Written evidence from Auxillis

Executive summary

- The definition of whiplash is too broad and encompasses some serious and debilitating consequences of Road Traffic Accidents.
- The rise in whiplash claims generally has been caused by the increased propensity of insurers and insurance brokers to refer injured clients to solicitors to make money, not by a 'compensation culture'.
- The suggestion that whiplash claims are an 'epidemic' and 'out of control' is simply not supported by the facts, claims are if anything on the decline.
- The prevalence of fraud is exaggerated. The industry's own estimate is that 11% of claims are 'tainted by fraud'. Not fraudulent, fraud is suspected. This means that more than 89% of whiplash claims are perfectly genuine.
- The vast majority of fraudulent claims are when the claim is launched a significant time after the incident. Reducing the limitation period would have two effects. Reducing fraud; making cold-calling uneconomic.
- The tariff for whiplash claims is unfair and disproportionately low compared to other compensation payments available in other circumstances.
- Raising the small claims limit is likely to produce a series of unintended consequences that will place burdens on the court system; reduce access to justice to genuine claimants; increase fraudulent and spurious claims via CMC's.
- At present CMC's find and refer a very small proportion of whiplash claims to solicitors. Claims that they refer have a disproportionate level of fraud and the cold-calling activities are a public nuisance. The tariff proposed and the use of small claims track and in time online courts will open the market up to CMC's to offer web-based claim services with little or no scrutiny and no professional duty to present valid claim. Defending these may be uneconomic for insurers.
- The Governments initiative is misconceived in that it will disadvantage genuine claimants but could facilitate fraudsters and the reduction in premiums which these reforms are meant to produce will not materialise.
- Claims that Britons have the 'weakest necks in Europe' is to compare only one aspect of the different judicial processes that exist in different jurisdictions out of context, therefore meaningless.

About Auxillis

Auxillis (Auxillis Ltd and Auxillis Services Ltd) is primarily involved in accident management including legal expenses insurance; credit protection; credit hire and credit repair and has been for over 25 years. It is the leading UK Company in this sector serving over 150,000 non fault accident victims per annum. The company works in partnership with the leading 'Direct' insurers providing services to their policyholders who have been innocent victims of non-fault accidents. Auxillis has a reputation for excellent customer service with ratings above 4* on leading review sites.

The businesses had a great deal of experience in personal injury, at one time it placed more than 20,000 personal injury claimants with solicitors each year. Personal injury is no longer a material part the business model, but it is still active in the field and two associate companies are SRA

regulated solicitors' practices that handle, amongst other classes of business, claimant personal injury claims.

The Evidence

1) **The definition of whiplash and the prevalence of RTA-related whiplash claims.**
   - **a)** Whiplash is defined in the act as any soft tissue injury. Soft tissue injuries comprise damage to muscles, ligaments and tendons throughout the body. Damage can include contusions; sprains and strains. It can be immediately seen that this definition goes far beyond the whiplash problem as presented by insurers. It is widely accepted that is difficult objectively diagnose whiplash. Bruising and sprains can be evidenced so these injuries and other similar traumas should not be caught up in this provision.

   b) The ABI, insurers and Aviva in particular point to a fall in reported Road Traffic Accidents[2] and contrast this with a rise in personal injury claims. This is a carefully chosen statistic. They could more easily compare injury claims with their own claim statistic. But the reported accidents have fallen for other reasons, a decreased propensity to report linked to the Police's decreased inclination to record having limited resources and other priorities. The period chosen also includes the advent of the LASPO reforms and a spike in claims made as a result. A2J has published compelling statistics to show that personal injury claims are actually on the decline[1].

2) **Whether or not fraudulent whiplash claims represent a significant problem and, if so, whether the proposed reforms would tackle this effectively**
   - **a)** Fraudulent whiplash claims do not represent a significant problem for insurers. Insurers themselves say that over 89% of claims made are entirely genuine[2], 11% are said to be 'tainted by fraud', not fraudulent - possibly fraudulent or exaggerated. The problem for society is the marketing activity that generates these fraudulent claims. It is said that 10% of whiplash claims are said to be made over 300 days after the accident[3], it is within these claims that the majority of fraud and expected fraud lie and these claims are the province of claims management companies using the marketing methods that cause so much nuisance to the general public. This can be tackled by reducing the limitation period to, say, 12 months allowing for exceptional cases to be advanced out of time on application to a court.

