Ministry of Justice

Statutory review of the whiplash tariff – a call for evidence

A response by the Association of Personal Injury Lawyers

March 2024

Introduction

We welcome the opportunity to respond to the Ministry of Justice' statutory review of the whiplash tariff. We maintain our position that the whiplash tariff is derisory and offensive, and does not provide access to justice for injured people. While we acknowledge that this review will not consider the overall policy objectives of the reforms, we believe that it is vital to view the tariff in light of those objectives and whether they have been met. The tariff was introduced to strike a balance between fair compensation and fairness for insurance policy holders. The data reveals that there has been fairness for neither. Many more people than originally envisaged are needing to pay for legal representation because they are unable to run these claims themselves. Despite the intention of the tariff and Online Injury Claim (OIC) portal to simplify the claim process, and reduce friction and arguments, challenges around quantum remain, and most cases that have entered the OIC have yet to settle. The corollary of this is that many people have been deterred from pursuing a whiplash claim at all. The cost, time and effort of pursuing these "straight forward" claims for such a meagre amount of compensation has meant that the number of these claims has plummeted dramatically since 2021. This is not access to justice.

There has also been little discernible benefit of the reforms for insurance policy holders, with car insurance premiums increasing by 90 per cent, while claims have fallen.

If the tariff system is to remain, despite its failure to achieve its objectives, there must be uprating for inflation; and consideration of the fact that most claimants are finding it necessary to pay for legal representation to navigate the OIC. Clear definitions of "minor psychological injury" and an "exceptional uplift" would go some way towards addressing some of the "pinch points" and delays experienced. More must be done to address the technological issues experienced within the portal - a system supporting the tariff must be easily accessible and efficient to use. On mixed injuries, the Supreme Court judgment in *Rabot v Hassam*[1] will provide clarity as to how to value these cases. We also suggest that the evidence of an increase in these claims is viewed in the context of an overall decrease in claims.

We are disappointed to note that the list of consultees is weighted heavily towards defendant firms and insurers, and we would ask that in considering responses, the Government takes into account any potential bias as a result of this weighting.

General comments

Child claims

We believe that there is an error in this call for evidence on page 49. The wording here states:

[1] **[**2024] UKSC 11

"*It should be noted that certain claims are exempted from the RTA Small Claims Protocol and the tariff. These are claims where the claimant is child on the date the claim is started and where either the claimant or defendant is a protected party as defined in rule 21.15 ."*

Our understanding is that while child claims are excluded from the road traffic accident small claims portal and OIC portal, child claims are not exempt from the whiplash tariff. In order to review the tariff properly, there must be an accurate understanding of how it applies.

Second medical reports

One wider area which needs addressing to ensure that these claims remain economic to run, and to preserve access to justice, is in relation to second medical reports. Currently, a fixed fee of £750 is recoverable for a second medical report (provided for in Part 27 of the Civil Procedure Rules[2]) for claims in the Online Injury Claim portal. Second reports are not required in most cases, but in some cases, the initial medical expert will highlight that a further report is needed, for example in relation to dental or ophthalmic injuries. The cost of this second report can be far higher than the £750 recoverable. One member was quoted £4,000 for a dentistry report that would be needed to progress the case. This would leave a shortfall of over £3000 that must be made up either by the claimant or their legal representative if they have one. This could be five or six times the amount that they would receive in compensation, and is mostly likely to deter the person from continuing with the claim. While second medical reports are not an issue in every case, and the example above relating to dentistry is an extreme demonstration, even in cases where the claimant would need to pay £100 or £200 towards the medical report, when the compensation received is so low this amount can be enough to deter people from pursuing the case.

The current cap of £750 in Part 27 of the Civil Procedure Rules applies in all small claims cases and is not tailored specifically to personal injury or whiplash claims. There is therefore no consideration within the cap of the current market rate for medical reports in these cases. We would recommend that there is not a fixed fee for second reports, and instead there should be alignment with other personal injury pre-action protocols regarding further medical reports. Claims in the Ministry of Justice Portal are governed by CPR Part 45.62. This provides that there is no cap on the recoverable cost, but the cost must be justified. This approach should be adopted for OIC portal claims, as it retains a mechanism for control of costs by the courts and compensators, but removes the unfairness of an arbitrary fee that does not reflect market prices and creates funding issues for the claimant.

It should also be noted that the issue with second medical reports has been exacerbated by the uncertainty around the definition of "minor psychological injury", set out below in answer to question 2. The uncertainty means that more second medical reports are needed than was originally intended when the reforms were introduced. The pre-action protocol for small claim road traffic accidents sets out at 7.4(4) that "it is expected that only one medical report will be required".

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[2] Disbursements for Online Injury Claim claims are governed by Practice Direction 27B. 1.14 (1) of Practice Direction 27B sets out that Rule 27.14(2)(f) will apply to experts' fees, including those of non-medical experts, to limit such fees to a sum not exceeding the amount specified in Practice Direction 27A paragraph 7.3(2) for the fees of each expert except where sub-paragraph (2) applies. 7.3(2) of Practice Direction 27A sets out that "The amounts which a party may be ordered to pay under rule 27.14(2)(e) (loss of earnings) and (f) (experts' fees) are…for experts' fees, a sum not exceeding £750 for each expert"

Overarching reform objectives

It is noted (paragraph 3 of the Call for Evidence) that the Lord Chancellor will consider the likely implications of different possible review outcomes, including the overarching reform objectives of reducing the number and cost of whiplash claims, before a final decision is made. It is also noted that the review will not assess the extent to which the whiplash reform programme measures have achieved their overall policy objectives. However, we believe it is impossible to undertake a review of the tariff figures, without considering whether the reforms have achieved their aims – i.e. has it been worth it?

