



Bar Council response to the “Reforming the Soft Tissue Injury (‘whiplash’) Claims Process” consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice consultation paper entitled “Reforming the Soft Tissue Injury (‘whiplash’) Claims Process: A consultation on arrangements concerning personal injury claims in England and Wales”.¹

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar’s high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

The Consultation

4. The consultation proposes four measures:

- (a) Removing compensation for PSLA (pain, suffering and loss of amenity) in whiplash claims or reducing PSLA by setting fixed amount payable - £400 or £425 if there is a psychological element;
- (b) Where recovery takes longer than the category of whiplash identified in (a) there will be a set tariff of compensation;
- (c) The small claims limit for personal injury will be raised to £5,000;
- (d) Pre-medical offers to settle RTA related soft tissue injury claims will be banned, claims will not be capable of settlement without medical evidence provided by MedCo accredited practitioners.

¹ Ministry of Justice, 2016 “Reforming the Soft Tissue Injury (‘whiplash’) Claims Process: A consultation on arrangements concerning personal injury claims in England and Wales”
<https://consult.justice.gov.uk/digital-communications/reforming-soft-tissue-injury-claims/>

5. Measures (a), (b), and (d) will require primary legislation. Measures to increase the small claims limit can be implemented by changes to the CPR, presumably through the Civil Procedure Rules Committee.

6. A consultation period of only six weeks, including the Christmas period, is extraordinarily short given the breadth of matters set out.

7. Personal injury claims, including 'whiplash' and RTA (road traffic accident) claims, have been the subject of significant reform in recent years, including the introduction of the portal, fixed fees on the fast track, QUOCS (qualified one way costs shifting), the abolition of the recoverability of success fees and ATE (after the event insurance) premiums, and reform to medical experts' reports and fees. These reforms reduce the cost of litigation and assist in combating fraudulent and exaggerated claims.

8. The abolition of recoverability of success fees and ATE through LASPO (Legal Aid Sentencing and Punishment of Offenders Act) gave claimants 'skin in the game' i.e. they faced potential costs' liabilities in bringing personal injury claims. This reform, plus the potential loss of the "QUOCS" shield, are a significant deterrent to fraudulent claims.

9. Courts now have a number of sanctions they can use to censure and deter claimants who make exaggerated or fraudulent claims: claimants losing QUOCS protection under CPR 44.16(1) where there is evidence of fundamental dishonesty; control of experts' fees under the MedCo Portal pursuant to CPR 45.29(2A); and the implementation of s.57 of the Criminal Justice and Courts Act 2015. The Bar Council agrees with the Personal Injuries Bar Association (PIBA) (Question 28 of the consultation; paragraphs 178-179 of the PIBA response) that measures are now in place to combat fraudulent claims and these should be allowed to 'bed down'.

10. The current consultation is inconsistent with and to some extent undermines many of the reforms of recent years. It is hard to understand or find credible evidence to support the government's main assertion that the reform proposals set out in this consultation paper will lead to a reduction in the number of exaggerated or fraudulent claims. While the government may be right that this is a legitimate aim, it is not one which is likely to be achieved through these measures which are much more likely to have a significant detrimental and discriminatory effect on personal injury victims.

11. Specific Issues

Option 1: The removal of PSLA for all minor RTA soft tissue claims (Question 5)

(1) The proposed removal of an award for pain, suffering, and loss of amenity from minor road traffic accident claims is wrong in principle. The Bar Council agrees with PIBA at paragraphs 31-36 of their response. The right of victims of tort to sue those who have injured them is a "bedrock" of civil litigation. PIBA indicates that the removal of the right to recover general damages is potentially a breach of the Claimant's Article 6 or A1P1 rights. Both PIBA and the Bar Council question to what extent the abolition of the right to claim such

damages in pursuit of the aim of reducing the number of fraudulent claims is either legitimate or proportionate.