   - **b)** The proposals may not address fraud in the way the Government envisages. A simplified process, online courts and small payments invites the fraudsters on. No longer will a solicitor be qualifying the claimant's story. If a solicitor takes a case forward and it fails, the firm loses real revenue. All sorts of CMC's and fraudsters will be able to take advantage of the new processes and insurers may not have the appetite to defend such trivial sums. In the meantime the genuine claimants will have had their compensation slashed and will have no costs protection when trying to claim for other losses. Loss of earnings, property damage, incidental expenses and their insurance excess. Unintended consequences are a certainty. Take, for example, admission of liability. Before the Woolf reforms many insurers would not admit liability in accidents. Policyholders were (and are) exhorted not to admit liability at the scene. The innocent victim was then faced with paying a solicitor to recover uninsured losses and if the amounts involved were small (excess) then the victim had no support. These proposals risk re-creating those conditions. Insurers will, over time, find that not admitting liability and relying on the victim's unfamiliarity with the processes will avoid having to pay out on legitimate claims. These proposals facilitate fraud, slash payments to genuine claimants and prejudice rights of innocent victims.

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[1] http://www.claimsmag.co.uk/2017/03/new-evidence-a2j-commissioned-report-shows-no-correlation-whiplash-claim-numbers-rising-motor-insurance-premiums/8436

[2] http://media.aviva.com/uk/pdf/rtr-driving-a-better-deal-summer-2016.pdf page 7

[3] IBID page 6

3) **The provisions in Part 5 of the Bill introducing a tariff to regulate damages for RTA-related whiplash claims, with an uplift in exceptional circumstances; and banning the settlement of claims without medical evidence.**

a) The tariff as proposed slashes the amounts recoverable by 20%-90% when compared to the average awarded in 2015. At the lower end the payments are derisory and in no way reflect pain, suffering and loss of amenity suffered by genuine claimants (the vast majority). The awards set by the courts reflect judicial views on the appropriate level of compensation for the injuries suffered. The tariff appears to be arbitrary. For 3 months pain the award will be £225. Compare this with a late train, £25, a late or cancelled flight up to £500.

b) The 'exceptional circumstances' uplift could spawn a raft of satellite litigation and judges struggle to define 'exceptional' with no guidance from the legislation. At one level every living person is 'exceptional'. The risk of the exceptional becoming the norm is probably low as our judges are blessed with common sense, but a series of trials will be needed to define what can be regarded as exceptional.

c) Banning the settlement of claims without medical evidence does, on the face of it, seem to have merit. But if Medco is to appoint the medical expert, and Medco is not available to the public, only to lawyers, it is unclear how this will operate. If all claims are to go into the RTA portal, at present access is restricted to lawyers. If the public and non-lawyers are to have direct access then the important filtering effect performed by lawyers is lost and it could be a free for all.

4) **The impact of raising the small claims limit to £5,000 for RTA-related whiplash claims, and of raising the small claims limit to £2,000 for personal injury claims more generally, taking account of the planned move towards online court procedures.**

a) **Further reduction in compensation for victims**. At £5,000 all RTA soft tissue injury claims as set out in the tariff will be excluded unless there are other heads of claim. The fixed costs paid to lawyers in small claims cases are trivial. Most clients without an LEI policy will be asked to enter into a CFA ceding 25% of their recovered damages and will be asked to purchase an ATE policy for £80-£300, leaving precious little for the injured party.

b) **More low value claims.** At present very few small claims track PI claims are made. Solicitors just not prepared to run them, however, post-reforms organisations, including but not restricted to solicitors, will set up simple processes with little or no filtering to process these claims leading to increased costs as a higher number of small, even frivolous claims are presented to insurers.

c) **Potential for claims inflation**. For non-tariff claims below £5,000 judges will be aware that claimants are paying for services out of damages. I other jurisdictions this had led to claims inflation with judges raising awards to compensate for the changes in funding arrangement.

d) **More litigants in person.** It has been widely recognised, including comments made by this committee, that another unintended consequence will be a rise in LIP's attending court. This will use up a deal of judicial time and cause adjournments and increase pressure on the court system as claimants will in many cases not have prepared their claim to the standards required.

e) **Simplifying procedures and online courts.** In cutting out the solicitor the process will, as we have already mentioned bypass a key filter that removes many fraudulent and frivolous claims from the system. To deal with the rise in LIP's and to bypass both solicitors and CMC's the processes will have to be hugely simplified and in time moved online. This places vulnerable consumers at real risk of under-recovery and losing their ability to claim all together, at the same time making it easier for fraudulent and exaggerated claims to be made.

f) **Rise of marginal businesses.** Where injured parties are invited to take the claim forward themselves, without legal assistance inevitably a number of new ventures will spring up to provide 'services'. Some will be legitimate, many will not. There is potential for the pace of cold-calling to increase rather than abate. The whole PPI debacle rumbles on with 'click bait' advertisements everywhere online and, e-mails and cold-calls still being made in the tens of thousands, if not millions.