APIL maintains that the reforms were based on misconceptions and false assumptions – see response to question 15 below, and have led to the denial of access to justice for those who are legitimately entitled to compensation. We also maintain that the tariff amounts are derisory and offensive, and undermine the fundamental principle that claimants should be fully compensated for their injuries[3] Similar injuries can produce very different effects on, for example, a young mother nursing a baby, a professional fitness instructor, or those who are already vulnerable such as the elderly, who may suffer a complete loss of confidence as a result of a "minor" whiplash injury. The amounts awarded in the tariff take no account of impacts such as sleep disturbances, the inability to undertake personal care or care for dependants, for example.

The Government stated in Part 3 of its response to the "reducing the cost and number of whiplash claims"[4] that the introduction of a fixed tariff of compensation provides a proportionate approach to compensation pain, suffering and loss of amenity for soft tissue injuries in RTA cases, and a fair balance against the interests of consumers paying motor insurance. This response included a table, which set out the average payment, the range for Judicial College Guidelines (JCG), and then the proposed tariff figure. There was no explanation of how the tariff figure was arrived at. When APIL wrote to the Government in August 2021 and raised that no data had been published to explain how the tariff figures had been determined, it received a response as follows: "In setting the tariff, the Government considered several factors, including the suggested guidelines for compensation set by the judiciary, the average level of whiplash compensation paid, and the overall government objectives to control costs and benefit consumers." This suggests that the averages and JCG figures were considered, and then arbitrarily slashed, on the basis that such reductions would benefit consumers. The interests of consumers and the cost of their motor insurance was the driving force behind these reforms. Yet, as set out below in answer to Q15, there has been no benefit to consumers through cuts to their car insurance premiums. All that has happened is that access to justice has been denied.

Our overarching position remains that the tariff approach is unsuitable, unfair, and offensive to injured people. If the Government is not minded to remove the tariff, however, we have engaged with the questions below as to what could be improved to make the tariff and the process for bringing whiplash claims, more workable.

Q1) To what extent do the injury duration ranges in Table 1 reflect the typical duration of whiplash injuries?

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[3] Livingstone v Rawyards Coal (1880) 5 App. Cas. 25

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

The tariff reflects the typical duration of whiplash injuries, however, the tariff increments do not reflect the prognoses provided by medical experts in their reports.

This discrepancy can hinder settlement, particularly when the prognosis in the report falls between tariff ranges. For example, a medical report may include a prognosis of 2 – 4 months. It is unclear whether this would fit within the 1-3 months, or 3-6 months tariff, and there is then argument between the parties about this.

We would suggest that there should be amendment to the tariff ranges, so that is set out in one-month steps, or medical reports should change, to specify the tariff band that should apply to the particular injury.

Q2) In your view, is splitting the tariff into "whiplash only" and "whiplash plus minor psychological injuries" a suitable approach?

There is currently no accepted definition of "minor psychological injury". As such, medical experts commissioned to provide an initial fixed fee report are often unwilling to suggest that there is "minor psychological injury". Instead, if they suspect a psychological injury, they suggest that a further psychological report is commissioned. This can be problematic because not only does it delay resolution of the claim, but there are often issues with the cost of second reports – as highlighted above in "general comments". This uncertainty means that more second reports are required than was originally intended/envisaged, and creates a situation that is contrary to the expectation within the small claims pre-action protocol that only one medical report will be required.

It may not be possible to source a psychological report for the fixed fee recoverable for a second report, and the claimant may be left with a shortfall which completely dwarves – or at least further erodes - the meagre amount of compensation that they are likely to receive in compensation. If a clear definition of "minor psychological injury" is provided, it is far more likely that GPs will feel comfortable in including this in their diagnosis within the initial medical report. Even then, however, we question how some of the experts qualified to provide an initial medical report would ever be able to diagnose a minor psychological injury. For example, physiotherapists are permitted to provide an initial report, but will have no expertise or knowledge in diagnosing any sort of psychological injury. In cases where a physiotherapist is commissioned to provide an initial report, there will always be a need to commission a further report – with the cost and delay associated with this – should there be an element of psychological injury.

Q3) How simple is the tariff to understand, use and explain?

As a mechanism, the tariff itself is easy to understand, use and explain to clients. However, there is a lack of awareness among the public around the whiplash tariff and online injury claim. Research commissioned by APIL for its UK Personal Injury Market Briefing[5] found that only 32 per cent of claimants had heard of Online Injury Claim, and only 6 per cent had used the OIC themselves. This indicates that those who knew of the OIC only did so because their

[5] APIL UK Personal Injury Market Briefing, December 2023 (available on request)

legal representative was using the system. Members report that most clients have no idea until they seek advice that these injuries are subject to a tariff.

