



Consultation

Part 2 of the Compensation Act 2006

Exemptions from the
Requirement for Authorisation

Response of Browne Jacobson LLP
12 October 2006

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Introduction

Browne Jacobson LLP

Browne Jacobson is a leading firm of solicitors in the Midlands, having offices in Nottingham, Birmingham and London. Among its clients the firm counts a number of national insurers, the Motor Insurers Bureau and the NHSLA. The firm deals with a substantial volume of litigation on behalf of these clients in all areas, including personal injury and employment claims.

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Interest in the Consultation

The activities of Browne Jacobson and many of its clients have the potential to fall within the ambit of Part 2 of the Compensation Act 2006 and associated secondary legislation. It is the Order to which this consultation relates which will prevent, for example, solicitors and insurers from requiring authorisation in order to carry out their day to day activities.

Other of Browne Jacobson's clients also have the potential to be affected by this legislation and we make submissions in respect of their position below.

Browne Jacobson submitted a response to the Department of Constitutional Affairs' previous consultation CP(L)12/06 in respect of the Scope Order, Regulations and Rules. That response may be found at:

http://www.brownejacobson.com/library/documents/Compensation_Bill_Consultation_response_FINAL.pdf

The Response

This response is based upon the experiences of lawyers at Browne Jacobson and upon feedback from a number of the firm's clients.

Within the response, the following references will be used:

The Act will refer to the Compensation Act 2006

The Exemptions Order to the draft Compensation (Exemptions) Order 2006

The Scope Order to the proposed Compensation (Regulated Claims Management Services) Order 2006

The Regulations to the proposed Compensation (Claims Management Services) Regulations 2006

The Rules will refer to the proposed Conduct Rules for authorised persons

The Regime will refer to the all of the above, taken together

Copies of the consultation to which this response relates together with the Act and exemptions order will be found as appendices to this document. The other documents listed above are available on the Department of Constitutional Affairs' website or as appendices to Browne Jacobson's earlier consultation response which can be accessed through the link above.

Summary

We understand the objective of the regime to be the protection of vulnerable consumers of claims management services, without the imposition of disproportionate burdens upon providers. We support the approach of initially targeting the areas of greatest concern, which has been adopted in respect of the scope order. This is a new regulatory regime and it is important that the net is not cast so broadly at the outset that areas where there is little need of regulation are caught.

The definition of claims management services within the Act and scope order is an extremely broad one and it is the exemptions order which will limit the regime's ambit to the appropriate fields. Broad exemptions are therefore required.

In addition to our comments below in respect of the detail of the draft order, we propose the following exemptions:

- Providers of claims management services in respect of claims where the claimant or potential claimant is not an individual
- Providers of claims management services in respect of counterclaims and claims to a contribution or indemnity under Part 20 of the CPR.
- Insurers engaged in third party capture
- Expert witnesses when they provide input to strategic and procedural decisions taken by the parties to a claim
- The MIB

We also make submissions regarding the appropriate mechanisms for monitoring the 'conditional exemption' in respect of independent trade unions set out at paragraph 7 of the draft exemptions order

Response to Consultation Questions

Question 1 - Legal Professionals

We agree that legal practitioners should be subject to an exemption.

We consider that references in paragraphs 4(1)(a) and (b) to "in a way permitted by the professional rules to which he is subject" should be removed.

We propose the removal of the above words as we believe that they blur the boundaries of the regime. They suggest that legal professionals not abiding by relevant professional rules may become subject to the regime. If legal practitioners are not acting in accordance with professional rules then their own regulators ought to be relied upon to intervene. This will be ensured by the regulatory bodies likely to be established as a result of the Legal Services Bill.

Question 2 - Those Regulated under the Financial Services and Markets Act 2000

We agree that those regulated by the FSMA ought to be subject to an exemption to this regime. We consider the current draft of paragraph 4 to be suitable for this purpose.

Third Party Capture

We repeat the submission in our response to Consultation CP(L)12/06 that "third party capture" ought also to be subject to an exemption.

We believe that this should extend to third party capture by any potential defendant.

We note that responses to the previous consultation will be taken into account in dealing with this issue. In our response to that consultation, we emphasised two arguments against the requirement of authorisation in order for insurers and similar defendants to engage in third party capture. We should like to take this opportunity to build upon these and to add some further points more specific to this consultation.

As we have previously indicated there appears to be little evidence to suggest that potential defendants do not act responsibly when engaging in third party capture activities. We understand that at this stage the regime is intended to focus upon the areas in which consumer protection is most required. We do not believe this to be one of them.

Further, we believe that the potential defendant and potential claimant's interests are often closely aligned when third party capture takes place. The aim of the defendant is to ensure rapid and effective intervention, often through early medical assessment and rehabilitation. This benefits the defendant as costs of legal proceedings can be avoided and, if a claim is made, it will reduce damages for suffering, incapacity and loss of the claimant. Where defendants or, in the case of insurers, their clients have an ongoing relationship with the potential claimant then early intervention will assist in

maintaining this. Of course, early intervention, rehabilitation and the preservation of existing relationships are also advantageous to the potential claimant.

Defendants seeking to explore this approach are making strenuous efforts at present to encourage its acceptance by claimants and their representatives. Again, this is an incentive to them to act responsibly in pursuing third party capture.

We see third party capture as an approach to litigation which is very much in line with the objective of dealing with claims effectively and proportionately and therefore in line with the objectives of the Civil Procedure Rules. It is, however, an emerging field and one which is being pioneered by a few defendants, in particular insurers. A requirement of authorisation in order to undertake such activities may hamper development in this area, to the detriment of claimants and defendants.

