



BRIEFING PAPER

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Whiplash claims: Prisons and Courts Bill

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Summary

The Prisons and Courts Bill (the Bill) was published on 23 February 2017 as Bill 145 of 2016-17. It has six parts which deal respectively with prisons; procedures in civil, family and criminal matters; the organisation and functions of courts and tribunals; the Judiciary and the Judicial Appointments Commission; whiplash; and final provisions.

This briefing paper deals with the whiplash provisions in Part 5 of the Bill, and includes information about the background to these provisions and reaction to them from interested parties. Part 5 of the Bill would extend to England and Wales only.

An associated Library briefing paper, Commons Library Analysis: The Prisons and Courts Reform Bill.

Whiplash claims

Background

Against a background of rising motor insurance premiums and the perception (not universally accepted) of the existence of a “compensation culture”, there has been a focus on the incidence of personal injury claims for whiplash injuries, insurance fraud more generally, and the extent to which this has affected the cost of motor insurance.

Reforms to civil litigation procedure and funding were introduced by the Coalition Government, which also developed a whiplash reform programme.

The Government remains concerned about the number and cost of whiplash claims and has consulted on ways to address the issue. It now intends to proceed with a range of reforms aimed at capping whiplash compensation payments and banning settlement of claims without medical evidence.

Part 5 of the Bill

Part 5 of the Bill deals with whiplash, including the definition of whiplash; damages for whiplash injuries; an uplift, in exceptional circumstances, to the amount of damages; banning settlement of claims before medical report; and regulation of the ban on pre-medical settlement. Much of the detail would be included in secondary legislation, which, in many cases, would be subject to the affirmative resolution procedure.

Reaction to the Government’s proposals

In general, lawyers’ groups, including the Law Society and the Association of Personal Injury Lawyers, are among those who have raised concerns about the Government’s proposals, while the Association of British Insurers has welcomed them.

The Government considers that the reforms would lead to savings of about £1bn and expects this to be passed on to motorists, resulting in an average saving per motor insurance premium of £40. Others disagree that the savings will be passed on and also consider it unfair that the reforms would reduce the compensation payable to genuine claimants, and leave victims to conduct claims without legal advice. There is also disagreement about whether the number and cost of whiplash claims has increased.

Further reading

Background information about the whiplash provisions is provided in Library briefing paper, [Small claims for personal injuries including whiplash](#). Information about factors

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influencing the cost of motor insurance premiums, and what Government and the industry have done to try and reduce costs, is provided in Library briefing paper, [Motor car insurance](#).

1. Background

Summary

Against a background of rising motor insurance premiums and the perception (not universally accepted) of the existence of a “compensation culture”, there has been a focus on the incidence of personal injury claims for whiplash injuries, insurance fraud more generally, and the extent to which this has affected the cost of motor insurance. Whiplash injury claims are also sometimes referred to as soft tissue injury claims.

Reforms to civil litigation procedure and funding were introduced by the Coalition Government, which also developed a whiplash reform programme.

The Government remains concerned about the number and cost of whiplash claims and has consulted on ways to address the issue. It now intends to proceed with a range of reforms aimed at capping whiplash compensation payments and banning settlement of claims without medical evidence.

The Government considers that the reforms would lead to savings of about £1bn and expects this to be passed on to motorists, resulting in an average saving per motor insurance premium of £40. Others disagree that the savings will be passed on. They also consider it unfair that the reforms would reduce the compensation payable to genuine claimants, and leave victims to conduct claims without legal advice. There is also disagreement about whether the number and cost of whiplash claims has increased.

1.1 Consideration of the issues involved

Transport Committee inquiries

Since 2010, the House of Commons Transport Committee has published a number of reports on the cost of motor insurance.

Among other things, the Committee has looked at the extent to which the cost of motor insurance is influenced by the prevalence of road accidents, insurance fraud, legal costs, and the number of uninsured drivers. The Committee has also considered ways of reducing the number and cost of whiplash claims. The Committee’s recommendations resulted, at least in part, in some of the reforms to law and procedure outlined below.

Insurance Fraud Taskforce

The Insurance Fraud Taskforce was set up by the Coalition Government in January 2015 to make recommendations to reduce insurance fraud.

Following a year-long review, the [Insurance Fraud Taskforce’s final report](#) was published in January 2016. The report made recommendations for industry, regulators and others, including six for Government. In a written Ministerial Statement, made on 26 May 2016,

the Government announced that it accepted each of the recommendations addressed to it.¹

1.2 Reforms already introduced

Civil litigation reforms

The Coalition Government introduced a range of reforms to civil litigation procedure and funding, many of which have an impact on personal injury claims.

In short, the reforms introduced already include:

- changes to conditional fee agreements (also known as “no win, no fee agreements”) which mean that in most cases, success fees and after-the-event (ATE) insurance premiums are no longer recoverable from the losing party and there is a cap on success fees in personal injury cases;
- the payment and receipt of referral fees have been banned in personal injury cases;
- in any personal injury claim where the court finds that the claimant is entitled to damages, but is satisfied on the balance of probabilities that the claimant has been fundamentally dishonest in relation to the claim, it must dismiss the entirety of the claim unless it is satisfied that the claimant would suffer substantial injustice as a result;
- legal services providers and claims management companies are prohibited from offering benefits to potential clients as an incentive to make a personal injury claim;
- the Road Traffic Accident Personal Injury Scheme has been amended.²

Further information is provided in the following Library briefing papers:

- [Small claims for personal injuries including whiplash](#),³
- [Referral fees in personal injury cases](#);⁴
- [No win, no fee funding arrangements](#).⁵

General information about action by the Coalition Government is provided in a Ministry of Justice Policy Paper, available on the Gov.UK website, [2010 to 2015 Government policy: civil justice reform](#).⁶

¹ HLWS24, [Government response to the recommendations of the Insurance Fraud Taskforce, 26 May 2016](#)

² [The Civil Procedure \(Amendment No.6\) Rules 2013](#), SI 2013/1695. Further information is provided in a Ministry of Justice consultation paper, [Extension of the Road Traffic Accident Personal Injury Scheme: proposals on fixed recoverable costs](#)

³ Number 04141, 13 December 2016

⁴ Number 06015, 8 September 2016

⁵ Number 7607, 31 May 2016

⁶ Updated 8 May 2015

Whiplash reform programme

In June 2015, Dominic Raab, who was then a junior Justice Minister, summarised steps taken by the Coalition Government in connection with whiplash claims, including measures related to medical reports and the “MedCo” Portal⁷:

The last Government worked closely with a wide range of stakeholders to develop an effective whiplash reform programme. New rules were implemented on 6 April 2015 to make sure that medical reports used in whiplash claims are obtained through the new MedCo IT portal. The new system also makes sure that solicitors are not able to obtain a report from an organisation with which they have a direct financial link.

