Ministry of Justice

Part 2 of the Government Response to: Reforming the Soft Tissue Injury ('whiplash') Claims Process

A consultation on arrangements concerning personal injury claims in England and Wales

March 2022

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A consultation response produced by the Ministry of Justice. It is also available at:

https://www.gov.uk/government/consultations/reforming-the-soft-tissue-injury-whiplash-claims-process

About this consultation response

To:	All stakeholders with an interest in the potential for further reforms to the process for making and settling low value personal injury claims and other related areas of the claims process.
Published on:	**22 March** 2022
Enquiries (including requests for the paper in an alternative format) to:	Email: whiplashcondoc@Justice.gov.uk

Neither the Impact Assessment nor the Equalities Statement accompanying Part 1 of the Government's consultation response apply to the call for evidence issues included in this second response document. However, these documents remain available and can be found here:

https://www.gov.uk/government/publications/civil-liability-bill

A Welsh language summary version of this response paper will be made available at:

https://www.gov.uk/government/consultations/reforming-the-soft-tissue-injury-whiplash-claims-process

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Introduction

i. Background

In November 2016, the Government published 'Reforming the Soft Tissue Injury ('whiplash') Claims Process – A consultation on arrangements concerning personal injury (PI) claims in England and Wales[1]'. The consultation ran for six weeks and closed on 6 January 2017.

This document invited comments on a package of legislative proposals and related measures designed to tackle the high number and cost of road traffic accident (RTA) related soft tissue injury claims (commonly known as whiplash claims), and the impact they can have on the cost of motor insurance premiums.

Parts 1-5 of the consultation included questions on primary and secondary legislative proposals to:

- consider whether compensation should be paid for pain, suffering and loss of amenity (PSLA) arising from minor whiplash claims;
- introduce a fixed tariff of compensation for PSLA for whiplash claims with an injury duration of up to 2 years;
- raise the small claims limit for PI claims; and
- ban the practice of seeking or offering to settle whiplash claims without medical evidence.

In addition to these measures, which formed the 'whiplash reform programme', the Government sought stakeholder views on several other related issues also affecting the PI sector. These were covered in Parts 6-7 of the consultation and sought feedback and evidence on:

- the implementation of recommendations 10 (late, exaggerated and fraudulent claims) and 17 (notification of source of referral) made by the Insurance Fraud Taskforce (IFT), as well as a recommendation made by the IFT's PI sub-group in relation to Qualified One-way Costs Shifting (QOCS);
- the provision of temporary replacement vehicles on credit hire terms;

[1] https://consult.justice.gov.uk/digital-communications/reforming-soft-tissue-injury-claims/supporting_documents/reformingsofttissueinjuryclaimsprocess.pdf

- options relating to the early notification of claims;
- the provision of rehabilitation treatment for injured claimants;
- potential changes to the recoverability of disbursements;
- the introduction of a European style Barème system for PI claims; and
- how Government reform could help control the costs of civil litigation.

ii. Consultation Response Part 1: legislative proposals

Due to the need to focus on progressing the primary and secondary legislative reforms, a decision was taken to split the Government's response to this consultation into two parts. The response confirming the measures to be taken forward by the Government in relation to these proposals was published on 23 February 2017 in Part 1 of the consultation response.

These reforms were originally due to be progressed in the Prisons and Courts Bill but were delayed when the Bill was withdrawn following the calling of a General Election on 18 April 2017. The measures were reintroduced to Parliament on 20 March 2018 in the Civil Liability Act (CLA) 2018, which received Royal Assent on 20 December 2018. Part 1 of the CLA 2018 was commenced on 31 May 2021 and:

- defines what is considered as a whiplash injury;
- introduces a fixed tariff of damages for PSLA relating to whiplash injuries with a duration of up to two years; and
- bans the practice of accepting or seeking an offer to settle a whiplash claim without medical evidence.

Additional secondary legislative measures including changes to the Civil Procedure Rules to increase the small claims limit for RTA related PI claims from £1,000 to £5,000 were also taken forward as part of the whiplash reform programme.

A decision was taken to delay publication of the second part of the response to allow resources to be focused on ensuring the successful Parliamentary passage of the CLA 2018. Following this, work with key stakeholders was prioritised to develop and implement a new innovative Official Injury Claim (OIC) digital service.

The OIC service is an accessible online process which enables genuinely injured claimants to make, progress and settle their claim with or without the help of a lawyer. More information on the OIC service along with supporting guidance and performance data can be found here: https://www.officialinjuryclaim.org.uk/

This work was unfortunately interrupted by the Coronavirus pandemic resulting in the suspension of whiplash reform programme work for six months to enable the PI sector to concentrate on their response to Covid-19 and the Government to focus on continuing to deliver key services in this challenging environment.

iii. Consultation Response Part 2: other related measures

The successful implementation of the whiplash reform programme on 31 May 2021 has allowed focus to return to the analysis and publication of the second part of the 'Reforming the soft tissue injury ("whiplash") claims process' consultation. This second paper concludes the Government's response and sets out:

- A summary of responses received, including specific analysis of the responses to the questions asked in parts 6 and 7 of the 'Reforming the Soft Tissue Injury ('whiplash') Claims Process' consultation; and
- Information on the next steps in relation to the topics covered in this document.

This publication summarises the submissions provided to the Government in 2016/17. Due to the delay in its publication, specific actions will not be taken forward based on the evidence supplied. Where additional action is to be taken, further announcements will be made in relation to next steps, including as to whether supplementary evidence gathering is required.

Responses to specific questions in Part 6 – Implementing the recommendations of the Insurance Fraud Taskforce

1. The Insurance Fraud Taskforce (IFT) was set up by Government in January 2015 to investigate the causes of fraudulent behaviour across the whole of the insurance sector. It was asked to recommend solutions to reduce the level of insurance fraud with the aim of both lowering costs and protecting the interests of consumers. The IFT was made up of representatives from the insurance sector along with key consumer organisations and was supported by a specific PI sub-group which was drawn from a wider stakeholder base.