In the circumstances, we submit that the criteria for exemption set out at paragraphs 7 and 10 of the consultation document are met:

- Many defendants engaging in third party capture will already be subject to regulation, for example through the FSA.
- In respect of other defendants, the requirement for authorisation in order to enter into this developing area would be unduly burdensome and would hamper development of the rehabilitative approach to claims management.
- There is no evidence of poor practice in this area and, given the alignment of claimant and defendant interests, there is limited risk of poor practice developing.

The interests of the consumer of legal services will therefore be best served by permitting an exemption in respect of third party capture by all defendants

Question 3 - Charities and Not for Profit Organisations

We agree that paragraph 7 offers an appropriate definition of not for profit bodies, without allowing the exemption to be abused.

We would suggest that a separate paragraph might allow an exemption for registered charities.

While paragraph 7 is likely to cover registered charities, it necessarily sets out a relatively complicated test based upon a number of factors. A separate exemption by reference to a charity's registration with the Charities Commission will more clearly establish their position. We consider that this would be valuable in ensuring that charities do not find themselves subject to ill founded complaints etc under the regime.

Question 4 - Trade Unions

We consider the definitions used in paragraph 9 to be appropriate.

We are concerned at the exemption of trade unions from the requirement for authorisation. We recognise the value of an effective code of practice and would suggest that the following scheme might be adopted:

- An initial exemption as set out in paragraph 7, made subject to compliance with a code of practice.

- A code of practice be set out which is generally consistent with the Rules promulgated by the regulator. Alternatively, a code of practice might refer directly to the rules.
- Retention of the regulators powers under Part 7 and 8 of the regulations in respect of independent unions in order to ensure compliance with the code of practice is maintained. We anticipate that the code itself might set out the precise monitoring regime to be followed.
- A specific mechanism by which the exemption may cease to apply to a trade unions. We would suggest that the regulator should be able to recommend withdrawal of the exemption to the Secretary of State who may then do so by Order.

We recognise that the majority of trade unions provide valuable services to their members and act in a responsible fashion. However, there is no regulator with control of their claims management services and there is evidence of malpractice by a few trade unions. Perhaps the most notable recent case is that of the Union of Democratic Mineworkers (UDM). We therefore welcome the inclusion of a condition in this exemption

The UDM case demonstrates that malpractice may only be uncovered after a number of years. We therefore consider that a system of monitoring should be introduced. We consider that the regulator under this regime should also monitor unions in order to ensure consistency.

We would suggest that the precise monitoring regime might be set out in the code of practice. However, we consider that for the purpose of the scheme being effective it should be made clear that the exemption under paragraph 7 does not extend to the investigative powers granted to the regulator under Parts 8 and 9 of the regulations.

To ensure consistency, we would propose that the rules to which unions are subjected under the code of practice should generally correspond with those issued by the regulator.

We anticipate that the most appropriate means of revoking the exemption in respect of a particular union will be through a further Order of the Secretary of State. However, we would suggest that this be set out specifically within the exemptions order, and that the regulator should be able to recommend that such orders be made.

We consider that the above regime allows for appropriate consumer protection without imposing upon unions the burden of a requirement for authorisation.

Question 5 - Specific Exemptions

Motor Insurers Bureau

We consider that the Motor Insurers Bureau (MIB) ought to be subject to a specific exemption.

We understand that MIB have already made submissions outlining the measures they take to ensure high service standards in exercising claims management functions. They seek to comply with FSA standards, notwithstanding they are not required to be FSA authorised under the Financial Services and Markets Act 2000. We consider MIB's

standards to be high and are conscious that MIB seek to maintain a position as a centre of excellence in claims handling. We consider that they offer a standard of service which may well exceed that of many authorised persons upon this regime coming into effect.

In addition to their self regulation, MIB are subject to the Agreements with the Secretary of State for Transport under which they operate and to the scrutiny of the Department for Transport. MIB's insurer members also monitor standards, including through regular audit, and generally expect these to be at least equal to their own. Of course, MIB's members are subject to FSA regulation.

MIB also has a clear policy of transparency. They use their website in particular as a means of making their policies, accounts and annual reports publicly available which permits for public scrutiny of their activities.

We therefore submit that that MIB are subject to adequate control without the additional requirement of authorisation and that there is no consumer protection related need to require that MIB be authorised.

The Medical Protection Society and The Independent Complaints Reviewer

We have no submission to make in respect of the proposals to exempt these bodies.

Question 6 - Other Exemptions

Those not providing claims management services in respect of individuals.

We propose an exemption in the following terms:

Section 4(1) of the Act does not prevent the provision of a regulated claims management service where that service is provided in respect of a claim or potential claim in which the claimant is not an individual.

As indicated in the introduction to the consultation document the aim of the regime is consumer protection. A wide definition of claims management services has been established and exemptions are now required in order to narrow the application of the regime to those it is intended to protect. We endorse the approach taken in the scope order of focussing upon the most problematic areas at the outset.

We understand the primary aim of the regime to be the protection of members of the general public against unscrupulous claims management businesses. However, many persons who provide claims management services work solely with businesses; for example, loss adjusters and others offering general advisory services to businesses. We are not aware of any evidence that shows a significant need for additional protection in this area.

The imposition of a requirement for authorisation in this field appears likely to increase the costs to many businesses of obtaining advice. It will also hinder competition among those providing such advice. In particular, the burden of authorisation will have a much more detrimental effect upon small providers than larger ones. We submit that these disadvantages are not likely to be offset by any significant improvement in consumer

protection through a requirement for authorisation of those providing services in this area.

In the circumstances, we propose an exemption and we consider that the draft above ought to be secure against abuse by commercial claims management companies who do target individuals. In particular, the focus of the test upon the status of the claimant will prevent service providers acting through intermediaries in order to avoid the need for authorisation.

Claims Management Services in respect of Counterclaims, Part 20 claims and Contribution Proceedings.