Further, while the mechanism of the tariff is straight-forward, it is very difficult to explain to a claimant the reason that they are only receiving a tokenistic tariff amount, and not full and fair compensation for their injuries. As set out above, a tariff which only factors in the duration of an injury leads to under-compensation, and does not permit consideration of how the injury has impacted the particular individual and their ability to continue in their daily life. We provided several examples of how "minor" whiplash injuries have had an effect on a range of individuals in our response to the Government's consultation in 2017. We repeat them here for completeness:

> *Rolfe v Rohman*
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> Mr Rolfe was correctly proceeding along a road when the defendant pulled out of a side junction and collided with the rear of Mr Rolfe‟s car. Mr Rolfe suffered soft tissue injuries to his neck, shoulders and left elbow, lasting 5-6 months. The injuries caused him discomfort at work for six weeks in relation to lifting objects. He was unable to take part in any leisure activities for six weeks, and suffered from sleep disturbance as a result of his pain. The compensation he was awarded took into account the effects that the soft tissue injury had on the individual, and his daily life.
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> Donnelly v QBE Insurance
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> The claimant was a front seat passenger in a car. A van driven by the defendant collided with them, and jolted her within the confines of her seatbelt. The medical expert reported that the claimant suffered soft tissue injuries to her neck and right shoulder. Symptoms were of moderate severity and were at their most acute for two months post-accident. The claimant's ability to attend to her own personal care and to that of her children was restricted for three weeks. Her ability to carry shopping was restricted for one month. Her sleep was disturbed, on account of pain, for six weeks, and her social life and capacity to undertake chores was restricted for the same period.

Q4) If you have experience engaging with unrepresented claimants, whether advising, providing support, or responding to claims, what is their experience of using the tariff?

We do not have experience of engaging with unrepresented claimants. However, upon review of the Online Injury Claim data, it is clear that unrepresented claimants are struggling to use the system. The number of unrepresented claimants using the system is strikingly low – 90 per cent of the claims submitted within the OIC are submitted by represented individuals[6]. In reality, this percentage is likely to be even higher as some of those who are unrepresented may be assisted by the at fault insurer, or an undeclared Claims Management Company. In their evidence to the Justice Select Committee in March 2023, Carpenters Group suggested that the true litigant in person figure was likely to be closer to 3 per cent[7]. DWF highlighted in their evidence "It should be noted that the vast majority of unrepresented claimants currently using the process are in fact assisted through the process by the at-fault

[6] https://www.officialinjuryclaim.org.uk/media/1415/oic-october-december-2023-data-publication.pdf
[7] https://committees.parliament.uk/writtenevidence/119369/html/

insurer. More could be done in any advertising campaign to reassure claimants that support is on hand."

Further, there are large numbers of calls to the support centre – for the 69,352 claims submitted by unrepresented individuals up to December 2023, there were 44,124 calls to the OIC's support centre[8]. In other words, for every 10 unrepresented claimants, more than six calls are being made to the support centre. This demonstrates that unrepresented claimants do not find the system straightforward or easy to use.

The Government has previously pointed to the data on unrepresented claimants settling claims for similar amounts to represented claimants, and more quickly, as an indication that the portal is working well for unrepresented claimants. However, we suggest that given the amount of cases still within the system, it is not possible to draw any such conclusions from the data at present. We suggest that it is likely that most of the claims resolved without representation have been solved more quickly, but for less compensation than could have been obtained with a legal representation. The judgment in *Rabot v Hassam* was handed down on Tuesday 26 March. Mixed injury claims that had previously stalled should now begin to be resolved, and we expect that any skew of the data will resolve, and the data will then highlight that represented claimants receive a higher settlement, on average. Additionally, professional users have experienced a range of technical issues with the portal, from its inception (see Q6(c)) which have hindered efficient settlement in those cases.

Q5) Do you have any other views on the structure or component parts of the tariff which are relevant to this review?

There is a lack of definition as to what is classed as "exceptional" in relation to the "exceptional uplift". Members report that third party insurers simply refuse to accept uplifted claims. Unless the case is one with a longer prognosis, it is unlikely that the claimant will then go on to challenge this refusal via the courts because the cost to do so would wipe out the amount of compensation they would receive. Therefore, it is simply never applied.

As set out above in our "general comments", it remains unclear how the figures for the component parts of the tariff were calculated. There is no logical basis for the figures, and they were set based on a policy intention of reducing costs for insurance premium holders. This intention has not been met (see below Q15), and this calls into question whether the tariff can still legitimately remain.

Q6) Since the introduction of the whiplash tariff, what changes have there been in regard to the following factors that would be relevant to this review?

a) The volume of whiplash settlements

The volume of whiplash settlements has decreased since the introduction of the whiplash tariff.

Data from the Compensation Recovery Unit[9] highlights that the number of motor injury claims has fallen despite an increase in traffic volumes and road injuries. In 2022, the number of road injury claims was 25 per cent lower than in 2020, despite the number of road casualties being 17 per cent higher. This indicates that fewer people are proceeding to bring claims following a collision. That the number of whiplash settlements is down, while the number of collisions is rising, indicates that there is a "justice gap" caused by the whiplash reforms, as fewer injured people are going on to claim. This is highlighted when comparing data

[8] https://www.officialinjuryclaim.org.uk/media/1415/oic-october-december-2023-data-publication.pdf
[9] See Appendix A

from England and Wales with that in Scotland and Northern Ireland. Compared to when the whiplash reforms were introduced in 2021, the number of motor injury claims has fallen by 14 per cent in England and Wales. At the same time, motor injury claims have increased by 20 per cent in Scotland, and 18 per cent in Northern Ireland. It is clear that in England and Wales, while traffic volumes and casualties have increased, claims have fallen, meaning fewer injured people are going on to claim much needed compensation.