2. The IFT published its final report on 18 January 2016 and made 26 recommendations, of which seven were for the Government. Copies of the IFTs interim and final reports along with updates on progress can be found on Gov.UK[2].

3. In a written ministerial statement published on 27 May 2016[3], the Government welcomed the report and accepted the seven recommendations addressed to it. Of these seven recommendations, two (recommendations 10 and 17) were considered as part of the Government's whiplash reform programme consultation and call for evidence, along with a further recommendation from the IFT's PI sub-group in relation to Qualified One Way Costs Shifting (QOCS).

4. Recommendation 10 concerned measures for dealing with 'late exaggerated or fraudulent claims', including a proposal for introducing predictable damages. This recommendation was addressed by the proposals covered in Part 1 of the Government's consultation response[4].

5. Recommendation 17, which relates to the mandatory notification of referral sources, and the PI working group's recommendation on QOCS are included in this response. The following paragraphs summarise the views received by respondents and set out the Government position on the way forward.

[2] https://www.gov.uk/government/groups/insurance-fraud-taskforce

[3] https://hansard.parliament.uk/Commons/2016-05-26/debates/e3624d23-7d2c-4892-ab02-efbb37b28a31/WrittenStatements

[4] https://consult.justice.gov.uk/digital-communications/reforming-soft-tissue-injury-claims/results/part-1-response-to-reforming-soft-tissue-injury-claims.pdf

i. Claims Notification Form (IFT Recommendation 17)

6. Recommendation 17 of the Insurance Fraud Taskforce final report[5] stated that the Government should consult on the issue of whether the Claims Notification Form should be amended to require claimant representatives to include referral sources.

> **Question 20:** Should the Claims Notification Form be amended to include the sources of referral of claim?
>
> Please give reasons.

7. The aim of this recommendation was to increase transparency and reduce fraud by identifying the referral source of all claims. The recommendation was also supported by the members of the IFT PI sub-group. The aim of the recommendation was to allow the parties to be sure the claim was referred from a reputable source and would also help to support the work of the regulators in the market.

8. 466 respondents answered this question. Most respondents were claimant lawyers (287), with 195 of those opposed to the proposal. However, opposition was not universal, with 85 claimant lawyers, 25 insurers and 9 defendant lawyers in favour of the proposal. There were differing views between Claims Management Companies (CMCs), with 5 in favour and 10 against. There were, however, several duplicate responses received, with 169 received from just four claimant lawyer firms, and 40 of the 45 credit hire responses from just one firm.

9. Overall, those in favour of the proposal argued that such a change would:

   - lead to more transparency in the claims process and help to identify/tackle fraud;
   - increase the effectiveness of the PI referral fee ban to reduce the options for evading it and provide regulators with more information to enforce it; and
   - help to reduce the frequency of cold calling arising from the PI sector.

10. Those opposed to the proposal argued that:

    - a claims origin should not be relevant as all claims should be dealt with on merit;
    - the claims source is confidential information which should not be given to insurers;

[5] Recommendation 17: In implementing the whiplash reforms outlined at Autumn Statement 2015, the government should consult on introducing a mandatory requirement for referral sources to be included on CNFs and claims should only proceed where CNFs are complete. Insurers should share data with the SRA and CMR if they suspect claimant representatives of breaching the referral fee ban.

- the proposal won't work as 'rogue' CMCs would just change their names;
- providing this information could lead to insurers unfairly targeting certain companies or dismissing claims simply because they have come from a particular source;
- it is unnecessary as referral fees are already banned, and this could create conflicts of interest for insurers and law firms operating under the ABS model; and
- sufficient routes for insurers to report unscrupulous CMCs or practices already exist.

11. Several additional suggestions were received in relation to this proposal. For example, some proposed that:

- the information should be shared with regulators but not insurers, who should be required to provide more of the detailed information they collect to regulators to assist in the fight against fraud; and
- there should also be the requirement for a 'Statement of Truth' to be used to ensure the information received is correct.

12. Since this consultation exercise was completed the regulation of CMCs has been strengthened through the implementation of the Financial Guidance and Claims Act (FGCA) 2018[6]. This legislation transferred responsibility for regulating CMCs from the Ministry of Justice to the Financial Conduct Authority (FCA). The Government also used the FGCA 2018 to introduce a ban on cold calling by CMCs.

13. The FCA have taken several steps to strengthen the regulation of CMCs and more information on their Regulatory Approach is available[7]. In addition, the FCA are also considering the introduction of a ban on the practice of *'Phoenixing'* to help tackle issues raised regarding the frequent changes of company names[8].

14. It should also be highlighted that in August 2018 a new mandatory field relating to the referral source of a claim was introduced into the RTA Portal Claims Notification Form by Claims Portal Limited in response to this recommendation.

Next steps

- *Given the action already taken by Claims Portal limited and the recent implementation of the new process for low value RTA related PI claims, the Government will continue to monitor this issue but does not currently propose to take any further specific action.*

[6] https://www.legislation.gov.uk/ukpga/2018/10/contents/enacted

[7] https://www.fca.org.uk/publication/policy/ps18-23.pdf

[8] https://www.fca.org.uk/news/press-releases/fca-announces-plans-stop-cmc-phoenixing

ii. Qualified One-Way Costs Shifting (IFT PI Sub-group recommendation)

15. In his 2009 Review of Civil Litigation Costs: Final Report[9] Jackson LJ recommended that Qualified One-Way Costs Shifting (QOCS) should be introduced for PI and limited to "proceedings which include a claim for damages for PI". The purpose of QOCS is to protect claimants against the financial risks of having to meet adverse defendant costs in the event that their claim fails.