We propose the following exemption:

Section 4(1) of the Act does not prevent the provision of a regulated claims management service in respect of:

- a) Counterclaims*
- b) Claims for a contribution*
- c) Claims for an indemnity*

Brought in accordance with Part 20 of the Civil Procedure Rules

The Act provides a definition of 'claims management services' which excludes services purely connected with the defence of a claim. We consider this appropriate. Defendants are far less likely than potential claimants to be subject to inappropriate practices by service providers. In particular, when a claim arises a defendant has the benefit of being free to select a legal service provider without undue influence.

However, it is appropriate for service providers acting on behalf of defendants to advise in respect of a defendant's ability to bring a counterclaim or to claim for a contribution or indemnity. Such advice appears to have the potential to fall within the ambit of the regime.

We submit that the giving of such advice does not introduce any additional risk to a consumer. Indeed, it will be in a consumer's interests that his adviser has no reservations in giving advice. We therefore consider that an additional exemption is required to cover these circumstances.

Expert Witnesses

We propose an exemption in the following terms:

Section 4(1) of the Act does not prevent the provision of a regulated claims management service where that service is provided by an expert witness in the proceedings to which those services relate and either:

- a) The witness is regulated as a member of:
 - i) The General Medical Council; or*
 - ii) The Nursing and Midwifery Council; or*
 - iii) The General Social Care Council; or*
 - iv) The Institute of Chartered Accountants; or*
 - v) The Royal Institution of Chartered Surveyors; or*
 - vi) The Engineering Council of the UK; or*
 - vii) Any other body specified by the regulator**

or

b) The witness provides claims management services solely within the ambit of his field of expertise in the litigation.

We note the exclusion of those giving or preparing to give evidence from the regime by virtue of paragraph 4(3)(b) of the Act. However, expert witnesses are often involved in aspects of the claim other than simply preparing and giving evidence. For example, they will often advise parties upon further investigations, the procurement of other expert evidence and the appropriate timetable for a claim. They can therefore become heavily involved in the management of a claim and this would appear to place them within the regime.

We do not consider that experts carrying out this role ought to require authorisation. Their role relates to case management and so has limited impact upon a claimant. We do not believe that there is a need for authorisation in order to ensure consumer protection.

We believe that a requirement for authorisation would be unduly burdensome to many experts and would discourage them for providing advice which is often valuable in progressing a claim in the most expeditious manner possible. In the circumstances, we propose an exemption.

Many experts, in particular in medical fields, will already be subject to their own regulators and we would suggest that these experts may be automatically excluded. We have identified regulators in the most significant fields in the draft above. Of course, this may be subject to expansion. We have also proposed provision for the regulator to add to the list as appropriate.

Some experts will not be subject to professional bodies. In respect of these, we propose a general exemption which allows for the provision of advice limited to the expert's field of expertise in the claim. We consider that this is broad enough to allow for the expert's knowledge to be drawn upon without opening up a potential loophole in the regime.

Appendix 1

Part 2 of the Compensation Act 2006

Compensation Act 2006

2006 Chapter 29 - *continued*

4 Provision of regulated claims management services

(1) A person may not provide regulated claims management services unless:

- (a) he is an authorised person,
- (b) he is an exempt person,
- (c) the requirement for authorisation has been waived in relation to him in accordance with regulations under section 9, or
- (d) he is an individual acting otherwise than in the course of a business.

(2) In this Part:

- (a) "authorised person" means a person authorised by the Regulator under section 5(1)(a),
- (b) "claims management services" means advice or other services in relation to the making of a claim,
- (c) "claim" means a claim for compensation, restitution, repayment or any other remedy or relief in respect of loss or damage or in respect of an obligation, whether the claim is made or could be made:
 - (i) by way of legal proceedings,
 - (ii) in accordance with a scheme of regulation (whether voluntary or compulsory), or
 - (iii) in pursuance of a voluntary undertaking,
- (d) "exempt person" has the meaning given by section 6(5), and
- (e) services are regulated if they are:
 - (i) of a kind prescribed by order of the Secretary of State, or
 - (ii) provided in cases or circumstances of a kind prescribed by order of the Secretary of State.

(3) For the purposes of this section:

- (a) a reference to the provision of services includes, in particular, a reference to:
 - (i) the provision of financial services or assistance,
 - (ii) the provision of services by way of or in relation to legal representation,
 - (iii) referring or introducing one person to another, and
 - (iv) making inquiries, and
- (b) a person does not provide claims management services by reason only of giving, or preparing to give, evidence (whether or not expert evidence).

(4) For the purposes of subsection (1)(d) an individual acts in the course of a business if, in particular:

- (a) he acts in the course of an employment, or
- (b) he otherwise receives or hopes to receive money or money's worth as a result of his action.

(5) The Secretary of State may by order provide that a claim for a specified benefit shall be treated as a claim for the purposes of this Part.

(6) The Secretary of State may specify a benefit under subsection (5) only if it appears to him to be a United Kingdom social security benefit designed to provide compensation for industrial injury.

5 The Regulator

(1) The Secretary of State may by order designate a person ("the Regulator"):

- (a) to authorise persons to provide regulated claims management services,
- (b) to regulate the conduct of authorised persons, and
- (c) to exercise such other functions as are conferred on the Regulator by or under this Part.

(2) The Secretary of State may designate a person only if satisfied that the person:

- (a) is competent to perform the functions of the Regulator,
- (b) will make arrangements to avoid any conflict of interest between the person's functions as Regulator and any other functions, and
- (c) will promote the interests of persons using regulated claims management services (including, in particular, by:
 - (i) setting and monitoring standards of competence and professional conduct for persons providing regulated claims management services,
 - (ii) promoting good practice by persons providing regulated claims management services, in particular in relation to the provision of information about charges and other matters to persons using or considering using the services,
 - (iii) promoting practices likely to facilitate competition between different providers of regulated claims management services, and
 - (iv) ensuring that arrangements are made for the protection of persons using regulated claims management services (including arrangements for the handling of complaints about the conduct of authorised persons)).

