Ministry of JUSTICE

Memorandum to the Justice Select Committee

Post-Legislative Assessment of the Compensation Act 2006

January 2012

Memorandum to the Justice Select Committee

Post-Legislative Assessment of the Compensation Act 2006

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

January 2012

Cm 8267 £10.75

Any enquiries regarding this publication should be sent to Paul Norris, Policy Manager, Ministry of Justice, 6.21, 102 Petty France, SW1H 9AJ.

This publication is available for download at www.official-documents.gov.uk and on our website at www.justice.gov.uk

ISBN: 9780101826723

Printed in the UK by The Stationery Office Limited
on behalf of the Controller of Her Majesty's Stationery Office

ID 2472633 01/12

Printed on paper containing 75% recycled fibre content minimum.

Contents

Introduction

This memorandum provides an assessment of the Compensation Act 2006 and has been prepared by the Ministry of Justice (MoJ) for submission to the Justice Select Committee. It is in two parts as the Act covers two separate and distinct areas. Part 1 contains provisions relating to the law of negligence and breach of statutory duty, and to liability in relation to the asbestos-related disease of mesothelioma; and Part 2 provides the framework for the regulation of claims management services.

Objectives

Part 1

1. The purpose of section 1 of the Act was to address what the Better Regulation Task Force (BRTF) report of May 2004 (Better Routes to Redress) suggested was a common misperception that could lead to a disproportionate fear of litigation and consequent risk-averse behaviour. Under the existing common law, for a claim in negligence or for breach of a statutory duty involving a standard of care to succeed, there must be a duty of care owed by the defendant to the claimant; a breach of that duty by the defendant; and loss or injury suffered by the claimant which is causally connected with the breach. Clause 1 concerns a particular aspect of the current law relating to the second component: whether there is a breach of the duty of care.

2. The question whether there has been a breach of the duty of care involves two elements: how much care is required to be taken (the standard of care) and whether that care has been taken. The ordinary standard of care is "reasonable care"; and the question whether or not that standard has been met is one of fact for the court to decide, having regard to all the circumstances of the case. What amounts to reasonable care in any particular case will vary according to the circumstances. In some cases, what would be required to prevent injury of the kind suffered may be such that to demand it of the defendant would be to demand more than is reasonable.

3. This provision in section 1 was intended to contribute to improving awareness of this aspect of the law; providing reassurance to the people and organisations who were concerned about possible litigation; and to ensuring that normal activities were not prevented because of the fear of litigation and excessively risk-averse behaviour.

4. This provision was not concerned with and did not alter the standard of care, nor the circumstances in which a duty to take that care would be owed. It was solely concerned with the court's assessment of what constitutes reasonable care in the case before it. It only affects statutory duties which involve a standard of care, such as those owed under the Occupiers' Liability Acts of 1957 and 1984. It does not extend to other forms of statutory duty, such as cases where there is an absolute statutory duty involving strict liability in the event of failure; cases which concern what is reasonable in a context other than carelessness; or cases where infringement of a right is actionable as a breach of statutory duty which does not depend on carelessness.

Section 2 provides that, in claims in negligence or breach of statutory duty, an apology, offer of treatment or other redress shall not of itself amount to an admission of liability.

Damages for Mesothelioma

5. The provision in section 3 of the Act was included to address a difficulty which had arisen as a result of a House of Lords' judgment. In the 2002 case of *Fairchild v Glenhaven Funeral Services Ltd and others* [2002] UKHL 22, the House of Lords decided that a person who had contracted mesothelioma after wrongful exposure to asbestos at different times by more than one negligent person could sue any of them, notwithstanding that he could not prove which exposure had actually caused the disease – because all had materially contributed to the risk of him contracting the disease. *Fairchild* did not resolve whether liability should be joint and several, although it was presumed by the parties that this would be the rule and this was the approach taken in practice. However, in *Barker v Corus UK Ltd (and conjoined cases)* [2006] UKHL 20, the House of Lords decided that the damages were instead to be apportioned among those responsible for the wrongful exposure according to their relative degree of contribution to the chance of the person contracting the disease.

6. That decision did not impose a limit on the damages which could be recovered from those responsible for the exposure to asbestos. But it did mean that the risk of any of them being insolvent and unable to pay the appropriate share would fall on the claimant, and that in practice the claimant would have to trace all relevant defendants, so far as this was possible, before liability could be apportioned and full compensation paid, or alternatively to issue multiple claims to recover damages on a piecemeal basis. The practical effects of this decision (which their Lordships were not asked to consider) were that claims could take much longer to be concluded, and would be much more difficult and time-consuming for claimants in circumstances where they and their families were already under considerable pain and stress. Section 3 therefore reversed the effects of the *Barker* judgment to enable claimants, or their estate or dependants, to recover full compensation from any liable person. Under the existing law it would then be open to the person who had paid the compensation to seek a contribution from other negligent persons.

