**Written evidence submitted by DWF (PCB 14)**

**Prisons and Courts Bill - Part 5: whiplash**

**DWF LLP** is a leading business law firm, with over 2,000 people working across 14 offices in a wide range of sectors. We carry out substantial litigation and advocacy services in all types of proceedings. We have one of the largest Insurance teams in the UK with nearly 850 people, including 84 partners and over 700 legal advisers.

Nigel Teasdale is a Partner at DWF LLP and leads the motor and fraud teams nationally. He is current President of the Forum of Insurance Lawyers ("FOIL") and gave evidence on behalf of FOIL at the Transport Select Committee oral hearings as part of its inquiry into whiplash claims. He is also a Director of MedCo.

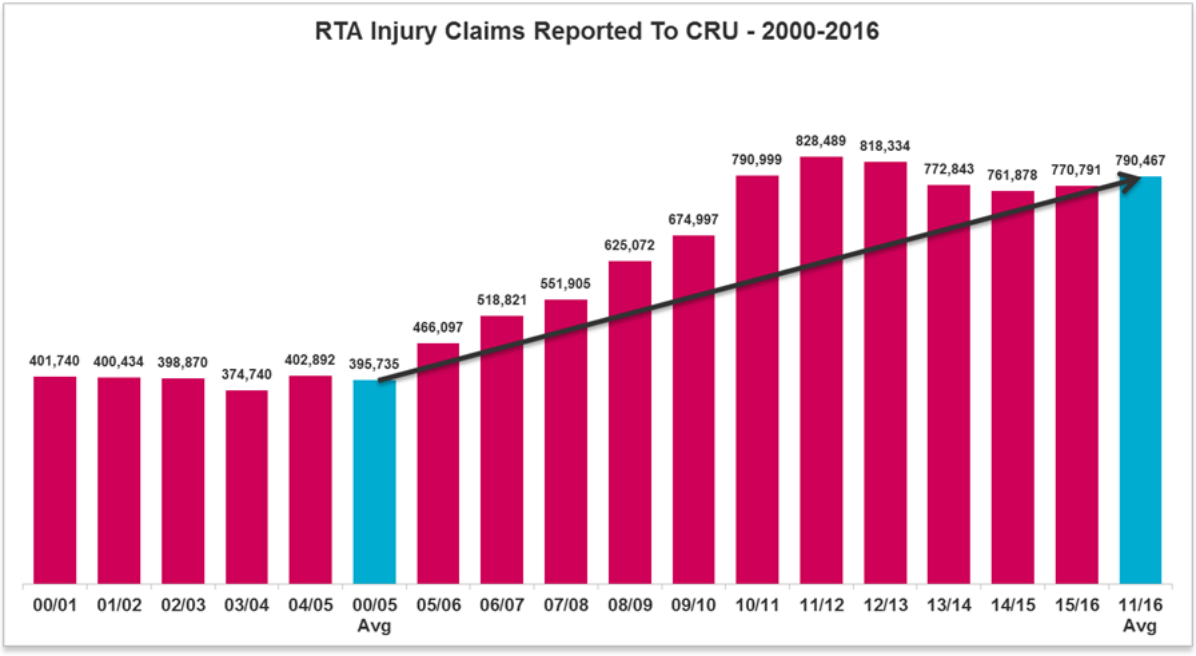
**The prevalence of RTA-related whiplash and soft tissue injury claims**

1. As the government recognised in its consultation paper "*Reforming the Soft Tissue Injury ('whiplash') Claims Process*", and as it has stated on numerous occasions, "*there is a need to tackle the high number and cost of minor RTA related soft tissue injury claims* ", many of which are exaggerated or fraudulent.

