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Reforming the Soft Tissue Injury ('whiplash') Claims Process

Stephensons LLP response to the Consultation

This response is prepared by Stephensons LLP and submitted by Kate Sweeney, Partner and Head of the Personal Injury team at Stephensons LLP. We request an acknowledgement of receipt of this submission, which should be sent to kas@stephensons.co.uk.

Stephensons LLP
Wigan Investment Centre
Waterside Drive
Wigan WN3 5BA

About Stephensons LLP

Stephensons Solicitors offer a wide range of legal services, but within our Personal Injury team we represent **Claimants** who have been injured in the UK and abroad, on the road, at work or in a public place. We also represent innocent victims of crime, which includes those who have been physically and sexually abused.

Stephensons LLP are members of MASS, APIL , and SCIL, and as such support the responses submitted by these organisations. We are also a signatory to the A2J consultation response.

Summary

We will seek to respond to each question posed within the consultation paper and attempt to provide constructive and workable comments. In summary however, whilst we as a firm recognise that there is dysfunction within the Personal Injury market, we object in the strongest terms to the proposals, which seek to remove the right of genuine accident victims to recover compensation following the negligent act of another person. This is a common law right built up over many hundreds of years, enshrined in our law. 60 million individuals will be denied access to justice, and the results will be a suggested, but very much unproven claim of a saving per motorist of £40 on their insurance premium.

There is undoubtedly issues with fraud, within the industry, however Stephensons has not had a problem with this - because we have never worked with CMC's, we have always diligently and carefully vetted every single Personal Injury enquiry received and have strict internal acceptance criteria which is enforced by well trained, experienced staff. We have however, represented many thousands of injured people over many years, and believe we have and continue to serve those injured Claimants well, and should like to continue doing so for many years to come.

The MOJ has openly accepted that the Consultation paper references out of date information and statistics. The evidence on which this paper is presented is anecdotal and wholly incorrect, but equally we recognise that across the board, statistics can be manipulated, which is why we call on the Insurance industry to provide accurate and reliable data, they being the ones who have this information available at the touch of a button.

In addition to responding to each question, we call upon each and every UK listed Insurer to provide accurate and reliable data, which they hold, not only to the MOJ, but to all stakeholders and the wider public at large. It is regrettable that Insurers have thus far failed to undertake this simple task, and one questions why they have not. Particularly in light of the blatantly incorrect data contained within the consultation paper.

We are aware that Economists have been instructed by a number of Stakeholder parties and that their evidence will be utilised when responding to the Consultation. On that basis defer to their expertise in that area. However, we would like to stress the need to fact check the claims made in relation to the impact these proposed reforms would have on the cost of motor insurance premiums, which is stated within the consultation paper to be savings to the insurance industry of £1billion, with the Impact Assessment paper indicating that insurers are expected to pass on 85% of these savings to motorists.

3 insurers have pledged to pass on any savings made, and there is no transparent means of identifying whether any such savings have been passed on, and in what amount, the £40 saving per motorist that is relied upon in the consultation, is wildly inaccurate. This will be explored in more detail by the expert Economists instructed in relation to all financial and economic sections of the consultation.

Stephensons would welcome the opportunity of working, as a representative body, with Insurers to explore and develop collaboratively, a more constructive and workable means of reforming the current claims process. This would be one which would tackle the current issues surrounding fraud, cold calling and spurious claims, and would be acceptable to all stakeholders, not least, those innocent injured Claimants.

There have been numerous reports in recent months, (following on from the vast raft of reforms which have been implemented in the PI sector since 2010), which have dealt with, the dysfunctional aspects of the Personal Injury market mentioned above, and which should be drawn upon, considered in detail and indeed followed in terms of recommendations. We are specifically referencing the Insurance Fraud Taskforce report, the Brady Report and the more recent Bach commission and Lord Briggs report on Court reform. All must be taken together, and used as a solid framework for moving forward with reforms which are just, proportionate and acceptable to all.

