EXPLANATORY MEMORANDUM TO

THE WHIPLASH INJURY REGULATIONS 2021

2021 No. XXX

1. Introduction

1.1 This explanatory memorandum has been prepared by The Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This Statutory Instrument makes regulations under the Civil Liability Act (CLA) 2018 which—

i. specify, by way of a tariff, the amount of damages payable for pain suffering and loss of amenity (PSLA) for any road traffic accident (RTA) related whiplash injury or injuries (as defined by the CLA) lasting up to 2 years, and any whiplash injury or injuries and any minor psychological injuries suffered on the same occasion as any whiplash injury. The tariff presents an ascending scale of fixed sum payments, with the appropriate tariff figure for any given case being determined by the duration of the whiplash injury incurred;

ii. allows the court to apply a discretionary uplift (up to 20%) to the tariff in exceptional circumstances;

iii. specifies what constitutes appropriate medical evidence for the purposes of settling a personal injury claim which includes a whiplash injury (and which, under section 5 of the CLA 2018 must be obtained before the claim may be settled) as well as specifying those experts who may provide such evidence.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 This entire instrument applies to England and Wales only.

3.3 In the view of the Department, for the purposes of House of Commons Standing Order No. 83P of the Standing Orders of the House of Commons relating to Public Business, the subject-matter of this instrument would not be within the devolved legislative competence of the Northern Ireland Assembly as a transferred matter and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament.

3.4 The Department has reached this view because the purpose of this legislation is to address the continued high number and cost of whiplash related personal injury claims (as defined in Part One of the CLA 2018) and the power under which it is made extends to England and Wales only.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales only.

4.2 The territorial application of this instrument is set out in Section 3 under "Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)".

5. European Convention on Human Rights

5.1 Lord Wolfson QC, Parliamentary Under Secretary of State at the Ministry of Justice has made the following statement regarding Human Rights:

"In my view the provisions of the Whiplash Injury Regulations 2021 are compatible with the Convention rights."

6. Legislative Context

6.1 Until now, where an agreement on the quantum of damages for PSLA for whiplash claims has not been reached, such damages have been determined by the courts. In determining the award of damages, the court will consider, amongst other matters, the severity and duration of the injuries and previous levels of compensation awarded for similar injuries. Guidance for the judiciary is provided in the *Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases*.

6.2 Part 1 of the CLA 2018 changes this by providing in section 3 of the Act that the Lord Chancellor may, in regulations and by way of a tariff, fix the amount of compensation that a court may award for PSLA in respect of one or more whiplash injuries or of one or more whiplash injuries and and any minor psychological injuries, such as low level travel anxiety, suffered on the same occasion as the whiplash injury. More serious whiplash injuries exceeding 2 years in duration are not subject to the tariff.

6.3 Section 5 of the Act further enables the Lord Chancellor to provide in regulations that the court may increase the sums prescribed under the tariff, if satisfied both that the degree of pain suffering or loss of amenity makes it appropriate to do so, and either one or more of the whiplash injuries is exceptionally severe, or the injured party's circumstances which increase the pain, suffering or loss of amenity caused by their injuries are exceptional. Regulations must specify, by reference to a percentage of the prescribed sum, the maximum uplift that might be applied.

6.4 Sections 6 to 8 of the CLA 2018 provide for a ban on "regulated persons" (for example, solicitors, claims management companies and insurers) seeking, offering, paying or accepting a settlement in respect of an RTA-related whiplash claim without first seeking appropriate medical evidence of the whiplash injury. Relevant regulators (for example the Law Society, or, where the relevant regulator is the Financial Conduct Authority, HM Treasury) must ensure that they have arrangements in place to monitor and enforce the ban. The approach is similar to that taken in banning the payment and acceptance of referral fees in Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012[1]. The Lord Chancellor may also in regulations make provision about what constitutes appropriate medical evidence and who may provide it.

---

[1] 2012 c. 10.

7. Policy background

What is being done and why?

7.1 The costs attached to investigating and settling high numbers of RTA related whiplash claims is transferred to consumers in England and Wales through increased motor insurance premiums. The relatively high level of compensation currently paid to claimants is out of proportion to the level of injury suffered. As such, controlling the costs of civil litigation for whiplash claims whilst ensuring proportionate compensation is paid to genuinely injured claimants is a government priority.