7. Section 3(7) of the Act also conferred a power for HM Treasury to make provisions that would facilitate the speeding up of payment of claims to mesothelioma victims by enabling responsible persons to claim money back from the Financial Services Compensation Scheme in specified circumstances (that is, in circumstances in which previously only the claimant would have had such a right) when another responsible person and their insurer were both insolvent and thus unable to pay their own share of compensation payments.

Part 2

8. Part 2 of the Act provides a framework to regulate people who offer to assist consumers to make a claim for compensation. The Better Regulation Task Force (BRTF) was asked by the Government to investigate the perceptions of a compensation culture. In its report, *Better Routes to Redress (May* 2004*)*, the BRTF recommended that the claims

management industry be given a chance to self-regulate and if progress were not made by December 2005, then the Government should regulate the sector. As attempts at self-regulation failed the Government brought forward the Compensation Act 2006, which established the framework for the regulation of claims management services.

9. The objectives set out in the Regulatory Impact Assessment for the Compensation Bill were:

   "*This proposal aims to provide better safeguards for consumers of claims management services. It is designed to encourage the provision of quality services, to enhance consumer protection and to provide consumers with a clear route to redress. In particular, the proposal aims to provide effectiveness and efficiency of the system for those who have a genuine claim to compensation, and to tackle practices that have helped to spread the misperceptions and false expectations of compensation claims amongst consumers. This will help to build consumer confidence and promote effective competition within the sector, whilst ensuring that the sector will be able to contribute effectively to the widening of access to justice.*"

10. The Regulatory objectives which are set out in the Act are:

    - Protecting and promoting the interests of consumers
    - Protecting and promoting the public interest
    - Improving standards of competence and conduct of authorised persons
    - Improving access to justice
    - Promoting practices to facilitate competition between different providers of regulated claims management services.

11. Personal injury claims were the principal driving force behind the introduction of regulation. Many claims management businesses were engaged in malpractice to the clear detriment of consumers and the public interest which included:

    - Aggressive marketing techniques;
    - Encouraging frivolous claims resulting in the perception of a compensation culture;
    - Misleading consumers about funding options;
    - Providing poor quality advice;
    - Dropping claims where they were not financially lucrative; and
    - Soliciting claims in hospital premises.

12. There was only one substantive market for compensation claims for financial products - mis-sold endowment policies. The major malpractice was misleading claims on websites, although it did not have a significant detrimental effect on consumers. However, many businesses charged high fees for making a claim on behalf of consumers which meant that even if a

claim were successful consumers were still left facing a shortfall on their mortgage.

13. There was also some concern about the practices of non legal practitioners in employment claims, and claims businesses encouraging consumers to submit claims for housing disrepair but with little intention of the necessary repair work being undertaken. Further evidence emerged of detrimental practice in claims made to the Criminal Injuries Compensation Authority and for Industrial Injury Disablement Benefit. As benefits did not fit with the wide definition in the Compensation Act of claim the Act was amended during the Parliamentary passage to ensure that these types of claims could also be brought within scope.

14. Before the introduction of the Compensation Bill very little was known about the size or scale of the industry as there had not been any research undertaken. However, the Citizens Advice report *No Win, No Fee, No Chance* published in 2004 provided sound evidence of the detriment to consumers by some of the more unscrupulous businesses. This report highlighted the more severe detriment to consumers, some of whom were left worst off by the intervention of claims management businesses who urged consumers to exaggerate claims and sign up for expensive insurance policies to finance their claim under a no win no fee basis.

15. The definition of compensation claim in the Part 2 is deliberately wide so that it can capture any type of compensation claim where there is evidence of malpractice; it also provides a number of ways in which the regulation can be provided. A scope order (see paragraph 43) defines the claims that are subject to regulation and states that any person who assists consumers in making a claim for commercial reasons must be authorised to do so.

16. Persons providing assistance for making a claim on a voluntary basis are exempted from the need to be authorised in the Act. Also any person who is already regulated including legal practitioners and not for profit organisations such as the Citizens Advice Bureau is exempted and does not need to be authorised.