The impact of the reforms over the past 6 years is not yet fully materialised or indeed assessed. To take such drastic steps at this juncture, in terms of the proposals made in this consultation, is in our view both premature and unnecessary. Significant, positive inroads have been made into re-shaping and reforming the Personal Injury market, and there is indeed more to come as time progresses. To implement the proposals as per the Consultation, would make a mockery of the recent reforms and - the work that was undertaken by all stakeholders in that process. It would also mean that the cost of such reforms, including the significant costs associated with the Portal, MedCo and other aspects of the reforms would have been for nothing.

It should also be observed that there have been significant changes to the Court system, following consultation, including massive increases in Court fees. The Court reform consultation fully recognised that the fees generated by Multi Track and fixed costs cases paid for the costs of small claims. Raising the small claims limit would mean even more cases in the currently loss leading small claims track, with very little by way of claims in the Fast of Multi Track. This would thus add additional financial burden on our already overstretched and under resourced Court system. This is just one Government area, and there are many more, that would be negatively economically impacted by these changes.

These proposals are fundamentally discriminatory, against the vulnerable in society - the old, mentally ill and uneducated, in addition to the "JAMS" (just about managing), for which this Government has stated they are here to represent and help.

Our responses to the Consultation now follow.

Question 1

Should the definition in paragraph 17 be used to identify the claims to be affected by removal of compensation for pain, suffering and loss of amenity from minor road traffic related soft tissue injury claims, and introduction of a fixed tariff of proportionate compensation payments for all other such claims? Please give your reasons why, and any alternative definition that should be considered.

We shall assume reference to paragraph 17 is a mistake and that it should in fact read paragraph 23. Stephensons does not agree with the removal of compensation or the introduction of a fixed tariff.

The focus of this consultation is "whiplash", whereas the definition referred to is considerably more extensive and it should be borne in mind the purpose for which this definition was developed and agreed (which was entirely different). Should this definition be used for these purposes, we are of the view that it would inevitably lead to disputes between the parties, resulting in satellite litigation.

At the point of developing this definition, there was no medical expert involvement, and in our view this is fundamental in relation to "whiplash" and defining the same.

The definition, in the context of these "whiplash" proposals is far too wide, and should not be used for these purposes, as it would be wholly discriminatory and unfair.

Question 2

Should the definition at paragraph 17 be extended to include psychological trauma claims, where the psychological element is the primary element of a minor road traffic accident related soft tissue injury claim? Please provide further information in support of your answer, including if relevant, how this definition could be amended to effectively capture this classification of claim.

As above, we assume when reference is made to paragraph 17, that it should in fact be paragraph 23.

Once again, we would refer to the driver behind this particular definition, which was to address an alleged dysfunction, in very small concentrations, within the PI market at that time.

Psychological injuries are distinct from physical injuries and can and do occur without physical injuries. The current law and judiciary recognise such injuries, for example within the JCG. As with the proposed fixed amount for "whiplash" injuries, a one size fits all approach is grossly unfair and discriminatory. Claimants with these injuries are assessed by those with a specific medical discipline, i.e. psychologists and psychiatrists, and many Defendant insurers refuse to accept evidence provided by a GP expert on this very basis.

A stakeholder group, consisting of those with expertise and knowledge, is required to provide a comprehensive and medically correct definition for the purposes of these reforms.

And once again, we repeat, the focus of this consultation is on "whiplash" reforms. Psychological injuries are not whiplash.

Question 3

The government is bringing forward two options to reduce or remove the amount of compensation for pain, suffering and loss of amenity from minor road traffic accident related soft tissue injury claims. Should the scope of minor injury be defined as a duration of six months or less? Please explain your reasons, along with any alternative suggestions for defining scope.

A person injured through no fault of their own is in law, able to seek compensation from the tortfeasor. The purpose of the compensation is to recompense them for their injury and losses and to put them back in the financial position, where at all possible, that they were in prior to the injury.

Injures, pain and suffering can only be compensated for in monetary terms. Rehabilitative intervention can assist with injury, pain and suffering but does not equate to financial compensation. Nor should it.

