Written evidence submitted by the Association of British Insurers (ABI) (PCB 20)

Prisons and Courts Public Bill Committee

About the ABI

The Association of British Insurers is the leading trade association for insurers and providers of long term savings. Our 250 members include most household names and specialist providers who contribute £12bn in taxes and manage investments of £1.6trillion.

Executive Summary

- The ABI and the wider insurance industry has repeatedly called for reform of the personal injury claims system,[1] and the objective of keeping motor insurance costs as low as possible is shared by the Government and insurance industry. The measures within the Bill present the opportunity to comprehensively reform the system and put a stop to the claims industry excessively profiting from the UK's compensation system at the expense of motorists.

- The ABI is supportive of the measures set out within the Bill, provided those measures are robustly implemented and that insurance industry concerns as outlined within this submission are effectively addressed, in particular surrounding the definition of whiplash injuries.

- Despite numerous reforms to the civil justice system in recent years and improvements to road and vehicle safety, the number of whiplash-related claims remains high, with the volume of claims for neck and back injuries rising sharply as claimant lawyers re-label their clients' 'whiplash' injuries.

- It is therefore essential that the definition of "whiplash" injury within the Bill, at the very least, be extended to include soft tissue injuries to the neck or upper torso or back or shoulder, or any combination of these, in order to ensure sufficient claims are captured, prevent circumvention of the new rules and ensure that potential savings for customers are not undermined.

- The insurance industry supports a fixed tariff for lower value soft tissue injuries, which will be key to delivering the objective of the reforms, will help bring certainty for claimants and which should act as a safeguard against claims inflation.

- The change to the Discount Rate threatens to wipe out the potential savings anticipated from these reforms, before they have been introduced. The Bill presents a timely opportunity to underpin in legislation a new framework for setting the Discount Rate, which is fair for claimants, tax payers and premium-payers, and allow a new rate to be set. The Government opened a consultation on this issue on 30 March and we would urge that this be swiftly concluded in order for any necessary legislative reforms to be incorporated into the Prisons and Courts Bill as it progresses.

[1] ABI Response to Reforming the soft tissue injury ('whiplash') claims process and further documentation

Clause 61 "Whiplash injury" etc

1. During the initial consultation period, the insurance industry strongly supported the use of the MedCo definition[2] for soft tissue injury claims, due to its simplicity and the fact that it was agreed by a cross-sectoral working group, including claimant legal representatives and leading medical organisations.

2. The Government's initial impact assessment, which estimated savings of nearly £1billion, was based on this definition, which covers around 90% of low value RTA claims.

3. The Government has decided against using the tried and tested MedCo definition covering soft tissue injuries when attempting to define whiplash type claims, and has instead attempted to create a new definition for whiplash within Clause 61 of the Bill.

Scope of definition

4. Clause 61 of the Bill defines "whiplash injury" *as an injury, or set of injuries, of the neck or the neck and upper torso*. A medical definition of "upper torso" excludes injuries affecting the lower back, which are a common feature of RTA soft tissue injury claims. Furthermore, it appears that the current definition excludes shoulder injuries which are also a common RTA soft tissue injury.

5. The industry supports the definition in the Bill including minor psychological injury claims which is both necessary and proportionate. Whilst there are currently very few claims where psychological injury is pursued as the primary injury, in a new system where general damages for *physical* injury are reduced, a perverse incentive will be created not to pursue the physical injury at all, but to pursue a psychological injury as the primary injury in order to circumvent the new rules.

The nature and scale of the problem

6. The current drafting of the definition within the Bill would mean:
    - Any RTA soft tissue type injury to the lower back (which is very common and covered by the MedCo definition) would be excluded from the reforms.
    - Any RTA soft tissue injury to the shoulder could be excluded, as the definition refers only to upper torso which may be interpreted as excluding shoulder injuries.
    - It is unclear whether an injury which is a whiplash type injury to the neck but also involves minor injury to another part of the person, for example bruising to arm, leg or hip, would be included in the tariff.
    - The Bill refers to "neck or neck and upper torso" which would exclude upper torso only injuries. The lack of clarity would make the current definition easy to circumvent for those wishing to do so, reducing the benefit of the reforms.