These measures supplement reforms implemented on 1 October 2014 to fix the costs of initial medical reports at £180; to provide an expectation that there will usually only be one report; to prohibit the reporting expert from providing medical treatment to the claimant; to discourage insurers from using pre medical offers to settle; and to allow defendants to submit their version of events to the expert if necessary.

Further reforms to tackle fraudulent claims at source came into effect on 1 June 2015, when it became mandatory for claimant-solicitors to carry out a previous claims check on potential clients. In addition a robust new accreditation scheme for medical experts will be introduced on 1 January 2016 to help improve the quality of medical reports overall...⁸

In October 2016, the Ministry of Justice published a revised set of qualifying criteria for medical reporting organisations.⁹

1.3 The current process for making a whiplash claim

There is currently no legislative provision which regulates damages for pain suffering and loss of amenity for road traffic accident related whiplash injuries.¹⁰

The Government summarised the current procedure in a [factsheet](#) published with the [Prisons and Courts Bill](#),¹¹ which includes information about how the amount of compensation is calculated:

3. In the vast majority of cases, liability for an accident is admitted early in the post-accident process. The amount of compensation awarded for pain, suffering and loss of amenity (PSLA) for RTA

⁷ MedCo Registration Solutions (MedCo) is an independent industry led not for profit company, HLWS123, [Whiplash Reform Programme: Review and Call for Evidence: Written statement, 16 July 2015](#)

⁸ [PQ 60 \[on Personal Injury: Compensation\], 4 June 2015](#)

⁹ [Ministry of Justice, MedCo Framework Review: Call for Evidence, Results Updated 25 October 2016, Revised criteria October 2016](#) [accessed 2 March 2017]

¹⁰ [Bill 145-EN paragraph 112](#)

¹¹ Bill 145 of 2016-17

[road traffic accident] related soft tissue injury claims is usually negotiated between the insurer of the at fault driver and the solicitor of the injured claimant, often with reference to the suggested compensation ranges included in the Judicial College Guidelines. The payment of PSLA in a small number of claims, where the claimant and defendant cannot agree, is determined by the Court. In 2015, the average compensation paid out for a whiplash claim with an injury duration of around six months was £1,850.

4. All claims must follow the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (RTA PAP), before any claim enters the court system. Claims can drop out of the RTA PAP process for a number of reasons, but the majority of the claims which exit the process, do so due to disagreements over quantum and liability.

5. If a medical report is required in support of a RTA related soft tissue injury, then the RTA PAP provides the following definition for such injuries:

RTA PAP - 16(a) "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".¹²

1.4 The number and cost of whiplash claims

The Government has concerns about the number and cost of whiplash claims, despite improvements in vehicle safety:

The Government set out its concern that the volume of road traffic accident related personal injury claims has remained static over the last three years and is over fifty per cent higher than 10 years ago (460,000 claims registered in 2005/06¹³ compared with 770,000 in 2015/16). The number of claims remains high despite a reduction in the number of road traffic accidents reported to the police and improvements in vehicle safety, for example better head restraints. Similar improvements in vehicle safety in other jurisdictions have led to a reduction in both the number of claims and motor insurance premiums.¹⁴

The Government has set out concerns about the number and cost of road traffic accident related personal injury claims

¹² Ministry of Justice, [Prisons and Courts Bill Whiplash – Tariff of predictable damages](#), 23 February 2017

¹³ Footnote to text:
<http://webarchive.nationalarchives.gov.uk/20080107205404/http://www.dwp.gov.uk/cru/performance.asp>

¹⁴ [Bill 145-EN paragraph 67](#)

In written evidence to the Justice Committee in February 2017, the Association of Personal Injury Lawyers said that the number of whiplash claims had actually fallen:

In fact, the number of whiplash claims registered with the Government's Compensation Recovery Unit (CRU) has fallen consistently in the past six years, by a total of 41 per cent since 2010/11. Even when whiplash statistics are combined with the number of injuries registered by insurers with the CRU as 'neck and back' injuries, there has been a significant fall of 11 per cent since 2011/2012.

Furthermore, the cost of personal injury claims to the insurance industry has fallen significantly since reforms were introduced in 2013. Data published by the Association of British Insurers (ABI) shows the cost of personal injury claims to motor insurers has fallen by more than 12 per cent (£500 million) a year since the introduction of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act – from £4.1 billion in 2013 to £3.6 billion in 2015.¹⁵

The Government disputes these figures. In its response to a Consultation on whiplash it said:

30. Many respondents from the claimant lawyer community have indicated their belief that the numbers of whiplash claims registered with the CRU are decreasing. However, further study of the CRU statistics suggests this is not the case and that differences in claims labelling may be behind this belief.

31. When soft tissue injury claims labelled as 'neck' and 'back' are considered together with those labelled as 'whiplash' the figure increases significantly. The number of such claims has remained steady over the last three years at around 680,000 claims, which is around 90% of all RTA related personal injury claims made.¹⁶

Claimant lawyers assert that the number of whiplash claims has fallen by as much as 41% since 2010/11, and that the cost of claims has fallen since reforms

1.5 The small claims track

Costs

The small claims track is supposed to provide a simple and informal way of resolving disputes at court. Although lawyers may be instructed, in most cases, the court will not order legal costs to be paid by the losing party. This means that the successful party must generally pay their own costs and for this reason, many claimants deal with a small claim without the help of a solicitor. In contrast, in cases assigned to other tracks, the successful party would normally expect to recover costs from the losing party.

