CIVIL JUSTICE COUNCIL (CJC) RESPONSE

REDUCING THE NUMBER & COSTS OF WHIPLASH CLAIMS

General

The CJC welcomes the opportunity to respond to this consultation. It further welcomes the intention to improve access to justice for meritorious whiplash claims and the aim of deterring exaggerated and fraudulent claims. Before turning to the specific questions posed in the consultation the CJC makes the following general points, which arise from the consultation.

First, the consultation acknowledges that the Government shares concerns that the growth in whiplash claims arising from road traffic accidents *may* be linked to an increase in such fraudulent and/or exaggerated claims (Consultation at 12). The CJC is concerned that significant reform is envisaged without the Government coming to an evidence-based conclusion that the growth in whiplash claims *is* linked to an increase in fraudulent and/or exaggerated claims. It would therefore support further research being carried out before what might be unnecessary, and potentially costly, reform is embarked upon. There is a sense that there is a danger of the problem being overstated, that only a small minority of claims are exaggerated or fraudulent, and the way to tackle fraud is by a robust approach by defendants to civil actions where there is evidence to support such an allegation or, in appropriate cases, through criminal prosecution.

Secondly, the consultation acknowledges that the Government accepts that whiplash injury is a complex issue, the diagnosis of which is not straightforward (Consultation 4 at & 15). It further notes that the Department of Health will work on developing clinical guidance and assess the scope for further research. The CJC welcomes this approach, as effective early diagnosis ought to increase the prospect that claims will be resolved

without the need to resort to litigation, and will do so on a properly informed basis. The CJC also welcomes a commitment to further research. This is particularly necessary to identify whether there is an underlying cause or causes other than fraud or exaggeration e.g., a medical cause or one arising, for instance, from the nature, use or lack of proper use, of car safety equipment such as seatbelts or head restraints, which underpins the rate of whiplash claims in England and Wales. In this respect work could be done with RoSPA to improve public education on the proper use of safety equipment. Work could also be carried out with the car manufacturers and the MIRRC (Thatcham) to further improve car safety and thereby minimise the scope for whiplash injuries to occur as a consequence of road traffic accidents.

Finally, the CJC questions the timing of the present proposals given the volume of civil justice reform taking place at present, and how the climate for claims will be changing. The impact of the Jackson costs reforms and other measures (e.g. reform to fixed fees in RTA cases) seem likely to have an impact on the number of claims being brought. More significantly it is not clear what the litigation landscape will be like from April 2013 or how long the various reforms taking effect then will take to settle down. Given the Government's intention to raise the small claims limit to £10,000 in April 2013 and the recently announced reforms to the fee structure applicable to the RTA Portal, the CJC would particularly stress that before such a reform be embarked on there is a fundamental need to: first, allow those reforms to take effect properly before any further rise to the small claims limit i.e., in respect of personal injury claims, is embarked upon. It may be that further changes at this point will not be sensitive to the post-April environment, and would undoubtedly add to the pressures on parties, practitioners and judges adapting to it; and secondly, and crucially, carry out a detailed evidenced-based assessment of the effects of those reforms.

Question 1:

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

The CJC is aware of concerns that the present system can give rise to a number of potential problems, such as the preparation and presentation of formulaic medical reports, often prepared at too late a stage after the injury was suffered, that neither

assist settlement nor effective judicial determination.

The CJC is also aware of concerns that a patient's GP or a panel doctor employed by a Medical Reporting Organisation (MRO) *may* not fully understand, and therefore act in accordance with, the overriding duty to the court imposed on all experts by CPR 35.3. Equally it understands the risk that may arise when a panel doctor employed by a MRO is instructed on an on-going basis by the same solicitor or claims management company i.e., the risk of a subtle, unconscious identification by the doctor with the client of those who instruct him or her. The same potential problem may also arise where a solicitor instructs a specific doctor directly and does so on an ongoing basis.

The CJC thus acknowledges the risk which currently exists that medical reports may not be as independent, or be perceived to be as independent, as they ought properly to be or as accurate in so far as diagnosis is concerned as they might be.

The CJC therefore agrees that the introduction of independent medical panels would be beneficial. Such panels would remove any real or perceived doubts as to the independence of the doctor providing a report. They would also ensure that only those doctors with appropriate training and expertise were able to provide whiplash injury reports and would be able to do so at an appropriate time. Moreover, the use of a standard medical report form ought to ensure that all relevant medico-legal issues are dealt with in each case.

The CJC also supports the review of those medical report forms which are presently used. The development of standard report forms has obvious benefits, both in terms of increased efficiency and, importantly, in terms of increased accuracy and consistency of approach by those doctors instructed to prepare such reports.

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

Not applicable.