16. The IFT's PI Sub-group, including both claimant and defendant representatives, recommended that claimants should be required to seek the court's permission to discontinue their claim if they wish to do so less than 28 days before trial. The aim of the recommendation was to reduce unnecessary costs for these claims, which are ultimately passed on to consumers.

17. The working group suggested that where fraud is raised in the defence, it is possible to take advantage of QOCS protection by running claims until shortly before trial, then discontinuing them. By discontinuing rather than proceeding to trial it is possible to avoid a finding of fundamental dishonesty and possible criminal proceedings. The group asserted that the proposed change would lead to more prosecutions and provide for both more customer visibility and a view that justice will be "seen to be done"[10]. Question 21 sought views on this recommendation:

> **Question 21:** Should the Qualified One-Way Costs Shifting (QOCS) provisions be amended so that a claimant is required to seek the court's permission to discontinue less than 28 days before trial (Part 38.4 of CPR)?
>
> Please state your reasons.

18. 451 respondents answered this question with 358 against the proposal and 83 in favour. Of those against, the largest number of respondents were claimant lawyers (313) and CMC and linked credit hire firms (49). However, 157 of these were multiple identical responses received from four claimant lawyer firms, six responses were received from one CMC, and 40 were received from two CMC/credit hire firms. Of those in favour, the most support came from insurers (23), claimant lawyers, (22), and defendant solicitors (8).

19. The majority of those opposed argued that if there is an allegation of fundamental dishonesty, then there is already recourse to have a discontinuance overturned by the

[9] https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf

[10] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/494507/IFTF_PIWG_Master.pdf

court. They also suggested that the proposal could lead to other problems, such as non-attendance, and that it should be recognised that there are legitimate reasons for late withdrawal of claim, for example, as a result of evidence provided by the defendant late on in the process. It was also argued that insurers often settle at the last minute, and this behaviour helps drive the late discontinuance of claims.

20. Those in favour felt that late withdrawal leads to unnecessary costs due to the work preparing for hearings, with costs passed on through higher insurance premiums. They argued that it was difficult and risky to obtain a fundamental dishonesty ruling as the bar was high, and that claimants with legitimate reasons for withdrawing would still be able to do so with the benefit of reduced costs. Claimants could also be disincentivised from bringing speculative claims in the hope of settling but then withdrawing late.

21. There were differing views as to the implication of the proposal in terms of the impacts on court time. Some argued changing the rules would increase applications and require more court resources. Other respondents argued the opposite, stating the courts would be able to work more efficiently as fewer scheduled hearings would need to be cancelled. Alternative suggestions were made in relation to this issue including:

    - reducing the timeframe for this proposal from 28 days to 20 days;
    - banning late discontinuance completely;
    - allowing the courts to order costs in discontinued cases; and
    - making sanctions reciprocal so that they apply equally to claimants and defendants.

22. Subsequent to this consultation, The Civil Justice Council also considered this issue alongside a number of related points in Part 8 of its 'Low Value PI Working Group report' which was published on 18 December 2020[11]. The CJC report discusses several options but notes no cross-industry consensus was achieved on this issue.

Next steps

- *There is no clear agreement from stakeholders on this issue with good arguments both for and against making changes in this area put forward. In addition, despite a considerable amount of discussion, the CJC also could not come to a consensus on this point and recommended further detailed consultation before any changes are made. Therefore, the Government does not propose to proceed with changes specific to this recommendation at this time but will continue to monitor behaviours in relation to QOCS and may return to this issue in future if there is a need to do so.*

11 https://www.judiciary.uk/wp-content/uploads/2020/12/20201218-FINAL-CJC-Low-Value-PI-Working-Group-Report.pdf

Responses to specific questions in Part 7 – 'Call for Evidence' on related issues

23. Part 7 of the consultation paper was a 'Call for Evidence' seeking stakeholder views on the following areas of interest to the Government:

    i. Provision of Credit Hire Services;

    ii. Early Notification of Claims;

    iii. Provision of Rehabilitation;

    iv. Recoverability of Disbursements; and

    v. Introducing a Barème[12] type system.

24. There was also an opportunity for respondents to submit suggestions for further reform to reduce the cost of civil litigation.

i. Credit Hire

25. Views were sought on issues related to the provision of temporary replacement vehicles on credit hire terms (commonly known as credit hire) and the potential options for tackling them. Concerns had previously been raised about this issue from both within and outside the market, in part due to the potential for credit hire costs to impact on the price of motor insurance premiums.

26. The Government's 'Call for Evidence' follows on from work completed by the Competition and Markets Authority in 2014[13], which completed a full market investigation covering this topic. The issue was also raised in Parliament during consideration of the Financial Guidance and Claims Act 2018 in the House of Lords, when Peers debated the need for all parts of the PI sector, including credit hire firms, medical report providers and claims management companies, to also be regulated[14].

27. In the Call for Evidence, multiple options for potential reform were provided and stakeholders were also invited to make suggestions on what else could be done on in this area.

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12 Barème systems use a combination of fixed tables of damages alongside a 'points' systems to identify where a claim fits in terms of vehicle damage, injury severity and compensation.

13 https://www.gov.uk/cma-cases/private-motor-insurance-market-investigation

14 https://hansard.parliament.uk/lords/2017-07-05/debates/57474CA7-3AFD-4C78-8A1F-9C64D82A9D79/FinancialGuidanceAndClaimsBill(HL)

Question 22: Which model for reform in the way credit hire agreements are dealt with in the future do you support?

a) First Party Model

b) Regulatory Model

c) Industry Code of Conduct

d) Competitive Offer Model

e) Other

Please provide supporting evidence/reasoning for your view (this can be based on either the models outlined above, or alternative models not discussed here).