¹⁵ [Written evidence from the Association of Personal Injury Lawyers, 7 February 2017, paragraphs 3-4](#)

¹⁶ [Part 1 of the Government Response to: Reforming the Soft Tissue Injury \('whiplash'\) Claims Process, Cm 9422, February 2017](#)

Financial limit

The financial limit for the small claims track for many types of claim is currently £10,000. The ceiling for personal injury claims (which would include many claims for whiplash injury) and housing disrepair is much lower at only £1,000.

Successive Governments have considered whether or not to raise the small claims track limit, generally, or specifically for certain types of claim. A number of arguments have been made for and against doing so. For example, those in favour of an increase in the limit for personal injury claims have pointed to disproportionately high legal costs in lower value claims, and have argued that cases involving claims for lower value injuries are straightforward enough for an unrepresented litigant to understand.

Those against an increase have argued, among other things, that personal injury claims involve complex law and that potential claimants could be deterred from making a claim, or accept too low a settlement figure, because of the difficulties involved. They also point to a potential “inequality of arms” as defendant insurers might still instruct lawyers in a small claims track case.

More information about the significance of allocation to the small claims track, and previous consideration of increasing the small claims track limit, is provided in another Library briefing paper: [Small claims for personal injuries including whiplash](#).¹⁷

1.6 Government proposals for reform

The Government has stated its commitment to “tackling the high number and cost of low value RTA related soft tissue injury claims, the vast majority of which are whiplash claims”.¹⁸

Autumn Statement 2015

In the Autumn Statement 2015, the Government proposed to increase the small claims track limit for personal injury claims to £5,000 and to remove the right to general damages for minor soft tissue injuries.¹⁹

Autumn Statement 2016

In the following year’s Autumn Statement, the Chancellor confirmed the Government’s commitment to legislate “to end the compensation culture surrounding whiplash claims, a major area of insurance fraud”. He said, “That will save drivers an average of £40 on their annual premiums”.²⁰

¹⁷ Number 04141, 13 December 2016

¹⁸ [Ministry of Justice, Reforming the Soft Tissue Injury \(‘whiplash’\) Claims Process, Cm 9299, November 2016, paragraph 7](#)

¹⁹ [Cm 9162, November 2015 at p125](#)

²⁰ [HC Deb 23 November 2016 c907](#)

1.7 Government consultation

On 17 November 2016, the Ministry of Justice launched a consultation, [Reforming the Soft Tissue Injury \('whiplash'\) Claims Process](#). The consultation closed on 6 January 2017. An [Impact Assessment](#) was also published.²¹ The consultation was stated to be "aimed at disincentivising minor, exaggerated and fraudulent RTA related soft tissue injury claims". The consultation paper stated that the cost to motorists arising from dealing with these claims was "out of proportion to the level of injury suffered" and contributed to the high cost of motor insurance premiums.²²

The consultation included the measures announced in the 2015 Autumn Statement and additional measures "aimed at providing claimants with proportionate compensation and greater certainty as to the value of their claim as well as reducing the number of claims settled without adequate challenge or proper medical evidence".²³

The Executive Summary summarised the proposed package of reforms:

The package includes four measures to:

- a) tackle the high numbers of minor RTA related soft tissue injury claims by either:
 - i. removing compensation for PSLA; or
 - ii. reducing compensation for PSLA by setting a fixed amount payable (£400 or £425 if there is a psychological element) for these types of claim.
- b) reduce compensation for PSLA for other RTA related soft tissue injury claims where recovery takes longer than for those covered by measure (a) above through the introduction of a set tariff of compensation;
- c) raise the small claims limit for all personal injury claims to £5,000, (by reference to the value of the PSLA element of the claim). This would have the effect that the legal costs of such claims would no longer be recoverable from defendants in the majority of soft tissue injury claims, although certain costs arising from litigation (for example the costs of issuing the claim) and a number of disbursements (for example the cost of the medical report) could still be claimed by a successful claimant; and
- d) ban pre-medical offers to settle RTA related soft tissue injury claims, so in future claims could not be settled without medical evidence provided by MedCo accredited practitioners.²⁴

²¹ MoJ015/2016, 17 November 2016

²² [Ministry of Justice, Reforming the Soft Tissue Injury \('whiplash'\) Claims Process, Cm 9299, November 2016, paragraph 1](#)

²³ [Ministry of Justice, Reforming the Soft Tissue Injury \('whiplash'\) Claims Process, Cm 9299, November 2016, p5](#)

²⁴ Ibid

The Government intends that claimants would still be able to receive compensation for other forms of loss, including medical costs, vehicle damage and loss of earnings.

Measures (a), (b) and (d) would require primary legislation. The increase in the small claims track limit (measure (c) above) would be achieved by a change to the Civil Procedure Rules. It would also be necessary to amend relevant Pre-Action Protocols including the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents.

The consultation paper also sought views on a number of other related issues affecting the personal injury sector.²⁵

Objectives of the proposed reforms

The consultation paper set out the objectives of the proposed reforms, including:

- Reducing the number of whiplash claims.²⁶
- Reducing the financial incentive to make a claim: the consultation paper stated that the cost of dealing with claims “is out of all proportion to any genuine injury suffered”.²⁷ The Government considers that, in lower value cases, shifting cases to the small claims track, where legal fees are not recoverable, would mean that claimants would have a direct financial interest in decisions about pursuing their claim in that they would be responsible for their own costs.
- Reducing motor insurance premiums: the Government stated that the reform package would save the industry around £1bn a year, “which will be passed on to consumers through reduced motor insurance premiums”.²⁸

The Government’s view of the issue

The consultation paper set out a number of reasons why the Government considers that the number of soft tissue injury claims in England and Wales remains too high, including:

- the difficulty in identifying and assessing soft tissue injury claims, meaning that claimants will usually know more about whether there is an injury, and if so how severe it is, compared with defendants:

This asymmetry of information, plus the availability of compensation at levels many claimants clearly regard as significant, means there are substantial financial incentives for claimants to bring cases regarding relatively minor injury, or to exaggerate the severity of their injury. By either

²⁵ Ibid, Parts 6 and 7

²⁶ Ibid p3. The Government sets out figures and further information on pp9-10

²⁷ Ibid

²⁸ Ibid p3

removing or reducing the availability of PSLA these incentives would be considerably reduced.

