



Ministry of
JUSTICE

Reducing the number and costs of whiplash claims

A consultation on arrangements
concerning whiplash injuries in
England and Wales

December 2012

Consultation Paper CP17/2012

Consultation start date: 11 December 2012

Consultation close date: 8 March 2013



Reducing the number and costs of whiplash claims

A consultation on arrangements concerning
whiplash injuries in England and Wales

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

December 2012

© Crown copyright 2012

You may re-use this information (excluding logos) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit <http://www.nationalarchives.gov.uk/doc/open-government-licence/> or email: psi@nationalarchives.gsi.gov.uk

Where we have identified any third party copyright material you will need to obtain permission from the copyright holders concerned.

Any enquiries regarding this publication should be sent to us at whiplashcondoc@justice.gsi.gov.uk

This publication is available for download at www.official-documents.gov.uk and from our website at www.justice.gov.uk/consultations

ISBN: 9780101842525

Printed in the UK by The Stationery Office Limited
on behalf of the Controller of Her Majesty's Stationery Office
ID 2506333 12/12

Printed on paper containing 75% recycled fibre content minimum.

About this consultation

- To:** All stakeholders with an interest in reducing the number and cost of personal injury claims, which contribute to the high cost of motor insurance premiums
- Duration:** From 11 December 2012 to 8 March 2013
- Enquiries (including requests for the paper in an alternative format) to:** Scott Tubbritt
Ministry of Justice
102 Petty France
London SW1H 9AJ
Tel: 020 3334 3157
Fax: 0870 739 4268
Email: whiplashcondoc@justice.gsi.gov.uk
- How to respond:** Please send your response by Friday 8 March 2013 to:

Scott Tubbritt
Ministry of Justice
102 Petty France
London SW1H 9AJ
Tel: 020 3334 3157
Fax: 0870 739 4268
Email: whiplashcondoc@justice.gsi.gov.uk
- Additional ways to feed in your views:** A series of stakeholder meetings is also taking place. If you wish to For further information please use the "Enquiries" contact details above.
- Response paper:** A response to this consultation exercise is due to be published in Spring 2013 at:
<http://www.justice.gov.uk>

Contents

Foreword	3
Executive summary	5
Introduction	8
Part One – The Issue	11
Part Two – Better Medical Evidence	15
Part Three – Better Incentives to Challenge Fraudulent or Exaggerated Claims	18
Part Four – Further Action	24
Part Five – Impact Assessments	26
Questionnaire	27
About you	34
Contact details/How to respond	35
The consultation criteria	37

Foreword



Britain has become the whiplash capital of the world. Between 2006 and 2012 claims for personal injury caused by road traffic accidents increased by 60%. Whilst over the same period the number of reported road traffic accidents fell by 20%. The Government shares the widespread concerns over this totally disproportionate growth in claims.

The Prime Minister has recognised the pressing need to tackle the rising cost of insurance premiums, and the effect this has on individuals, families and businesses in the current challenging economic conditions.

With every fraudulent and every exaggerated insurance claim that goes unchallenged the premium of each motorist increases. Insurers estimate that the cost of whiplash claims from road traffic accidents, which comprise 90% of relevant personal injury claims, to the average policy-holder is £90 per year. This is not a victimless problem.

We must, of course, preserve access to justice for the genuinely injured, but that does not mean allowing exaggerated, misrepresented or fabricated claims to go unchallenged.

On 14 February 2012, the Prime Minister hosted an 'Insurance Summit' which looked closely at reducing motor insurance premiums. Both the Government and the insurance industry committed to action: the Government to looking at how best to tackle the issue without eroding access to justice; insurers, as well as looking at how to tackle this issue, committed to pass on savings to policy holders and to ensuring that genuine claimants receive the appropriate recompense.

This consultation document presents options that build upon the significant reforms this Government is already introducing from April 2013, through Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Reforms which include making the costs of no win no fee conditional fee agreements more proportionate and fairer between claimants and defendants, as well as banning referral fees in personal injury.

The measures in this consultation look to remedy two areas where the current arrangements are imperfect: the difficulties in diagnosing the injury and the nature and cost of the court system that can work against insurers challenging suspect claims.

The first aspect this document considers is the creation of independent medical panels to support better diagnosis of possible whiplash injuries.

**Reducing the number and costs of whiplash claims
A consultation on arrangements concerning whiplash injuries in England and Wales**

The second looks at the small claims track threshold for personal injury claims arising from road traffic accidents, which provides a more cost effective route for straightforward claims and self represented litigants.

Our aim is to deter fraudulent and exaggerated claims and reduce the cost of dealing with whiplash claims while preserving access to justice.

The Government accepts that whiplash injury is a complex issue and that the causes and options to address them in this paper are not the only ones. We are keen to receive further ideas respondents might have to help us deliver our aims in this area.

The Ministry of Justice will review all submissions to this consultation and publish a response on the aspects of the current arrangements in Spring 2013.

A handwritten signature in black ink, appearing to read 'Helen Grant', with a stylized, cursive script.