28. 326 respondents provided an opinion on at least one of the options set out in the consultation paper. Not all of these respondents provided views on all the options with many of them providing views on only their most favoured option and some supporting more than one. Overall, the most popular was option c) the Industry Code of Conduct with 183 respondents in favour.

29. Many of those responding also provided additional comments ranging from assertions that there are no issues to be addressed in the credit hire system at present to more general comments about the credit hire process. The following paragraphs summarise the specific views provided on each of the options:

A. **the First Party Model –** received support from 54 respondents with 34 claimant lawyers and 11 insurers in favour. The main argument made was that this approach would help consumers receive vehicles more quickly, and that it would have a positive impact on tackling fraud. It was also argued that this would require credit hire organisations to compete for work based on service rather than referral fees offered. Suggestions to supplement this option included making the provision of temporary replacement vehicles mandatory, capping of any subrogated costs and ensuring that 'no claims' discounts should be protected.

B. **the Regulatory Model -** was not strongly favoured by respondents, with just 25 supporting the proposal. Support came from claimant lawyers (10), insurers (4), and transport and travel organisations (3), with the rest spread out across a different range of sectors. The arguments put forward included that this approach would help fix costs so that credit hire companies could not overcharge, which would work better than the current General Terms of Agreement. Other responses focused on refining or improving the specifics of the regulatory model, including fixed/capped industry rates and extending the referral fee ban to cover credit hire organisations.

In addition, a further suggestion that work should be carried out to ensure that a temporary vehicle was really required and that it was supplied for set timescales was also put forward.

C. **the Industry Code of Conduct Model -** was supported by 183 respondents with 98 positive responses from claimant lawyers, 38 from credit hire firms and 14 from CMCs. It should however be noted that several identical submissions were received from a small number of organisations, with one firm of solicitors providing 39 duplicate responses, one credit hire firm proving 37 and one CMC providing 12.

Of those in favour of this option it was stated that the existing General Terms of Agreement (GTA) were both effective and appropriate, and that this option would continue to provide choice for not-at-fault claimants. It was argued that any other option had the potential to harm the market and be less cost effective. Additional suggestions included either strengthening the GTA or making it mandatory, with one respondent suggesting that a MedCo-style approach could work. It was also suggested that the GTA should include industry-wide fixed rates and that there should be provision for (at fault) insurers to provide their own replacement vehicle.

Moreover, it was proposed that any code of conduct should include a duty to be honest and impartial, and that greater clarity should be provided to consumers regarding credit hire and the terms of the agreement they are asked to sign. Finally, it was put forward that credit hire organisations should be regulated by the FCA.

D. **the Competitive Offer Model -** the number in support of this option was considerably lower than for the others, with just 17 respondents in favour. There was some support from claimant lawyers (5) and insurers (3) with the rest coming from a range of individuals as well as from a local law society, a trade association and a Trade Union. They argued this option would be effective in terms of controlling costs as well as aligning cost control and liability. Additional suggestions included ensuring the claimant's freedom of choice is retained, or that adequate provisions are in place to make sure claimants don't lose out from malpractice.

E. **other ideas -** most who responded to this point used it to provide additional argument to support their preferred choice, and suggestions were in general like those suggested for option c) above. For example, several responses recommended banning referral fees in relation to credit hire and providing a window in which at-fault insurers can provide alternative transport.

Question 23: What (if any) further suggestions for reforms would help the credit hire sector, in particular, to address the behaviours exhibited by participants in the market?

Please provide the factors that should be considered and why.

30. 244 respondents made further suggestions for reform to the credit hire system. As for option c) above, many were variations of their responses to the earlier options, although some different suggestions were made. These included how the system could be made more efficient by, for example, encouraging either the sensible sharing of information, or quicker settlements by at-fault compensators.

Question 24: What would be the best way to improve the way consumers are educated with regards to securing appropriate credit hire vehicles?

31. 275 respondents suggested ways to educate consumers regarding securing appropriate credit hire vehicles. 144 of these argued against the need for any action in this area, stating that educating consumers was irrelevant and unnecessary. However, for context, one law firm provided 35 duplicate responses whilst several linked law firms, CMCs and Credit Hire firms provided 91 identical responses on this issue. In addition, some respondents also felt that the need to educate consumers would disappear in the event of their preferred solution being implemented.

32. Other respondents were evenly split between believing that Government, insurers and/or credit hire organisations ought to be responsible for providing more information to the public on how the credit hire system works. 24 respondents agreed that consumers should be made more aware that, depending on the agreement, they could be held liable for paying for the replacement vehicle under a credit agreement.

33. There were also calls for greater transparency, and for standardised information sheets to be provided to consumers (produced either by industry bodies or the Government) in the event of a credit hire agreement being signed.

Next steps

- *Since the Government consulted on this topic, work has continued within the industry on reinforcing and revising the voluntary GTA. As well as the GTA many of those operating in the sector have also developed specific streamlined agreements to enable the credit hire process to work effectively for claimants.*

- *The Government is therefore of the view that the best approach would be to continue to work with the key stakeholders in this sector to monitor and improve the use of industry agreements, including the GTA. Further consideration will also be given to whether it would be beneficial to make the use of such agreements' mandatory in the future. It should however be noted that further action on this point is subject to alignment with future Government priorities as it would require a suitable primary legislative vehicle and Parliamentary time to progress.*

ii. Early notification of claims & seeking treatment within a set period of time

34. The Call for Evidence sought views on whether changes should be made to the claims notification process to require early notification of an injury or intention to claim. This proposal drew on the requirement in some Scandinavian countries for claimants to seek and prove they had medical treatment or sought medical advice for an injury within 72 hours of the accident. It was suggested that early notification could help deal with the number of claims made towards the end of the limitation period, where medical evidence is scant.