Data also shows that while the volume of claims is down, the volume of settlements within the OIC is down even further. As of December 2023, 383, 644 claims were sitting in the system awaiting some kind of resolution. This represented 55 per cent of all claims submitted to the OIC[10]. OIC data suggests that some claims are "dormant", i.e. stalled at a certain stage in the process, and no progress on the claim has been recorded. That a large number of claims are stalling at certain points should be a cause for concern and calls into question the efficacy of the system.

Only a quarter of OIC cases have reached settlement[11]. For the small number of claims which have settled in the system, the path to settlement has not been speedy. For claims which settled in November 2023, the average time from submission to settlement was 285 days (over 9 months), up from 225 days in November 2022 (an increase of 27%). Delays are likely to continue to rise as cases with more complex injuries and longer prognoses begin to settle in the system. This again indicates that the system is not a quick and simple process, as envisioned by the Government.

b) The composition of the claims market

The reforms have contributed to a decline in the number of practitioners working in the PI sector. Analysis of data obtained from the Solicitors Regulation Authority, Bar Standards Board and CILEx regulation set out the scale of these reductions. Between 2019 and 2023, the number of personal injury law firms in England and Wales fell by 27 per cent – a drop of almost 200 firms. In 2023, PI law firms in England and Wales fell by 27 per cent – a drop of almost 200 firms. In 2023, PI law firms accounted for 5.4 per cent of all law firms, down from 7 per cent in 2019. This consolidation of the market means that there is less choice for consumers.[12]

There are also far fewer claims management companies operating in the personal injury sector following the reforms. We are pleased to note that fears of CMCs flooding the market have not come to fruition.

c) Caseloads

The number of cases being submitted is higher than the number of claims settling (see above at 6a)), so caseloads are increasing. There are a number of factors which have contributed to increasing caseloads, including insurer behaviour, low offers, issues with the OIC portal, and court delays.

The Ministry of Justice states that the "OIC is an accessible and easy to use system for everyone – with or without a lawyer – which reflects the Government's

[10] https://www.officialinjuryclaim.org.uk/media/1415/oic-october-december-2023-data-publication.pdf
[11] https://www.officialinjuryclaim.org.uk/media/1415/oic-october-december-2023-data-publication.pdf
[12] APIL UK Personal Injury Market Briefing 2023 (available on request)

commitment to access to justice for all"[13]. This is not the case – we set out above at Q4 the issues faced by unrepresented claimants. Professional users have experienced delays due to the lack of integration between the portal and firm case management systems. There is also no integration between the MoJ Portal and the OIC Portal, meaning that if a case drops out of the OIC Portal and into the MoJ Portal, all of the information needs to be re-entered from scratch. There should be a direct link between the two portals, to avoid this. There is also an issue with proceedings having to be issued, potentially, twice – for both liability and quantum. Insurers are also asking claimants to attend a quantum hearing when not required at a stage 3 hearing.

In our evidence to the Justice Select Committee in March 2023[14], APIL members reported claims forms being rejected due to the claimant's National Insurance Number having a space wrongly entered; uploading of documents failing randomly; messages sent but not received by the other party; settlement offers not being received by the claimant; and offer amounts being received which differed from what the insurer intended.
The reality is that the process is not accessible, or easy to use, and it does not provide access to justice.

In addition to technological issues, members report that while one of the purposes of the tariff was to remove friction points and negotiation from the process of settling these claims, this has not happened. Instead, insurers tend to employ tactics to make these cases as uneconomic as possible for the claimant. Insurers challenge prognoses given within the initial medical report, and make offers one or even two bands below the correct tariff for that injury duration. These arguments delay settlement and increase caseloads.

Court delays also contribute to increased caseloads, with the backlog meaning that cases are taking longer to be heard, and therefore resolve. Insurers are also exploiting the delays, offering lower amounts to claimants in the knowledge that claimants will not want to challenge the decision as they will have to wait up to a year to receive compensation.

Many cases will also have stalled in the system, awaiting the outcome of the *Rabot* decision in the Supreme Court.

d) Any other relevant factors related to whiplash claims
We have covered "other" relevant factors in answer to questions 6(a) – (d).

7) How has the introduction of the whiplash tariff changed the process of valuing injuries for the purpose of making offers/counter offers?

Mixed injuries have always been a feature of road traffic collision claims. We would also suggest it is too soon to tell whether there has been an increase in mixed injury claims as of yet, as many claims have been awaiting the outcome of *Rabot v Hassam.* It is also important to view any changes in the number and percentage of mixed injury claims in the context of

[13] https://committees.parliament.uk/writtenevidence/119286/html/
[14] https://committees.parliament.uk/writtenevidence/119326/pdf/

claims volumes falling by almost half since 2019, as a report by the Association of Consumer Support Organisations (ACSO)[15] highlights:

> 'The number of personal injury RTA claims has greatly reduced in recent times. In the two years prior to the introduction of the whiplash tariff there were a total of 1,100,028 motor personal injury claims; in the two years after, there were a total of 755,222 motor personal injury claims, a 31.3 per cent decrease. The latest Compensation Recovery Unit data show that motor personal injury claims were at an all-time low for 2023 at 352,230.1 In 2019, the last full year before the introduction of the tariff (excluding 2020 as this was severely impacted by the Covid-19 pandemic), the equivalent number was 653,983.
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> Of this greatly reduced number, the proportion of settled claims involving mixed injuries has, according to the Association of British Insurers (ABI), risen from 26.6 per cent in 2016 to 38.9 per cent in 2023.
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> Such an increase is likely to be because before the tariff, the whiplash injury constituted the vast proportion of the claim; claiming for other minor injuries was not likely to make a material difference to its overall value. The tariff, in reducing dramatically the value of the whiplash injury, led to more claims being made for other, non-tariff injuries sustained.'