(3) If the Secretary of State thinks that no existing person (whether an individual

or a body corporate or unincorporate) is suitable for designation under subsection (1), he may by order establish a person for the purpose of being designated.

(4) The Regulator shall:

- (a) comply with any directions given to him by the Secretary of State;
- (b) have regard to any guidance given to him by the Secretary of State;
- (c) have regard to any code of practice issued to him by the Secretary of State;
- (d) try to meet any targets set for him by the Secretary of State;
- (e) provide the Secretary of State with any report or information requested (but this paragraph does not require or permit disclosure of information in contravention of any other enactment).

(5) The Secretary of State shall lay before Parliament any code of practice issued by him to the Regulator.

(6) The Secretary of State may pay grants to the Regulator (which may be on terms or conditions, including terms and conditions as to repayment with or without interest).

(7) A reference in this Part to the Regulator includes a reference to a person acting on behalf of the Regulator or with his authority.

(8) The Secretary of State may by order revoke a person's designation under subsection (1).

(9) While no person is designated under subsection (1) the Secretary of State shall exercise functions of the Regulator.

(10) The Secretary of State may by order transfer (whether for a period of time specified in the order or otherwise) a function of the Regulator to the Secretary of State.

6 Exemptions

(1) The Secretary of State may by order provide that section 4(1) shall not prevent the provision of regulated claims management services by a person who is a member of a specified body.

(2) The Secretary of State may by order provide that section 4(1) shall not prevent the provision of regulated claims management services:

- (a) by a specified person or class of person,
- (b) in specified circumstances, or
- (c) by a specified person or class of person in specified circumstances.

(3) Provision by virtue of subsection (1) or (2) may be expressed to have effect subject to compliance with specified conditions.

(4) Section 4(1) shall not prevent the provision of regulated claims management services by a person who is established or appointed by virtue of an enactment.

(5) For the purposes of this Part a person is "exempt" if, or in so far as, section 4(1) does not, by virtue of this section, prevent him from providing regulated claims management services.

7 Enforcement: offence

(1) A person commits an offence if he contravenes section 4(1).

(2) A person who is guilty of an offence under subsection (1) shall be liable:

(a) on conviction on indictment:

(i) to imprisonment for a term not exceeding two years,

(ii) to a fine, or

(iii) to both, or

(b) on summary conviction:

(i) to imprisonment for a term not exceeding 51 weeks,

(ii) to a fine not exceeding level 5 on the standard scale, or

(iii) to both.

(3) Until the commencement of section 281(4) and (5) of the Criminal Justice Act 2003 (c. 44) (51 week maximum term of sentences) the reference in subsection (3)(b)(i) above to 51 weeks shall have effect as if it were a reference to six months.

8 Enforcement: the Regulator

(1) The Regulator may apply to the court for an injunction restraining a person from providing regulated claims management services if he is not:

(a) an authorised person,

(b) an exempt person, or

(c) the subject of a waiver in accordance with regulations under section 9.

(2) In subsection (1) "the court" means the High Court or a county court.

(3) The Regulator may:

(a) investigate whether an offence has been committed under this Part;

(b) institute criminal proceedings in respect of an offence under this Part.

(4) For the purpose of investigating whether an offence has been committed under this Part the Regulator may require the provision of information or documents.

(5) On an application by the Regulator a judge of the High Court, Circuit judge or justice of the peace may issue a warrant authorising the Regulator to enter and search premises on which a person conducts or is alleged to conduct regulated claims management business, for the purposes of investigating whether an offence has been committed under this Part.

(6) The Regulator may take copies of written or electronic records found on a search by virtue of subsection (5) for a purpose specified in subsection (3)(a) or (b).

(7) In subsections (4) to (6) a reference to the Regulator includes a reference to a person authorised by him in writing.

(8) The Secretary of State shall make regulations:

(a) specifying matters of which a judge or justice of the peace must be satisfied, or to which he must have regard, before issuing a warrant under subsection (5), and

(b) regulating the exercise of a power under or by virtue of subsection (4) or (5) (whether by restricting the circumstances in which a power may be exercised, by specifying conditions to be complied with in the exercise of a power, or otherwise).

9 Regulations

(1) The Secretary of State shall make regulations about:

(a) authorisations under section 5(1),

(b) the functions of the Regulator.

(2) The Schedule specifies particular provision that may be made by the regulations.

(3) Transitional provision of regulations under this section may, in particular, make provision about the extent to which functions under this Part or under the regulations may be exercised in respect of matters arising before the commencement of a provision made by or by virtue of this Part.

10 Obstructing the Regulator

(1) A person commits an offence if without reasonable excuse he obstructs the Regulator in the exercise of a power:

- (a) under section 8(4) to (6), or
- (b) by virtue of paragraph 14 of the Schedule.

(2) A person who is guilty of an offence under subsection (1) shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

11 Pretending to be authorised, &c.

(1) A person commits an offence if he falsely holds himself out as being:

- (a) an authorised person,
- (b) an exempt person, or
- (c) the subject of a waiver in accordance with regulations under section 9.

(2) A person commits an offence if:

- (a) he offers to provide regulated claims management services, and
- (b) provision by him of those services would constitute an offence under this Part.

(3) For the purposes of subsection (2) a person offers to provide services if he:

- (a) makes an offer to a particular person or class of person,
- (b) makes arrangements for an advertisement in which he offers to provide services, or
- (c) makes arrangements for an advertisement in which he is described or presented as competent to provide services.