35. The IFT also made recommendations for action in this area. Recommendation 10[15] considers the question of late claims and suggests that costs penalties could be attached to claims which a made more than six months after the accident.

36. There were two questions in the consultation paper on this issue. The first asked respondents whether a system of early notification should be introduced in England and Wales, and the second sought input on whether claims not notified with a set period of time should be presumed to be 'minor'.

> **Question 25:** Do you think a system of early notification of claims should be introduced to England and Wales?
>
> Please provide reasons and/or evidence in support of your view.

37. 460 people answered this question. 181 respondents were in favour of the proposal, 246 were against and 33 were unsure. 59 were duplicate responses.

38. Of the 181 in favour of the proposal, 93 were duplicate responses received from linked law firms, CMCs and Credit Hire firms. There was strong support from the insurance sector with 22 favourable responses.

39. Many of those who were supportive argued that a period of 12 months could be acceptable, with exemptions for children and protected parties. Others suggested that the current limitation period was too long, which encouraged CMCs and cold calls and had the potential to encourage fraudulent claims (particularly those made during the

[15] IFT Rec 10: The Government should review how fraudulent late claims can be discouraged through changes to court, cost and evidence rules considering options including:
- recent claims (e.g. within 6 months) proceeding as normal through the fast track, but older claims being dealt with in the SCT
- reducing recoverable costs by 50% if a minor PI claim is notified six months after the accident
- introducing a system of predictable damages for soft tissue injuries
- introducing a rebuttable evidential presumption that no injury was suffered where claims are lodged after a specified period of time has elapsed since the alleged accident

last few months of the limitation period). They argued this was particularly true for whiplash claims as for these the claimant would be aware of any injury very soon after the accident, and that there are few good reasons for delaying making a claim for more than a few weeks.

40. Of the 246 opposed, these respondents focused on the argument that claimants may have good reasons why they would be unable to meet such a requirement. For example, if they had a pre-existing injury or health condition it may be some time before they became aware that their accident may have made this worse. They also argued that such a requirement would put an increased and unacceptable burden on NHS A&E and GP services. 59 of the responses opposed to this question were duplicates received from one law firm.

Question 26: Please give your views on the option of requiring claimants to seek medical treatment within a set period of time and whether, if treatment is not sought within this time, the claim should be presumed to be 'minor'.

Please explain your reasons

41. 490 responses were submitted in relation to question 26 with 61 in favour, 396 respondents opposing the proposal, and 33 unsure.

42. Support for the proposal came mainly from claimant lawyers (12), insurers (15) and respondents from the transport/travel sector (9). Those in favour of this approach argued that if a claimant was genuinely injured there would be no reason for not promptly seeking treatment to alleviate their suffering.

43. Of the 396 who disagreed with the suggestion posed in question 26, the majority (285) were claimant lawyers. There was also opposition from CMCs/credit hire firms (52), insurers (13) and defendant lawyers (7). However, it should be noted that 84 negative responses were duplicates received from just 3 law firms, and a further 47 identical negative responses were also received from CMC/credit hire firms.

44. Those against the proposal generally argued that the proposal was unfair, unnecessary and that it would needlessly increase the burdens on the NHS.

Next steps

- *Following consideration of the responses, and in light of the recent implementation of the whiplash reform programme, the Government does not currently intend to pursue this option. This will, however, be kept under review and may be returned to if required.*

iii. Rehabilitation

45. Rehabilitation in relation to injuries suffered following an RTA may benefit some claimants, but it is not necessarily beneficial to all those that suffer an injury. In some cases little or no treatment is required, or where the claimant has an underlying medical condition, rehabilitation can on occasion make the condition worse. Within this context, concerns have been raised - by all parts of the PI sector - relating to rehabilitation being routinely included in all claims, and the potential for fraud.

46. The consultation document sought views on several options in relation to the provision of rehabilitation, as well as seeking alternative ideas to address the problems identified.

> **Question 27:** Which of the options to tackle the developing issues in the rehabilitation sector do you agree with (select 1 or more from the list below)?
>
> Option 1: Rehabilitation vouchers
>
> Option 2: All rehabilitation arranged and paid for by the defendant
>
> Option 3: No compensation payment made towards rehabilitation in low value claims
>
> Option 4: MedCo to be expanded to include rehabilitation
>
> Option 5: Introducing fixed recoverable damages for rehabilitation treatment
>
> Other:
>
> Please give your reasons

Option 1: Rehabilitation vouchers – 49 respondents supported this option, with 34 responses from claimant lawyers, 3 from CMCs and 3 from the medical sector. There was limited support from other stakeholder groups. The main argument provided was that such an approach ensured claimants could not spend funds meant for rehabilitation for other purposes and that it could help limit the number of sessions to just those needed.

It was suggested that vouchers could encourage early commencement of rehabilitation and mitigate the effects of injuries on claimants. Additionally, it was noted that this solution was fair and would also reduce costs as insurers would only need to pay for vouchers which had been used. Other points put forward in relation to vouchers:

- a revised market protocol governing behaviours would be needed;

- an electronic vouchers system to administer the process would be helpful;
- the system would have to be adapted so that insurers could be invoiced at the end of the treatment and make the payments directly;
- financial relationships between rehabilitation providers, lawyers, insurers and CMCs, and that should be broken and MedCo could administer the scheme;
- there should be a requirement for a statement of truth regarding the rehabilitation treatment provided;
- such a system would be challenging and costly and not all rehabilitation providers would accept vouchers, limiting claimant choice; and
- it could result in insufficient rehabilitation as individuals' needs differ and a voucher system could encourage claims inflation.