- successful claimants do not bear the cost of bringing a claim which, instead, is paid by unsuccessful defendants, with defendants sometimes considering it not worth contesting claims:

...because it is very hard to disprove RTA related soft tissue injury claims, defendants who contest such claims are likely simply to increase their total costs without substantially increasing their chances of success. Hence, in such circumstances, and especially for lower value claims, it may be more cost effective for defendants to accept liability without contesting the claim and to pass the costs involved on to motor policy insurance holders.

- the current system allows the parties to settle RTA related soft tissue injury claims without the claimant presenting medical evidence to the defendant:

Costs of investigating the claim (and challenging it in court) can often incentivise defendants to settle without this information, with a settlement being seen as a more commercially viable option. This has led to a situation where medical reports are not always used to support claims, which can in turn incentivise minor, exaggerated or fraudulent claims. Therefore, mandating the need for a medical report to evidence claims would help deter claims of this nature in future.

Consultation questions

The consultation sought views on a number of matters including:

- the definition of RTA related soft tissue injury claims and whether this should include psychological trauma claims;
- the definition of “minor” claims – views were sought on two options: injury duration up to and including six months, and up to and including nine months;
- two options to deal with minor claims:
 - the removal of compensation for PSLA for all minor RTA related soft tissue claims or
 - the introduction of a fixed sum of compensation for minor RTA related soft tissue injury claims - £400 (or £425 if a claim also contains a psychological element);
- the process for assessing injury duration;
- the introduction of a fixed tariff system for other RTA related soft tissue injury claims;
- raising the small claims track limit for personal injury claims generally, or for RTA cases only - the Government proposed a new limit of £5,000 for the PSLA element but asked for views on

whether, why and to what level the small claims limit for personal injury claims should be increased to beyond £5,000;²⁹

- introducing a prohibition on pre-medical offers to settle RTA related soft tissue injury claims and how this should be enforced;
- implementing the recommendations of the Insurance Fraud Task Force.

There was also a call for evidence on a number of related issues.³⁰

The consultation paper also sought views on whether improvements could be made to provide further help to litigants in person using the small claims track. In addition, the Government asked whether any specific measures should be put in place in relation to claims management companies and paid McKenzie Friends³¹ operating in the personal injury sector.³²

1.8 Transport Committee reaction to the Government's proposals

Transport Committee letter

On 11 January 2017, at the request of the Transport Committee, its Chair, Louise Ellman, wrote to Lord Keen of Elie, Advocate General for Scotland and spokesperson for Ministry of Justice business in the House of Lords.³³

Louise Ellman noted that the proposals could help to depress the number of claims overall, but also that they were not specifically targeted at fraudulent claims. She called on the Government to show how genuine claims would be protected:

The Transport Committee's recommendations focused on raising the bar for successful claims and was concerned to ensure that genuine claimants were not penalised. Your current proposals seek to reduce the incentives to claim. The Government should demonstrate how the proposals to reduce levels of compensation

²⁹ Further information on the Government's case for change is provided in another Library briefing paper, [Small claims for personal injuries including whiplash](#), Number 04141, 13 December 2016

³⁰ [Ministry of Justice, Reforming the Soft Tissue Injury \('whiplash'\) Claims Process, Cm 9299, November 2016](#), Part 7

³¹ The consultation paper includes this information about McKenzie Friends: "A McKenzie friend assists a litigant in person in a court of law in England and Wales. They don't need to be legally qualified and tend to be lay advisors who provide moral support for litigants, take notes, help with case papers and give advice on the conduct of a case. McKenzie friends cannot conduct litigation, address the court or sign court documents, their services are usually free, but paid McKenzie Friends are becoming more common", [Ministry of Justice, Reforming the Soft Tissue Injury \('whiplash'\) Claims Process, Cm 9299, November 2016, p30, footnote 21](#)

³² Ibid p30

³³ [Transport Committee, Letter from Louise Ellman to Lord Keen regarding injury claims, 11 January 2017](#)

will deter fraudulent claims while allowing those with a genuine claim to get appropriate restitution. It is important that, in responding to the consultation, the Government shows how genuine claims will be protected.

(...)

Overall I would prefer to see the Government place more emphasis on measures that make it harder for fraudulent claims to succeed. It would be a poor outcome and represent an injustice for genuine claimants if the overall level of claims fell but the proportion of fraudulent claims rose.

Ms Ellman considered that those seeking to make fraudulent claims were likely to try to exploit any new tariff or rule, and expressed concern that the proposals would simply see fraudulent claims displaced.

The letter also highlighted the potential unintended consequence of creating space for claims management companies to operate: "Even very small awards might allow them to make a profit if they can encourage enough claims". Louise Ellman called on the Government to demonstrate how its reforms would not be open to such abuse. Another unintended consequence might be on the management of claims arising from road traffic accidents where there is no injury.

Louise Ellman also questioned the timing of the reforms:

I do not consider that there has been enough time for the effect of the reforms that have been made recent years to have been properly evaluated. In particular I would like to see more of the recommendations from the Insurance Fraud Taskforce implemented. There should be a proper evaluation of the reforms to date and further reform only if it can be shown that previous reforms have not delivered.