(4) A person who is guilty of an offence under subsection (1) or (2) shall be liable:

- (a) on conviction on indictment:
 - (i) to imprisonment for a term not exceeding two years,
 - (ii) to a fine, or
 - (iii) to both, or
- (b) on summary conviction:
 - (i) to imprisonment for a term not exceeding 51 weeks,
 - (ii) to a fine not exceeding level 5 on the standard scale, or
 - (iii) to both.

(5) Where a person commits an offence under this section by causing material to be displayed or made accessible, he shall be treated as committing the offence on each day during any part of which the material is displayed or made accessible.

(6) Until the commencement of section 281(4) and (5) of the Criminal Justice Act 2003 (c. 44) (51 week maximum term of sentences) the reference in subsection (4)(b)(i) above to 51 weeks shall have effect as if it were a reference to six months.

12 The Claims Management Services Tribunal

(1) There shall be a tribunal to be known as the Claims Management Services Tribunal.

(2) The Tribunal shall be constituted as follows:

- (a) members of the Financial Services and Markets Tribunal shall also be members of the Claims Management Services Tribunal,
- (b) the President of the Financial Services and Markets Tribunal shall also act as President of the Claims Management Services Tribunal,
- (c) the Deputy President of the Financial Services and Markets Tribunal shall also act as Deputy President of the Claims Management Services Tribunal, and
- (d) the panel of chairmen of the Financial Services and Markets Tribunal shall also be the panel of chairmen of the Claims Management Services Tribunal.

(3) An appeal or reference to the Tribunal shall be heard by a member of the panel of chairmen:

- (a) selected in accordance with arrangements made by the President, and
- (b) sitting alone or, in accordance with those arrangements, with one or two members of the lay panel;

and a chairman who sits with one other member shall have a casting vote.

(4) The Lord Chancellor may make rules about the proceedings of the Tribunal; and the rules:

- (a) shall include provision about timing of references and appeals,
- (b) shall include provision for the suspension of decisions of the Regulator while an appeal could be brought or is pending,
- (c) shall include provision about the making of interim orders,
- (d) shall enable the Tribunal to suspend or further suspend (wholly or partly) the effect of a decision of the Regulator,
- (e) shall permit the Regulator to apply for the termination of the suspension of a decision of his,
- (f) may include provision about evidence,
- (g) may include provision about any other matter of a kind for which rules under section 132 of the Financial Services and Markets Act 2000 (c. 8) (the Financial Services and Markets Tribunal) may make provision,
- (h) may include transitional, consequential or incidental provision,
- (i) may make provision generally or only for specified cases or

circumstances,

(j) may make different provision for different cases or circumstances,

(k) shall be made by statutory instrument, and

(l) shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(5) The following provisions of Schedule 13 to the Financial Services and Markets Act 2000 shall have effect, with any necessary modifications, in relation to the Claims Management Services Tribunal:

(a) paragraph 5 (remuneration and allowances),

(b) paragraph 6 (staff),

(c) paragraph 7(3) and (4) (composition),

(d) paragraph 8 (sittings),

(e) paragraph 10 (practice directions),

(f) paragraph 11 (evidence), and

(g) paragraph 12(1) to (3) (decisions).

(6) In Part 1 of Schedule 1 to the Tribunals and Inquiries Act 1992 (c. 53) (tribunals under supervision of Council) insert at the appropriate place:

"Claims management services	The Claims Management Services Tribunal established by the Compensation Act 2006."
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13 Appeals and references to Tribunal

(1) A person may appeal to the Claims Management Services Tribunal if the Regulator:

(a) refuses the person's application for authorisation,

(b) grants the person authorisation on terms or subject to conditions,

(c) imposes conditions on the person's authorisation,

(d) suspends the person's authorisation, or

(e) cancels the person's authorisation.

(2) The Regulator may refer to the Tribunal (with or without findings of fact or recommendations):

(a) a complaint about the professional conduct of an authorised person, or

(b) the question whether an authorised person has complied with a rule of professional conduct.

(3) On a reference or appeal under this section the Tribunal:

- (a) may take any decision on an application for authorisation that the Regulator could have taken;
- (b) may impose or remove conditions on a person's authorisation;
- (c) may suspend a person's authorisation;
- (d) may cancel a person's authorisation;
- (e) may remit a matter to the Regulator;
- (f) may not award costs.

(4) An authorised person may appeal to the Court of Appeal against a decision of the Tribunal.

14 Interpretation

In this Part:

- "action" includes omission,
- "authorised person" has the meaning given by section 4,
- "claim" has the meaning given by section 4,
- "claims management services" has the meaning given by section 4,
- "exempt person" has the meaning given by section 6(5),
- "regulated claims management services" shall be construed in accordance with section 4(2)(e),
- "specified", in relation to an order or regulations, means specified in the order or regulations, and
- "the Regulator" means (subject to section 5(7)) the person designated under section 5(1) or, where no person is designated or in so far as is necessary having regard to any order under section 5(10), the Secretary of State.

15 Orders and regulations

(1) An order or regulations under this Part:

- (a) may make provision that applies generally or only in specified cases or circumstances,
- (b) may make different provision for different cases or circumstances, and
- (c) may include transitional, incidental or consequential provision.

(2) An order or regulations under this Part shall be made by statutory instrument.

(3) An order under section 4(2)(e):

- (a) may not be made unless the Secretary of State has consulted:
 - (i) the Office of Fair Trading, and
 - (ii) such other persons as he thinks appropriate, and
- (b) may not be made unless a draft has been laid before and approved by

resolution of each House of Parliament.

(4) An order under section 4(5) may not be made unless a draft has been laid before, and approved by resolution of, each House of Parliament.

(5) An order under section 5 may not be made unless a draft has been laid before, and approved by resolution of, each House of Parliament.

(6) An order under section 5(3) may include provision:

(a) for the appointment of members;

(b) for funding;

(c) for dissolution (which may include provision enabling the Secretary of State to make provision for the transfer of property, rights and liabilities).