Option 2: All rehabilitation arranged and paid for by the defendant – 80 responses supporting this proposal were received, with 39 from claimant lawyers and 16 from insurers. Those in favour argued that it would help ensure early rehabilitation where it was required, and it would also keep costs down. It was also suggested that this approach could help prevent fraudulent and unnecessary rehabilitation claims and that it placed cost control and liability in the same place. It was also thought that this approach would help unrepresented claimants to arrange rehabilitation easily.

Those against argued that it would not discourage claims inflation and that it would be unfair if this process was controlled by insurers. It was claimed it would not speed up the process and claimants could lose choice over their provider. In addition, it was argued that it would encourage under-settlement and the possibility of sub-standard treatment. It was thought there would also be a conflict of interest for insurers, with some suggesting that an at-fault insurer owed no duty of care to the claimant.

Other suggestions raised by respondents in relation to this option included:

- maintaining claimant choice should be designed into any new system; and
- all sides should come to an agreement as to the provider and the cost.

Option 3: no compensation payment made towards rehabilitation in low value claims – this option received little support from respondents with 9 in favour, including 2 claimant lawyers, 2 insurers, 2 medical sector respondents and 3 from the 'other' category. Those in support argued that rehabilitation was neither needed nor beneficial for low value whiplash claims and that NHS physiotherapy was enough for claimants requiring rehabilitation. Additionally, one respondent stated that this was the only option to address the problem of over-compensation and that it would prevent the automatic

referral in all circumstances to rehabilitation firms owned by or related to organisations involved in the claims process.

The arguments against indicated that rehabilitation should be available to everyone, as it can shorten recovery times and injury duration and so reduce the overall damages payable. It was suggested that removing rehabilitation would hinder access to justice and interfere with the right to be put back into the position you were in prior to the accident. Stakeholders also contended that rehabilitation should be provided if recommended by a medical expert, and not providing it as part of the claim settlement would increase the burden on the NHS. It was also argued that there would need to be clear guidance as to what was meant by "low-value".

Fewer alternative suggestions were made although it was put forward that the imposing of a limit on the length of time following an accident a claimant could receive rehabilitation, for example three months for low value claims, could be considered.

Option 4: MedCo to be expanded to include rehabilitation – there were 164 positive responses to option 4, with 92 claimant lawyers, 50 CMC/credit hire firms and 9 insurers supporting the idea of extending MedCo to cover rehabilitation. However, a number of these were duplicate responses with 45 identical responses received from 1 law firm and a further 46 identical responses received from CMC/credit hire firms.

It was argued that this approach would allow a revised approach to rehabilitation to start as soon as possible and that it would also introduce greater independence into the process. In addition, stakeholders noted that giving MedCo oversight in this area would also ensure appropriate monitoring of the provision of rehabilitation as well as the potential to introduce an accreditation scheme to provide confidence in the standards of treatment provided.

It was suggested that there was no reason the MedCo system would not work for rehabilitation, and that this approach would ensure appropriate standards, ethical behaviours and an equitable system. Respondent felt that the principle of random allocation could in theory also be used for rehabilitation, and that utilising the MedCo model could also help unrepresented claimants to source rehabilitation providers.

Those arguing against stated that claimants might prefer to be treated by a known provider rather than a stranger and that MedCo was cumbersome. It was also argued that randomisation would not improve the system and unrepresented claimants would find it difficult to navigate. Using MedCo would not resolve cost liability issues and that the provision of rehabilitation was too complex for MedCo, not least given that MedCo was still relatively new. Additional suggestions included that:

- claimants should have some say as to their provider and that there would need to be additional consultation before this option could be implemented;

- there would need to be a substantial transitional phase and consideration would be required as to funding of MedCo for this work;
- care is needed so that smaller providers would not be put at an unfair disadvantage;
- there should be a fixed tariff per rehabilitation session or at the least realistic pricing for treatment; and
- MedCo could provide a triage system to independently assess the level (if any) of rehabilitation needed.

Option 5: Introducing fixed recoverable damages for rehabilitation treatment – in total 61 respondents favoured option 5. The bulk of the support came from claimant lawyers (49) with little support from other stakeholder groups. In addition, it should be noted that a number of these were duplicate responses with 26 identical responses received from 1 claimant law firm.

Those in favour of this option argued that it would discourage those seeking to add unnecessary treatment to a settlement to increase the overall level of compensation to be paid. In addition, it was felt that this option would provide quick access to treatment and resolve disputes over costs at the same time as providing certainty as to them.

Those against this option argued it might increase costs unnecessarily and leave claimants seeking treatment at less reasonable rates. It was also thought that it would only act to encourage adding rehabilitation as the norm for all claims, whether required or not. It was thought that this option could result in claimants receiving either too little or too much treatment. All costs incurred should be recovered and that fixing costs for rehabilitation would be difficult to achieve in practice as well as potentially being anti-competitive. Alternative suggestions included that:

- there should be different fixed rates available to cover the different treatment types available;
- rates would need to be assessed regularly to make sure they continued to meet the costs of treatment;
- consideration of some form of London weighting might be needed; and
- the fees charged be medical reporting agencies would also need to be fixed.

47. In summary, Option 4 - extending MedCo - was the best supported option, followed by Option 2 – Defendants pay for all rehabilitation costs. The least supported option was option 3 – removing compensation for rehabilitation.

Question 28: Do you have any other suggestions which would help prevent potential exaggerated or fraudulent rehabilitation claims?

48. In total 395 respondents replied to this question. Many of the points raised were repeats of suggestions put forward earlier in submissions relating to the specific options on rehabilitation. In addition, there were also a significant number of duplicate responses with a claimant lawyer firm, CMC and credit hire operator responsible for submitting 91 duplicate responses and another claimant law firm providing a further 36 identical submissions to this question.