Option 2: the introduction of a fixed sum (Questions 6 & 7)

(2) In the alternative to Option 1, the government proposes a fixed sum for minor RTA related soft tissue injury for up to six months of £400 or £425 if the claim includes a claim for psychiatric injury. BC agrees with and commends the analysis and research set out by PIBA at paragraphs 73-81 of their response. The proposed awards are far too low and offend against the principle of full compensation in personal injury claims that has been established law since 1880. However, the BC also agrees with PIBA that the introduction of fixed-sum compensation is wrong in principle: (1) awards for General Damages are made by the judiciary with the assistance of advocates; (2) judicial decisions inform the Judicial College Guidelines for the Assessment of General Damages (now in its 13th Edition); (3) the introduction of a fixed sum, even at the lower ends of the scale of damages awards, introduces a novel fetter on what would otherwise be a decision based on the exercise of judicial discretion; (4) a fixed sum would be arbitrary and not take into account the potential range of symptoms and factors that would ordinarily be relevant to the assessment of pain, suffering and loss of amenity; (5) the introduction of a fixed sum would not have any obvious impact on reducing fraudulent claims.

The introduction of a tariff system (Question 11)

(3) The government proposes a tariff for RTA related soft tissue injury claims from £400 (0-6 months) to £3,500 (19-24 months) with a slightly higher tariff for claims which include a psychological injury. The Bar Council agrees with PIBA that a tariff is wrong in principle for the same reasons set out by PIBA at paragraphs 53-72 of their response: that there is no evidence to support the suggestion that a tariff system will protect insurers and the public against exaggerated and fraudulent claims; current awards for general damages, set by the judiciary, are balanced and reasonable; the current system works well as evidenced by the very high number of cases which settle without either court proceedings or judicial assessment; and the introduction of a tariff will not prevent disputes but simply change the basis upon which the parties argue about the level of compensation without the final arbiter being able to take into account all the circumstances of the case, providing for a wholly arbitrary and artificial process. The Bar Council draws attention to PIBA's particular expertise in relation to the assessment of the value of awards for general damages as set out at paragraphs 94-116 of their response. The Bar Council notes PIBA's comparative analysis of award from 0-3 months to 10-12 months and its alternative figures for a tariff ranging from £1,100 to £3,000 for such cases. The Bar Council agrees with PIBA that this analysis itself shows how far the arbitrary nature of a tariff does considerable damage to the principle of achieving full compensation for personal injury victims and highlights the disconcerting and casual approach to actuarial rigour evident in the Government's consultation.

Raising the Small Claims Limit (Question 13).

(4) The Bar Council agrees with PIBA that there is no apparent reason to raise the small claims limit if the Government's proposed tariff comes into force. If there is to be an increase in the small claims track such an increase should be limited to £3,000 for all personal injury claims, coinciding with a fixed tariff for soft tissue road traffic claims up to £3,000. If the small claims limit is to increase to £5,000 it should be limited to road traffic claims only. See paragraphs 119-121 of the PIBA response.

(5) The Bar Council agrees with PIBA wholeheartedly on "the need for all litigants to have access to independent legal advice and representation to ensure they are on an equal footing with legally represented and well-financed insurance companies" (paragraph 158 of the PIBA response).

(6) Both PIBA and the Bar Council have considerable concerns about the effects of any increase on the small claims limit, in particular:

- (a) an inevitable increase in the number of litigants in person;
- (b) unrepresented clients having to deal with matters of procedure, including obtaining and paying for medical records and instructing and paying for medical and other experts;
- (c) unrepresented litigants dealing with complex areas of law including causation, valuation of damages, contributory negligence, joint and several liability, assessment of prospects of success on liability; but with limited sources of assistance and information being available for those unrepresented litigants;
- (d) inequality of arms between a litigant in person and a well-resourced insurance company;
- (e) the discriminatory impact on unrepresented litigants with disabilities or for whom English is not their first language;
- (f) an increase of the small claims limit to £5,000 for personal injury would include a wide range of serious injuries, including permanent scarring and injuries requiring surgery (see paragraph 127 of the PIBA response).

(7) Like PIBA, the Bar Council is far from convinced that any benefit to be had by increasing the small claims limit outweighs the very considerable detriments identified in paragraphs 11(5) and 11(6) above. Any increase in the small claims limit is bound to put increasing strain on the civil justice system. As noted at the outset, this consultation paper falls to be considered against the background of a wide and radical reform of the personal injury sector over the last five years. These reforms should be given further time before more fundamental change is ushered in; such a change would be unlikely to achieve the government's stated aim and would be to the huge detriment of many personal injury victims who would be left without legal representation as a consequence.

(8) The Bar Council agrees with PIBA that it is not appropriate to consider raising the small claims limit beyond £5,000. (Question 14).

Bar Council
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