Helen Grant
Parliamentary Under Secretary of State for Justice

Executive summary

1. Between 2006 and 2010, the number of reported road traffic accidents (RTAs) fell by around 20%.¹ During the same period, the number of claims for personal injury (PI) arising from RTAs rose by around 60%.² Some 2.7 claims for whiplash damages are made for every accident reported and Department of Work and Pensions Compensation Recovery Unit data indicates that around 70% of RTA PI claims are for whiplash injuries. This rate is significantly higher than in other countries: a 2004 comparative study shows that the equivalent rate in Germany to be 47% and Spain 32%, whilst in France the rate was just 3%.³
2. This growth has been the cause of widespread concern and has had a significant impact. According to the Association of British Insurers (ABI), some £90 of the cost of the average motor insurance premium stems from the cost of whiplash injuries. In total, whiplash injuries now account for nearly £2bn of compensation payments per year, accounting for 20% of the typical car insurance premium.⁴
3. The Government is already taking considerable steps to reverse this trend with specific action on whiplash injuries. Following the Prime Minister's summit of 14 February 2012, we will be supporting better diagnosis of possible whiplash injuries. Additionally, through the Claims Management Regulator, providing assistance to the Information Commissioner's Office to crack down on the misuse of data linked to unwelcome text messages which might encourage wrongful claims. The Government's package of measures will help to tackle the root causes of these inflated costs.
4. These actions take place within the wider context of substantial reforms to civil litigation funding and costs that the Government is introducing in April 2013. These reforms, in Part 2 of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 and associated measures, take forward Lord Justice Jackson's recommendations.
5. In addition to this work, the Government is identifying options to further reduce the number and total cost to the public of fraudulent or exaggerated whiplash claims. This consultation considers two areas for change.

¹ Source DfT:
<http://www.dft.gov.uk/statistics/tables/ras40007/>
<http://www.dft.gov.uk/statistics/tables/ras45009/>

² Source DWP CRU:
<http://www.dwp.gov.uk/other-specialists/compensation-recovery-unit/performance-and-statistics/performance-statistics/>

³ http://www.svv.ch/sites/default/files/document/file/CEA_HWS-Studie_englisch.pdf

⁴ http://www.abi.org.uk/Publications/Tackling_Whiplash_Prevention_Care_Compensation1.aspx

6. The first area is the arrangements for the diagnosis of whiplash injuries. As a soft tissue injury, whiplash injuries may be difficult to diagnose, with evidence often based on the claimant's description of an accident and the pain or discomfort. Potentially, the injury might have healed either by the time the doctor is asked to diagnose or a claim is brought. Given the difficulty of diagnosing correctly there are arguments in favour of moving to medical panels⁵ appointed or accredited by the court. The panels could improve the diagnosis of whiplash injury.
7. The second area is the level at which the damages threshold should be set for claims arising from RTAs for either personal injury or whiplash injuries under the Small Claims track. This court track is designed to be more suitable for relatively straightforward claims and for self-represented litigants.
8. Insurers report regularly that it is simply not rational to challenge many claims given that the value of the claim is often less than the costs of challenge. As such, the present arrangements might not provide the proper incentives to allow fraudulent claims to be tested properly. A beneficial result of an increase to the damages threshold for personal injury claims in this area would be for more fraudulent and/or exaggerated claims to be challenged, potentially reducing the number of such claims made.
9. On this issue, we recognise that the reforms in Part 2 of the LASPO Act 2012 are likely to go some way towards ameliorating the current problems. Changes to conditional fee agreements and banning the payment and receipt of referral fees in PI cases, will make a significant difference to the costs involved in civil litigation and the current culture of claims. Given the severity of the problem and its impact on individuals the Government believes that further action to reduce the number and costs of claims is needed.
10. The Government is consequently consulting on options for increasing the relevant Small Claims track threshold for damages from the current £1,000 to £5,000, with a view to providing a simple route for relatively straightforward claims and reducing the cost which should help to make it more likely that fraudulent and exaggerated claims are challenged.
11. Claims pursued through the small claims track usually result in both sides bearing their own costs, meaning that it would become more economically viable for defendants to challenge exaggerated or fraudulent claims given that there is reduced risk of funding high costs if the case is lost. In addition the costs rules would make it more likely that claimants would be deterred from making such claims unless they were genuinely injured.

⁵ A register of accredited medical practitioners approved to assess claimants suffering from possible whiplash injuries arising from a road traffic accident.

12. The Small Claims track is designed to deal with relatively straightforward claims and to serve self-represented litigants. District Judges usually preside and have a responsibility to equalise any 'uneven playing field' where one party is self-represented.
13. Taken together, the changes being consulted upon will make it less likely that fraudulent or exaggerated claims will be made, and if they are that they can be properly tested. Such reductions in claim numbers should be reflected in the insurance premiums each motorist pays, given that the insurance industry has committed to pass on savings to policy holders.
14. The Government accepts that arguments around access to justice and equality of arms might arise, and is acutely aware of the need to protect access and equality. Options for increasing the threshold for all PI claims were consulted on in 2007. The consultation response came down against an increase partly on that basis.
15. PI claims have in the past been considered too complex for self-represented litigants, and there is a risk that those with reasonable claims would either not challenge an unreasonable adverse determination by an insurer or fail to claim proper damages for their injuries. However, whiplash claims tend to be more straightforward to consider than other types of PI claim, and now form the vast majority of low value RTA PI claims.
16. The Government accepts that this is a complex area and continues to consider a range of options to tackle the problems around whiplash injury. The Government is keen to hear any further suggestions that interested parties might have.

Introduction

This paper sets out for consultation options around the use of independent medical panels⁶ to assess whiplash claims and to reduce the costs of making or challenging such claims in court through amending the threshold for damages for personal injury claims in the Small Claims track.

The consultation is aimed at all stakeholders with an interest in reducing the number and cost of whiplash RTA claims, which contribute to the high cost of motor insurance in England and Wales and the perception of a 'compensation culture'.

This consultation is conducted in line with the Government's Code of Practice on Consultation and falls within the scope of the Code. The consultation criteria, which are set out on page 37, have been followed.

The Government's Impact Assessment indicates that claimants, defendants and their representatives are likely to be particularly affected. The proposals are likely to lead to additional start up costs as well as longer term savings for businesses. The Impact Assessment along with an Equality Impact Assessment are being published separately.

Comments on the Impact Assessment and the Equality Impact Assessment are very welcome.