49. However, in addition to the 127 identical responses provided there were several additional unique suggestions, including:

- the need to ensure, via independent medical evidence, that rehabilitation was needed, and the level required;
- that there should be more fundamental dishonesty claims made by defendants where exaggeration in relation to the provision of rehabilitation was alleged;
- that rehabilitation referral fees should be banned;
- that the current rehabilitation code should be enforced, and that rehabilitation could only be sourced from providers signed up to the code; and
- that signed confirmation from both the medic and the claimant that the treatment had taken place should be required.

Next steps

- *Since the consultation closed, the Government has engaged regularly with a wide cross section of the industry on the provision of rehabilitation. This includes discussions with both the Forum of Insurance Lawyers (FOIL) and the Association of Consumer Support Organisations (ACSO). This has enabled productive dialogue to continue with industry stakeholders including insurers, claimant lawyers, defendant lawyers, medical experts, medical reporting organisations and direct rehabilitation providers.*
- *The Government remains committed to regular discussion with industry bodies and other rehabilitation organisations. Therefore, having considered the issues raised through the 'Call for Evidence' MoJ will continue to engage with the sector, through FOIL, ACSO and other key stakeholders, to support the development of an industry Rehabilitation Code with a view to agreeing a cross sector approach to rehabilitation.*

- *Additionally, we will continue to monitor the provision of rehabilitation and how this may be impacted by the implementation of the new Official Injury Claims Service for unrepresented claimants. Further consideration of the feasibility of expanding the MedCo system to support the provision of rehabilitation option will be considered as a longer-term option.*

iv. Recoverability of Disbursements

50. As part of the Government's commitment to reducing the costs associated with civil litigation, the call for evidence asked whether there should be restrictions on the recovery of disbursements (such as initial medical report costs) for whiplash claims.

> **Question 29:** Do you agree or disagree that the Government explore the further option of restricting the recoverability of disbursements, e.g. for medical reports?
>
> Please explain your reasons.

51. 453 submissions were received in relation to question 29. Of these, 396 opposed limiting the recovery of disbursements and 57 were in favour. The majority opposing were claimant lawyers (288), CMCs/credit hire companies (51) and insurers (13), with a further 44 from other stakeholders. However, several duplicate responses were also received with two law firms providing 41 and 35 duplicate submissions respectively, and a further 47 identical responses were received from a linked CMC and Credit Hire company.

52. The main reason given against further action in this area was that the wider reform programme detailed in Part One of the Government response will already significantly limit the ability of a claimant to recover their legal costs. In addition, the further requirement for all whiplash claims to be supported by medical evidence means that restricting the recoverability of such disbursements would be unfair to claimants.

53. Of those who agreed with the proposal support came mainly from insurers (21) with a smaller number of claimant lawyers (7) and defendant lawyers (5) also in favour. A further 24 responses came from the other stakeholder groups. Those in favour suggested that disbursements were currently being used by some for financial gain and restrictions were necessary to control claims costs. It was also argued that full disbursements should only be available for claims which were issued/notified within the limitation period, with reductions made if the claim was made towards the end of that period.

Next steps

- *The responses received to the consultation in relation to this issue indicated very little support for this option. The recent implementation of the whiplash reform programme will have a significant impact on reducing costs in this area. Therefore, the Government believes that adding further restrictions on the recoverability of disbursements would put undue burdens on unrepresented claimants and that it is more appropriate for the current arrangements for disbursements to continue. The Government has therefore decided to not currently pursue this option.*

v. Barème

54. The Call for Evidence sought stakeholder views as to whether a Barème[16] type system should be developed for claims made in the UK.

> **Question 30:** A new scheme based on the 'Barème' approach, could be integrated with the new reforms to remove compensation from minor road traffic accidents related soft tissue injury claims and introduce a fixed tariff of compensation for all other road traffic accident related soft tissue injury claims. What are the advantages and disadvantages of such a scheme?
>
> Please give reasons for your answer and state which elements, if any, should be considered in its development.

55. 374 submissions were received in total in response to this question. Of these, 176 were supportive and provided examples of the advantages of implementing a Barème system. This came from 85 claimant lawyers, 49 CMC/credit hire firms, 19 insurers and 23 from other stakeholder groups. It should be noted that 87 identical positive responses were received from 1 firm of lawyers and a linked CMC and credit hire firm.

56. Those in favour noted that a Barème system would be like the points-based systems that are already in use by insurers and some claimant lawyers to value a claim ahead of the quantum negotiations (COA[17] and Colossus). This could provide a simplified system for unrepresented claimants as there would be more predictability of damages.

57. 198 respondents received were opposed to a Barème system, of which 155 were claimant lawyers and 11 were insurers. A further 43 responses were received from a

[16] Barème systems use a combination of fixed tables of damages alongside 'points-based' scoring systems to identify where a claim fits in terms of vehicle damage, injury severity and compensation.

[17] COA and Colossus are systems used by insurance companies to input details about PI claims, which evaluate what the settlement should be by drawing on a company's previous settlements & the wider market to minimise pay-out variance.

range of other respondents. A total of 26 duplicate responses were received from 1 firm of claimant lawyers. In the main, those who argued against the Barème system said that it was simply a variation of a tariff and would lead to unfair settlements/under compensation.

Next steps

- *Following consideration of the responses received, the Government recognises there are good arguments for pursuing the implementation of a Barème system. However, with the need to bed in the recently implemented whiplash reforms we are not currently minded to do so. We will, however, continue to keep this option under review.*

vi. Other suggestions to control the costs of civil litigation

58. The final question in the consultation document provided respondents with the opportunity to provide suggestions for further reform to help control the costs of civil litigation.

Question 31: Please provide details of any other suggestions where further Government reforms could help control the costs of civil litigation.