Implementation

Part 1

17. The provisions in Part 1 of the Act came into effect upon Royal Assent on 25 July 2006.

Part 2

18. Claims Management Regulation was fully implemented by April 2007. When the legislation was first introduced into Parliament no decision had been taken about the regulatory structure and the Act therefore provided several options: the Secretary of State could establish a new regulatory body, designate an existing regulatory body to be the regulator or be the regulator himself. As there was no one who was either able or prepared to be the Regulator in the timescale, and setting up a new regulatory body would take time and be costly, it was decided that the Secretary of State should be the Regulator. This decision was announced in Parliament during Second Reading of the Compensation Bill in the House of Commons[1].

19. A Claims Management Regulation Unit (CMRU) was established. This Unit is led by the Head of Regulation, who is a civil servant. He is supported by a small team who are based at the Ministry of Justice. This team takes statutory decisions on behalf of the Secretary of State. A front line Compliance Office is provided under contract to MoJ by Staffordshire County Council (SCC). The Compliance Office processes applications for authorisation, monitors compliance with the rules, undertakes audits of business premises, provides an enquiry line for businesses and consumers, investigates complaints and carries out enforcement actions.

20. It was announced in Parliament during Lords Consideration of Commons Amendments on 19 July 2006[2] that Mark Boleat would be appointed as the first Head of Regulation. Mr Boleat had produced a report during the Parliamentary passage of the Bill with advice on who should be the Regulator and, given his previous experience as Director General of the Association of British Insurers and lead on various trade bodies, he was well placed to get the Regulation off the ground. Kevin Rousell, an established civil servant in MoJ, took over the role when Mr Boleat left.

21. The CMRU is made up of a mix of officers with a wide range of experience from policy, trading standards, police, consumer advice and insurance sector backgrounds. The Unit has also benefited from secondments provided by the Financial Services Authority (FSA), The Office of Fair Trading (OFT) and Advertising Services Authority (ASA). A non-statutory

[1] Hansard Vol 447 (no. 162) Col 426

[2] Hansard Vol 684 (no. 183) Col 1329

Regulatory Consultative Group (RCG) (see Annex A for list of current members) comprising representatives of relevant major stakeholders, including claims management businesses, other regulators, trade associations and consumer organisations, acts as a sounding board for the Regulator and has provided cross sector advice on Regulation. The RCG initially met monthly as the Regulatory Framework was being developed. This allowed for any issues of dispute to be discussed openly and ensured joint agreement on all issues. It now meets three to four times a year but regular 1:1 meetings are held with key organisations and other Regulators such as the Solicitors Regulation Authority (SRA), FSA, Financial Ombudsman Service (FOS) and Citizens Advice Bureau.

22. The Claims Management Service Tribunal was established under section 12 of the Act to hear appeals from businesses that were refused authorisation or authorised business whose authorisation was suspended, cancelled or who had conditions attached to their authorisation. The Tribunal was in practice made up of members of the Financial Services and Markets Tribunal and the President of that Tribunal was also President of the Claims Management Services Tribunal. This was a proportionate and cost effective way of providing an appeal structure that was totally independent of the Regulator.

23. The Tribunals, Courts and Enforcement Act 2007 abolished the Claims Management Services Tribunal on 18th January 2010. Appeals against enforcement decisions of the Regulator are now made to the First-tier Tribunal (Claims Management Services) (which hears appeals against decisions of the regulator) and is part of the General Regulatory Chamber (GRC) – a new “chamber” that forms part of the First-tier Tribunal and that merged individual tribunals that hear appeals on regulatory issues.

24. The GRC was commenced in 2009 and claims management regulation appeals were brought into the jurisdiction also on 18 January 2010. On transfer, all existing rules were replaced by GRC specific rules made by the Tribunals Procedure Committee. The intention behind the new GRC rules was to create a single set of rules that can apply to all regulatory jurisdictions within the “chamber” rather than have several sets of rules applying. Most appeal processes, for example, timings (e.g. 28 days for filing evidence; 14 day notice of hearing etc) and contents/requirements of evidence remain the same but there were some notable changes including more use of Alternative Dispute Resolution (ADR), a power to award costs, fewer stages for filing evidence and the onward appeal from the Tribunal now lies to the Upper Tribunal rather than the Court of Appeal.

25. Since Regulation commenced, there have been 12 appeals to the Tribunal. Of these 5 appeals have completed the entire appeals process and, in each case, the Tribunal upheld the decision of the Regulator. The remainder have either been dismissed as the appellant failed to meet the statutory requirements by filing statements, or the Tribunal decided to

strikeout the appeal as it did not meet the statutory criteria. Notices of appeals and decisions are published on the Claims Management Services Tribunal website which is now part of the Justice website[3].