Ms Ellman said that there was "little direct evidence that tackling fraud has reduced premiums":

It is claimed that the proposals will result in a reduction in insurance premiums as the savings are passed on to motorists. This claim was made repeatedly over the time the Committee was looking at the cost of insurance. There is little direct evidence that tackling fraud has reduced premiums. The recent increase in insurance premium tax may well offset any future fall arising from efforts to tackle fraud. At best the Government should probably be claiming that it has stopped claims rising as fast as they otherwise would have rather than raising expectations about lower premiums. In opposing fraud the Government should not put genuine claimants at risk of an injustice.

Government response

Lord Keen of Elie wrote to Louise Ellman on 23 February 2017. [His letter](#) set out details of the Government's response to the whiplash consultation rather than addressing the specific points made in Ms Ellman's letter.

1.9 Justice Committee evidence session

Oral evidence

On 7 February 2017, the Justice Committee heard oral evidence from two witnesses, James Dalton, Director of General Insurance Policy, Association of British Insurers, and Neil Sugarman, President, Association of Personal Injury Lawyers (APIL).³⁴

Commentary on the evidence session is provided in the following articles:

- [John Hyde, "Forensic MPs finally nail insurers over their PI spin", Law Society Gazette, 7 February 2017;](#)
- [John van der Luit-Drummond, "Bob Neill MP: MoJ 'firing in wrong direction'", Solicitors Journal, 7 February 2017;](#)
- [Nick Hilborne, "MoJ "firing in wrong direction" on PI reforms, says justice committee chair", Legal Futures, 7 February 2017;](#)
- [Marek Handzel, Justice Committee questions thinking behind MoJ whiplash proposals, claimsmag.co.uk, 9 February 2017.](#)³⁵

Written evidence

APIL also submitted [written evidence](#). This set out APIL's opposition to the Government's proposals:

We believe the proposals undermine fundamentally the rule of law, a key tenet of our constitution which ensures everyone is treated fairly. Furthermore, the proposals are without foundation in evidence and are profoundly unfair to people who have been injured through no fault of their own, the vast majority of whom are entirely honest. The proposals, if introduced, would result in injured people subsidising the insurance industry which collects premiums precisely for the purpose of paying compensation to people who have been injured.

APIL also took issue with the Government's reference to the measures being intended to deal with "fraudulent" whiplash claims, pointing to the lack of evidence to assess the number of fraudulent whiplash claims:

20. In fact, there is no evidence that a high proportion of personal injury claims are fraudulent, as is claimed in the consultation. Data published by the ABI relates to the level of motor and liability insurance fraud in general. In its public pronouncements about fraud, the ABI routinely includes both 'proven' and 'suspected' fraud (ie, what the ABI thinks is fraud but which cannot be proven as fraud). It has long been the case in our justice system that one is innocent until proved guilty.

³⁴ [Justice Committee, Oral evidence: Government consultation on soft tissue injury claims, HC 922, 7 February 2017](#)

³⁵ All links accessed 8 March 2017

21. When the ABI separated the two figures for the first time in 2014 it became clear that 'proven' (or 'confirmed') fraud was just 0.25 per cent of all claims, and this figure remained the same in 2015. This data relates to all motor insurance claims, including policy-holders over-egging their own claims, or making false declarations in applications for insurance. Personal injury fraud is a fraction of that figure, and fraudulent whiplash claims are a fraction of that. Nobody knows for certain the size of the fraction because independent, reliable figures for personal injury fraud do not exist.

APIL said that people with genuine 'minor' injuries are not 'dishonest':

The fact that genuinely injured people, with modest but perfectly valid claims, are consistently being vilified in the same breath as fraudsters and people who exaggerate claims is not only disingenuous, it is offensive.³⁶

Furthermore, APIL did not consider that moving the majority of claims to the small claims track would stop fraud in whiplash claims. They said that people would turn to claims management companies (CMCs) to conduct their claims and that "this will inevitably increase the number of fraudulent claims, rather than help to reduce them".³⁷

1.10 Government response to consultation

On 23 February 2017 (the same day as the introduction of the Prisons and Courts Bill), the Ministry of Justice published part one of its [response](#) to the consultation.³⁸ This deals with the Government's whiplash reform programme; part two is to be published "in due course" and will deal with implementing the recommendations of the Insurance Fraud Taskforce and the call for evidence on related issues.

The Government is intending to publish a final stage impact assessment shortly which is to contain a revised estimate of the expected savings in light of evidence received through the consultation process. The Government states that it "fully expects these savings to be passed on by insurers to consumers and that it will be monitoring the impact of the reforms on the cost of motor insurance".³⁹

56% of the 625 responses had been from claimant lawyers and around 60% of the responses to each question came from claimant solicitors.

The Government considers that there are "currently substantial financial incentives for claimants to bring cases regarding relatively minor injury, or to exaggerate the severity of their injury" and states that Government intervention is required to tackle this issue. The response document states that the proposed reforms are targeted in particular at RTA

³⁶ Paragraph 22

³⁷ Paragraph 23

³⁸ [Part 1 of the Government Response to: Reforming the Soft Tissue Injury \('whiplash'\) Claims Process, Cm 9422, February 2017](#)

³⁹ Ibid paragraph 5

whiplash claims, “where it has become culturally acceptable for claims to be made for very low level injuries”.⁴⁰

The Government intends to proceed as follows:

- The reforms will cover RTA related whiplash claims and minor psychological claims:
 - A definition will be developed to reduce the scope for affected claims to be displaced into other categories of claim. The Government accepts that the definition should not cover more serious psychological illnesses, for example, depression and post-traumatic stress disorder, which are diagnosable using international standards. The Government therefore proposes to limit the scope of this measure to minor psychological injuries, such as ‘travel anxiety’ and ‘shock’.⁴¹
- The Government has decided not to remove payment of PSLA for minor RTA related soft tissue injury claims nor to have a single payment for minor claims.
- A tariff of fixed compensation for pain, suffering and loss of amenity will be introduced for claims with an injury duration of between 0 and 24 months; the Government states that this means that there is no longer a need to set a definition of what is considered to be a “minor” claim.⁴²
- The use of the “prognosis” approach for assessing injury duration will continue. (The Government had consulted on whether a diagnosis approach should be used instead - meaning that the claimant would have had to wait six months to be able to have a medical report completed to determine whether symptoms remained). The Government set out the rationale for continuing with the prognosis approach:
 - This allows claimants to be able to seek any rehabilitation/treatment in a timely manner so as to be as effective as possible. The Government is also of the view that MedCo will continue to play an important role in this area. MedCo can, and will, continue to identify bad behaviour through analysis of its management information, and take the necessary robust enforcement action.⁴³
- A single tariff will cover both whiplash claims and minor psychological claims:
 - This decision takes account of the views of respondents to the consultation and the guidance included in the most recent Judicial College Guidelines.