59. In total, 387 responses were received to question 31. There were 245 responses from claimant lawyers, 51 responses from CMCs/credit hire organisations, 26 from insurers, 16 from the medical reporting sector, 11 from the travel/transport sector, 9 from defendant lawyers, 4 from judicial stakeholders, 3 from trade unions with a further 22 from the individuals/other category. However, 72 responses were duplicates received from just 3 law firms, along with 47 identical replies from CMC/credit hire firms.

60. Many of the submissions reiterated earlier comments made by stakeholders or repeated general opposition/support to reform in the PI and civil claims areas. However, a range of interesting suggestions for further reform were made, including:

- carrying out independent research to gather evidence that there are continuing problems before undertaking further reform;
- introducing reforms to sanction defendants/insurers who make unreasonable offers or who unfairly challenge claims in which the claimant is successful;
- increasing penalties and sanctions for claimants, medical experts and claimant representatives who bring fraudulent claims;

- increasing the powers of the SRA for solicitors who bring the profession into disrepute, such as those who accept claims sourced through illegal cold calling;
- capping insurance premium levels or linking them with claims volumes so that insurers are forced to reduce premiums proportionately if the number of claims reduces;
- reintroducing the refund of the trial fee if parties settle early, reviewing the PIDR and extending the scope of fixed recoverable costs;
- banning all PI claims advertising, introduce a ban on cold calling and claims farming and ban CMCs and McKenzie friends in PI claims.
- reducing the PI limitation period to 1 year as an injury should be apparent by then;
- conducting court hearings online/on paper unless there are good reasons for an oral hearing;
- introducing an alternative claims process and increasing the value of Claims Portal claims to over £25,000; and
- closing loopholes in the referral fee ban to capture all those involved in buying and selling of PI claims.

Next Steps

- *The Government would like to thank those stakeholders who made further reform suggestions. There were a considerable number of good points made, which merit further consideration. These included suggestions to reform the way the PIDR is calculated, extend the use of fixed recoverable costs (FRC), ban cold calling by claims management companies and review the effectiveness of the Government's ban on the payment and receipt of referral fees in PI claims.*
- *However, since the consultation paper closed there has been progress made on several of the issues suggested under this section. For example, the Government has acted in the area of updating the PIDR[18] following the implementation of the provisions included in Part 2 of the Civil Liability Act 2018. The Government also confirmed on 6*

[18] https://www.gov.uk/government/news/lord-chancellor-announces-new-discount-rate-for-personal-injury-claims

September that it would take forward the majority of the recommendations made by Sir Rupert Jackson[19] in relation to extending the FRC regime[20].

- *In addition, the Government has introduced a ban on cold calling by claims management companies through provisions in the Financial Guidance and Claims Act 2018. The Government has also completed its post implementation review of Part two of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. This review considered the views of both stakeholders affected by the ban and from the Regulators who enforce it and is available to download[21].*

- *No further specific actions are proposed at this time in relation to any of the suggestions made in response to this question, but they will be considered if the Government decides further reform is necessary to control the number and cost of claims.*

19 https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf

20 https://www.gov.uk/government/consultations/fixed-recoverable-costs-consultation

21 https://www.gov.uk/government/publications/post-implementation-review-of-part-2-of-laspo

Conclusion and next steps

61. The submissions, evidence and data summarised in this this document were provided in 2016/17. Due to the considerable amount of time which has passed since they were received and reform subsequently implemented, the Government does not propose to take forward specific action based on the views supplied at this time.

62. The following paragraphs provide a summary of the actions and next steps to be taken in relation to the issues covered by this paper.

Responses to specific questions in Part 6 – Implementing the recommendation of the Insurance Fraud Taskforce

i. Claims Notification Form (IFT Recommendation 17)

63. The Government will continue to monitor the impact of the recent whiplash reforms on this issue with no further action taken at this time.

ii. Qualified One-Way Costs Shifting (IFT PI Sub-group recommendation)

64. With no clear agreement from stakeholders on this issue, the Government does not currently propose to proceed with changes specific to this recommendation, but will continue to monitor the impacts of wider Government reform on behaviours in relation to QOCS.

Responses to specific questions in Part 7 – 'Call for Evidence' on related issues

i. Credit Hire

65. Having considered the submissions provided on the proposed options the Government will work with key stakeholders in this sector to monitor and improve the use of industry agreements, including whether to make the use of such agreements mandatory.

ii. Early notification of claims & seeking treatment within a set period of time

66. The Government does not currently intend to pursue this suggestion, but it will be kept under review.

iii. Rehabilitation

67. The Government has considered the issues raised in the submissions provided in response to this issue and will continue to engage with key rehabilitation stakeholders to discuss industry led options for improving the rehabilitation process following the implementation of the whiplash reforms. In addition, further consideration of the feasibility of the longer-term option of expanding the MedCo system will continue.

iv. Recoverability of Disbursements

68. The Government agrees that adding further restrictions on the recoverability of disbursements at this time would put undue burdens on unrepresented claimants and that the current arrangements for disbursements should continue.

v. Barème

69. The Government will continue to monitor the impact of the recent whiplash reforms on the sector before considering further action in this area. There do, however, remain good arguments for pursuing the implementation of a Barème system and this option will be kept under review.

Other suggestions to control the costs of civil litigation

70. The Government thanks stakeholders for contributing to this Call for Evidence and for providing several helpful suggestions for reform. No specific actions will currently be taken forward in relation to the points put forward, but they will be used to help inform future policy decisions.

71. As indicated above, the Government will continue to monitor several of the activities covered by this response document in case further action is required. Where possible, Officials will liaise with appropriate representative bodies to seek feedback and ensure that where issues have been identified that industry agreed solutions can be developed and taken forward.

Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the Cabinet Office Consultation Principles 2018 that can be found here:

https://www.gov.uk/government/publications/consultation-principles-guidance