Copies of the consultation paper are being sent to:

Academy of Medical Royal Colleges

Access to Justice Action Group

Advice UK

Age Concern

Association of British Insurers

Association of Her Majesty's District Judges

Association of Medical Reporting Organisations

Association of Personal Injury Lawyers

Association of Professional Claims Managers

Association of Regulated Claims Management Companies

British Chambers of Commerce

British Insurance Brokers Association

⁶ A register of accredited medical practitioners approved to assess claimants suffering from possible whiplash injuries arising from a road traffic accident.

**Reducing the number and costs of whiplash claims
A consultation on arrangements concerning whiplash injuries in England and Wales**

British Medical Association
British Orthopaedic Association
British Osteopathic Association
British Society for Rheumatology
Citizens Advice
Chartered Society of Physiotherapy
City of London Police – Insurance Fraud Enforcement Division
Civil Court Users Association
Civil Justice Council
Civil Procedure Rule Committee
Claims Standards Council
Confederation of British Industry
Consumer Justice Alliance
Council of Her Majesty’s Circuit Judges
Disability Rights UK
Equality and Human Rights Commission
Federation of Small Businesses
Forum of Complex Injury Solicitors
Forum of Insurance Lawyers
General Medical Council
Insurance Fraud Bureau
Insurance Medical Group
Judicial College
The Law Society
Local Government Association
London Motorist Action Group
Mencap
MIND
The Money Advice Service
Motor Insurers Bureau
Motor Accident Solicitors Society
Personal Injuries Bar Association
Royal College of General Practitioners
Royal College of Physicians of London

**Reducing the number and costs of whiplash claims
A consultation on arrangements concerning whiplash injuries in England and Wales**

Royal College of Surgeons

RTA Portal Company

Thatcham – Motor Insurance Repair Research Centre

Trades Unions Congress

Transport for London

Welsh Government

Women's National Commission

Part One – The Issue

17. Claims for compensation relating to personal injuries (PI) are increasing as the number of road traffic accidents (RTAs) is falling and motor vehicles become safer. Figures for the number of RTAs fell by 19% between 2006 and 2012, from 189,000 to 151,000,⁷ whilst the number of recorded insurance claims for RTA personal injuries rose by nearly 60%, from 519,000 in 2006 to 828,000 in 2011.⁸
18. Data from the Department of Work and Pensions Claims Recovery Unit (CRU) indicates that around 570,000 claims were made for whiplash injury in 2011/12, around 70% of total RTA PI claims. An international comparison study carried out in 2004 showed that this figure is significantly higher in the UK than in other European jurisdictions, such as Spain, Germany or France.⁹
19. Whiplash injury is the term used to describe the neck pain which occurs after the soft tissue in the spine has been stretched and strained when the body is thrown in a sudden, forceful jerk. As a soft tissue injury, whiplash is difficult to diagnose with certainty as there may be no visible signs. Evidence is often a diagnosis based largely on the claimant's description of the accident and the pain or discomfort.
20. Damages for minor or moderate neck injuries, such as whiplash injury, are likely to attract damages of between a few hundred pounds to £17,850 for the most serious injuries.¹⁰ Sample data from commercial sources¹¹ suggests around £2,500 is paid in damages on average for RTA claims and that the large majority of claims are for less than £5,000.
21. In most examples, a claim will be brought by claimant(s), usually an injured driver and/or passengers, with the defendant driver's insurance company responding. Broadly, the sequence of events following a claim once an accident has occurred might be:
 - diagnosis by a doctor (often either the claimant's GP or a panel doctor employed by a Medical Reporting Organisation);
 - claim by the claimant driver;

⁷ Source DfT:
<http://www.dft.gov.uk/statistics/tables/ras40007>
<http://www.dft.gov.uk/statistics/tables/ras45009>

⁸ Source DWP CRU: <http://www.dwp.gov.uk/other-specialists/compensation-recovery-unit/performance-and-statistics/performance-statistics/>

⁹ http://www.svv.ch/sites/default/files/document/file/CEA_HWS-Studie_englisch.pdf

¹⁰ Guidelines for the Assessment of General Damages in Personal Injuries Cases, 11th edition.

¹¹ Written evidence from AA motor insurance to the Transport Committee. The Cost of Motor Insurance, Volume I (March 2011). Written evidence page 62.

- consideration by the defendant driver's or drivers' insurers; and
 - if rejected by those insurers, determination of the claim by the court.
22. There has been an undoubted growth in whiplash claims arising from RTAs. The Government shares the widespread concerns that this growth may be linked to an increase in fraudulent and/or exaggerated claims. Every fraudulent or exaggerated claim for compensation adds to the cost of each motor insurance policy purchased. The UK insurance industry estimates that the total cost of all whiplash injuries, including compensation and associated legal costs, is some £2 billion per year,¹² £90 for each insurance policy.
23. At the Prime Ministers Insurance Summit in February 2012, insurers committed to pass on any savings in this area as a result of Government reforms to civil litigation costs and a reduction in fraudulent or exaggerated claims to consumers and to ensure that genuine injuries are compensated.
24. The Government accepts that whiplash injury is a complex issue. It is focusing work on 4 key areas to make progress:
- i. **improving diagnosis** – whiplash, as a soft tissue injury, is difficult to diagnose, particularly as the symptoms might have healed by the time of an examination. To help rectify this the Government is working to deliver better guidance on the injury and its diagnosis;
 - ii. **developing standards for diagnosis** – better diagnosis will also be promoted by assured standards of training and audit. The proposals on medical panels¹³ are designed to help deliver this;
 - iii. **challenging questionable claims** – under current arrangements, defendants face greater costs to challenge a claim than to pay out. The proposals in this consultation help to rectify that situation; and
 - iv. **tackling the perception that exaggerated claims are acceptable** – individuals can hold the view that fraudulent or exaggerated claims against insurers are justifiable and victimless. In reality, those actions might be criminal, and add to the cost of motor insurance for all individual policy-holders. The Government is working with insurers and other interested groups on measures to tackle these perceptions, building on current notable examples, such as the work of the City of London Police's Insurance Fraud Enforcement Department.¹⁴
25. Part two of this consultation concerns the process for providing medical evidence in support of a claim. Presently, medical certification might be provided either by the claimant's GP or by a medical reporting officer

¹² http://www.abi.org.uk/Publications/Tackling_Whiplash_Prevention_Care_Compensation1.aspx

¹³ A register of accredited medical practitioners approved to assess claimants suffering from possible whiplash injuries arising from a road traffic accident.

