

The Rt Hon the Lord Blencathra
Chairman
Delegated Powers and Regulatory Reform Committee
House of Lords
London
SW1A 0PW

Sent by email (hdelegatedpowers@parliament.uk)

16 April 2018

Dear Lord Blencathra,

Re: The Civil Liability Bill (HL)

I am writing regarding the Civil Liability Bill which we understand the Committee will be considering in the coming days. Whilst it may be unusual for the Committee to receive external representations regarding the delegated powers of a piece of legislation, we hope that we may contribute to the deliberations of the Committee.

The Motor Accident Solicitors Society (MASS) comprises 120 solicitor firms that employ over 2,000 lawyers and claims handlers throughout the UK, acting for the victims of road traffic accidents. Collectively member firms conduct the vast majority of RTA PI claims each year.

We have welcomed many of the Government's initiatives to tackle fraud and reform of the claims sector and continue to work with the Government, sitting as one of the stakeholder representatives on the MoJ's Whiplash Reform Steering Group and its four sub-groups. Nevertheless, we have serious concerns about the effectiveness and likely consequences of the Government's whiplash reform programme and have serious reservations regarding some of the proposals contained within the Civil Liability Bill.

However, given the remit of the Committee, we shall endeavour to limit our comments on the Bill to the extensive use of delegated powers contained within the Civil Liability Bill:

- Given the short length of the Bill (12 Clauses), the Bill proposes the extensive use of delegated powers. Whilst we agree in part with some of the Government's reasons for this, we are also concerned that this will severely limit parliamentary scrutiny as the full impact of the proposed measures cannot be determined without consideration of the proposed regulations/secondary legislation. The devil is very much in the detail.
- We do, however, recognise and welcome that the proposed regulations in Clauses 1-4 are to be implemented under the affirmative resolution procedure which may provide a limited degree of parliamentary scrutiny.

Part 1, Clause 1

- Clause 1 proposes that the Lord Chancellor should determine detailed regulations to define whiplash as an injury, the manner in which the injury was sustained and its symptoms. Given the absence of medical qualifications and experience within the Ministry of Justice, we suggest that

the delegated responsibility for this task is misplaced and should more appropriately reside with the Government's Chief Medical Officer and a panel of independent medical experts.

- The Delegated Powers Memorandum states that "it is necessary to consult with experts in this field, including medical practitioners, lawyers and the insurance industry to ensure that the definition to be included in regulations is, and remains, accurate and captures those injuries which
- are the focus of these reforms". We would like to emphasise to the Committee that this role is purely "consultative" and that the Ministry of Justice has retained the right to reject the views of this panel. We do not think that this politicisation of a medical diagnosis is an appropriate responsibility and power for the Lord Chancellor.

Part 1, Clause 2

- Clause 2(2) suggests that "the amount of damages for pain, suffering and loss of amenity payable in respect of the whiplash injury is to be an amount specified in regulations made by the Lord Chancellor". The Delegated Powers Memorandum (para 15) states that this relates to "the substantive rights to compensation of victims of tort, and in exercising it the Lord Chancellor will be performing an exercise of assessing levels of compensation previously undertaken by the courts".
- We do not believe that this an appropriate responsibility and power for the Lord Chancellor, but should continue to reside with a judicial body, such as the Judicial College, which is more qualified and experienced in determining damages, as is currently the case. The Judicial College's 'Guidelines for the Assessment for General Damages in Personal Injuries' has provided a clear and logical framework for the assessment of damages in personal injury cases since they were first published in 1992, but the courts have been assessing damages since the creation of the law of tort. We believe that it is entirely consistent and logical that the Judicial College should continue to determine damages under the revised regime proposed by the Ministry of Justice.
- In the Delegated Powers Memorandum (para 37), the Ministry of Justice argues that the powers under Clause 8 should be retained by the relevant judicial procedure rules committee which is independent from Government. It argues that "it would be a novel departure, raising issues in relation to the division of responsibilities between the judiciary and executive arising out of the reform of the office of Lord Chancellor, for rules of court to be contained in primary legislation" which (para 38) "has been in force for 21 years". We suggest that it would be entirely inconsistent and unjustifiable to propose the opposite in relation to Clause 2. The judiciary and the courts should continue to determine the appropriate levels of damages for accident victims as they have done since the creation of the law of tort. We do not believe that it is appropriate for this power to be assumed by the Lord Chancellor.
- For similar reasons as previously set out, we do not believe that it is appropriate for the Lord Chancellor to be granted powers to determine regulations relating to "minor psychological injuries", but believe that this is more appropriately determined by independent medical experts.
- We suggest that Clause 2(7), which states that "regulations under this section amending or replacing regulations may increase or reduce amounts payable in respect of injuries", is too vague in its wording and commitment to undertake any future review and the absence of any proposed timeframe for future reviews may result in injured motor accident victims progressively losing out on the real-value levels of compensation that they deserve. We believe that it would be more appropriate that the Bill expressly commits to an annual review or to avoid the unnecessary use of parliamentary time in the future, is subject to an annual adjustment for inflation.

Part 1, Clause 4

- For the record, we fully support the policy proposal contained in Clause 4 and have long called for the production of a medical report before settlement. Whilst we recognise the justification for the delegated power (para 20) that the accreditation process for medical experts (currently undertaken by MedCo Registration Solutions, 'MedCo') may change in the future, we nevertheless have concerns that the Lord Chancellor is to be granted powers to make regulations about "what constitutes appropriate evidence of an injury". We would prefer to see some

recognition on the face of the Bill that regulations would be constituted by independent medical experts.

MASS fully supports actions which will deter and reduce fraudulent behaviour in the claims process and so reduce the cost associated with fraudulent activity. We have always worked collaboratively with all sections of the claims sector to determine effective and practical solutions to the problems faced by the sector and we will continue to do so. We do, however, have some serious concerns about the likely consequences of elements of the proposed whiplash reform programme, including extensive use and wide scope of delegated powers under the Civil Liability Bill.

We hope that this correspondence is helpful to the Committee in its deliberations.

Yours sincerely,

Simon Stanfield
MASS Chair