How injuries affect individuals is highly subjective. What can be life impacting injuries to one individual, are not to another. Every individual is unique and how they react and deal with the injuries they sustain following any accident, varies hugely. That is simply human nature. Every person is different. Some are more stoical than others. Some of us have pre-existing issues, which make us more vulnerable to injury, or less likely to recover as quickly. Which is another reason why a "one size fits all" approach is not in any injured person's best interests. It is only in the interests of the insurers.

This is why it is almost impossible to define what is a minor injury, but in our view, certainly anything above 3 months is not minor - and evidence suggest that if a soft tissue injury persists above 6 months, then it is likely to become a chronic problem. So most certainly not minor by any definition.

Our current Judicial College Guidelines provide comprehensive brackets for a vast number of different injuries – (including soft tissue injuries) - to all body parts. This is used extensively, and reliably by the Judiciary, who couple their own expertise and good case law, when making awards of damages to genuine, injured Claimants. There is no justifiable reason to tamper with this system of assessing damages, other than to satisfy the Insurers desire to pay genuinely injured Claimants less by way of compensation.

The Judicial College Guidelines categorise minor whiplash injury as an injury from which a full recovery is made within 3 months. The JCG also recognises the existence of minor injuries and provides modest sums for compensation the **lowest award** being £200.

Currently, a Claimant with soft tissue injuries up to 6 months would likely receive an award for their pain, suffering and amenity up to £2500. And associated with that can be significant other losses, such as loss of earnings, rehabilitation costs, travel and care costs, and medication costs.

We have represented injured people, who have suffered injuries at this level, which have resolved around 6 months post-accident but whose lives were significantly disrupted as a result of their injuries. These injuries have resulted in them being unable to work for a period of time - and putting them under severe financial pressure. Without our assistance and representation they would not have obtained the compensation they were entitled to, nor would they have recovered all their additional losses. To define such as a minor injury, and non compensatable is an affront to those genuinely injured people.

Question 4

Alternatively, should the government consider applying these reforms to claims covering nine months' duration or less?

As we have detailed above, an injury of 6 months duration is most certainly not in our view, a minor injury, and should not be classified as such. A nine month injury is almost certainly not a minor injury, and is likely to be chronic, a view we believe would be supported by the Medical profession.

Question 5

Please give your views on whether compensation for pain, suffering and loss of amenity should be removed for minor claims as defined in Part 1 of this consultation? Please explain your reasons.

Stephensons object to this proposal.

It would be completely wrong to totally remove compensation for pain, suffering and loss of amenity. To remove the right to recover any compensation following the negligent act of another person is to intervene in the application of the common law built up in this country over decades and will simply serve to deny genuinely injured people access to justice - which is their basic human right.

If, as a rail passenger, your train is 30 minutes late you are entitled to compensation. If, as an airline passenger you are delayed by a matter of a few hours, you are entitled to £500 compensation. How can the

Government reconcile these proposals in light of the level of compensation awards, made to people who have not suffered any kind of injury, physical or otherwise. It is nonsensical, unworkable and completely discriminatory.

In addition it simply cannot be right that a person who sustains soft tissue injuries as a result of an accident at their place of work is able to claim compensation, but a driver or passenger in a motor car who sustains the same injury is unable to claim.

We would question what is the main justification for these reforms? Is it simply to crack down on the proven fraud, which statistically is not proven.

We are yet to see the Insurance industry provide cogent evidence of the level of fraud alleged as a main driver behind these reforms. The Government in the consultation paper, states it is committed to reducing the number and cost of minor RTA related soft tissue claims. The evidence is however clear - that the number of such claims is falling, and that the costs borne by insurers, post LASPO is also significantly falling, and will maintain their impact.

There is no evidence that compensation paid for such claims "is too high" for the suffering endured. General Damages are prescribed by the Judicial College Guidelines.

For those in our society who are "Just about Managing", the sums we are referring to represent a significant proportion of their income. To deprive anyone of the right to compensation, particularly this class of individual and other vulnerable people in society, is fundamentally and morally wrong.