(7) The first order made under section 6 may not be made unless a draft has been laid before, and approved by resolution of, each House of Parliament.

(8) An order under section 6 which has the effect of removing or restricting an exemption from section 4(1) may not be made unless a draft has been laid before, and approved by resolution of, each House of Parliament.

(9) Any other order under section 6 shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(10) Regulations under section 8 or 9 may not be made unless a draft has been laid before, and approved by resolution of, each House of Parliament.

Appendix 2

Consultation in Respect of Exemptions (CP(L)22/06)

Compensation Act 2006

Regulation of Claims Management Services

**Consultation on exemptions from
the requirement for authorisation**

September 2006

CP(L) 22/06

COMPENSATION ACT 2006
**Consultation on exemptions from the requirement for
authorisation**

Introduction

1. The Compensation Act 2006 received Royal Assent on 25 July. The Act is in two parts: part 1 covers the law of negligence and part 2 covers the regulation of claims management services. A copy of the Act and papers issued during the Parliamentary passage can be found on the DCA website at: (<http://www.dca.gov.uk/legist/compensation.htm>).
2. DCA issued a consultation paper on 6 July 2006 (CP(L) 12/06: Compensation Bill (Claims Management Services)). This sought views on key aspects of the proposed regulation of claims management services. It included:
 - the draft Scope Order¹ to be made under section 4(2)(e) of the Compensation Act which will define the activities and sectors covered by the legislation;
 - the draft regulations that will be made under section 9 and the Schedule which cover the requirements for authorisation and other related matters.The paper also sought views on the conduct rules the regulator will prescribe under paragraph 8 of the schedule to the Act. A copy of the paper is on the DCA website at: <http://www.dca.gov.uk/consult/claimsmang/cp1206.htm>
3. A further consultation paper on the application form for seeking authorisation and fee scales was issued on 4 August 2006 (CP(L) 18/06).

The Regulator

4. The Secretary of State for the Department for Constitutional Affairs will be the Regulator initially; and a Head of Regulation with a small DCA unit will provide support. An external monitoring and compliance unit will undertake the key administrative tasks. DCA is in the process of identifying a trading standards unit to fulfil this role.

Timetable

5. The timetable for establishing the regulation is as follows:
 - From November 2006 Applications for authorisation invited
 - February 2007 Deadline for submitting initial applications
 - April 2007 Offence of providing, or offering to provide regulated claims management services commences

¹ The Scope Order will define the regulated activities and the sectors that will be subject to regulation. Anticipate that the sectors to be included in the Scope Order will be: Personal Injury, Mis-selling of Financial Products, Employment, Housing Disrepair, Criminal Injuries Compensation, Industrial Injuries Disablement Benefit.

Exemptions

6. Section 6 of the Compensation Act 2006 gives the Secretary of State the power to exempt by order persons or classes of person from the requirement for authorisation. Those who are exempt may provide regulated claims management services without the need for authorisation by the Regulator.
7. The primary aim of the regulation is protect consumers by regulating the conduct of those who provide claims management services for commercial gain but who are currently unregulated. The power to exempt can therefore be used to ensure that those who provide regulated claims management services within the relatively wide definition in section 4 can be excluded where the Secretary of State considers regulation would be excessively burdensome, or where he considers a person or class of person is already subject to adequate regulatory control.
8. Individuals who offer regulated claims management services otherwise than in the course of a business are specifically excluded from the prohibition in section 4(1) and are therefore outside the scope of regulation. So individuals will not require authorisation or exemption if they offer advice voluntarily, for example by providing advice to friends, or by working in a voluntary capacity for an advice centre. Organisations established or appointed by virtue of an enactment (such as statutory ombudsmen) are exempted by s. 6(4) of the Act.
9. The Secretary of State's power to exempt under section 6(2) may be used to:
 - exempt a specified person or class of person
 - provide that there is no requirement for authorisation in specified circumstances (for example in relation to a particular type of claim)
 - provide that there is no requirement for authorisation by a specified person or class or person in specified circumstances
10. Before exempting a person or class of person, the Secretary of State needs to be satisfied that appropriate standards are in place to ensure adequate consumer protection, and that the exempt person or class of person is likely to provide a standard of service similar to that provided by authorised persons. Relevant considerations include internal mechanisms in place for quality control and handling consumer complaints, although the level of scrutiny required in each case must be related to the reputation of the organisation in question and whether any concern had been expressed about the services provided.
11. A draft exemption order is attached to this paper at Annex A. The remainder of this paper seeks views on the proposed exemptions for particular persons or classes of person, and specifically whether these are covered adequately by the draft exemption order.

Legal Professionals

12. It is the Secretary of State's intention to exempt solicitors, barristers and legal executives from the requirement for authorisation, insofar as they provide regulated claims management services as part of their professional practice. The Secretary of State is satisfied that these bodies have in place appropriate rules of professional conduct regulating the behaviour of their members. All three are "authorised bodies" for the purposes of the Courts and Legal Services Act 1990 and the Secretary of State approves their rules in relation to rights of audience and rights to conduct litigation (in consultation with an independent advisory body the Office of Fair Trading and four designated judges). The exemption of these legal

professionals will avoid the need the need for duplication in regulation, and therefore avoid imposing unnecessary regulatory burdens.

13. The exemption will only apply to the extent that an individual is already regulated in the provision of claims management services by their professional body. If a legal professional offered regulated claims management services which were outside the regulatory ambit of their professional body (for example if they were provided as part of a separate business, or if they were simply a student member of the professional body) the exemption would not apply and they would need to seek authorisation from the Regulator.
14. In addition, the Secretary of State intends to exempt registered foreign and EU lawyers providing regulated services on the basis that they are required to comply with similar regulatory standards to legal professionals in England and Wales.
15. The exemption of legal professionals is covered by paragraph 4 of the draft exemption order.