Given that there is now very little financial incentive to pursue "whiplash only" claims, these have reduced. Post reform, of the much smaller number of claims left, it is to be expected that there would be an increase in the percentage of claims that include "mixed injuries".

A further point is that there is increased granularity in claims notification forms, which has led to an increase in mixed injuries being flagged[16] because there is a need to be far more accurate and specific than prior to the reforms. With the tariff only applying to "whiplash" and "whiplash plus minor psychiatric injury", it is important to distinguish between those, and any other injuries that may have been suffered. Previously, mixed injuries would not have been picked up in the same way because there was not a mechanism to do so, or a need to be as specific, because the general damages would have properly compensated for both the whiplash and other injuries suffered. Now that the tariff is in place, there is a need to be very specific about the claimant's injuries, so that, even if the claimant cannot be properly compensated for the whiplash injury, they are at least properly compensated for other injuries.

Further, it is perfectly reasonable that injured individuals would claim for a variety of injuries following a road traffic collision. Data from the Government's own National Travel Survey highlights the range of injuries suffered by road injury victims. Of those injured in a road collision in the previous three years, 40 per cent suffered bruising, 45 per cent suffered shock, and 23 per cent suffered sprains or strains[17]. It is offensive to suggest that the "increase" in mixed injury claims has been because claimants are inventing these injuries – this rhetoric has been insinuated by the ABI in an article suggesting that we are "increasingly

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[15] *Accessing Mixed Injury Claims in the Official Injury Claim Portal* *https://acso.org.uk/sites/default/files/members-documents/acso-report-medical-data-undermines-mixed-injuries-epidemic-claim.pdf*

[16] In the SCNF, claimants are asked whether they have suffered the following injuries: ribs/chest/torso; face/cheekbones/jaw/nose; forearm/wrist/hand/fingers(s)' teeth; head/senses; hips/pelvis/genitals; leg/knee/ankle/foot/toe; shock/anxiety/other psychological conditions; multiple injuries.

[17] https://www.gov.uk/government/statistical-data-sets/nts06-age-gender-and-modal-breakdown#road-safety. The figures referred to can be found in the spreadsheet: '*NTS0624: Details of involvement and injuries sustained in road accidents in previous 3 years, aged 16 and over: England, 2007 onwards*'.

moving from being the country that has the weakest necks in Europe, to the country with the weakest knees"[18]. Claimants are simply accurately recording their injuries to ensure that they are fairly compensated for injuries not falling within the tariff. The ABI suggests in their article that this behaviour "risks eroding the benefit of the reforms". However, as the Supreme Court highlights in its judgment in *Rabot v Hassam,* "clearly claimants who have suffered only whiplash injuries will receive a significantly lower sum in damages pain, suffering and loss of amenity, than at common law …and, as shown by these cases, that remains true even where damages are also claimed for non-whiplash injuries." We would also question, as highlighted by the evidence we present in this paper, exactly what the benefit of the reforms has been.

8) How was the introduction of the whiplash tariff changed the process of agreeing settlements for mixed injury claims?

Three years into the reforms, there is still uncertainty and friction around how to value mixed injury claims. We have received anecdotal evidence from claimant practitioners handling these cases that amounts offered by third party insurers for non-tariff injuries (valued at £1,500 - £2,200 using the Judicial College Guidelines), have been as low as £80, with insurers rejecting the "Sadler step back" approach as not suitable where the whiplash award is a reduced tariff award. Many claims have been awaiting the outcome of the Supreme Court decision in *Rabot,* which has led to many claims "stalling" within the OIC system. Further, there is a risk that some mixed injury cases that have settled, likely those where the claimant was unrepresented, will have been undercompensated due to the lack of clarity around how these cases should be valued. Following the Supreme Court decision in *Rabot* , while it will take some time for the effect of the judgment to filter through to settlements, a more accurate picture of the difference between represented and unrepresented claims should start to become apparent. Following the decision of the Supreme Court, there is now clarity around how mixed injury claims should be handled, and how damages should be calculated in these cases.

9) What do you think should be taken into account in the review regarding mixed injuries?

As mentioned in the consultation paper, and above, the issue of mixed injuries was to be determined by the Supreme Court - the decision in *Rabot* will now bring further clarity. We maintain that the Civil Liability Act does not interfere with the claimant's common law right to full compensation for the non-tariff injury, and that it was not Parliament's intention to address any issue relating to non-pecuniary damages for non-whiplash injuries. The overriding factor in relation to mixed injuries should be the claimant's right to full compensation.

10) What has been the impact of inflation on claimants' damages since 31 May 2021?

Inflationary increases have eroded claimants' damages since the tariff was increased. The Call for Evidence accepts at paragraph 35 of the call for evidence that the real value of the figures has fallen. Uplifting the figures published in February 2021 by CPI inflation between February 2021 and December 2023 shows that damages at the lower end of the tariff are between £55 and £200 lower than they should be. While this may not seem a huge amount, this is a large percentage of the overall award. At the higher end, the tariff award for more

[18] https://www.abi.org.uk/news/blog-articles/2024/2/seeking-clarification-on-mixed-injuries-claims-at-the-supreme-court/

than 18 months but not more than 24 months should be £920 more than it is currently. See appendix B for inflation calculations.