Motor insurance is compulsory in the UK. The removal of damages would undoubtedly have a negative impact on this, as Consumers - (unlikely to see any reduction in their motor insurance premiums) - become aware of the fact that damages have been removed and will question what value there is in paying their motor premiums, the result being a rise in the number of uninsured drivers on our roads

Question 6

Please give your views on whether a fixed sum should be introduced to cover minor claims as defined in Part 1 of this consultation.
Please explain your reasons.

Stephensons object to a fixed sum and indeed any sort of tariff scheme.

However, if such is to be introduced, which is of course preferable to the removal of damages entirely, then such a tariff should be reasonable and in accordance with the JC Guidelines.

The JC Guidelines are in essence, a tariff scheme, one which enables flexibility to reflect injuries and how the same affect an individual. Loss of amenity, pain and suffering vary greatly from individual to individual, depending on many factors, including age, pre accident physical and mental health, occupation, personal

circumstances, life experience, etc. Under a tariff system, the ability to assess an individual would be eroded, and would mean those most vulnerable would be discriminated against.

This would not be fair and would erode access to justice.

Question 7

Please give your views on the government proposal to fix the amount of compensation for pain, suffering and loss of amenity for minor claims at £400 and £425 if the claim contains a psychological element. Please explain your reasons.

We repeat our objection to the introduction of a fixed sum. However, should the same be introduced they should reflect current awards. It would appear that the sums referred to by the Government in the consultation paper bear no resemblance at all to current awards or the JC Guidelines, and one must ask on what evidential basis such sums have been selected.

If this is based on Industry data, collated from sources such as Colossus, COA etc., then there is a serious question regarding bias, but also regarding the reliability of this data, not simply from an impartiality perspective, but based on the fact that this is purely insurers settlement data, and does not include judicial awards.

It should also be noted that the JC Guidelines referred to within the Consultation are the outdated 12th version. The 13th version was published prior to the publication of the Consultation on 17th November 2016.

Our views in relation to the derisory £25 “supplement” should the injury include a psychological element is a mere mockery and serves only to trivialise those who suffer mental illness. It demonstrates a complete lack of understanding and indeed compassion on behalf of the Government of such injuries and is in direct contrast to - for example, the “Time to Change” campaign, partly funded by the Department of Health, whose aim is to end mental health discrimination.

Looking at proportionality issues, as we are required to by the CPR, the levels of damages suggested are wholly disproportionate to the costs of obtaining a medical report and indeed issuing the claim at Court.

Question 8

If the option to remove compensation for pain, suffering and loss of amenity from minor road traffic accident related soft tissue injury claims is pursued, please give your views on whether the “Diagnosis” approach should be used. Please explain your reasons.

We repeat that we do not agree with the removal of compensation for PSLA and feel that both the diagnosis and prognosis approaches suggested are problematic.

However, if one is to be used, our preference is for the Prognosis approach.

The diagnosis approach goes against the widely accepted rehabilitation code which should be followed by all parties to ensure a claimant makes the best possible recovery. This is a fundamental part of the claims process. For a claimant to have to wait for a period of six months without seeking any medical assistance or being provided with any independent medical advice is detrimental to the claimant and their recovery and is designed purely to prevent genuine claimants from claiming.

In addition such approach would have the unintended consequence of placing further burden on Government resource, such as the NHS who would be subject to additional cost of funding rehabilitation, and other associated costs, such as investigative tests and prescription costs. This will lead to further administrative costs for the Government, generated by the additional work the DWP and CRU will have to undertake as a result.

More people will remain off work for this period, which again will result in many unintended consequences.

The opportunity to examine injured claimants when their symptoms were most severe would be lost - and the presentation at a later date leads to problems due to the passage of time. This would result inevitably in the production of addendum reports, which means more cost. A report after six months will not suffice or ensure the claimant is properly or fairly compensated for their injuries.

It would leave injured Claimants in a financially pressurised situation. Again, an attack on some of the most vulnerable in society.