¹⁴ <http://www.cityoflondon.police.uk/CityPolice/Departments/ECD/IFED/>

appointed by a party linked to the claim, for example a claims management company or an insurer. This differs from the system in, for example, France, where whiplash claim rates are many times lower than those in the UK.¹⁵ Independent Medical Panels might help to remove any undue pressure a medical examiner might feel to come to a particular conclusion.

26. Part three of this Consultation consequently concerns whether more claims could be brought under the Small Claims track, a simpler and cheaper process which makes it easier to challenge claims and which would reduce costs for defendants, making it more likely that more claims will be challenged where appropriate. Whilst insurers do currently challenge claims, and there have been notable successes in this area, it is estimated that it could cost many times more to challenge a claim for a whiplash injury than to settle.
27. Currently, many claims proceed under the Fast Track. This means that as well as their own costs and compensation the losing party also has to pay the other side's costs, a success fee to the other side's lawyer and any After The Event insurance premiums they may have taken.

Current non-PI claims

The Small Claims track – Claims worth under £5,000 (increases to £10,000 in April 2013) are usually heard in the 'Small Claims track' of the county court. This track is for more straightforward cases and the parties are able to represent themselves without a solicitor if they wish to do so. The judge decides what happens to a claim and will ensure an unrepresented party understands what to do and when.

The Fast Track – Higher value and more complex claims up to £25,000 usually go to a 'fast track' hearing. The trial usually takes about a day, but can last up to a maximum of three weeks.

The Multi-track – Very complex claims worth £25,000 or more usually go on the 'multi-track'. The trial can often last several days and will usually continue on consecutive days until it is completed. It could also take up to 30 weeks on average before the hearing starts, even with 'fast-track'.

¹⁵ http://www.svv.ch/sites/default/files/document/file/CEA_HWS-Studie_englisch.pdf. In France doctors are required to have specialised training to assess relevant injuries. Following an initial check up the patient is given a clinical examination which concludes with a neurological examination and a study of the victim's previous state of health. The professional(s) examining the patient have a degree of independence. The claimant may separately instruct a doctor to be present.

Reducing the number and costs of whiplash claims
A consultation on arrangements concerning whiplash injuries in England and Wales

28. The implementation in April 2013 of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 will help to rebalance this system, for example by fundamentally reforming success fees. The higher cost of challenging a claim in the Fast track might still, however militate against an insurer deciding to reject or resist a fraudulent or exaggerated claim for whiplash.
29. Whilst looking at whether and how to rebalance the system to reduce costs and incentivise the challenging of fraudulent and exaggerated claims, the Government is acutely aware of the need to preserve access to justice.
30. The Government is also aware that the current situation has complex and varied causes. This consultation forms just one strand of our comprehensive approach to bringing downward pressure onto the cost of insurance.

Part Two – Better Medical Evidence

31. Under current arrangements, a person who wishes to make a claim for a whiplash injury as a result of a car accident can go to any registered medical practitioner and ask them to certify that they have sustained an injury. Many go to their own GP (as a private, non-NHS transaction), others to a GP or a doctor employed by a Medical Reporting Organisation recommended by their legal services provider(s).
32. A standard fee of £195 has been agreed for such transactions by the private fees committee of the British Medical Association, though the actual fee paid would be for negotiation between the individual doctor and the legal services provider.
33. In addition, if the insurance company representing the driver decides to contest the claim, they may also ask for a report, usually from the claimant's GP. This report would normally be returned direct to the insurance company.
34. Diagnosis of whiplash injury is not straightforward. There are no objective diagnostic tests in normal use, although some novel approaches have been reported and are being explored. As a consequence of the nature of the purported injury and cause, in many cases the doctor is being asked to assess the alleged injury some time after the accident, which may make it even more difficult for a doctor to assess and to consider the cause.
35. In situations where the report is provided by a doctor other than the claimant's GP, that doctor is unlikely to see the patient again. Even when that doctor is the claimant's GP, the next contact might not be for some time. In those situations the doctor will have little or no opportunity for 'feedback' which would allow them to understand whether their diagnosis was correct. If there are no formal and coordinated arrangements for clinical audit; the opportunities for learning and developing skills in diagnosing whiplash injury may be limited.
36. In addition, there is no mandatory reporting form, though a Ministry of Justice template form is available. The information reported and format used can be variable, subject to certain requirements, making it more difficult for insurers and claimants to agree the value of damages in valid claims and for insurers to challenge questionable claims.
37. The Department of Health will be taking forward work with the appropriate professional organisations to develop clinical guidance and to assess the scope for further research which will help to improve diagnosis.
38. There are, however, widespread concerns that the nature of the injury and the challenge of diagnosis might both favour, at the margins of the area, giving a particular diagnosis.