We would maintain that the tariff is not appropriate compensation, but if it is to remain, at the very least the tariff should be uplifted to reflect inflationary increases since 2021.

10) Does CPI remain an appropriate inflationary measure? If not, why not?

We are not able to comment on the appropriate inflationary measure, but would suggest that there should be consistency with the Judicial College Guidelines, as these also address inflation in relation to damages.

11) Is the three-year inflationary buffer built into the whiplash tariff effective? If not, what alternative would you propose and why?

It is clear that the three-year inflationary buffer is not effective. As set out at question 10, the tariff awards are far below what they should be to reflect the actual inflationary increases that have taken place over the past three years. This demonstrates that a three-year review is not appropriate, especially given the economic instability of current times. There should be an annual review and appropriate uplifts every year. There should also be a set date on which the annual reviews must be implemented. We would also suggest that the fairest approach would be to apply any inflationary uplift retrospectively, to include all existing claims.

12) Are there any other economic factors which should inform the review?

The current cost of living crisis should be taken into account. Claimants are more at risk of under-compensation, as they will be keen to get compensation more quickly which means that they may be tempted to accept a lower offer. This can be, and has been, exploited by insurers who will challenge prognoses in medical reports and make lower offers than the tariff band. Claimants who are struggling financially will be less willing to challenge this behaviour, as they will not want to further delay settlement, or incur the costs of going to court.

13) What other factors are relevant in the context of a tariff review? Please provide reasons supported by data where possible.

Efficacy of the OIC system

The efficacy of the system as a whole should be reviewed. As mentioned in question 6(a), for the small number of claims which have settled in the system, the path to settlement has been slow. There is evidence that claims have stalled at certain points within the system, and professional users (who make up the majority of OIC users) have encountered numerous technological difficulties and glitches. It is not possible to link firm case management systems with the OIC portal, which means duplication of work and increased time and cost spent.

Complexity remains, as does the need for legal representation

The tariff was introduced on the basis that people would not need to use legal representation to obtain compensation for these injuries. In reality, most people are still choosing to use a lawyer, which demonstrates that the system is far more complicated than originally intended, and it has not been successful in removing friction and sticking points from these claims. Solicitor costs are not recoverable and therefore the meagre amounts awarded for these injuries are further eroded to pay for necessary legal representation.

As above at 6 (c), APIL members report that despite the tariff system, there are still arguments over quantum. There should be a prohibition on insurers being able to offer anything than the tariff award as stated by the medical report.

Tactics are often employed by defendants to render claims uneconomic to run. For example, causation arguments are raised, and then dropped. Liability is admitted, and then a low offer is made. The claimant rejects that offer and then the claim proceeds to trial but the liability admission is withdrawn and the claimant is then faced with a full trial on liability and the costs and delays associated with that.

The offset of the tariff award being lower than what would have been awarded under the Judicial College Guidelines is that the process was intended to reduce friction and be simple enough for a lay person to navigate themselves. This has simply not been the case in reality. The result is that those who are genuinely injured are deterred from pursuing a claim, because it is simply not worth the time and effort to do so.

14) Are there any other considerations not already discussed that should be taken into account as part of the review?

The reforms were predicated on the basis that the cost and number of whiplash claims was too high, and that consumers were paying for this through high car insurance premiums. The reforms, it was stated, would reduce premiums by £35[19]. Despite a 23 per cent fall in motor insurance claims since the whiplash reforms, Office for National Statistics data shows that the price of motor vehicle insurance has increased by 90 per cent since the reforms were introduced[20]. Since the reforms were introduced, the cost of injury claims settled by motor insurers is down by 27%, according to the ABI's data[21]. It may be argued that savings have been "passed on", because premiums would be even higher if the reforms had not been introduced. However, this does not stand up to scrutiny. Premium increases have far outpaced the rise in claims costs. Since the introduction of the reforms, motor insurers' total claims costs, including repair, have increased by 17 per cent[22]. During this same period, drivers have seen their premiums increase by more than five times that amount. If savings from injury claims had been passed on, premiums would not have increased by more than five times the rate of claims inflation.

The reality is that the promise of reduced premiums following the reforms was highly unlikely. Injured people have been targeted and denied full and fair compensation for their injuries, for a promise that was impossible to deliver. It is time for the real reasons that premiums have been rising, to be properly scrutinised and tackled. These include repair costs – even before the reforms, repair costs far exceeded the cost of injury claims. In 2017, repair claims cost insurers £769 million more than injury claims. In 2020, repair claims cost insurers £1.1 billion more than injury claims.[23]

APIL also maintains that the number of whiplash claims was not "too high" prior to the reforms. The suggestion was that the number of whiplash claims needed to be reduced because there were too many fraudulent claims. It is clear that the whiplash reforms have been successful in reducing the number of claims, however it is also clear that it is not only

[19] https://www.gov.uk/government/news/over-1-billion-savings-for-motorists-as-whiplash-reforms-come-into-force
[20] https://www.ons.gov.uk/economy/inflationandpriceindices/timeseries/l7je/mm23
[21] https://www.abi.org.uk/data/data-packages/ (General insurance – motor)
[22] https://www.abi.org.uk/data/data-packages/ (General insurance – motor)
[23] https://www.abi.org.uk/data/data-packages/ (Motor insurance – claims)

fraudulent or exaggerated claims that are no longer being made. In 2019, the ABI's data showed that 1.12 per cent of PI motor claims were "confirmed to be fraudulent"[24]. Of those claims made in 2019, therefore, around 7,300 were fraudulent. If only fraudulent claims were no longer being pursued, there would have been only a relatively minor drop in claims. As set out in Appendix A, CRU figures show that the number of claims has fallen by almost 302,000 since 2019. Many people are being deterred from bringing genuine claims, and from accessing compensation for their injuries. While APIL does not accept the ABI's very broad definition of fraud to include "suspected" fraud, even if this definition were used, claims should only have fallen by 63,000 since 2019.