7.2 The Chancellor of the Exchequer outlined the government's reform proposals in the 2015 Autumn Statement. The then Chancellor (George Osborne) described the government's commitment to ending "the cycle in which responsible motorists pay higher premiums to cover false [whiplash] claims by others".

7.3 Successive governments have retained this commitment as a key policy objective. In June 2017, the government made a commitment to "reduce insurance costs for ordinary motorists by tackling the continuing high number and cost of whiplash claims" included in the 2017 Queens Speech (https://www.gov.uk/government/speeches/queens-speech-2017).

7.4 The government remains concerned with the continuing high volume of these claims, despite there being fewer accidents and safer cars on our roads. There were around 830,000 personal injury claims made in 2019/20, of which around 653,000 were RTA related and around 85% of these were for whiplash injuries.

7.5 The reforms are comprised of primary legislation included in Part 1 of the CLA 2018 and secondary legislative changes to the Civil Procedure Rules to increase the small claims track limit, in so far as it applies to damages for PSLA in RTA related personal injury claims, from £1,000 to £5,000.

7.6 Claimants subject to these reforms, including these regulations, will be supported by the development of a new online service. The Official Injury Claim portal[2] is an accessible service being developed in conjunction with stakeholders which will enable both represented and unrepresented claimants to process and settle RTA related personal injury claims valued at no more than £5,000.

7.7 This Statutory Instrument is made under Part 1 of the CLA 2018. It introduces a tariff of predictable damages for all RTA related whiplash injuries (as defined under the CLA) of up to 2 years, suffered on the same occasion, and any whiplash injury or injuries and any minor psychological injuries suffered on the same occasion as any whiplash injury or injuries. The tariff specifies two figures, one for whiplash injuries only and one for whiplash injuries and any minor psychological injuries suffered on the same occasion. In both instances the value of the claim will be based on the duration of the whiplash injury, so claimants will still be able to identify the compensation owed by reference to the prognosis in the medical report.

7.8 This Statutory Instrument also allows the judiciary - in exceptional circumstances and upon application by the claimant - to apply a discretionary uplift of up to 20% to the

[2] https://www.officialinjuryclaim.org.uk/

relevant tariff amount. These regulations are consistent with the regulation making power under the CLA 2018 and do not seek to define 'exceptional circumstances'.

7.9 In addition, these regulations specify the medical evidence that must be seen by a regulated person (as defined in section 9 of the CLA 2018) before they may invite a payment in settlement of, or settle, offer to settle, or make or accept a payment in respect of, an RTA-related whiplash injury claim. The regulations provide that where a claimant lives in England and Wales, or chooses to be examined in England or Wales, evidence of the whiplash injury or injuries must be provided in a fixed cost medical report from an accredited medical expert selected via the MedCo Portal. If, however, a medical report has been obtained in respect of a another injury suffered on the same occasion as the whiplash injury, which is identified in the report as a more serious injury than the whiplash injury, that report may be used if it is from a doctor who is listed on the General Medical Council's Specialist Register and it also reports on the whiplash injury.

7.10 The terms "fixed cost medical report[3]", "accredited medical expert[4]" and "MedCo[5]" are defined in the regulations. Separate provision is made for where a claimant lives, and is examined, outside England and Wales, albeit that the RTA would have occurred in that jurisdiction, to take account of the fact that these claimants will not in most cases be able to source their medical report via the MedCo Portal.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 As this instrument does not amend another instrument, no consolidation of legislation is required.

10. Consultation outcome

10.1 A full public consultation was undertaken between 17 November 2016 to 6 January 2017, inviting responses from members of the public, industry representative bodies, affected organisations, charities and other government Departments. In February 2017 a consultation response was published outlining the legislative proposals which subsequently informed the CLA 2018. Measures to disincentivise minor, exaggerated and fraudulent claims for whiplash were included in Part One of this Act.

10.2 Following implementation of these reforms, motorists could see their insurance premiums reduced by approximately £35 a year on average. The full consultation response document setting out the way forward is available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/593431/part-1-response-to-reforming-soft-tissue-injury-claims.pdf

[3] "fixed cost medical report" means an initial report in a whiplash claim from an accredited medical expert.