Question 9

If either option to tackle motor claims (see Part 2 of the consultation document) is pursued, please give your view on whether the prognosis approach should be used. Please explain your reasons.

Stephensons prefer the Prognosis approach, which is broadly in line with how things currently operate. Coupled with MedCo, which is operating well, this approach is most certainly the better option.

It would avoid the uncertainty and delay that the “Diagnosis” approach would create, and would also relieve pressure from, in particular, the NHS.

Question 10

Would the introduction of the “Diagnosis” model help to control the practice of claimants bringing their claim late in the limitation period? Please explain your reasons and if you disagree, provide views on how the issue of late notified claims should be tackled.

As previously detailed, the “Diagnosis “ approach would deter genuinely injured Claimants from making a claim, and could have the opposite effect of encouraging more claimants to wait 6 months and then bring a claim.

The Government have not detailed what the diagnosis period is likely to be, but we assume from the consultation that it will be six months. The government have also failed to confirm what the consequences would be should a claim not be brought within a 12, 18 or even 24 month post-accident timeframe, nor have they confirmed whether this would have any impact on any prognosis provided by an expert who will not have seen the Claimant within a six month period. By limiting when a claim can be brought, innocent injured Claimants who have, for valid reason, failed to bring their claim within a prescribed time will be punished. The reasons for delay may perfectly reasonable, such as health problems, or life events (moving house, changing jobs, having a baby) or just simply down to lack of education about the time limits which apply, a problem so often encountered now in relation to the straightforward 3 year limitation period.

In our view, the most effective way to deal with late claims would be to prevent or outlaw cold calling and spam texting. It is the existence of such a prolific practice (more so in other industries such as PPI, solar panels etc. than in PI, but significant nonetheless) that drives late claims. Such "leads", and the releasing of this information – (presumably held by insurers) - to third party companies leads to members of the public receiving large amounts of spam messages, in the form of calls and texts.

The number of complaints received by the ICO about accident claim nuisance calls and texts rose by almost half between 2014 and 2015. This type of aggressive and indeed unlawful "marketing" damages the reputation of the legal profession.

Our view is that the current law on limitation should not be tampered with. It is a highly effective piece of legislation. The IFT's proposals in this area is unworkable, but there are clearly steps which can be taken by all stakeholders, which would address this issue and thus resolve the problem of late claims. Having different limitation periods for different types of personal injury claims would be extremely confusing and unfair to genuine Claimants.

We would refer to alternative proposals suggested by MASS and A2J, relating to the inclusion of source referral details (to be disclosed to the IFB only) on all claim notification forms, and financial (cost) penalties should a CNF be submitted outside the 12 month period, subject to certain, exclusions.

Question 11

The tariff figures have been developed to meet the government's objectives. Do you agree with the figures provided? Please explain your reasons why along with any suggested figures and detail on how they were reached.

Stephensons do not agree with the proposed tariff figures, for reasons previously outlined, because in summary they do not adequately compensate for the injuries sustained. We note we are requested to suggest alternative figures complete with details on how they were reached. The Government however has not within the consultation explained how the figure of £400 has been reached, increasing to £425 should the injury include a psychological element.

The amounts suggested are too low and we note that there is a wide discrepancy between the proposed tariff amounts and the current JC Guidelines amounts. We do not believe that the proposed tariff amounts

would adequately compensate an injured Claimant and would effectively represent a windfall for the Defendant insurer. We have previously observed that the JC Guidelines referred to, is an out of date edition. If any are to be used, it should be the most current edition, i.e. the 13th edition, which should be adjusted to include inflation etc.

From review of the proposed tariff table, we note that psychological injuries based on the suggested tariff amounts, are valued at approximately 13.7p per day, which we believe seriously undermines and trivialises a psychological injury.