The huge reduction in legitimate claims is also compounded by the lack of evidence to date that the reforms have had any discernible impact on reducing the already low levels of fraud in the system. Figures from the ABI show that the percentage of motor injury claims confirmed to be fraudulent was higher in 2022 than pre-reform.

We do not accept that the premise of these reforms, nor do we believe that the reforms have achieved their objectives. Given that the outcomes of the tariff so far have been a restriction in access to justice, and with the data indicating that costs around PI are not a main driver of the cost of insurance premiums, we would be firmly against any widening out of the whiplash reforms – either in the form of an increased small claims limit or the inclusion of a wider variety of injuries in the tariff system. Given that the increase in the small claims limit for road traffic accident claims in 2021 was far and above what would have been required to match inflationary increases, there would not even be a justification to increase the small claims limit by inflation at this time.

As we mention throughout this response, injured people should get full compensation for their injuries - the tariff is derisory and leads to under-compensation. It is clear from the reforms so far that these even "minor" cases are far from "straightforward" – personal injury claims must be dealt with in a framework that allows the recovery of costs. Following the Supreme Court decision in *Rabot,* it is clear that the correct interpretation of the effect of the Civil Liability Act is that a power was granted by Parliament to change how damages are assessed for whiplash injuries only. The principle of full compensation is maintained for the non- tariff injuries. It is therefore not possible, nor desirable, for any change to be made to the tariff that seeks to expand its remit to non-whiplash injuries.

15) Please provide evidence on how the whiplash tariff review may affect people with protected characteristics

Vulnerable parties are simply not catered for in the Online Injury Claim portal. As demonstrated above, the portal is not easy to navigate without a legal professional, and those who are vulnerable are more likely to struggle. There is nothing built into the OIC to make it more easily accessible for those who are vulnerable.

The costs for vulnerable people in running these cases may also be greater than for those who are non-vulnerable, as costs such as interpreters' fees, translation fees, may need to be incurred.

Further, the OIC does not cater to those who are digitally disadvantaged. Those who are elderly, have a disability, and those on lower incomes are more likely to be digitally disadvantaged and therefore find it more difficult to engage with the OIC. According to a review of OFCOM's research on digital exclusion among adults in the UK in 2022[25], 23 per

[24] https://www.abi.org.uk/data/data-packages/ (General insurance – motor)
[25] https://www.ofcom.org.uk/__data/assets/pdf_file/0022/234364/digital-exclusion-review-2022.pdf

cent of those with limitations/impairments either did not use or did not have access to the internet. 40 per cent of those who were living alone with a condition that limited or impacted their use of communication services said that they did not use or did not have access to the internet at home. 60 per cent of those who were aged over 70, living alone with a condition that limited or impacted their use of communication services did not use or have access to the internet at home. Those who are financially vulnerable are more likely to face digital exclusion – according to the 2022 OFCOM report, 11 per cent of those with a household income of less than £10,399, and 11 per cent of those receiving a means tested benefit, had experienced an affordability issue, such as having to modify or cancel their fixed broadband contract.

We also reiterate that the tariff figures are set too low and leave people undercompensated. This under-compensation is likely to be particularly acute for those with protected characteristics. A whiplash injury is more likely to cause a lasting impact via a complete loss of confidence in someone who is elderly, for example.

Any queries in relation to this response, in the first instance, should be directed to:

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Appendix A

Table 1: Total CRU claims v total road casualties

Compensation Recovery Unit data obtained via a Freedom of Information Request; road casualty data published by the Department for Transport: https://roadtraffic.dft.gov.uk/custom-downloads/road-accidents/reports/27726e30-7318-433c-b96c-e032cce5a5b4).

	Total Portal and OIC motor claims (England & Wales)	**Total CRU motor claims (Great Britain)**	**Reported road casualties (Great Britain)**	**Reported road casualties – England and Wales**
2019	689,099	653,983	153,158	145,568
2020	481,988	495,373	115,584	110,592
2021	400,661	398,051	128,209	123,103
2022	382,340	370,645	135,480	129,869
2023	354,909	352,230		

APPENDIX B

CPI (May 2021 baseline)

Duration of injury	Amount – Regulation 2(1)(a)	Uprated with CPI	Difference	Amount – Regulation 2(1)(b)	Uprated with CPI	Difference	CPI (May 2021-Feb 2024)
Not more than 3 months	£240	£287	£47	£260	£310	£50	19.40%
More than 3 months, but not more than 6 months	£495	£591	£96	£520	£621	£101	19.40%
More than 6 months, but not more than 9 months	£840	£1,003	£163	£895	£1,069	£174	19.40%
More than 9 months, but not more than 12 months	£1,320	£1,576	£256	£1,390	£1,660	£270	19.40%
More than 12 months, but not more than 15 months	£2,040	£2,436	£396	£2,125	£2,537	£412	19.40%
More than 15 months, but not more than 18 months	£3,005	£3,588	£583	£3,100	£3,702	£602	19.40%
More than 18 months, but not more than 24 months	£4,215	£5,033	£818	£4,345	£5,188	£843	19.40%