[4] "accredited medical expert" is a medical expert accredited by MedCo to provide medical reports.

[5] MedCo is a system for accrediting medical experts and for sourcing initial fixed cost soft tissue injury medical reports mandated by the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents.

10.3 The government's pre-legislative proposals were examined by the Justice Select Committee during an inquiry in 2018. The consequent report of the committee - Small claims limit for personal injury - is available here: https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/659/659.pdf

10.4 The government's response to the above report is available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725155/Govt_Resp_to_Justice_Committee_s_Report_on_Small_Claims_Limit_for_Personal_Injury_web_.pdf

10.5 Sections 3 and 5 of the CLA 2018 requires the government to consult the Lord Chief Justice on before making regulations under those sections. A formal consultation letter from the Lord Chancellor was issued to the Lord Chief Justice on 26 October 2020, and his views have been given due consideration before making these regulations.

11. Guidance

11.1 There are no plans to issue specific statutory guidance for this instrument, but operational guidance in relation to using the new system will be provided to support claimants affected by the implementation of these reforms.

12. Impact

12.1 A detailed Impact Assessment was produced when the Whiplash Reform Programme received Royal Assent as part of the CLA. Full details of the impacts and savings associated with the reform programme can be found here: https://www.gov.uk/government/publications/civil-liability-bill.

12.2 Since then the tariff has been uprated in line with inflation (Consumer Price Index (CPI) to reflect a 2021 implementation. To future proof the awards, the tariff has been uplifted by the forecast CPI inflation between March 2021 and March 2024.

12.3 Overall this does not make a substantial difference to the estimates in the IA as it is likely that current damage awards have also increased broadly in line with inflation as set out in the 15th edition of the Judicial College Guidelines. However, in the two years following implementation the tariff increase is slightly higher than the expected inflation and therefore the savings will be marginally lower than those in the IA. By year 3 inflation will catch up with the increase in the tariff and, therefore, savings will revert to those savings estimated in the IA.

12.4 Overall, businesses, charities and voluntary bodies are estimated to experience a direct net benefit of around £740m a year as a result of implementing the whiplash reform programme. This is made up of £870m in benefits and £130m in costs.

12.5 In particular, the reforms are expected to result in savings of approximately £1.2 billion for industry. However, implementation is also expected to lead to an increase in unrepresented claimants, which could lead to increased costs for the third sector. In terms of impacts on the public sector we expect:

- an overall reduction in court disputes as the application of the tariff will minimise quantum disputes. Where there are court savings to insurers, these would be a short-term cost to Her Majesty's Courts and Tribunals Service which operates at cost recovery in the long term.

- savings of around £1m in medical report VAT income for Her Majesty's Revenue and Customs from the estimated additional 38,000 claims which will require a medical report.
- a reduction in the number of people attending National Health Service hospitals as outpatients and a reduced burden on doctors' time. However, this would have cost implications of approximately £6m in outpatient fees that doctors would no longer recover.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses including claimant law firms. However, given the the purpose of the reforms it would be inappropriate to apply an exemption from this legislation to these firms. Therefore, no specific action is proposed to minimise the regulatory burden on small businesses.

14. Monitoring & review

14.1 This legislation will be monitored via statutory review clauses included in sections 4 and 8 of the CLA 2018.

14.2 Section 4 of the CLA 2018 requires the Lord Chancellor to carry out reviews of the tariff figures, the first of which must be completed no later than 3 years after the regulations come into force. Subsequent reviews must be completed at intervals not exceeding three years in duration. The Lord Chancellor must prepare and publish a report of each review and lay a copy of each report before Parliament.

14.3 Section 8 of the CLA 2018 specifies that the Treasury may make regulations to enable the FCA - where it is the relevant regulator - to monitor and enforce compliance with the ban on settling whiplash claims without appropriate medical evidence.

15. Contact

15.1 Scott Tubbritt, policy advisor for Civil Justice and Law Policy at the Ministry of Justice (Telephone: 020 3334 3157 or email: scott.tubbritt@justice.gov.uk), can be contacted with any queries regarding the instrument.

15.2 David Parkin, Deputy Director for Civil Justice and Law Policy, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 Lord Wolfson QC, Parliamentary Under Secretary of State at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.