39. A further concern is that GPs, who frequently build strong relationships with patients and their families over many years, may find it difficult to decline to certify an alleged whiplash injury, even if there may be doubts about the diagnosis. Similarly, doctors who regularly receive work from legal service providers or insurers may be keen to retain a relationship with them.
40. The Government is consequently consulting on whether a system of independent medical panels,¹⁶ which would assess claims for whiplash injury and give objective, impartial advice to the court, should be established. The Government believes that independence would help address the concerns described above about the current arrangements for the diagnosis of whiplash injuries.
41. If this proposal were taken forward, there are various options around delivery. Broadly, the two key models for such a system are:
- i. an *accreditation scheme*. The Government would establish the standards for accrediting providers of medical assessment services and would appoint an organisation by competitive tender to run an accreditation scheme. Individual doctors, groups of doctors or Medical Reporting Organisations could apply for accreditation. Only reports from accredited doctors or organisations, submitted using a standard form as described below, would be accepted as evidence in disputed claims; and
 - ii. a *national call-off contract*. The Government would work with interested parties such as the insurance industry and representatives of claimants' legal service providers to develop the criteria for a national framework contract. The criteria could be similar to those for the accreditation scheme.
- Medical organisations would be invited to bid to be placed on the list of approved suppliers under the contract, possibly on a geographical basis.
- An independent board, with representatives from the court service, claimants' organisations and insurance companies, might be created to manage competitions for contracts to assess whiplash injury claims and to supply reports, again using the standard form.
42. Under either approach, a key feature would be the use of a standardised medical report for the assessment of claims. This would be based on best practice guidance in the diagnosis of injury and could contain relevant information and evidence supporting the conclusion, such as the date of the accident, and the medical notes of any consultation with the claimant's GP or specialist immediately after the accident.

¹⁶ A register of accredited medical practitioners approved to assess claimants suffering from possible whiplash injuries arising from a road traffic accident.

43. Where a doctor performing the assessment was in significant doubt over the presence or absence of a whiplash injury or over the likelihood of significant lasting damage, they would be invited to express the degree of uncertainty.
44. If taken forward there would be options around peer review and scrutiny of the reports. For instance, each assessment could be scrutinised by an experienced assessor, who could if necessary call the claimant for a further examination if the medical report did not appear to be internally consistent. Alternatively, two doctors could independently examine the patient and then compare their findings in order to produce a single consensus report. Other, potentially less costly options are also possible. In general terms, greater scrutiny would increase the degree of confidence in the findings, though costs would also increase.
45. A key risk of this change is that cost might fall to a different party. The Government does not deem it appropriate for the costs to fall on the public purse, thereby increasing the burden for all taxpayers, given that the benefits will accrue to specific groups elsewhere. Subject to this caveat, the Government is consulting on how costs should be dealt with, and on ways to limit those costs.

Consultation questions:

- Question 1: Do you agree that, in future, medical reports for whiplash injury claims should be supplied by independent medical panels,¹⁷ using a standard report form, and should be available equally to claimants, insurers, and (for contested claims) the courts?**
- Question 2; If not, how would you address the problems listed at paras. 35–39 above?**
- Question 3: Which model should be used for the independent medical panels – Accreditation, national call-off contract or some other variant?**
- Question 4: Do you consider that an element of peer review should be built into every assessment, or only for a sample of assessments for audit purposes?**
- Question 5: How should costs be dealt with and apportioned?**

¹⁷ A register of accredited medical practitioners approved to assess claimants suffering from possible whiplash injuries arising from a road traffic accident.

Part Three – Better Incentives to Challenge Fraudulent or Exaggerated Claims

46. The Civil Procedure Rules (CPR) provide for a system of case management tracks that have different rules to ensure that cases are dealt with in a manner appropriate to their value and complexity.
47. All defended civil claims are allocated to one of three tracks: the Multi-track, the Fast track or the Small Claims track. There are several factors that the court can take into account when allocating a claim to a certain track, for example, the views of the parties and the nature and complexity of the claim. However, the most straightforward way for the courts to distinguish between cases is on the basis of monetary value, so each different track has a financial threshold, which determines what the normal track for a claim will be.
48. Cases allocated to the Small Claims track are usually those with a monetary value of less than £5,000.¹⁸ Currently there are two exceptions to the general rule. The first is PI claims where a limit of £1,000 applies (this amount relates to the damages awarded for pain, suffering and loss of amenity (PSLA) only and excludes any other damages claimed). The second exception is housing disrepair where the limit of £1,000 applies for the cost of the disrepair and £1,000 for any other damages arising from the disrepair. This consultation does not consider housing disrepair.
49. Claims that are allocated to the Fast track are generally those with a value that exceeds the limit of the Small Claims track, but is less than £25,000. The Multi-track is the normal track for any claim that does not fall within the scope of the Small Claims or Fast track (i.e. predominantly with a value exceeding £25,000).
50. The purpose of the Small Claims procedure has always been to provide an informal environment in which disputes can be resolved in a simple, straightforward way that is accessible and proportionate to their low value. This means that the normal procedural rules and the strict rules of evidence do not apply (for example witnesses do not have to give evidence on oath). The presence of expert witnesses is subject to the agreement of the court and hearings are conducted in an informal manner, often with parties sitting around a table.
51. The cost rules relating to recoverable costs for the Small Claims differ greatly from those of the Fast track and Multi-track. In the latter two tracks the successful party is generally able to recover their costs, including the cost of legal representation, from the unsuccessful party.

¹⁸ This will increase to £10,000 from April 2013.