The proposed fixed tariff damages table allows for only 6 injury duration periods, covering a 24 month period in totality, with the longest duration period covering 6 months (0-6 months) and the second longest covering 5 months (19-24 months). We are of the opinion that the grouping of such long duration periods together, could result in an injustice for the injured Claimant. We note that a Claimant who is injured for a period of 6 months, with no psychological injury would receive the same amount of compensation as a claimant injured for a matter of days, i.e. £400.00. Similarly, someone who has been injured for a period of 24 months would receive the same by way of compensation as someone injured for 5 months less, i.e. 19 months. This is unjust, and may present significant issues when supporting other losses such as care and loss of earnings.

In our experience of dealing with accidents abroad, particularly road traffic accidents, we would sound a note of caution when comparing our jurisdiction to our European counterparts.

Question 12

Should the circumstances where a discretionary uplift can be applied be contained within legislation or should the Judiciary be able to apply a discretionary uplift of up to 20% to the fixed compensation payments in exceptional circumstances? Please explain your reasons why, along with what circumstances you might consider to be exceptional.

It is not clear whether this uplift is in relation to conduct, or in relation to a claim being considered outside the tariff scheme due to the particular circumstances of that individual Claimant.

If conduct of either party, Claimant or Defendant has been unreasonable, then financial penalties at such a level so as to be an effective deterrent should apply, to both damages and costs.

Should an individual Claimant have a particular set of factors which mean consideration outside the tariff scheme is necessary, this demonstrates perfectly why a tariff scheme of such rigidity is not appropriate in personal injury claims.

Question 13

Should the small claims track limit be raised for all personal injury or limited to road traffic accident cases only? Please explain your reasoning.

This consultation is in relation to “whiplash” claims, and is entitled “Reforming the soft tissue injury (whiplash) claims process. Accordingly to include consideration of other types of personal injury claim is inappropriate and misleading and will mean that access to justice for genuinely injured Claimants is removed.

The dramatic proposed increase in the small claims track is unfair in relation to road traffic claims and is firmly rejected by Stephensons. As is any suggestion that an increase should apply to all personal injury claims. To do otherwise would be to bring into the equation other, more complex personal injury claims, including clinical and dental negligence claims. Such are neither simple nor straightforward and require legal representation regardless of value.

A value of a claim does not equate with its complexity. Bringing such claims within this suggested small claims rise would mean a denial of justice in such complex and life-changing claims which have the potential to improve the provision of taxpayer funded medical and dental treatment in this country.

Question 14

The small claims track limit for personal injury claims has not been raised for 25 years. The limit will therefore be raised to include claims with a pain, suffering and loss of amenity element worth up to £5000. We would, however, welcome views from stakeholders on whether, why and to what level the small claims limit for personal injury claims should be increased to beyond £5000.

Stephensons accept that the small claims track limit has not been raised for 25 years, and accepts there may be an argument for an increase in the limit, but that statement ignores the fact that consideration has been given numerous times to the raising of the small claims limit, with the outcome always being that for many, considered and educated reasons, it should remain as is, i.e. at £1000 for personal injury claims. Those considerations confirmed the limit to be reasonable as it is set to exclude minor injuries, but enables Claimants to be legally represented where they would be unable to bring a claim themselves without legal representation. The reasons such reviews concluded that limit should stay at the £1000 level have not since the reviews were undertaken, changed. Reforms introduced since 2010 still require time to bed in and take effect, the results of which are yet to be analysed.

The arbitrary figure of £5000 has no base in evidence. If an increase is to be implemented, it should sensibly and appropriately assessed on an inflationary basis.

There will be many unintended consequences of this proposal, such as increase in Litigants in Person (LiP’s), which will only serve to add further pressure on to our already overstretched Court service (which will have been further impacted by a dramatic reduction in Court fees as a result of more cases falling under the small claims track limit). Who will assist these LiPs? Whilst acknowledging the valuable work offered by CABs and other charitable organisations, they simply do not have the funding, resource or skills to fill the breach left by the job done by thousands of specialised PI lawyer’s day in, day out.

Huge numbers of law centres are shutting, as are CAB’s, who offer limited hours and assistance and Court staff also do not have the time or indeed expertise, to offer advice, which in any event is beyond their mandate and job descriptions.