⁴⁰ Ibid paragraph 33

⁴¹ Ibid paragraph 45

⁴² Ibid paragraphs 51 and 63

⁴³ Ibid paragraph 73

The figures in the tariff have been updated taking into account the uplift provided for in the most recent version of the Judicial College Guidelines. It was suggested in the consultation document that the lowest bracket should be 0–6 months, but this has now been broken down further into two bands, namely 0–3 months and 4–6 months. The Government has decided that the levels of compensation available under the new tariff will be as follows:⁴⁴

Proposed Unified Tariff

Injury Duration	2015 average payment for PSJA – uplifted to take account of JCG uplift (industry data)	Judicial College Guideline (JCG) amounts (13th edition) Published September 2015	New tariff amounts
0–3 months	£1,750	A few hundred pounds to £2,050	£225
4–6 months	£2,150	£2,050 to £3,630	£450
7–9 months	£2,600	£2,050 to £3,630	£765
10–12 months	£3,100	£2,050 to £3,630	£1,190
13–15 months	£3,500	£3,630 to £6,600	£1,820
16–18 months	£3,950	£3,630 to £6,600	£2,660
19–24 months	£4,500	£3,630 to £6,600	£3,725

Source: Part 1 of the Government Response to: Reforming the Soft Tissue Injury ('whiplash') Claims Process, Cm 9422, February 2017

- The judiciary will be able to apply a discretionary uplift of up to 20% in exceptional circumstances, the definition of which will not be set out in statute:

Instead we believe it is more appropriate to leave consideration of when a claim is exceptional to the discretion of the courts.⁴⁵

The judiciary will also be able to decrease the amount awarded under the tariff in cases where there may be contributory negligence.⁴⁶

- The small claims track limit for RTA related personal injury claims will be increased to £5,000. The small claims track limit for all other types of personal injury claims will be increased to £2,000 "in line with inflation" but will be kept under review. The Government will consider whether a further increase to £5,000 for all PI claims is required in the future.⁴⁷
- The Government intends to give further consideration to suggestions made in connection with supporting litigants in person, and will work with both MedCo and Claims Portal Limited on this issue. The Government will also discuss the potential impact on the courts and judicial resources with the judiciary and other interested parties.⁴⁸

⁴⁴ Ibid paragraph 78

⁴⁵ Ibid paragraph 81

⁴⁶ Ibid paragraph 112

⁴⁷ Ibid paragraph 93

⁴⁸ Ibid paragraph 99

- There will be a regulatory ban, without exemptions, on the making, soliciting, accepting and receiving of offers to settle claims without medical evidence in RTA related whiplash claims only.⁴⁹

Measures requiring primary legislation are included in the [Prisons and Courts Bill](#). The Government intends that the increase to the small claims track limit, which will be effected through secondary legislation, will be implemented at the same time, on 1 October 2018.⁵⁰

1.11 Motor insurance premiums

There has been some debate about whether the cost of motor insurance premiums will fall as a consequence of the proposed reforms. The Government considers that the reforms could result in a saving of £40 for motorists, but others question whether savings will be passed on by insurers.

In addition, other factors affecting motor insurance premiums may operate to mask the effect of any particular reform.

For example, since the Government published its response to the consultation on reforming the whiplash claims process, the Lord Chancellor has announced a reduction in the “Discount Rate” which applies when personal injury compensation payments are calculated.⁵¹ The insurance industry considers that this will cause premiums to rise by £70.

Further information about factors influencing the cost of motor insurance premiums, and what Government and the industry have done to try and reduce costs, is provided in a separate Library briefing paper, [Motor car insurance](#).⁵² This includes information about the Discount Rate announcement.

1.12 Personal injury market

A [petition on the UK Government and Parliament’s website](#), which was started after the Government published its consultation paper, called on the Government to keep the personal injury small claims limit at £1,000 and to keep damages for whiplash injuries. Among other things, the petition claimed there would be mass redundancies following implementation, “possibly 60,000”.

The Government’s response spoke of the resilience of the personal injury market:

The personal injury market has long proven itself to be adaptable and innovative, and it is likely that the industry will continue to

⁴⁹ Ibid paragraph 104

⁵⁰ Ibid paragraphs 116 to 120

⁵¹ [Gov.UK, from the Ministry of Justice, New discount rate for personal injury claims announced, 27 February 2017](#) [accessed 8 March 2017]

⁵² Number 06061, 27 February 2017

provide cost effective services following the implementation of these reforms. The potential impact on solicitors will depend on a number of factors, including the volume of claims and their ability to adapt in response to a rapidly changing market. A full impact assessment which explores these issues in more detail was published alongside the consultation.

The Government reiterated that claimants would not be precluded from seeking legal representation in the small claims track if they so wished.

In January 2017, it was reported that research from Capital Economics, commissioned by the lobby group, Access to Justice, had found that “up to 80% of the 44,200 employees involved in personal injury work, including insurers and claim managers, could lose their jobs due to a crackdown on whiplash claims”.⁵³

⁵³ [Louie Bacani, Whiplash reforms threaten 35,000 jobs – study, Insurance Business, 24 January 2017](#) [accessed 8 March 2017]

2. The Bill

The Prisons and Courts Bill (the Bill) was published on 23 February 2017 as Bill 145 of 2016-17. The Bill's progress can be followed on the [Prisons and Courts Bill page](#) of the Parliamentary website.