7. If the current definition is not amended, three things are likely to happen:
    - Firstly, based on industry data, the definition will only capture 35-40%[3] of current claims, rather than the 90% estimated with the Government's original impact assessment;
    - Secondly, claims that are currently defined as upper torso and neck will be classed solely as upper torso or back by claimant lawyers and medics to circumvent the new rules, dropping the number of claims captured even further;
    - Thirdly, there will likely be significant further displacement of claims from neck to back injuries meaning that the reforms will cover even fewer claims.

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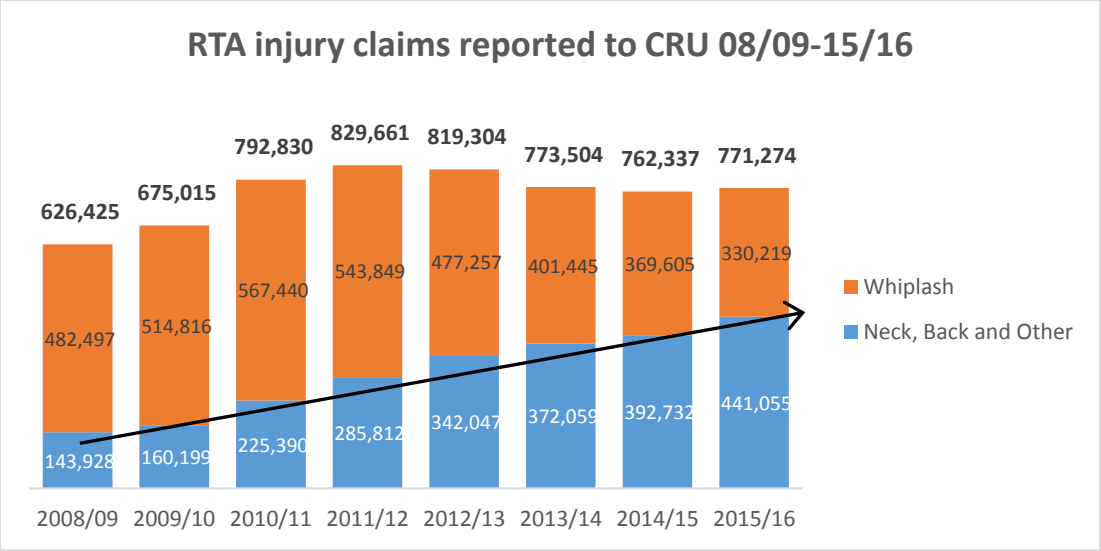
[2] 'soft tissue injury claim' means a claim brought by an occupant of a motor vehicle where the significant physical injury caused is a soft tissue injury and includes claims where there is a minor psychological injury secondary in significance to the physical injury;

[3] Based on data from Claims Outcome Advisor (COA), a software based damages assessment tool used by several leading motor insurers

8. The Government's own data from the Compensation Recovery Unit (CRU) (see exhibit 1) shows that claimant lawyers have been relabelling whiplash injuries as back and neck injuries in recent years and, under the current definition, there will be a strong incentive to continue doing so as these claims would then fall outside the disciplines imposed by the Bill.

Exhibit 1: Motor accident claims by injury type registered to the Compensation Recovery Unit (CRU)



9. It is important to note that whilst defendant/insurer representatives register claims with the CRU they do so using data provided to them by claimant representatives, often automatically transferring this data to the CRU electronically.

10. As the definition currently stands it is clear that the cost savings that insurers are able to pass on to consumers will be significantly reduced and the purpose of the measures significantly undermined.

Required solution

11. If the Government is minded not to use the MedCo definition, then at a minimum, the new definition must cover:
    - Soft tissue injuries that consist of or includes an injury to the neck or upper torso or back or shoulder, or any combination of these;
    - The new definition must also include those cases where this is the main injury and there is some other minor injury to another part of the body, to avoid obvious incentives to claim for minor bruising or pain simply to escape the tariff.

Breach of duty

12. Clarity is sought with regards to clause 61(3) and clause 61(4) in so far as they appear to seek to exclude claims for breach of duty. Assuming that the intention is to exclude claims made by an employee against their employer we do not consider this is necessary. Clause 61 of the Bill refers to 'driver negligence', therefore excluding any such claims for breach of duty - something which we would support as not being the intention for provision under this Bill.