52. In the Small Claims track the costs that can be recovered from the other side are strictly limited. The usual rule is that the court may only award fixed costs attributable to issuing a claim, any court fees, reasonable travelling expenses for a witness or party and limited costs for loss of earnings for a party or a witness (up to £90 per day per person). In addition, fees of any permitted experts (currently limited at £200 per expert) can be claimed, and an amount up to £260 can be claimed for legal advice and assistance in claims including an injunction or specific performance. No costs can be claimed for legal representation or for the services of a lay representative.
53. The small claims procedure was first introduced in 1973 and the limit was originally set at £75. In 1991 it was set at £1,000 and in 1996 the limit was raised to £3,000. In April 1999 the track limits for small claims were examined again and the decision was taken to increase it to £5,000. At the same time the limit for PI claims was reviewed but remained at £1000. However, it was decided that it should apply to general damages only (i.e. the money awarded for PSLA) rather than the value of the entire claim.
54. The then Department for Constitutional Affairs consulted on the small claims limit in April 2007, although it decided against increasing the threshold from £1000. This decision was made on the basis that the claims process for PI claims could and would be improved to provide for fair compensation in a more efficient and cost-effective way and that the £1000 threshold provided a better balance between the rights of claimants and defendants.
55. Sir Rupert Jackson in his 2009 Review of Civil Litigation Costs¹⁹ concluded that then was not the right time to review the limit for PI claims.
56. The 2011 Government consultation 'Solving disputes in the county courts: creating a simpler, quicker and more proportionate system'²⁰ sought views on proposals to reform the civil justice system in the courts in England and Wales. Following this consultation the Government decided that the small claims ceiling should be increased to £10,000 by April 2013. The consultation did not look at or propose to raise the limit in relation to PI or whiplash claims.
57. There is some evidence to suggest that the majority of whiplash and many other PI RTA claims are valued between £1,000 and £5,000, and therefore are highly likely to be considered under the Fast track if they are contested. Sample data has indicated an average value of around £2,500 paid in damages for RTA PI claims.
58. The Association of British Insurers indicates that the additional risk of cost recovery in the Fast track should the insurer lose provides insurers with a

¹⁹ http://www.judiciary.gov.uk/publications-and-reports/review-of-civil-litigation-costs/?wbc_purpose=basic.rss

²⁰ https://consult.justice.gov.uk/digital-communications/county_court_disputes

strong incentive to pay out for questionable claims rather than see them tested in court.

59. The Government is of the view that many small value whiplash claims are relatively straightforward and that the Small Claims track might be a more suitable venue in which to determine them than the Fast track. More complex and unsuitable claims could still be heard under the Fast track.
60. Additionally, the change would be more amenable to the challenge of fraudulent or exaggerated claims. Consequently, the Government is consulting on options that would bring more PI or whiplash claims arising from RTAs into the Small Claims track, thereby providing a better framework for the challenge of fraudulent or exaggerated claims.
61. The options are to:
1. increase the threshold for RTA whiplash claims to £5,000; or
 2. increase the threshold for all RTA PI claims (including whiplash) to £5,000; or
 3. retain the current threshold.
62. From April 2013 the general Small Claims track threshold will increase to £10,000. This consultation does not consider increasing the limit for PI or whiplash injury to that level. Such a significant change in the threshold would necessarily capture claims and symptoms with significant complexity likely to be unsuitable for the Small Claims track. Whilst such a change might be warranted in the future, the Government does not consider now the right time to consult on doing so.
63. The intended result of an increase to the limit would be to allow more relatively straightforward cases to be heard in the Small Claims court with the additional benefit of making it more economic for insurers to challenge fraudulent and exaggerated claims. The Small Claims track is a less costly regime in which to bring a case, and therefore a less costly one in which to challenge questionable whiplash injuries.
64. Given that the insurance industry has committed to pass on any savings in this area,²¹ the Government's desired outcome would be a downward pressure on the cost of motor insurance.
65. The Government recognises that there are three primary risks in such proposals. The first is a reduction in access to justice resulting from injured parties either not claiming initially or not challenging rejections of valid claims. This might be an unintended consequence of a claimant on the Small Claims track being less likely to obtain legal representation without cost to them.

²¹ <http://www.number10.gov.uk/news/insurance-summit/>

66. The second key risk is based around 'equality of arms'. Under the Small Claims track a claim for injury following a RTA will usually be brought by an individual seeking compensation for alleged injury from 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 is likely to be represented professionally
67. The third risk is that, without representation, individuals with valid claims may be more likely to accept settlements of less than the amount which would provide fair compensation for the injury they have suffered.
68. In addition to the Small Claims track being designed for self-represented litigants, and the role of District Judges in ensuring the proceedings are being taken forward equally and fairly, significant advice and support is provided to self-represented litigants, including by Her Majesty's Courts and Tribunals Service (HMCTS). The Civil Justice Council has made a number of recommendations to improve the support for self-represented litigants which are being taken forward by the Civil Justice Council themselves, the Ministry of Justice, HMCTS and others, including the judiciary. The recommendations include improved guidance and an expansion in the number of court centres with Personal Support Units.
69. These risks are also mitigated to an extent by the option for a claimant to take out Before the Event (BTE) insurance to help with legal costs and the payment of disbursements, albeit at an, often modest, cost. A number of current motor insurance policies either include or offer as an option, BTE insurance that provides the policy holder with legal cover.
70. Under either Option 1 or Option 2, the change would be limited to damage caused in RTAs.

Increasing the Threshold

Option 1 – Raise the Small Claims Track Threshold for RTA Whiplash claims to £5,000

71. This approach would bring the majority of current whiplash claims under the Small Claims track.
72. Claims for whiplash injuries following RTAs present the most concern for the Government. As such, if a threshold were to be increased it could just apply in relation to whiplash injuries arising from RTAs. As the description of whiplash tends to be relatively simple, this would have the advantage of being more suitable for self-represented litigants than other types of PI. Complexity of PI claims was one of the considerations for not increasing the limit in 2007 and will remain a factor in allocation decisions, which are not taken solely on the value of the claim.