26. An application form for businesses wishing to apply for authorisation was devised based on the FSA application form. The form cannot be downloaded from the website without the applicant first providing specific information about himself. This has helped with tracking any individual who might attempt to trade without authorisation having started the application process but withdrawing the application subsequently. Shortly after full implementation of the regulatory regime a formal review was carried out to evaluate how the authorisation process had contributed to the objectives of regulation. The overall assessment at that time was that the process for authorising businesses had been successful with no significant problems with either the form or the technology that supported it. The application form was reviewed again and revised in 2010/11 to include more detailed requests for information. The application procedure was also enhanced with on-line help and guidance.

27. All applications are carefully scrutinised by a dedicated applications team and a number of checks are made on the authenticity of the applicant and the information provided. All applications for authorisation must be either granted or refused by the Regulator within three months of receipt but if any further information is required then the time taken to produce it is not included.

28. The Act provides the statutory basis for the Regulator to prosecute any business providing claims management services without authorisation. There have not been any prosecutions to date as work is targeted on detecting and stopping businesses that are trading without authorisation. The action taken to encourage compliance through applying for authorisation has avoided the need for lengthy and costly prosecutions.

29. Extensive use is made of the enforcement provisions in the Act and Regulations. The CMRU uses the National Intelligence Model as the working enforcement tool. The statutory procedures require investigation into any breach of a condition of authorisation - mainly non-compliance with the regulatory rules - and then seeking a written submission from a business before any enforcement action is taken. Stringently following the statutory requirements has ensured that a case for taking enforcement action is based on solid evidence. The fact that there have been so few applications to the Tribunal, and the Tribunal has upheld the decision of the Regulator for all those that have completed the process, suggests that when the Regulator has taken enforcement action this has been the right decision.

[3] http:/www.tribunals.gov.uk/cms

30. Regulation is self funding and costs are met from fees paid by businesses when applying for authorisation, and all authorised businesses are required to pay an annual regulation fee which is based on their annual turnover. A Fees Determination is published annually for consultation setting out the proposed application and annual fees for the following Regulatory Year. Due to an anticipated shortfall in fee income for 2010/11 it was necessary to increase the fees in year; this was done after consultation with the sector. The shortfall was due to a higher than anticipated number of businesses surrendering their authorisation and fewer applications being made for authorisation. The flexibility in the Regulations allows for in year increases to ensure full cost recovery. For 2011/12 a much higher range of fees was set to safeguard funding for the year to support the anticipated full range of enforcement activities.

31. All authorised businesses are required to provide a complaints handling scheme under the Complaints Handling Rules. The Rules require a business to investigate consumer complaints about the service provided, and to remedy matters. If the consumer is still dissatisfied with the outcome of the complaint or the way it has been handled, he can inform the CMRU about this. The CMRU then works with the business and the consumer to attempt to resolve the areas of concern. If these steps are unsuccessful the consumer can request a formal review of the complaint and the Regulator has the power under the Regulations to direct a business to apologise, re-do the work or in some limited circumstances to refund some or all of the fees paid. The Regulator might also issue directions to a business about the handling of complaints or any other aspect of the business procedures to avoid a similar situation arising in the future. The conciliatory work undertaken has in most cases been successful so there have been few requests for a formal review.

32. Auditing authorised businesses has been a key regulatory tool since regulation commenced. All businesses are risk rated when they are first authorised and any with a medium risk rating will be audited within the first few months of regulation. The Regulator also undertakes thematic audits relating to specific business sectors or geographic areas. All businesses audited are provided with information and advice in a detailed report. Postal audits are also undertaken which are more efficient and less time-consuming for businesses and the Regulator. Requests for information, via a questionnaire, have been used to obtain specific information. An example of what this specific information constitutes is requesting information from businesses that hold client money.

33. A further unexpected work stream emerged shortly after Regulation commenced as it became clear that a number of authorised businesses were involved in staged accidents. Staged accidents are criminal offences and the CMRU has worked closely with the police, the Insurance Fraud Bureau, the SRA and others to identify those individuals and businesses who might be involved in such accidents. The CMRU also took the lead in establishing an informal working group of relevant regulators and enforcement agencies to ensure collaborative working with all those who have an interest in stamping out staged accidents. Information Sharing Agreements have

also been agreed with a number of police forces to ensure information can be shared more easily and assistance given where necessary. This is an area where regulation of the claims management sector has achieved far more than could reasonably have been anticipated when first established.