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

The CJC considers that there are potential drawbacks to both an accreditation and a national call off contract scheme. An accreditation scheme could prove inflexible, while there is a real risk that a national call-off contract scheme could be perceived to include criteria that reflect the interests of claimant representatives and/or insurance representatives rather than be the product of disinterested organisations.

The CJC considers that any scheme introduced should be: i) flexible; ii) transparent; iii) independent, and be perceived to be independent, of any vested interests; and iv) provide a clear selection process for those doctors who are authorised under it. Any scheme should, as a minimum, require any panel doctor to be up-to-date with the latest research and practice regarding whiplash injuries. Of the four criteria, the need for independence is absolutely essential.

While the CJC considers that a national call-off contract could, in principle, meet the above criteria – and one member suggested that such a contract could be run by a not-for-profit body made up of all interested parties – it considers that an accreditation scheme provides the optimum approach. In particular an accreditation scheme could be developed and run by the General Medical Council (GMC).

This has two advantages: first, the GMC is a disinterested party in that it is not involved in the litigation process on behalf of, or as, either claimants or defendants; secondly, the GMC has the skill and expertise to properly draw up medical accreditation criteria, which could then be applied to individual doctors who seek accreditation or medical organisations that seek to have their doctors accredited.

The CJC stresses that whichever scheme is established its focus should be the authorisation of individual doctors, who are assessed and authorised on the basis of their expertise, and not organisations that can then hire or instruct individual doctors who are not then subject to any independent scrutiny or authorisation.

To ensure flexibility the GMC could be required to keep the accreditation scheme and its operation under review. Moreover an accreditation scheme has the virtue of providing for applications for accreditation either by individuals or medical organisations to take place on an on-going basis. This will allow greater potential competition amongst those able to

provide medical reports than a system operated under a national call-off contract which could produce static lists of those authorised following periodic tender processes.

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

The CJC notes that in some cases such review will in practice be unnecessary in any event i.e., in those cases which are of such value and complexity that both claimant and defendant are permitted to instruct their own experts.

In those cases where only one medical report is obtained and/or submitted to the court, the CJC would query the benefit of having a second doctor assess a medical report prepared by a properly accredited doctor drawn from the proposed independent panel. Such a process could unnecessarily and disproportionately increase costs, not least given the expectation that such claims where only one expert report is obtained will be those claims were more than one expert report, or assessment, would be disproportionate.

The CJC understands that there is a genuine need to ensure that those doctors who are authorised to provide independent medical reports are subject to some scrutiny, independent from the judicial process. Such independent scrutiny should best be achieved under an accreditation scheme (as endorsed above), which required periodic re-accreditation of panel members. Such an approach is likely to prove the most cost-effective and proportionate approach, whilst being the best able to maintain standards through requiring, for instance, evidence of on-going training by way of continued professional development and through an assessment of an anonymised, randomly-selected sample of actual reports. Such reports should be obtained for the purposes of re-accreditation to ensure, for instance, that the doctor seeking re-accreditation: a) had suitable expertise to warrant re-accreditation; b) was not engaging in impermissible practices, such as producing formulaic reports that did not properly deal with the issues. Were a new portal to be introduced for managing such claims, the data held there might be used as the basis for a system of random, sample checks of medical reports. Such a system of checks, which could be carried out during the period between accreditation and re-accreditation could be used as a means to scrutinise doctors on an on-going

basis. Such random spot checks could, in an appropriate chase, be used as a means of drawing to the attention of the accrediting body a need to carry out a proper investigation of a particular doctor and potentially revoke their accreditation.

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

The CJC considers that the cost of an on-going accreditation scheme should be funded from the fee payable for each medical report issued by a panel doctor. It was strongly of the view that whichever scheme is authorised it should not be owned or funded by the insurance industry as that would give rise to a clear perception of bias.

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

The CJC members' views varied on this question, reflecting a membership representing both claimant and defendant interests.

The CJC would however make the following points:

First, the proposed reform has two aims: i) to increase the prospect that whiplash claims can be defended effectively and economically; and ii) to increase the prospect that defendants are able to contest an increased number of exaggerated or fraudulent claims. Both aims it appears are to be achieved through increasing the small claims limit.

While the CJC can understand the argument that a greater number of claims could be defended if the small claims limit were increased it is not apparent that such an increase will have such an impact on the prospect that more claims which are said to be exaggerated or fraudulent will be defended. The small claims track is designed to provide a simple, straightforward procedure for relatively simple and straightforward claims; for claims that can be disposed of at most in a half-day hearing. Where it is alleged that a claim is exaggerated or fraudulent, irrespective of its value, it is unlikely that it will be allocated to the small claims track. Such allegations, which often involve, more than one expert report and cross-examination of multiple witnesses can only properly be dealt with on the fast or multi-track: see in particular CPR 26 PD 8.1(d) and

the Court of Appeal decisions in *Kearsley v Klarefield* [2005] EWCA Civ 1510, [2006] 2 ALL ER 303 and *Casey v Cartwright* [2006] EWCA Civ 1280.