It will undoubtedly lead to a rise in the already growing and unregulated sector that is paid McKenzie Friends. Such cannot hold themselves out to be legal representatives or conduct any advocacy. The government consultation on McKenzie Friends is awaited, as is the Bar Council's research with the University of Cardiff into this area, but we strongly agree with their recommendation that McKenzie Friends should only be permitted to assist a Claimant if they are unpaid.

There would be a requirement to overhaul the entire White Book and Civil Procedure Rules, which were written for and by Lawyers, not lay people and are inherently complex. Does the government expect LiP's to pay costly subscriptions to be able to access such tools? Or will the Government start to reopen local libraries and make such material available to the public?

The Consultation makes no references to the issues faced by certain demographics, for example those who cannot read or write, or to a poor level (which is estimated to be in the region of 12 million adults in the UK), those Claimants whose first language is not English, those without internet access, the old, the infirm, the disabled, protected parties and children. Or simply those who work, have families and simply can't devote the time required to run their own case. There is an assumption that everyone can be a LiP and run their own case, which is naïve assumption. It would be a real David –v- Goliath scenario.

The consultation states that small claims hearings are often "not in a formal courtroom setting", but as PI practitioners, we are aware that this is very often **not** the case. Our local County Court is situated in the very formal Magistrates Court., so every hearing is in a very formal Courtroom setting. Such cases being often heard in Court, by members of the Judiciary, with rules of evidence which Claimants are expected to follow. It is, without doubt, an extremely daunting prospect for the lay individual.

Litigation is an extremely stressful and intimidating process to go through, even with the benefit of legal representation.

At present, the obligation to pay legal costs acts as a check and balance on an insurer's claims handling and decision making process. If this is removed, insurers will have little or no incentive to deal with claims in an efficient and fair way. They may well seek to deny liability in as many cases as possible – (which in our view, should mean such cases are excluded from falling within the small claims track limit and be an automatic exit trigger) - whether such denials are justified or not, safe in the knowledge that a LiP is less likely and indeed able to challenge their stance.

It would fuel an increase in CMC activity, who are currently difficult to regulate and manage, such prediction being that the new regulator will take to 2020 to be fully resourced and in a position to bring the same under control. It seems ironic that the Government, who fairly recently viewed CMC's as being the root of the (perceived) claims culture problem, are now apparently of the view that they are now an alternative and a reasonable solution in the personal injury sector.

The consultation paper fails to confirm what regulatory system/professional indemnity insurance will apply to CMCs and McKenzie Friends to ensure claimants are afforded the same protection they currently have when they instruct a member of the Legal profession.

The figure of £5000 is not a reasonable suggestion, and as such anything above that even less reasonable or indeed fair.

Question 15

Please provide your views on any suggested improvements that could be made to provide further help to litigants in person using the Small Claims Track.

In our view the Small Claims Track is wholly unsuitable in its current format, to deal with Personal Injury claims.

Numerous changes would have to be made to accommodate the vast influx of LiP's, including increasing Court staff, including increased Judicial time, more education of the public in how to be a LiP, overhauling of the relevant legislation and Court forms etc., the list is in reality endless.

We would refer to the extremely comprehensive response to this question provided by MASS.

Question 16

Do you think any specific measure should be put in place in relation to claims management companies and paid McKenzie Friends operating in the PI sector.

Please explain your reasons why.

As previously outlined, these proposals, if implemented, will lead to a frenzied increased in the number of CMC's and McKenzie Friends operating, in a mostly unregulated manner, within the PI sector. It of course goes without saying that the latter, and indeed most likely the former, have no legal training or expertise, nor are they insured or accountable as members of the Legal Profession are required to be - for the protection and benefit of the injured Claimant.

The recommendations of the Brady report into the effective regulation of CMC's (only recently transferred to the FCA, who are unlikely to be resourced and ready to undertake such a role properly until 2020) are yet to be implemented and we would be extremely anxious if such proposals were implemented before the same were undertaken. The CMC market is currently volatile and fairly chaotic. The frenzied activity that would follow should these proposals be implemented cannot be underestimated and could result in a PI sector which becomes completely out of control, descending into more chaos.