13. There is a risk that if the provisions are retained as they are currently drafted that they will lead to satellite litigation by some seeking to submit that conventional road traffic accidents escape these intended reforms as being breach of statutory duty claims.

Clause 62: Damages for whiplash injuries

14. The introduction of a tariff, the full details of which will be specified within regulations pursuant to the passage of the Bill, will be key to supporting the overall objective of the reforms, provide clarity to claimants, act as a disincentive against claims inflation and protect against gaming of the system.

15. The tariff, if it operates effectively, should work to rebalance damages to a level more proportionate to the level of pain and suffering caused. The relatively incremental increases between tariff periods at the lower end also means that there should be less incentive for claimants to exaggerate their symptoms, as the financial benefit of doing so will be limited.

16. The upward curve of the tariff means that it will work up to the point where it converges with the common law damages for injuries beyond two years duration and which would attract a value of over £5,000 and fall outside the SCT.

17. The insurance industry supports a fixed tariff but cautions that this could be significantly undermined by the proposed discretionary uplift as outlined further below.

Clause 63: Uplift in exceptional circumstances

18. According to the explanatory notes accompanying the Bill, this clause enables the Lord Chancellor to provide in regulations that the court may, at its discretion, increase the prescribed sum under the tariff by up to 20% in exceptional circumstances. The ABI, when responding to the Government's soft tissue injury consultation on this point, did not support allowing an uplift due to concerns over the potential volume of satellite litigation, abuse by claimant lawyers and the approach by the judiciary which has the potential to make the exception the norm.

19. There is a risk that the discretionary uplift will encourage litigation in circumstances where the maximum uplift is disproportionate to the cost and court resource required to address the issue. The benefits of the fixed tariff are in its simplicity and certainty, there being no requirement for argument by lawyers in court over the value of damages. The introduction of a discretionary uplift removes these benefits.

20. In reality, an "exceptional circumstance" is far more likely to have an impact on claims for loss of amenity than pain and suffering and be compensated via a claimant's special damages claim. The prognosis for pain and suffering us measurable and determinable by the tariff.

21. The Bill states that the discretionary uplift should not be awarded as a matter of course and should be limited so as to avoid increased payments which exceed the additional pain, suffering and loss of amenity endured. We strongly support the limiting of such awards for the reasons set out above and would support safeguards to ensure that exceptional really does mean "exceptional". Not doing so would remove the certainty provided by the new tariff system, and would likely reduce the savings anticipated by the measures.

Clause 64 and Clause 65 - Rules against settlement before medical report

22. As long as the package of reform is implemented robustly and in its totality, pre-medical offers for low value soft tissue injury claims will no longer be needed and the ABI supports the banning of the same.

23. The use of pre-medical offers has arisen largely due to the fact that medical evidence for a soft tissue injury often has very little evidential value. It is important that medical evidence is obtained early in the process, so that a medical expert has the opportunity to examine the claimant whilst they still complain of symptoms. On that basis the medical evidence becomes something more than just a historical narrative, as the expert can consider objective factors, i.e. range of movement etc., where possible.

24. It is important to stress that pre-medical offers can be and are requested or made by claimant lawyers as well as defendants/insurers, and their removal will be an important step in deterring fraudulent or frivolous claims.

Increasing the Small Claims Track (SCT)

25. The proposed increase to the SCT limit, (a measure which will be introduced outside the Bill by way of secondary legislation) is welcomed by the insurance industry. The SCT limit has not been increased since 1991 and, in that time, the number of RTA claims that fall within the limit has dropped to well under 10%. Given the advances in consumer IT over the years, and the simplicity of the vast majority of low value RTA claims, now is the right time to increase the limit.

26. When increasing the SCT limit it is vital that adequate safeguards are in place to protect genuine claimants. These include:

    - The development of an easy, user-friendly method for claimants to progress their claims. It is unlikely that the Claims Portal provides that solution in its current form, although it could form the basis of one. A simple and consumer-friendly process is required which enables claimants to present their claims directly, and receive the information and support they need.

    - A straightforward way to solve liability disputes. Liability is not disputed in the vast majority of RTA claims. In the minority that are disputed, a simple resolution process would be required. Parallels can be drawn with the recommendations in the final report of Lord Justice Briggs' 2016 Civil Courts Structure Review and lessons learned as to what that dispute resolution process may look like.