73. A risk to achieving the desired outcome under either Option 1 or Option 2, however, is that claims are inflated to bring them into the Fast Track process. There is also a risk, at least in the short term, of greater strain being placed on judicial and court resources as more cases are challenged, though this might be rebalanced in the longer-term as fewer fraudulent or exaggerated claims are made.

74. Adding a whiplash-specific threshold would, however, risk adding further complexity and creating early arguments over the classification of the injury in question. It might also mean that fraudulent or exaggerated claims would continue to be brought in future, though for a different type of PI. There is therefore a case to increase the threshold for all RTA PI claims.

Option 2 – Raise the Small Claims Track Threshold for all RTA Personal Injury claims to £5,000

75. This option would bring the majority of whiplash claims and many other PI RTA claims under the Small Claims track. More complex claims might continue to be considered under the Fast track process, given that claim value is only one factor determining allocation.

76. The Government accepts that there might be a risk of unintended consequences in doing so; including that significantly complex claims, could be brought under the Small Claims track. However, the responsibility of the judiciary to consider the complexity as well as the value of the claim when allocating a case to track may militate against this.

Option 3 – No Change to the Small Claims Track Threshold

77. As now, this would mean the vast majority of whiplash claims being dealt with within the Fast track, with very few claims allocated to the small claims track. The reforms in Part 2 of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 will have an effect on civil litigation costs generally and should deter fraudulent and exaggerated claims.

78. The LASPO Act 2012 received Royal Assent on 1 May 2012 and the reforms in Part 2 will be implemented in April 2013. They include fundamental reform of no win no fee conditional fee agreements (CFAs) and a ban on the payment and receipt of referral fees in Personal Injury cases. The Government believes that Lord Justice Jackson's reforms will have a significant beneficial impact on whiplash claims, by addressing the compensation culture and taking excess money out of the system.

Interaction with the Road Traffic Accident Protocol

79. Presently the majority of RTA PI and whiplash claims where liability is not contested are dealt with through the RTA Protocol. The Protocol is designed to provide a relatively swift way of addressing claims with predictable costs. At present, the Protocol applies to RTA claims in which liability is admitted, up to a value of £10,000. However, the Government

has announced its intention to extend the RTA Protocol by April 2013 to include claims up to £25,000, and to incorporate employers' and public liability accident claims.

80. In many cases, claims under the Protocol are processed through the online system provided by the RTA Portal Company Limited.
81. The Government recognises that changes to the Small Claims track threshold might impact upon the Protocol and its delivery in practice. For example, the RTA Portal might not presently be suitable for all self-represented litigants. If the Government were to proceed with changes to the Small Claims threshold, it would be interested in how it might mitigate any adverse effect on that operation, including by considering whether small claims could be brought under the Protocol in due course.

Consultation Questions

Question 6: Should the Small Claims track threshold be increased to £5,000 for RTA related whiplash claims, be increased to £5,000 for all RTA PI claims or not changed?

Question 7: Will there be an impact on the RTA Protocol and could this be mitigated?

Part Four – Further Action

82. The Government remains determined to reduce the financial burdens placed on each and every motorist by fraudulent and/or exaggerated claims for whiplash or other PI damage as part of its general strategy of supporting reductions in the cost of living and the cost of insurance premiums.
83. The Government is already taking forward a range of work in this area. Changes to CFAs and the banning of referral fees in PI claims (under the LASPO Act 2012) will make a significant difference to the costs involved in civil litigation and the culture of claims.
84. The Ministry of Justice is also working with the Information Commissioner's Office to crack down on the misuse of data to tackle unwelcome texts concerning the possibility of claiming for whiplash injury.
85. The Department of Health will work with the relevant professional bodies to provide better guidance on diagnosing whiplash injury. The Department for Transport is taking forward work on motor insurance premiums generally. This includes work on improving safe driving amongst young drivers, promoting safer car and seat design and a communications strategy to inform the public about the nature of the problem and understand the impact on premiums.
86. In addition to Government action, the insurance industry has launched a cross industry fraud database to enable insurance companies to share data about fraudulent claims. This is a positive step and the Government would encourage that such data sharing be extended to include all those who can help deter potential fraudsters from making claims. The industry is also funding a specialist police unit dedicated to tackling insurance fraud. The Insurance Fraud Enforcement Department²² (IFED) is based at the City of London Police's Economic Crime Directorate and has a 34-strong team of detectives and financial investigators.
87. IFED acts with operational independence to investigate fraudulent claims and has a remit to tackle motor insurance fraud including individuals who exaggerate claims and organised 'cash for crash' gangs. In May 2012 detectives from the unit made arrests as part of an ongoing investigation into a suspected 'cash for crash' fraud estimated to be worth more than £1 million.
88. We are keen to take this opportunity to request further ideas respondents might have, with a view to considering whether they could be practicably applied to deliver the changes we seek.

²² <http://www.cityoflondon.police.uk/CityPolice/Departments/ECD/IFED/>

Consultation Questions

Question 8: What more should the Government consider doing to reduce the cost of exaggerated and/or fraudulent whiplash claims?

Part Five – Impact Assessments

1. The Government is mindful of the importance of considering the impact of these plans on different groups. We have therefore considered the impact of all the measures in the package in line with our duties to groups who share a relevant protected characteristic under the Equality Act 2010. The Equality Act 2010 identifies the nine protected characteristics of race, gender, disability, gender identity, pregnancy and maternity, marriage and civil partnership, religion or belief, sexual orientation and age.
2. Our assessments of the potential impact of these proposals have been published alongside this Consultation Paper.
3. In the Impact Assessment, and the Equalities Impact Assessment, we acknowledge there are some gaps in the research and statistical evidence we have been able to use to understand the potential impact of our proposals. We would welcome any further information, evidence and comment which may help to address some of these gaps in any further assessment.