34. Although it is not a statutory requirement a Claims Management Regulation Annual Report has been published each year since Regulation commenced. These Reports have provided detailed information on the activities of the claims management sector and detail on how regulation has responded to the ever evolving and challenging claims market. The Annual Report 2010/11 was published in July 2011 and provides an overview of the achievements during the year[4]. Further information on these achievements is provided in the Preliminary Assessment section below.

35. Communication has been a key factor of the Regulatory regime since it commenced. In addition to the regular meetings with stakeholders and publication of an Annual Report the Regulator has had articles published about CMRU in various legal, insurance and financial publications and he has been interviewed frequently by the media and has spoken at conferences and seminars. A bulletin is also published regularly. This is primarily aimed at authorised businesses but is also a useful source of information for others with an interest in claims management regulation.

36. Business and consumer surveys have been independently undertaken to obtain direct views about the regulation and the services provided. These have helped to develop and enhance the regulation and the results have either been published on the website or been provided in an annex to the Annual Report.

37. A bespoke Claims Management Regulation website was established in late 2006 to provide comprehensive information for businesses and consumers on regulation and includes a register of all businesses with confirmation of the current authorised status. The register is in real time and updated immediately there is a change to a business's authorised status and can be accessed at any time. In May 2011 the CMR website content was integrated with the new "Justice" website. In addition there is information about claims management regulation on the Directgov website and the Business Link website.

38. An enquiry facility was also established to provide first step advice to consumers and businesses. Guidance leaflets and FAQs are available on the website on a range of issues to help and guide consumers. Over time this element of the service has been developed and enhanced and consumers are encouraged to check the website in the first instance as this does provide most answers to the questions that are frequently raised via other communication media.

[4] http://www.justice.gov.uk/publications/corporate-reports/claims-management-regulation/claims-management-regulation-annual-report-2010-11.htm

39. The Annual Report for 2010/11 provides the following key figures about authorised businesses:

Number of authorised businesses (at end March 2011)	3,213
Number of authorised businesses increased by	91
Businesses authorised during this period	884
Businesses authorised with conditions	10
Applications for authorisation 'withdrawn/terminated'	186
Applications for authorisation refused	9
Authorisations surrendered	539
Authorisations suspended	10
Authorisations cancelled	349

40. Initially it was anticipated that around 700 businesses would apply to be authorised. In total since Regulation commenced there have been more than 5,000 businesses authorised to provide claims management services.

Secondary legislation

Part 1

41. The power in section 3 to make provisions enabling responsible persons to claim money back from the Financial Services Compensation Scheme in specified circumstances was subsequently exercised by HM Treasury in the Compensation Act 2006 (Contribution for Mesothelioma Claims) Regulations 2006, which came into effect on 7 December 2006.

Part 2

42. In order to meet the Parliamentary Commitment to bring the legislation fully into force by April 2007, work had commenced on the secondary legislation whilst the Bill was still before Parliament. The necessary orders and regulations were therefore published in draft on 25 July 2006; the draft exemption order was published slightly later on 11 August 2006. Regional meetings in Leeds, London, Manchester and Newcastle were held with claims management businesses. These meetings provided direct engagement with those who would be most affected by the new regulation. Meetings were also held with stakeholders to obtain views on the proposals. The SIs were approved by Parliament and came into force in time for full implementation of the Regulation in April 2007.

Compensation (Regulated Claims Management Services) Order 2006

43. This order is made under section 14 (3) (b) of the Act and defines the sectors subject to Regulation and the activities. The sectors include personal injury, financial products and services, employment, industrial injuries disablement benefit, housing disrepair and criminal injuries compensation and any person providing services in these areas must be authorised unless exempt.

44. The types of claims management activities regulated include:

- Advertising for, or seeking out (for example by canvassing or direct marketing), persons who may have a cause of action;
- Advising a claimant or potential claimant in relation to his claim or cause of action;
- Referring details for a fee of a claim or claimant, or cause of action or potential claimant, to another person, including a person having a right to conduct litigation;
- Investigating or commissioning the investigation of the circumstances, merits or origins of a claim with a view to using the results in pursuing the claim;
- Representing a claimant

Compensation (Claims Management Services) Regulations 2006 (as amended by the Compensation (Claims Management Services) (Amendment) Regulations 2008

45. The Regulations provide the detail on how claims management regulation is delivered and include:

- Arrangements for granting a waiver (if the SofS decided to grant a person an exemption)
- The detailed criteria when considering an application for authorisation
- The making of fees determination
- The making of regulatory rules and code of practice
- Complaints handling by the regulator and grounds when a direction can be made to Make a direction for redress
- Routine audits of a business to inspect records
- Investigations into unauthorised trading
- Investigations into allegations or complaints that a business has failed to comply with conditions of authorisation
- The grounds when a search warrant can be obtained
- Grounds and procedure for suspending, cancelling or adding conditions to a persons authorisation

46. The Regulations were amended in 2008 to extend the warrant provisions to include the power to seize documents and to include a requirement for a business in the personal injury sector to have professional indemnity insurance if it represents a person making a claim.