The Ministry of Justice has published [Explanatory Notes](#) and an [overarching impact assessment](#). It has also published a series of [factsheets](#) on the Bill.

The Bill has six parts:

- Part 1 deals with prisons;
- Part 2 deals with procedures in civil, family and criminal matters;
- Part 3 deals with the organisation and functions of courts and tribunals;
- Part 4 deals with the Judiciary and the Judicial Appointments Commission;
- Part 5 deals with whiplash;
- Part 6 has the final provisions.

This briefing paper deals with the whiplash provisions in Part 5 of the Bill. An associated Library briefing paper, Commons Library Analysis: The Prisons and Courts Reform Bill, deals with the remainder of the Bill and also includes the information in this briefing paper.

Box 1: Whiplash provisions in Bill

Part 5 of the Bill, **Clauses 61 to 67**, deals with whiplash, including:

- the definition of whiplash;
- damages for whiplash injuries;
- the uplift in exceptional circumstances;
- rules against settlement before medical report; and
- regulation of the ban on pre-medical settlement.

Much of the detail would be included in secondary legislation, which, in many cases, would be subject to the affirmative resolution procedure.

Part 5 of the Bill would extend to England and Wales only.

The Explanatory Notes, [paragraphs 358 to 364](#), provide detailed information about each clause.

In short, the clauses are as follows:

- **Clause 61** deals with the definition of “whiplash injury”, the detail of which would be set out in regulations made under the affirmative resolution procedure, and the circumstances in which such injuries are incurred. The provisions would apply if the injury was caused by the negligence of a driver.

- **Clause 62** would enable the Lord Chancellor to make regulations, under the affirmative resolution procedure, to set out the amount of damages for pain, suffering and loss of amenity and minor psychological injuries, payable in respect of whiplash injuries of a duration up to two years. The Explanatory Notes set out how it is intended that this provision would operate:

it is intended that the power will enable the Lord Chancellor to (a) set and describe each category of severity of injury on the tariff; and (b) set the amount of fixed sum payment for each such category. The Lord Chancellor may amend the categories, and/or the amount of the payments and may increase or decrease the amounts. The Lord Chancellor may also include within, or in addition to, the specified sums, an additional sum for minor psychological injuries (often referred to as 'travel anxiety') arising from the same accident.⁵⁴
- **Clause 63** would enable the Lord Chancellor to make regulations to provide for the judiciary to have power, in exceptional circumstances, to apply an uplift, of a maximum specified percentage, to the amount of damages payable under the tariff. The regulations would be made under the affirmative resolution procedure and after consulting the Lord Chief Justice.
- **Clauses 64 to 67** would deal with the ban on offering, soliciting or accepting offers to settle whiplash claims before seeing medical evidence. Further details about the medical evidence would be set out in regulations made under the affirmative resolution procedure.
- The ban would apply to "regulated persons" (as defined in **Clause 67**, and including, for example, solicitors and barristers). It would be monitored and enforced by the "relevant regulator" (again, as defined in **Clause 67**, and including, for example, the Law Society and Bar Council) who could make provision in regulations for that purpose. When the relevant regulator is the Financial Conduct Authority, the Treasury would have power to make regulations to enable the FCA to monitor and enforce the ban.
- The Lord Chancellor would have power, by regulations made under the negative resolution procedure, to add to the lists of both regulated persons to whom the ban should apply and relevant regulators.

⁵⁴ [Bill 145 – EN paragraph 359](#)

3. Commentary

Box 2: Arguments for and against the Government's proposals

During the process of policy development which followed the announcement in the 2015 Autumn Statement, the reaction from interested parties has been mixed. In general, lawyers' groups, including the Law Society and the Association of Personal Injury Lawyers, are among those who raised concerns about the Government's proposals,⁵⁵ while the Association of British Insurers (ABI) welcomed the Chancellor's statement.⁵⁶

A number of commentators were particularly concerned about the consultation proposal to increase the small claims track limit to £5,000 for all personal injury claims, including those for workplace injuries. In the event, the Government has not proceeded with this proposal.

Information about reaction to the Government's 2015 proposals and to the 2016 consultation is provided in the Library briefing paper [Small claims for personal injuries including whiplash](#).⁵⁷

Reaction to the Government's response to the consultation and the whiplash provisions in the Bill has followed similar lines. Some examples are set out below.

3.1 The Law Society

The Law Society has welcomed the Government's decision not to raise the small claims track limit to £5,000 for all personal injury claims.⁵⁸ However, it considers that people who have suffered injuries in road traffic accidents will be denied access to justice and does not agree that the £5,000 limit for motoring claims is reasonable:

The government is treating injuries that would be regarded as grievous bodily harm in the criminal courts as small claims. A limit of £5,000 will mean injuries including facial scarring, fractured ribs, a bruised chest and whiplash to the neck would be considered as 'small claims'. This means people will be forced to bring claims themselves without expert legal advice.

The Law Society has also raised concerns about an "inequality of arms" and the effect this might have on the operation of the courts:

The MoJ does not appear to have properly considered the fact that this will clog up the court system creating a David and Goliath situation where people recovering from their injuries, deprived of legal advice, have no choice but to act for themselves.

⁵⁵ Law Society press release, [Law Society slams personal injury claims limit rise](#), 26 November 2015, APIL, [Chancellor's Autumn Statement – reaction from Association of Personal Injury Lawyers \(APIL\) 25 November 2015](#) [accessed 8 March 2017]

⁵⁶ ABI, [2015 Autumn Statement: ABI comment on measures to end the right to cash compensation for minor whiplash injuries](#), 25 November 2015 [accessed 8 March 2017]

⁵⁷ Number 04141, 13 December 2016

⁵⁸ [Law Society, Ministry of Justice plans mean victims of negligent drivers won't get legal help, 23 February 2017](#) [accessed 8 March 2017]

Those defending claims meanwhile are likely to be able to pay for legal advice. The increase in the number of litigants in person that will result from these changes will have serious consequences for the courts.