Q1. Do you consider that the exemption for legal professionals is expressed appropriately in the draft exemption order?

Businesses regulated by the Financial Services Authority

16. The Secretary of State also intends to exempt those who are already regulated by the Financial Services Authority (FSA), to the extent that they are already regulated in the provision of claims management services by the FSA. This would cover insurers who provide services in relation to claims by their own policy holders. It may be the case that some businesses will need to be regulated by both the FSA and by the Claims Management Regulator for the different activities they carry on as part of their business.
17. The question of whether third party capture by liability insurers should be regulated is addressed in our earlier consultation paper on the draft scope order (CP(L)12/06), which sought views on the position of liability insurers who seek to capture a person injured by their policy holder and provide a package of services including rehabilitation before settlement of the claim. As this activity involves a third party rather than the insurer's policy holder, it is not fully regulated by the FSA. However, the FSA's rules do state that in its dealings with a third party an insurer "should have regard to Principle 1 (Integrity), Principle 2 (skill, care and diligence) and Principle 5 (Market conduct)" and "should not deal with the claim in any way less favourably than it would have done had the claim been proceeded against its customer." Consideration of responses to our earlier consultation on this topic will inform a decision about whether third party capture should be excluded from the scope of regulation.

Q2. Do you consider that the exemption for those regulated by the FSA is expressed appropriately in the draft exemption order?

Businesses licensed under the Consumer Credit Act

18. Providing loan facilities (or making arrangements to provide such facilities) for the purposes of pursuing a claim will be a regulated activity, as will referring claimants to loan providers. Those lending money or arranging credit for others are already required to be licensed under the Consumer Credit Act 1974 by the Consumer Credit Licensing Bureau. The Secretary of State therefore intends to exempt those licensed under the Consumer Credit Act to the extent that they are already regulated. This means, for example, that a bank or other financial institution which

provides loans but does not offer any other regulated claims management service will not require authorisation.

Charities and not-for-profit advice agencies

19. The government does not wish to impose unnecessary burdens on the not-for-profit and charitable advice sector, and recognises the extremely valuable work that is done by this sector to provide access to justice. It is therefore proposed to exempt charitable and not-for-profit bodies from the requirement for authorisation.
20. Concern has been expressed that commercial claims management companies could exploit an exemption for not-for-profit bodies as a loophole in the regulation, perhaps by using such an organisation as a vehicle for carrying on commercial activities while unregulated. It is important that the definition in the exemption order is broad enough to capture genuine not-for-profit advice agencies (many of which are not registered charities), while not opening a loophole. The definition in the draft exemption order is consistent with the one developed for the draft Legal Services Bill.

Q3. Does the definition of not-for-profit bodies in paragraph 7 of the exemption order successfully capture legitimate not-for-profit organisations, and exclude situations where individuals might wish to exploit such an organisation for commercial gain?

Independent Trade Unions

21. Following extensive debate in Parliament during the passage of the Compensation Act, the government has committed to exempt from the requirement for regulation Trade Unions certified as independent by the Certification Officer, where they provide the claims management services to their members or members' families. Trade Unions generally provide good quality claims management services to their members, and an exemption will allow them to continue without the addition burden of regulation. However, there is some concern about the activities of a very small number of unions. Individual trade unions which consistently fall below the standards outlined in the code could be excluded from a general exemption and required to seek authorisation if they wished to continue providing regulated services.
22. There was widespread support in Parliament for the exemption to be limited to the provision of services to full members and retired members. It is important that the definition of "member" is appropriate so as to avoid exempting Trade Unions in the circumstances that they sign-up a member purely for the purposes of pursuing a claim.

Q4. Are the definitions of "full member" and "retired member" in paragraph 8(2) of the draft exemption order appropriate?

23. This exemption will be subject to the condition that Trade Unions comply with a code of practice prescribed by the Secretary of State, which is being developed in conjunction with the Trades Unions Congress. The code of practice will outline the key principles which Trade Unions should follow when providing regulated claims management services to their members – including openness and transparency about the handling of their claim and a proper mechanism for complaints and redress when things go wrong. The code will be issued for consultation shortly.

24. Only unions which fall within the definition of s.1 of the Trade Union and Labour Relations (Consolidation) Act 1992 can be listed, so the exemption could not be successfully exploited as a loop hole by commercial claims management companies.

Other organisations

25. The Secretary of State has received requests for specific exemption from the following organisations:
- The Medical Protection Society, which is a not-for-profit mutual organisation, offering support to health professionals with the legal and ethical problems that arise from their professional practice. This includes offering legal advice in respect of clinical negligence claims.
 - The Independent Complaints Reviewer, who provides an independent complaints review service for a number of public bodies including the Land Registry, the Charity Commission and the Housing Corporation.
 - The Motor Insurers Bureau, which was established in 1946 as a private company limited by guarantee for the purpose of entering into Agreements with the Government to compensate the victims of negligent uninsured and untraced motorists. Every insurer underwriting compulsory motor insurance is obliged, by virtue of the Road Traffic Act 1988, to be a member of MIB and to contribute to its funding.

Q5. Is it appropriate to exempt these additional organisations from the requirement for authorisation?

Other candidates for exemption

26. It may be that other classes of person should be exempted. It is envisaged that the activity of referring claimants details will only be regulated by order under s.4(2)(e) where such referrals are carried out for money or money's worth. However, there may be cases of other organisations providing regulated services, which it is not appropriate to regulate. For example, employers may offer claims management services to their employees in some cases, and health care professionals may provide informal advice to patients about the options for pursuing a claim. This is legitimate activity which may fall within the definition in section 4. In addition, it is possible that Student Unions provide advice to their members which falls within the definition.