In the light of this, the CJC is concerned that the Government's belief, set out in the Consultation at page, paragraph 11, is based on a misconception: an increase in the small claims limit is unlikely in practice to render it '*more economically viable for defendants to challenge exaggerated or fraudulent claims given that there is a reduced risk of funding high costs if the case is lost.*' The position set out in the consultation is misconceived as it is based on the assumption that simply raising the small claims limit will bring such claims within the scope of the small claims track, when such claims are likely to continue to require allocation to the fast or multi-track notwithstanding their financial value.

Secondly, a £5,000 limit for personal injury claims in general is high. It would bring some quite complex claims within the ambit of a case track that is not designed for such cases. This may increase resource pressure on the courts. It may require such claims to be listed for half a day or for a day, thus reducing the overall efficacy of the small claims process through increasing listing delay.

Thirdly, increasing the limit to £5,000 increases the risk that claimants may be encouraged to exaggerate the value of their claim in order to bring it within the ambit of the fast track.

Fourthly, the CJC is concerned that if a new portal is to be introduced for managing claims on an expanded small claims track sufficient time must be given for it to be properly developed, properly specified, budgeted-for and delivered. A streamlined process could be set up with claimants initiating the process via the portal and generating a response pack from defendants explaining the process and triggering a medical assessment. Guidance for claimants should cover a claim's likely worth, with standard awards known up-front. The availability of legal fees insurance cover should be promoted.

Fifthly, the CJC is concerned about the suggestion that if the small claims limit be increased it should be increased for personal injury claims arising from whiplash cases.

As a matter of both principle and practicality it is not appropriate to have two different procedural approaches for the same type of injury claim depending on the basis on which the injury arose. It cannot be right, for instance, for a claimant who suffered a neck injury arising out of a whiplash claim to have their claim allocated to a different case track to that which a claimant suffering from a similar injury which arose from in an employment context, or as a consequence of a tripping injury. Such an approach would undermine the fundamentally trans-substantive nature of procedure, increase uncertainty for both claimants and defendants as to which track a claim could be allocated to and which cost regime applies, and increase costs through greater satellite litigation over allocation. The CJC therefore concludes that a partial, whiplash-specific, increase in the small claims limit would not be appropriate.

Finally the CJC notes that this question also suggests that the small claims limit could be raised for all RTA claims, not just whiplash injury related ones, although it is on the whiplash cases that the Government is focusing its concerns. While the CJC understands the impetus behind the present, whiplash-based, consultation (subject to the point made at the outset of this response) it is not clear what, if any, evidence there is which would support a proposal to increase the small claims threshold for personal injury claims in general. It therefore suggests that before a proper proposal is formulated in respect of the general PI threshold that the Government commission an evidence-based review.

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

An increase in the small claims limit will definitely have an impact on the RTA Protocol as would take away the vast majority of claims from that process and portal, with major implications in terms of cost per claimant. It would raise questions as to whether it would be economic for defendants to invest in a portal system. It would also raise the danger of losing the portal's strong record for encouraging settlements, which at the present time sees around 69% of cases currently entering settlement.

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

The CJC considers that the Government could take the following steps:

1) Increase funding for medical research into whiplash injury and ensure that greater expertise is developed amongst the medical profession generally to increase the quality and accuracy of diagnosis, thus reducing the scope for exaggeration or fraudulent claims;

2) Greater use of existing sanctions, as a deterrence measure, for exaggerated or dishonest conduct i.e., greater use of: the power to strike out claims; cost sanctions; the court's contempt power; and, in appropriate cases, criminal prosecution;

3) Provide a mechanism, through a central register of claims, for data-sharing which might help detect repeat claimants. Care would need to be taken to ensure that such a mechanism did not however give rise to any data protection issues.

The CJC is not in a position to answer Questions 9 or 10.

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

The CJC does not consider that the introduction of independent medical panels should have an adverse effect on individuals with protected equality characteristics. Care will however need to be taken to ensure that such panels are operated so as not to have such an adverse effect.

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

The CJC notes the proposed reform may have an adverse impact on individuals with a protected equality characteristic. It may as the Equality Impact Assessment suggests reduce access to justice for individuals with such characteristics where they do not have before-the-event insurance cover. The absence of such cover, and the lack of alternative funding mechanisms, combined with limited, fixed costs recover may act as a

disincentive to claim. Alternatively it may see an increase in individuals with protected characteristics taking such claims as litigants-in-person due to the increased application of small claim fixed recoverable costs.

The CJC is particularly concerned in the light of this that the Government conducts detailed research into this issue in order to ensure that individuals with protected characteristics are not adversely affected by the proposed reforms.