procedure Rules to oblige litigants to verify the honesty and accuracy of their case and their evidence. Proceedings for contempt of court may be brought against a person if he makes a false statement in a document verified by a statement of truth
(CPR 32.14). The small claims track does not use statements of truth\(^3\), surely one of the most useful methods for encouraging honesty in civil litigation.

- **Evidence will not be given under oath.** This is the effect of CPR 27.8(4). Giving evidence after swearing an oath has a sobering effect on the willingness of witnesses to lie. It is hard to see how moving suspicious whiplash claims into a jurisdiction which generally dispenses with oaths will achieve the objective of reducing fraud overall.

- **There will be little time in which to investigate the claim.** The claimant’s witness statement and all documents in support of his claim will be served around 14 days before the hearing, affording the defendant very little time in which to cross-reference the various accounts, run searches on asserted facts through databases and other investigatory tools etc..

- **There would be no questions to the medical expert\(^4\) to ask whether the evidence for a genuine whiplash claim was sound.**

- **There would be no Requests for Information\(^5\) by which to ask the Claimant to clarify his case or to test his willingness to be candid about his medical or claims history.**

- **There would be no applications for specific disclosure\(^6\) to extract documents in the claimant’s possession which may shed light on the honesty of his claim.**

58. PIBA cannot see how pushing all whiplash claims into the small claims track will achieve anything other than **impairing** the insurers’ ability to challenge claims. The speed and informality of the small claims track will make it **easier** for fraudsters to get their claims through to judgment without serious challenge.

**PREVIOUS CONSULTATIONS AND OTHER REFORMS**

59. Proposals to raise the SCT limit in personal injury claims have been considered twice before. In each case it was concluded that it would be preferable to make the process for PI claims over £1,000 more cost-effective. Numerous reforms have recently been implemented or are about to be implemented to achieve this objective. These include the introduction of fixed recoverable costs for RTA claims, the RTA Protocol and reforms relating to the funding of civil litigation. Further proposals have been made to fix costs in the fast track.

60. PIBA suggests that the government waits to see what effect these reforms will have on the number of whiplash claims and in particular on the number of dishonest claims. The risk to access to justice arising from the proposal to raise the SCT threshold identified by the consultation itself is significant in our opinion. Procedural reform should not be effected for the sake of it.

**RESPONSE TO PART 4 OF THE CONSULTATION: FURTHER ACTION**

61. Paragraph 88 and Question 8 of the Consultation asks what more the government should consider doing to reduce the cost of exaggerated and/or fraudulent whiplash claims.

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\(^3\) CPR Parts 32 and 33 are excluded by CP 27.2(1)(e) and (d).

\(^4\) CPR 35.6 is excluded from SCT cases by CPR 27.2(1)(e).

\(^5\) CPR Part 18 is excluded by CPR 27.2(1)(f).

\(^6\) CPR 31 is excluded in its entirety by CPR 27.2(1)(b).
We suggest the following, and contend that they are far more likely to achieve this outcome than adjusting the threshold for the allocation of personal injury claims.

62. **The Government should increase the likely consequences of being found out**
Dishonest claimants in personal injury cases are often not people with criminal backgrounds. As with dishonest claims on household insurance, there is a sense that “everyone’s doing it”, “no one will know”, “insurers can afford it” and “the worst that can happen is that I’ll not get any compensation”.

63. In our opinion more needs to be done to get the message across that pursuing a dishonest personal injury claim is likely to have significant consequences, and will be treated very seriously. This could be done in any one or more of the following ways:

64. The consequences of being found out could be widely publicised. The perception at paragraph 18 above should be properly addressed. The consequences of attempting to defraud the DWP are widely advertised. The same should be attempted for PI claims.

65. **The police should be encouraged to follow up cases in which a claim has been dismissed on the basis that it was dishonest and the judge has referred the case to the DPP.**

66. **The procedure for committal for contempt should be made quicker and cheaper.** Presently this is a cumbersome and costly procedure. Insurers should be able to pursue such proceedings more readily and at less expense.

67. **The Supreme Court decision in Summers v Fairclough Homes Ltd [2012] UKSC 26 should be publicised** The Appellant insurers in Summers sought to argue that where a Claimant grossly exaggerates an otherwise genuine personal injury claim, his right to damages should be extinguished altogether. The Supreme Court did not allow the appeal, but made is clear that the courts did have discretion to do so. Whilst that litigation did not concern a whiplash injury, it would be open to government publicise the fact that where a court finds that a claimant has dishonestly and substantially exaggerated the majority of the claim, the courts have discretion to order that the Claimant should lose his right to damages altogether and should pay the Defendant’s costs.

68. **Medical Records should be disclosed in all cases**
The draft protocol for the extension of the process for low value personal injury claims in road traffic accidents states at paragraph 7.2B: “In most claims with a value of no more than £10,000, it is expected that the medical expert will not need to see any medical records”. In fact, as argued above, scrutiny of a claimant’s medical records represents one of the very few ways in which the claimant’s assertion of a whiplash injury can be checked. We understand the desire to save the cost of obtaining such records, and concerns as to the burden on medical practitioners, but we do not see that it is unreasonable to expect any person wishing to pursue a personal injury claim to demonstrate that they sought medical advice promptly, and that they have been consistent in their account of the injury.

[Appendices not published]

*May 2013*