Q6. Are there any additional persons or classes of person which should be included in the exemption?

Comments

27. Comments on this consultation should be received by **Friday 13 October 2006**. Comments can be sent by post or e-mail to:

Claims Management and Private Funding Policy
Legal Services Regulation and Redress Division
Department for Constitutional Affairs
3rd Floor, Selborne House
54-60 Victoria Street
London SW1E 6QW

E-mail: claimsmanagementregulation@dca.gsi.gov.uk

Appendix 3

Draft Compensation (Exemptions) Order 2006

- (c) an individual providing the service at the direction, and under the supervision, of a legal practitioner acting in the normal course of practice, in a way permitted by the professional rules to which he is subject, who is—
 - (i) his employer or fellow employee; or
 - (ii) a director of a company, or a member of a limited liability partnership (being a company or partnership referred to in subparagraph (b)) that is his employer.
- (2) In paragraph (1), “legal practitioner” means—
- (a) a solicitor, barrister or advocate of any part of the United Kingdom;
 - (b) a Fellow of the Institute of Legal Executives;
 - (c) a European lawyer, as defined in the European Communities (Services of Lawyers) Order 1978(a);
 - (d) a registered foreign lawyer, within the meaning given by section 89(9) of the Courts and Legal Services Act 1990; or
 - (e) any other member of a legal profession, of a jurisdiction other than England and Wales, that is recognised by the Law Society or the General Council of the Bar as a regulated legal profession.

Persons providing services that are regulated activities under the Financial Services and Markets Act 2000

5.—(1) Section 4(1) of the Act does not prevent the provision of a regulated claims management service by a person if—

- (a) the service is a regulated activity for the purposes of the Financial Services and Markets Act 2000; and
- (b) the person—
 - (i) is an authorised person and is authorised to provide the service;
 - (ii) is an appointed representative (within the meaning given by section 39 of the Financial Services and Markets Act 2000) of an authorised person who is authorised to provide the service, and does so as the representative of that authorised person; or
 - (iii) has, in relation to providing the service, the benefit of an exemption order under section 38 of that Act.

(2) In paragraph (1), “authorised person” has the meaning given by section 31(2) of the Financial Services and Markets Act 2000.

Certain consumer credit providers

6. Section 4(1) of the Act does not prevent the provision of a regulated claims management service by a person licensed under the Consumer Credit Act 1974(b) to carry on a consumer credit business if the provision of the service is authorised by that licence.

Charities and not-for-profit advice agencies

7.—(1) Section 4(1) of the Act does not prevent the provision of a regulated claims management service by a not for profit body—that is, a body that, by or under its constitution—

- (a) is required to apply the whole of its net income after payment of outgoings for charitable or public purposes; and
- (b) is prohibited from distributing, directly or indirectly, any part of its net income by way of profits, or its assets, among any of its members.

(a) S.I. 1978/1910, as amended by the European Communities (Services of Lawyers) (Amendment) Order 2004 (SI 2004/1117).
 (b) 1974 c. 39.

Independent trade unions

8.—(1) Section 4(1) of the Act does not prevent the provision of a regulated claims management service by an independent trade union to a full member or retired member of the trade union, or to a member of the immediate family (as determined in accordance with the rules of the trade union) of a full member or retired member.

(2) In paragraph (1)—

“full member” of a trade union means a member who has, under the rules of the trade union, the full rights of a member, and who pays subscription at the full rate for such a member;

“independent trade union” has the same meaning as in the Trade Union and Labour Relations (Consolidation) Act 1992(a);

“retired member” of a trade union means a person who has been a full member of the union but no longer works in employment that is a qualification for membership.

(3) For a person to have the full rights of a member of an independent trade union for the purposes of paragraphs (1) and (2), the person must have at least—

(a) the right to representation by the trade union in a dispute about pay or working conditions; and

(b) the right to vote in union elections.

(4) An exemption of a person under this article is subject to compliance by the person with the condition that the person must, in providing regulated claims management services, act in accordance with any code of practice for the provision of regulated claims management services by trade unions issued by the Secretary of State.

Signed by authority of the Secretary of State

Cathy Ashton
Parliamentary Under Secretary of State
Department for Constitutional Affairs

Date

EXPLANATORY NOTE

(This note is not part of the Order)

Part 2 of the Compensation Act 2006 (“the Act”) regulates the activities of claims managers.

Claims managers gather cases either by advertising or direct approach. A claims manager acts either directly for a client to pursue a claim or as an intermediary between a client and legal practitioners who represent him or her. Claims managers make money from several sources—referral fees from solicitors, commission on auxiliary services and after the event insurance, and sometimes from loans to clients.

A person who provides “regulated claims management services” must be authorised under the Act to do so, or be exempted, or have the benefit of a waiver of the obligation to be authorised. Under section 4 of the Act, a regulated claims management service is one declared to be regulated by order by the Secretary of State.

The Compensation (Regulated Claims Management Services) Order 2006(b) declares certain kinds of services to be regulated when provided in connection with certain kinds of claim. The services include advertising for claimants, referral of claimants to legal practitioners, advice in relation to claims, provision of loans for the purposes of pursuing claims, investigation of claims and commissioning reports by experts. The kinds of claim include: personal injury claims and criminal injuries compensation claims; employment-related claims such as wages, unfair dismissal

(a) 1992 c. 52.

(b) The Compensation (Regulated Claims Management Services) Order 2006, SI 2006/...

and discrimination; claims for housing disrepair; and claims relating to the mis-selling of certain financial products.

This Order exempts legal practitioners (barristers, solicitors, advocates, legal executives and foreign lawyers) who are already regulated by their respective professional bodies from the obligation to be authorised. It also exempts various other persons that are either already regulated in other ways, or do not provide regulated claims management services for profit.