Compensation (Specification of Benefits) Order 2006

47. This order provides that a claim for an industrial injury disablement benefit can be included as a claim for the purposes of the Act.

Exemptions Order 2007 as amended by the Exemptions (Amendment) Order 2008

48. This Order specifies the persons or category of persons and organisations that are exempt from the need to be authorised as the activity is already subject to authorisation. The following are therefore exempt from the need to be authorised -

(a) Legal practitioners acting in the normal course of practice in a way permitted by professional rules to which the legal practitioner is subject. Where however a legal practitioner has established a separate corporate body, for example to market its services, such a body is not exempt.

(b) Persons providing claims management services that are already regulated activities under the Financial Services and Markets Act

2000 or who are exempt from the need to be authorised under that Act. This includes insurance companies.

(c) Charities and not for profit advice agencies (for example, the Citizens Advice Bureau).

(d) An individual acting otherwise than in the course of business. This includes networks of individuals (operating through a website, for example), provided it is not done for reward.

(e) Trade unions certified as independent, subject to compliance with a code of practice (available on the website).

(f) Independent complaints reviewers.

(g) Student unions.

(h) The Motor Insurers Bureau, the Medical Protection Society and medical defence unions.

(i) Certain categories of referrers, known as exempt introducers (see below).

(j) Persons who give or prepare to give evidence. This covers, for example, people retained by claimants, defendants, insurers and solicitors to provide evidence about the causes or nature of a claim. Medical practitioners come into this category.

(k) Persons, typically loss adjusters, providing services to defendants and who in so doing may be involved in subrogated claims, that is counter claims against the claimant or claims against a third party.

49. As there are many businesses that refer a small number of cases either to solicitors or claims management businesses, it would be disproportionate for such businesses to be required to be individually authorised. The Exemption Order includes a specific category of person who does not need to be authorised and who is known as the 'exempt introducer' - providing the specific criteria in the Order is met. A business may refer claims and will not be required to seek authorisation if;

- It provides no other regulated claims management activity, including advertising or seeking out persons who may have a cause for a claim, or advising on a potential claim; and
- Acquiring the case for referral is incidental[5] to the introducer's main business; and
- The referral is only made to an authorised business or legal practitioner; and
- The business is paid for no more than 25 referrals per calendar quarter.

[5] 'Incidental' means that the claim must arise as a result or consequence of the business being carried out by the introducer such as road side recovery organisations, not a separate feature of the business.

50. The business must meet each one of these criteria to be deemed an exempt introducer. Additionally, the authorised business or legal practitioner receiving these referrals must take steps to ensure that the introducer has obtained the referrals in accordance with the Conduct of Authorised Persons Rules 2007.

The Tribunal Procedure (First-tier) Tribunal) (General Regulatory Chamber) Rules 2009

51. The GRC Rules apply to any appeals made by a business that has been refused authorisation, or an authorised business whose authorisation is suspended, cancelled or if conditions are attached to its authorisation. They specify the practice and procedure the Tribunal must follow including case management powers, the giving of directions, the power to strike out a party's case, the serving of documents, evidence, submissions, witnesses and costs. The Rules replaced the Claims Management Services Tribunal Rules 2007.

Regulatory Rules

52. The Regulations require the Regulator to make rules relating to conduct, complaints handling and clients fees. Regulatory rules were consulted on in the autumn of 2006 and final Rules were published to coincide with the commencement of Regulation. All businesses are required as a mandatory condition of their authorisation to comply with the following Rules:

    - Conduct of Authorised Persons Rules 2007
    - Complaints Handling Rules 2007
    - Client Account Rules 2006

53. Any business that is found not to have complied with a Rule following an investigation could face enforcement action which would include suspension, cancellation or having specific conditions attached to its authorisation. All enforcement actions are taken in accordance with the Regulator's published Enforcement Policy[6] which also sets out additional enforcement actions such as warnings or undertakings.

[6] The Enforcement Policy was published in April 2007 and reflects the principles of the Cabinet Office Enforcement Concordat.