    - Ensuring that appropriate safeguards are in place to protect against the exploitation of claimants by Claims Management Companies (CMCs) and McKenzie Friends.

27. The Ministry of Justice is the process of establishing a cross industry working group, made up of all relevant interests, to oversee the effective implementation of the SCT increase, ensure that claimants' rights are protected and access to justice is maintained. The industry is fully committed to working with all stakeholders to ensure that this outcome is delivered.

Ensuring effective regulation of Claims Management Companies (CMCs) and McKenzie Friends

28. Ensuring robust regulation of Claims Management Companies (CMCs) will play an important role in the overall effectiveness of the reforms. This is why the industry welcomes the Government's commitment to implementing the recommendations in the Carol Brady review[4] in full and transferring the responsible regulator from the Claims Management Regulator (CMR) to the Financial Conduct Authority.

29. However, the primary legislation needed to give the FCA the power to regulate CMCs has not yet been introduced into Parliament. We understand that this means that the FCA will not take over full responsibility for CMC regulation until 2019 (one year later than was originally planned). It is important that the change in regulation is not further delayed and that the necessary legislation is introduced as soon as possible, so the FCA and the CMC sector can begin preparing for the new regime.

30. The simplified claims process being implemented should ensure that the vast majority of claimants can present their own claims without representation. However, this does not mean that all will choose to do so. Whilst solicitors are restricted in what fees they can charge by the current Damages Based Agreement (DBA) regulations this is not the case for CMCs and McKenzie Friends (who are currently not regulated at all). The transition of responsibility to the FCA presents an opportunity to address the problem of CMCs, including by capping the amount they can charge consumers. In particular, CMC should not be able to 'double charge' customers. Only one fee should be charged per claim, and a CMC should not be able to claim the capped fee, and then recommend a solicitor or McKenzie Friend who charges the same capped fee.

31. In addition it is vital that regulation applying to solicitors and CMCs is extended to McKenzie Friends in order to safeguard claimants and to ensure that the entirety of the reforms, including the banning of pre-medical offers, also applies to them.

Impact of the significant reduction in the Discount Rate upon insurance premiums

32. One of the Government's stated public policy objectives for the personal injury reforms is to deliver cost savings so that those savings can be passed onto motorists in the form of lower premiums. Insurers have made public commitments to do so and the industry has a great record of doing so following previous reforms to the civil justice system.

33. However, on 27th February the Lord Chancellor announced a reduction to the discount rate from 2.5% to minus 0.75%, effective from 20th March. This decision has already had a profound impact upon the costs of insurance and the public purse:

    - As a direct result of this change, PwC have estimated that an average comprehensive motor insurance policy may increase by £50-£75, with higher increases for younger and older drivers – potentially up to £1,000 for younger drivers (18-22 year olds) and a rise of up to £300 for older drivers (over 65 years old);
    - Willis Towers Watson, the global advisory firm, estimates the impact of the change on insurers as a material one-off reserve charge of approximately £5.8 billion, which represents 56% of the overall motor claims cost of £10.43 billion in 2015. In addition, there would be a roughly £868 million per annum increase in the cost of providing motor insurance in the future;
    - The Spring Budget announcement confirmed that the change to the rate will have a massive £6 billion impact on the NHS over the next 5 years.

[4] https://www.gov.uk/government/publications/claims-management-regulation-review-final-report

34. Insurers support full and fair compensation to seriously injured claimants but the significant change in the discount rate and the massive increase in claims costs will inevitably have a seriously negative impact on consumers, businesses and the public purse.

35. Whilst these proposed reforms, if fully implemented, will still have a positive impact on reducing insurance premiums after their introduction at the end of 2018, the reductions, as things stand, are likely to come from a much higher starting point given the significant cost impact of the discount rate reduction.

36. The Lord Chancellor has said 'the system needs to be reformed…' and we welcome the consultation published on 30th March. It is imperative that the outcomes of this consultation are swiftly analysed and that legislation is brought forward at an early stage. Indeed, the Prisons and Courts Bill presents a timely opportunity to underpin in legislation a framework for setting the discount rate which is fair for claimants, tax payers and premium payers.

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