Injured claimants are best and most properly represented by legal professionals, who are closely regulated, both in terms of activity, behaviour, supervision and training and who are fully insured and accountable.

Question 17

Should the ban on pre-medical offers only apply to road traffic accident related soft tissue injuries.

Please explain your reasons why.

It is the fundamental objective in any claims process to get claims settled as quickly and efficiently as possible and that includes the making of reasonable and sensible offers as soon as is practicable and supported by evidence.

However, the practice of making pre medical offers is viewed by many as negative within the claims process.

This consultation is looking at “whiplash” claims, so any comment should be confined to that type of injury. However, if banning pre-meds, it seems perverse to do for some but not all.

And the making of pre-med offers to a LiP is entirely different than making it to a Claimant who has legal representation.

Question 18

Should there be any exemptions to the ban? If so what should they be and why?

All or nothing would be Stephensons view.

Question 19

How should the ban be enforced? Please explain your reasoning.

There needs to be clear, unambiguous rules surrounding pre-medical offers, with harsh financial penalties if not complied with. A central record of all “incidences” should be created, which could be monitored by something akin to a “Behaviours Committee”, who could identify trends and repeated offenders and take appropriate action.

Question 20

Should the Claims Notification Form be amended to include the source of referral of claim? Please give reasons.

Yes but on the strict proviso that such information is passed only to the IFB and NOT to insurers.

Question 21

Should the Qualified One-Way Costs Shifting 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.

This question has been drafted without considering the correct rules. The relevant rules on QOCS are found not within Part 38.4 of the CPR, but 44.13 and 44.15 and a fraudulent claim cannot simply discontinue with impunity in accordance with Practice Direction 12, 4(c) to CPR 44.

As the rules currently stand, allegations of fundamental dishonesty can still be tested by a Defendant, without the Notice of Discontinuance being set aside.

Call for Evidence

We understand the deadline for responses in relation to this section is not 6th Jan and that further time will be given to these.

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).

Question 23

What (if any) further suggestions for reform would help the credit hire sector, in particular, to address the behaviours exhibited by participants in the market.

Question 24

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

This is an area which has already been subject of an extensive review by the CMA, spanning two years. And these questions are not application to the Whiplash reforms.

Question 25

Do you think a system of earlier notification of claims should be introduced in England and Wales?

No. As outlined previously in our response, there is no requirement to tamper with the current legalisation surrounding Limitation. To do so would create an overly complex position. Please see our previous responses for suggestions to resolve issues relating to late notification of claims.

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.

Stephensons view is that this is a poor proposal, in part spurned by anecdotal evidence which is unsupported and indeed incorrect.

There are many reasons why Claimants do not seek medical attention within a particular time frame. Work commitments, home commitments, unavailability at the GP practice of appointments. To impose such a draconian requirement would serve only to add more pressure on to GP's and walk in centres, and of course create a very unjust situation.

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 4 appears to us to be the most sensible. But it is not without its complexities.

Question 28

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

Enforce the Rehabilitation code more uniformly, and the only way to do that is to make it compulsory.

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?

Disagree, as with many of these proposed reforms, it would create a huge injustice for those less well-off Claimants, the "jams" in society.

Question 30

A new scheme based on the "Bareme" approach, could be integrated with the new reforms to remove compensation from minor road traffic accident 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 it's development?

Only advantage is that compensation is linked to extent of injury, but other than removing damages for minor soft tissue injury, how does that differ from what we already have.

Question 31

Please provide details of any other suggestions where further government reform could help control the cost of civil litigation.

As is probably clear from our response to the questions raised in this Consultation, Stephensons strongly believes the focus of these reforms should be on tackling any fraud element within the PI sector, but not at the expense of removing the right of genuinely injured people, however they were injured, to claim compensation. And that the focus should remain on what the consultation paper was prepared in relation to, Road Traffic accidents.

Cold calling and spam texting must be banned, which would revolutionise the PI sector in so far as it would remove this disruptive activity from the sector.