2. There are two aspects to this issue.

3. Firstly, the significant increase in numbers of RTA claims over the last decade.

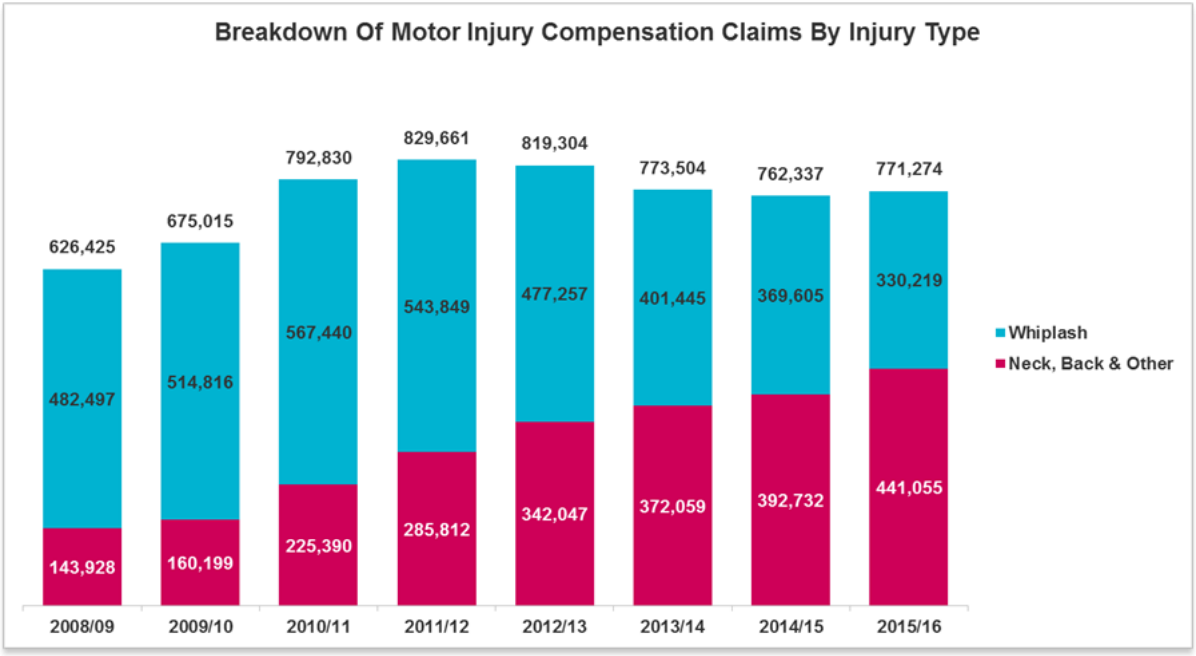
4. The first graph below shows global numbers of RTA claims reported to CRU between 2000/01 and the most recent data for 2015/16. It allows the longer term trend to be measured. The blue bars which are each 5 year averages standing 11 years apart show an increase between them of as much as 100%: effectively volumes of RTA claims have doubled when the period of 5 years up to 2004/05 is compared to the period of 5 years up to 2011/16 (source: CRU). This is set against a declining number of RTA accidents involving personal injury.




5. Secondly, the designation of claims away from a position where the majority of these claims were identified as being for whiplash to a current position where most of them are now described by reference to other categories of neck, back and other also needs to be appreciated.

6. As the government also recognise in Part 1 of its response to its own consultation paper, whilst claims notified to CRU as "whiplash" have fallen over recent years, the number of claims notified to CRU that are classified as "neck, back & other" have actually risen, overshadowing the decrease in "whiplash" claims, as the chart below shows (source: CRU).

7. Essentially the second graph shows the same data as the first graph, but separates RTA claims into claims of two types. This data is currently available to us only over a shorter period however: from 2008/09 to date.




8. Over the last seven years, claims for "whiplash" (as categorised by the CRU) have fallen by over 150,000 or more than 30%, whilst claims for "Neck, Back & Other" (as categorised by CRU) have increased by over 300,000 or more than 300%. These are important statistics when it comes to the definition of whiplash claims.

9. Whilst the way that these claims are categorised by the CRU might have changed, the problem of not only high but also significantly increased numbers of claims that the government identified some time ago, remain and the situation will not change, unless steps are taken to tackle the underlying problems as a whole. We explore below how that might be achieved through Part 5 of the Prisons and Courts Bill.

**Clause 61 of the Prisons and Courts Bill**

10. If the problem as identified by the government in their consultation paper is to be tackled properly and once and for all, then we anticipate that a number of amendments will need to be made to clause 61 of the Prisons and Courts Bill which defines which claims will become subject to the reforms.

**Sub clause 1 – the definition of whiplash**

11. The current definition of whiplash injury itself, at sub clause (1) will need to be widened beyond those claims for injury that are to "the neck or the neck and upper torso", so as to also include claims for soft tissue lower back injuries.

12. When the government consulted on what definition should be used for the purpose of the reforms, it was suggested that the MedCo definition be used, which is this:

13. "*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".*

14. Whilst accepting that the MedCo definition was created so as to tackle the behaviours that had been identified by the government in the commissioning of medical experts in whiplash claims, it has been in place now for approaching two years, the definition works well and is one that is well known to practitioners who operate in the whiplash claims arena. If a different new definition were introduced for the purpose of the reforms, then that would in our view create the potential for confusion, particularly as it is likely that claimants will need to obtain a medical report via MedCo, post reform, when the MedCo definition will apply. If, as is anticipated, claimants look to bring their own claims on a self-represented basis post reform, then where confusion from the use of more than one definition can be avoided it should be.