The Law Society added that fraudulent claims should be addressed by targeting the fraudsters – “not the vast majority of honest claimants who have been injured and bring genuine claims.”

While welcoming the proposal to ban pre-medical settlement of whiplash claims, the Law Society called for this to be extended to all claims.

The Law Society is sceptical that any savings will be passed on by insurance companies, adding that “the insurance industry has significant form in falling short when it comes to passing savings to its customers”:

The Association of British Insurers (ABI) conceded to the Commons Justice Select Committee during a session on personal injury reform that the insurance industry saved ‘hundreds of millions of pounds’ from reforms to personal injury in 2013 and that the number of whiplash claims have come down in the last year.

The findings of an economic study by Compass Lexecon* also show that gains from the government plans will boost insurers’ profits. At the same time the plans would curtail the number of people who can claim for soft tissue injury caused through no fault of their own.

*The study by Compass Lexecon focused on the government’s impact assessment of proposed changes to the soft tissue injury claims process and an increase in the small claims court limit.

It was commissioned by the Law Society, the Association of Personal Injury Lawyers (APIL), the National Association of Motor Accident Solicitors (MASS) and carried out by economists at Compass Lexecon.

3.2 Association of Personal Injury Lawyers (APIL)

APIL spoke of people injured in traffic accidents being “robbed of fair compensation in the deluded belief that insurance premiums will fall as a result”.⁵⁹ APIL President, Neil Sugarman, spoke of data from the insurance industry which, he said, “shows that since 2013, the annual cost of motor-related personal injury claims has fallen by £536 million yet insurance premiums have continued to rise.” Mr Sugarman spoke of the effect of other factors on insurance premiums:

Expensive motor repairs and repeated hikes in insurance premium tax are both major factors in the cost of motor premiums, yet the

⁵⁹ [Association of Personal Injury Lawyers, Prisons and Courts Bill 'robs Peter to pay Paul' say lawyers, 23 February 2017](#) [accessed 8 March 2017]

Government is fanatical about suppressing the right to claim for legitimate injuries instead," he said.

Neil Sugarman also warned of the risk of increased texts and calls from CMCs:

There will be an explosion of calls and texts from claims management companies encouraging people to make personal injury claims, even if they haven't been injured," he said.

The small claims court is designed for people to represent themselves and this will just be a business opportunity for claims management companies, which make the cold calls and texts, who will tout for claims just as they do for people who were mis-sold payment protection insurance," Mr Sugarman explained.

The fact is the Government should put its energy into banning cold calls and texts altogether.

3.3 Access to Justice

The campaigning group, Access to Justice (A2J), expressed disappointment with the whiplash provisions in the Bill and also considers that the proposals would "open the doors for claims management companies and cold callers to wreak further havoc on the market."

Andrew Twambley, spokesperson for Access to Justice, considers the proposals would benefit insurers:

"Insurers will be rubbing their hands in glee. They have the government in their pocket, and will themselves be pocketing any savings made, for themselves and their shareholders."

"Motor insurance is compulsory, but the millions of people who buy the product understand that, in doing so, they take out a contract with an insurer to be compensated if they are injured. The government has driven a coach and horses through that principle and insurers are complicit in helping to break this fundamental relationship with their customers."⁶⁰

Separately, Martin Coyne, chairman of Access to Justice, was quoted as drawing attention to the potential loss of jobs:

"We all agree it's necessary to reduce fraudulent and frivolous claims, and get rid of cold calling, but not at the expense of tens of thousands of jobs and for the sole benefit of insurance companies," said Mr Coyne.

"There are better ways to maintain the historic and important rights of injured people to receive redress yet also tackle fraudsters who try and game the system."⁶¹

⁶⁰ [A2J, Access to Justice responds to the publication of the Prisons & Courts Bill, 23 February 2017](#) [accessed 8 March 2017]

⁶¹ Marion Dakers, "[Whiplash crackdown could cost 35,000 jobs, lawyers claim](#)", Telegraph, 23 January 2017 [accessed 21 March 2017]

3.4 Association of British Insurers (ABI)

James Dalton, Director of General Insurance Policy at the ABI welcomed the Bill and said the reforms to whiplash claims “cannot come soon enough”. He considered that it was lawyers who benefitted from the current position:

“For far too long claimant lawyers have been defending a system riddled with exaggerated and fraudulent claims because they have been profiting handsomely from it. The gravy train must stop. Motorists know that the UK’s roads have been getting ever safer, so why have whiplash style claims been rising? People want an insurance claims system that provides compensation and support to those who genuinely need it. What they don’t want is to be plagued by spam calls and texts from ambulance chasers, whilst personal injury lawyers continue to profit from a broken system in urgent need of reform.”⁶²

3.5 Insurance Fraud Bureau (IFB)

The IFB considers that “reducing the amount of excess cash in the system” will be beneficial in fighting fraud:

Ben Fletcher, Director of IFB said, “One of the reasons that organised crime groups have orchestrated ‘crash for cash’ scams for far too long is that they’re perceived as low risk and high reward. The industry has been working hard to deal with this myth and has been successful in fighting back, with over 1190 people arrested and 498 convicted.

“It’s due to the amount of money in the system that fraudsters are perceiving this as an easy target and exploiting it, netting upwards of tens of thousands of pounds. By reducing the amount of excess money in the system, we hope to see a positive effect in helping to tackle these scams, as the criminals recognise that the risks are higher and the rewards are lower than they once were.

“The effects and harm caused by these scams is wide reaching from those plagued by nuisance calls. It is also a burden on the innocent policyholder who is asked to cover the cost and the road users whose safety are being put at risk by criminals targeting them to deliberately cause a collision. In taking some of the excess cash out of the system, we hope that it will help to positively influence the level of ‘crash for cash’ fraud that we see.”⁶³

⁶² [ABI, “Reforms to whiplash claims cannot come soon enough”, 23 February 2017](#) [accessed 8 March 2017]

⁶³ [Insurance Fraud Bureau, IFB responds to Government whiplash reforms, 23 February 2017](#) [accessed 8 March 2017]

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