Legal Issues

Part 1

54. None.

Part 2

55. The definition in the Act is sufficiently wide and the framework flexible that there have not been any legal issues of concern which have come to light to date. During the passage of the Act there was evidence of claims management businesses diversifying and offering to make claims for bank charges. Financial services were therefore also brought into scope to ensure that any malpractice could be dealt with. When the Unenforceable Consumer Credit Agreements (UCCA) claims market emerged, they were covered by this wide definition and all businesses offering to challenge loan and credit card agreements were required to be authorised.

Other Reviews

Part 1

56. None.

Part 2

Better Regulation Executive Review

57. The Better Regulation Executive (BRE) undertook a review of the regulatory regime in 2009. In its October 2009 report *Better Regulation, Better Benefits; Getting the Balance Right*[7] the BRE featured claims management regulation as an effective regulatory model. The report identified the engagement of stakeholders, minimal administrative burdens for business and post implementation reviews as key factors to the success of this regulatory regime. The report stated:

> "*Claims management regulation is a good example of how regulation can be introduced quickly, efficiently and at low cost, with the support of the industry to protect consumers"*.

James Sandbach, Citizens Advice said:

> "*Overall this [Claims Management Services] has been a successful regulatory intervention done quickly and effectively."*

Andy Wigmore, Policy Director of the Claims Standards Council (the body that represents the interests of some claims management businesses) said:

> "*We were getting 100 complaints a day from Accident and Emergency Departments (about ambulance chasers). Within 3 months of the regulation commencing these had stopped. Good stakeholder engagement has strengthened the regulation and ensured industry support... The regulation has teeth – it is not just regulation for regulation's sake and this only happened because of the engagement with stakeholders. The nucleus of this regulation is the Regulatory Consultative Group which has given the regulator the opportunity to see and listen with amazing clarity. With any regulation you will get stakeholders who want to engage – this means you get regulation you can do something with."*

Internal work

58. The current arrangement for regulating the Claims Management sector was originally intended to be an interim solution and the longer term consideration was for the possibility of regulation and/or complaints handling to be moved under the umbrella of the Legal Services Board.

[7] http://www.bis.gov.uk/files/files53231.pdf

This was announced by the previous administration at Second Reading of the Bill in the House of Commons[8]. There are powers in the Legal Services Act 2007 for the Regulation to transfer to the Legal Services Board[9] and for complaints to be handled by the Legal Ombudsman[10].

59. In the four years since formal regulation commenced there have been significant developments in the claims market, reforms introduced under the Legal Services Act 2007 and the major review into the funding and costs of civil justice claims by Lord Justice Jackson[11]. Officials have recently considered the current regulatory arrangements in light of this. It is clear that the CMRU is well-established, provides a cost effective proportionate regulatory burden on regulated businesses and although the claims sectors that are subject to regulation can differ in terms of compliance and enforcement issues, there are benefits in retaining the status quo of one regulatory regime at the present time. Taking into account the fact that the claims industry is likely to be undergoing a period of significant change in the medium term, both in terms of the introduction of Alternative Business Structures and the proposed ban on the payment or receipt of referral fees, it does not seem appropriate or sensible now to consider major reform of the delivery model for claims management regulation. The optimum time to consider this would seem to be in about 18 months to 2 years when the effects of the reforms on the industry will be apparent.

60. It has been suggested that complaints about claims management business should in due course be transferred to the Legal Ombudsman and whilst this has potential advantages in terms of an independent service with stronger powers of redress and potentially freeing up the CMRU to focus resources on investigations and enforcement action, more work and careful consideration would be needed before any transfer could be affected. The CMRU and the Legal Ombudsman are already working together to help ensure consumers with complaints receive appropriate advice and support and have developed a memorandum of understanding which is due to commence shortly. Given the Legal Ombudsman has expressed an interest in taking on claims management complaints, discussions will continue between the CMRU, the Legal Ombudsman and the LSB about the feasibility and options for transferring the complaints handling function in due course.

[8] Hansard Vol 447 (no. 162) Col 427

[9] Legal Services Act 2007 Section 187 and Schedule 19

[10] Legal Services Act Section 161

[11] Right Honourable Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report,* The Stationery Office, December 2009

Preliminary Assessment of the Act

Part 1

61. As noted above, the provisions that were included in section 1 clarified and restated the existing law to confirm that the courts, in considering claims for negligence or breach of statutory duty, may have regard to whether requiring particular steps to be taken by the defendant might prevent or impede desirable activities from taking place. The underlying aim of the provision was to improve awareness of this aspect of the law and ensure that normal activities were not prevented because of the fear of litigation and excessively risk-averse behaviour. Section 2 of the Act provides that an apology, an offer of treatment or other redress shall not of itself amount to an admission of negligence or breach of statutory duty.