15. The currently proposed definition will also significantly reduce the financial benefits accruing from the reforms. In evidence given by Rob Townend, Aviva UK Claims Director before you on 28 March 2017, he estimated that as much as 60% of Aviva's RTA claims would fall outside the reforms if the currently proposed restricted definition is used, which excludes injuries to the back: in other words only 40% of claims would remain covered by the reforms. Anecdotally, from the discussions that we have had with clients, Aviva's breakdown is not atypical, and also roughly mirrors our own data on pre-litigation claims handled by DWF, although this is a significantly smaller sample than the likes of Aviva.

16. The government has recognised in both its consultation paper and its response to its own consultation, that steps need to be taken to ensure that there is no claims displacement from one area to another following implementation of the reforms. When the government came to draft the MedCo definition, it recognised and accepted that the real problem that required tackling lie with "non demonstrable" injuries of which whiplash is the most common, but not the only type.

17. The substantial financial incentives that are on offer to claimants to bring claims for back injury, following an RTA are the same as those incentives on offer to bring whiplash claims and, according to the evidence given by Mr Townend at least, represent the greater proportion of claims and presumably the greater proportion of cost. If the definition is not widened, so as to include soft tissue injuries to the lower back, then the reforms may miss a significant part of the current problem which will then widen due to claims displacement and the impact of the reforms will be significantly dissipated.

**Sub clause 4 - excluding claims brought in breach of statute**

18. Another issue as the Chair of the Justice Committee, Bob Neill, recognised when he spoke at the second reading of the Bill, is that claims that are brought as a result of breach of statute will be excluded as clause 61, sub-clause 4 of the Bill states:

19. "*(4) A case is excluded by this subsection if the act or any one or more of the acts causing the injury also constitutes or together constitute a breach of one or more relevant statutory provisions*"

20. Whilst the norm is for RTA claims to be brought in negligence, the inclusion of this sub clause could in future see claims being brought where breach of statute is pleaded instead, circumventing the reforms. For example, where a claim arises out of a defendant's failure to stop at a red traffic light, claimants could in future plead that the defendant failed to comply with section 36 of the Road Traffic Act 1988 (the relevant section of the RTA) and by doing so would see their claim excluded from the reforms.

21. For the reforms to succeed, sub clause (4) should be removed in our view, and it should be made clear in the Bill that the reforms apply to claims brought in both negligence and for breach of statutory duty.

**How Part 5 of the Prisons and Courts Bill might contribute to eradicating fraudulent whiplash claims**

22. It is the money that is available through bringing whiplash claims that is attractive to organised criminals and to the opportunist, intent on making fraudulent claims. The fact that whiplash is a non-demonstrable injury, means that it is easy for a fraudster to successfully negotiate an attendance on a medico-legal expert, so that the expert then produces a report that supports the claimant in their claim. This applies to soft tissue injuries to the neck, upper back and lower back.

23. Fraudsters are quick to adjust to new regulations and will find a way of committing fraud, if there is one available to them. In part, the post-LASPO ballooning of noise induced hearing loss claims was caused by some fraudsters focussing their efforts on the bringing of these claims. This was because of both the higher detection rates in whiplash-related fraud due to anti-fraud measues developed in relation to that type of claim, as well as displacement caused by the reduction of fixed costs which applied to whiplash claims when set against the hourly rate costs which could still be recovered in NIHL claims.

24. If the definitions currently used for the reforms are not changed, then we anticipate that fraudsters will simply shift away from the bringing of soft tissue neck and upper back injury claims and will instead bring claims involving soft tissue lower back injuries. We have given an example of that type of behaviour already and would expect it to be repeated.

25. If the money is taken out of the system across all types of RTA related soft tissue injury claims, so that the potential rewards are greatly reduced, then making a claim becomes a less attractive proposition, when weighed against the risks of being caught.

26. Solicitors who support those making fraudulent whiplash claims, do so because the rewards that are on offer to them, in terms of the fixed costs that are recoverable, together with their cut of damages under a success fee and other ancillary incomes, outweigh the risks of their actions being brought to the attention of the regulator and any subsequent enforcement action that might be taken.

27. When viewed in this light the figures stated in the tariff take on significance beyond a simple recalibration of the level of damages that is appropriate for whiplash claims. Assuming that the definition is expanded to include claims for soft tissue low back injuries, the reduced level of damages that will be on offer in the future will act as deterrent to the opportunist fraudster, and to the organised criminal and their enablers.

28. With the adoption of the recommendations made by the Insurance Fraud Taskforce, and those made by Carol Brady, following her fundamental review of CMCs, these reforms should be viewed as part of a package which includes the bringing of committal proceedings and the introduction of fundamental dishonesty, so that when combined together they will reduce fraud. The second part of the government's response to its consultation is also likely to set out further steps that the government will take, as part of its review of soft tissue injury claims and which are also likely to impact upon the levels of fraud.

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