Consultation Questions

- Question 9: Do you agree with the accompanying equality screening? If not, please explain why.**
- Question 10: Can you identify ways in which the procedure under current arrangements impacts on people with protected characteristics? If so please provide evidence of impact.**
- Question 11: Do you consider that the introduction of independent medical panels²³ to assess whiplash injuries will impact on people with protected characteristics? If so, please give details.**
- Question 12: Do you consider that an increase in the small claims limit for Whiplash/RTA personal injury claims from £1,000 to £5,000 will affect people with protected equality characteristics? If so, please give details.**

²³ A register of accredited medical practitioners approved to assess claimants suffering from possible whiplash injuries arising from a road traffic accident.

Questionnaire

We would welcome responses to the following questions which are set out in the 'Reducing the number and costs of whiplash claims' consultation paper.

Question 1: Do you agree that, in future, medical reports for whiplash injury claims should be supplied by independent medical panels, using a standard report form, and should be available equally to claimants, insurers, and (for contested claims) the courts?

Yes

No

Comments:

Question 2: If no, how would you address the problems listed at paragraphs 35 to 39 of part two of this consultation document?

**Reducing the number and costs of whiplash claims
A consultation on arrangements concerning whiplash injuries in England and Wales**

Question 3: Which model should be used for the independent medical panels – Accreditation, national call-off contract or some other variant?

Accreditation scheme National Call-off contract Other

Comments:

Question 4: Do you consider that an element of peer review should be built into every assessment, or only for a sample of assessments for audit purposes?

Yes No

Comments:

**Reducing the number and costs of whiplash claims
A consultation on arrangements concerning whiplash injuries in England and Wales**

Question 5: How should costs be dealt with and apportioned?

Comments:

Question 6: Should the Small Claims track threshold be increased to £5,000 for RTA related whiplash claims, be increased to £5,000 for all RTA PI claims or not changed?

RTA Related Whiplash

RTA Related PI

No Change

Comments:

Reducing the number and costs of whiplash claims
A consultation on arrangements concerning whiplash injuries in England and Wales

Question 7: Will there be an impact on the RTA Protocol and could this be mitigated?

Yes

No

Comments:

Question 8: What more should the Government consider doing to reduce the cost of exaggerated and/or fraudulent whiplash claims?

**Reducing the number and costs of whiplash claims
A consultation on arrangements concerning whiplash injuries in England and Wales**

Question 9: Do you agree with the equality impact assessment published alongside this document? If not, please explain why.

Yes

No

Comments:

Question 10: Please provide evidence of any ways in which the procedure under current arrangements affects people with different protected equality characteristics.

Reducing the number and costs of whiplash claims
A consultation on arrangements concerning whiplash injuries in England and Wales

Question 11: Do you consider that the introduction of independent medical panels to assess whiplash injuries will affect people with protected equality characteristics? If so, please give details.

Yes

No

Comments:

Question 12: Do you consider that an increase in the small claims limit for Whiplash/RTA personal injury claims from £1,000 to £5,000 will affect people with protected equality characteristics? If so, please give details.

Yes

No

Comments:

**Reducing the number and costs of whiplash claims
A consultation on arrangements concerning whiplash injuries in England and Wales**

Thank you for participating in this consultation exercise

Please send your completed responses to:

Scott Tubbritt
Ministry of Justice
4.23, 102 Petty France
London, SW1H 9AJ

Fax: 0870 739 4268

Email: whiplashcondoc@justice.gsi.gov.uk

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by 8 March 2013 to:

Scott Tubbritt
Ministry of Justice
102 Petty France
London SW1H 9AJ

Tel: 020 3334 3157
Fax: 0870 739 4268
Email: whiplashcondoc@justice.gsi.gov.uk

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <http://www.justice.gov.uk/consultations>

Alternative format versions of this publication can be requested from:

Scott Tubbritt
Ministry of Justice
102 Petty France
London SW1H 9AJ

Tel: 020 3334 3157
Fax: 0870 739 4268
Email: whiplashcondoc@justice.gsi.gov.uk

Publication of response

A paper summarising the responses to this consultation will be published in six months time. The response paper will be available on-line at <http://www.justice.gov.uk/index.htm>.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice

Reducing the number and costs of whiplash claims
A consultation on arrangements concerning whiplash injuries in England and Wales

with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.
2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

These criteria must be reproduced within all consultation documents.

Consultation Co-ordinator contact details

Responses to the consultation must go to the named contact under the How to Respond section.

However, if you have any complaints or comments about the consultation **process** you should contact Sheila Morson on 020 3334 4498, or email her at consultation@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

**Ministry of Justice
Consultation Co-ordinator
Better Regulation Unit
Analytical Services
7th Floor, 7:02
102 Petty France
London SW1H 9AJ**



information & publishing solutions

Published by TSO (The Stationery Office) and available from:

Online

www.tsoshop.co.uk

Mail, Telephone, Fax & E-mail

TSO

PO Box 29, Norwich NR3 1GN

Telephone orders/General enquiries: 0870 600 5522

Order through the Parliamentary Hotline Lo-Call: 0845 7 023474

Fax orders: 0870 600 5533

Email: customer.services@tso.co.uk

Textphone: 0870 240 3701

The Houses of Parliament Shop

12 Bridge Street, Parliament Square

London SW1A 2JX

Telephone orders: 020 7219 3890/General enquiries: 020 7219 3890

Fax orders: 020 7219 3866

Email: shop@parliament.uk

Internet: <http://www.shop.parliament.uk>

TSO@Blackwell and other accredited agents

ISBN 978-0-10-184252-5