CPI (Feb 21 baseline)

Duration of injury	Amount – Regulation 2(1)(a)	Uprated with CPI	Difference	Amount – Regulation 2(1)(b)	Uprated with CPI	Difference	CPI (Feb 2021-Feb 2024)
Not more than 3 months	£240	£291	£51	£260	£315	£55	21.26%
More than 3 months, but not more than 6 months	£495	£600	£105	£520	£631	£111	21.26%
More than 6 months, but not more than 9 months	£840	£1,019	£179	£895	£1,085	£190	21.26%
More than 9 months, but not more than 12 months	£1,320	£1,601	£281	£1,390	£1,686	£296	21.26%
More than 12 months, but not more than 15 months	£2,040	£2,474	£434	£2,125	£2,577	£452	21.26%
More than 15 months, but not more than 18 months	£3,005	£3,644	£639	£3,100	£3,759	£659	21.26%
More than 18 months, but not more than 24 months	£4,215	£5,111	£896	£4,345	£5,269	£924	21.26%

RPI (May 21 baseline)

Duration of injury	Amount – Regulation 2(1)(a)	Uprated with RPI	Difference	Amount – Regulation 2(1)(b)	Uprated with RPI	Difference	RPI (May 2021-Feb 2024)
Not more than 3 months	£240	£303	£63	£260	£328	£68	26.20%
More than 3 months, but not more than 6 months	£495	£625	£130	£520	£656	£136	26.20%
More than 6 months, but not more than 9 months	£840	£1,060	£220	£895	£1,129	£234	26.20%
More than 9 months, but not more than 12 months	£1,320	£1,666	£346	£1,390	£1,754	£364	26.20%
More than 12 months, but not more than 15 months	£2,040	£2,574	£534	£2,125	£2,682	£557	26.20%
More than 15 months, but not more than 18 months	£3,005	£3,792	£787	£3,100	£3,912	£812	26.20%
More than 18 months, but not more than 24 months	£4,215	£5,319	£1,104	£4,345	£5,483	£1,138	26.20%

RPI (Feb 21 baseline)

Duration of injury	Amount – Regulation 2(1)(a)	Uprated with RPI	Difference	Amount – Regulation 2(1)(b)	Uprated with RPI	Difference	RPI (Feb 2021-Feb 2024)
Not more than 3 months	£240	£309	£69	£260	£335	£75	28.72%
More than 3 months, but not more than 6 months	£495	£637	£142	£520	£669	£149	28.72%
More than 6 months, but not more than 9 months	£840	£1,081	£241	£895	£1,152	£257	28.72%
More than 9 months, but not more than 12 months	£1,320	£1,699	£379	£1,390	£1,789	£399	28.72%
More than 12 months, but not more than 15 months	£2,040	£2,626	£586	£2,125	£2,735	£610	28.72%
More than 15 months, but not more than 18 months	£3,005	£3,868	£863	£3,100	£3,990	£890	28.72%
More than 18 months, but not more than 24 months	£4,215	£5,425	£1,210	£4,345	£5,593	£1,248	28.72%

CPIH (May 21 baseline)

Duration of injury	Amount – Regulation 2(1)(a)	Uprated with CPIH	Difference	Amount – Regulation 2(1)(b)	Uprated with CPIH	Difference	CPIH (May 2021-Feb 2024)
Not more than 3 months	£240	£283	£43	£260	£306	£46	17.84%
More than 3 months, but not more than 6 months	£495	£583	£88	£520	£613	£93	17.84%
More than 6 months, but not more than 9 months	£840	£990	£150	£895	£1,055	£160	17.84%
More than 9 months, but not more than 12 months	£1,320	£1,555	£235	£1,390	£1,638	£248	17.84%
More than 12 months, but not more than 15 months	£2,040	£2,404	£364	£2,125	£2,504	£379	17.84%
More than 15 months, but not more than 18 months	£3,005	£3,541	£536	£3,100	£3,653	£553	17.84%
More than 18 months, but not more than 24 months	£4,215	£4,967	£752	£4,345	£5,120	£775	17.84%

CPIH (Feb 21 baseline)

Duration of injury	Amount – Regulation 2(1)(a)	Uprated with CPIH	Difference	Amount – Regulation 2(1)(b)	Uprated with CPIH	Difference	CPIH (Feb 2021-Feb 2024)
Not more than 3 months	£240	£287	£47	£260	£311	£51	19.56%
More than 3 months, but not more than 6 months	£495	£592	£97	£520	£622	£102	19.56%
More than 6 months, but not more than 9 months	£840	£1,004	£164	£895	£1,070	£175	19.56%
More than 9 months, but not more than 12 months	£1,320	£1,578	£258	£1,390	£1,662	£272	19.56%
More than 12 months, but not more than 15 months	£2,040	£2,439	£399	£2,125	£2,541	£416	19.56%
More than 15 months, but not more than 18 months	£3,005	£3,593	£588	£3,100	£3,706	£606	19.56%
More than 18 months, but not more than 24 months	£4,215	£5,040	£825	£4,345	£5,195	£850	19.56%