g) **Insurer referrals.** At present by one LASPO compliant method or another, insurers refer clients with soft-tissue injuries to solicitors and receive value for so doing. This has real value to the policyholder because (from real hands on experience) insurers perform continual due diligence to ensure that the company they refer their policyholder to behaves properly and gives good service. If a complaint occurs the referring insurer can apply massive pressure to the solicitor, far more than available to any single customer to get the problem resolved. If this is no longer commercially viable then victims will be left to their own devices. The idea that a consumer looking for a service provider in these circumstances will pitch up at the door of his local solicitor is fanciful. Businesses with marketing power will sweep up these customers and extract value that will no longer go back into the insurance industry paying out the claims.

h) **BTE market**. At present the BTE insurers face very low claims ratios, not because no losses are suffered but rather the supply chain absorbs the costs. As a result the underwritten premium is very low though the product is sold for £25-£40 per policy. This means that the insurance providers; (insurers and brokers selling motor insurance); receive a high margin profitable income stream that can be used to keep motor premiums down. The changes will mean that the supply chain can no longer absorb the costs and claims ratios will rise and the underwriting cost will rise. To maintain income and profitability the motor insurance industry will either raise the cost of the add-on policy, or it will have less income with which to subsidise motor premiums and they will rise. A perverse outcome.

5) **The role of claims management companies in respect of these matters.** At present claims management companies are marginal referrers of whiplash claims as attested to by Aviva in a limited, but significant customer survey[4]. In 2014 only 9% claimed via a CMC, down from 11% in 2013. The vast majority of claims come via insurers or brokers and of course PI solicitors though most of their referrals will have come from within the insurance industry. The tariff and simplified processes could easily increase the percentage of fraudulent and exaggerated claims and encourage numerous enterprises to both encourage claims, and profit from them

6) **Oral evidence to the Committee by the ABI and APIL.**

We would like to take this opportunity to add a few points to the Oral evidence given to the Committee in a recent session. We were heartened to see the Committee taking a robust line with both witnesses. There were, in our opinion, some gaps in the evidence as presented and these following paragraphs are intended to aid the Committee in its consideration of the evidence

a) **Q36 *Alberto Costa:*** *Chair "Come to us. Take out a premium to reduce the risk of not having any compensation for whiplash"?..... by the very companies you represent, as a reason to take out an insurance product.*

This refers to the BTE product and its consequences as set out in 4 h above. There can be little doubt that these proposals will increase the cost of BTE insurance, perversely driving up insurance

[4] https://www.aviva.com/media/upload/Road_to_Reform_July14.pdf

costs while delivering lower benefits to the consumer because the level of compensation will be slashed. Overall a very bad deal for the motoring public

b) ***Q46 Kate Green:*** *We do not know who would be the losers from such a policy.*
James Dalton: *Car accidents affect everyone, and the nature and characteristics of those experiencing whiplash will be the spectrum of society.....*

One does not know if Mr Dalton hasn't thought about this, or was obfuscating. It is intuitively obvious that the more disadvantaged in our society (in particular the 'Just About Managing' group that the Prime Minister picked out in her inaugural speech - now rebranded as 'Ordinary Working Families') will be disproportionately affected by the proposed changes.

In any accident being in the larger; newer and more expensive car equipped with the most up-to-date safety related features is a major factor in avoiding injury. Those on middle and low incomes are more likely to be in older, less sophisticated vehicles with fewer safety features. The relatively modest sums of compensation in most whiplash claims are significant to those on middle and low incomes, but far less important to those on higher incomes. Making an injury claim is actually quite involved, many victims do not bother. In our experience 30% of those that say they suffered some form of injury after the accident do not go on to make a claim. A fact not mentioned anywhere in the debate on the supposed 'compensation culture'.

c) ***Q63 Chair****: Why do there seem to be significantly more whiplash claims in this country than other comparable countries?*

In all of the whiplash debate this is the area where we think that the analysis has been most facile. To compare different jurisdictions and legal systems on the basis of one class of claim is preposterous. Many European countries have a codified legal system; the UK has law of precedent with compensation and levels of damage set by the independent judiciary.

With all of its faults; costs and delays the UK Courts deliver a phenomenal service in comparison with our European neighbours. It is (relatively speaking) simple to raise a claim for compensation of any sort and the UK, costs follow the event. So if a claimant wins both damages and costs in the claim are recoverable. Not to be able to recover costs is a massive disincentive to claim in many other jurisdictions.

In short, victims in the UK claim compensation because they can. In many other countries, they can't. Combine this with the propensity for insurers and brokers to capture and refer claimants to solicitors and the answer to question 63 is clear.

31 March 2017