62. Sections 1 and 2 reflected and did not change the law, and on that basis we would not expect them to have led to any significant change in the way in which the courts have dealt with these cases. The detailed examination of evidence to assess any possible impact would involve the Ministry of Justice in seeking to examine the basis on which the courts have reached their decisions in a wide range of individual cases over the last five years. The Government does not consider that this would be appropriate, as it could be seen as undermining the independence of the judiciary and casting doubt on the way in which they have interpreted the law.

63. It would also be impractical in resource terms, as it would effectively require a thorough detailed examination of individual decisions in an attempt to determine whether the courts had struck the right balance between the interests of the parties. Even if this were feasible in resource terms, it would be very unlikely to yield any clear or coherent results, as the courts' decisions will have been based on balancing all the evidence put before them and will have varied according to the specific circumstances of each case. The determination of liability is a matter which the Government considers that the courts are in the best position to decide based on all the circumstances of individual cases.

64. The provisions in sections 1 and 2 of the Act were one element in a wide-ranging programme of work undertaken by the then Government to tackle perceptions of a compensation culture.

65. The present Government has also considered whether a compensation culture exists in Britain. The Rt Hon Lord Young of Graffham published his report *Common Sense, Common Safety*[12] in October 2010. Among other things, the report referred to misconceptions perpetuated by the media about people's potential liability for doing voluntary acts. Lord Young

[12] http://www.number10.gov.uk/wp-content/uploads/2010/10/402906_CommonSense_acc.pdf

recognised that the law itself is clear and does not need to be changed, but proposed action to improve awareness and recommended that this should be done through legislation at some future point if other means failed. In response to this recommendation the Government committed to providing focused guidance and advice to the public where appropriate, and has already done so in the case of guidance on snow clearing published by the Department for Transport in October 2010 to clarify people's responsibilities in clearing snow from the front of their properties and to reassure them on the position on liability. In addition, Lord Hodgson also considered the effect that the threat of litigation has on the voluntary sector in his report *Unshackling Good Neighbours*[13] published in May 2011. Lord Hodgson made a number of recommendations and will be invited back to review the progress in implementing them in May 2012.

66. As also noted above, the purpose of section 3 of the Act was to address the practical effects of a decision by the House of Lords in relation to civil claims for compensation for mesothelioma. This had raised procedural difficulties for claimants in proving liability which would have meant that claims could take much longer to be concluded, and would be much more difficult and time-consuming for claimants in circumstances where they and their families were already under considerable pain and stress. Section 3 remedied the practical problem which had arisen by providing for joint and several liability to apply in these situations, so that the practical difficulties involved no longer arise.

Part 2

Independent assessment of impact of Regulation

67. A rigorous analysis of the impact of regulation has been an integral part of MoJ's approach to regulating the claims management industry from the outset. A Baseline Study was published in April 2007 to help guide the regulatory regime by providing a sound analysis of known malpractice in the market, and to facilitate the analysis of the impact of regulation. At the end of each Regulatory Year an Impact of Regulation Assessment has been independently undertaken to inform and assess the regulatory regime. Mark Boleat, who was the first head of Regulation, produced these reports and in his final 'Third Year Assessment' published in July 2010 he also assessed whether the regulation had any impact on access to justice. This assessment looked at the affect of regulation over the full three year period in terms of the impact of regulation in reducing malpractice as markets have changed and new forms of malpractice have appeared and how malpractice has been reduced. This Assessment also considers whether the introduction of regulation has any impact on 'access to justice' including on the number of claims made.

[13] http://www.cabinetoffice.gov.uk/sites/default/files/resources/unshackling-good-neighbours.pdf

68. The Third Year Assessment identified how the claims management market and the regulatory regime have evolved. It has effectively met its objectives by dealing with overt malpractice through the authorisation process and swift and targeted enforcement action in the three years since Regulation commenced in April 2007. Achievements included:

    - cold calling in person has been significantly reduced
    - unauthorised marketing in hospitals has been eliminated
    - significant progress has been made in co-operative working arrangements to deal with fraudulent motor accident claims
    - misleading use of the expression “no win no fee” has largely been eliminated
    - misleading claims on websites have been almost entirely removed and rules requiring websites to give a physical postal address are being complied with
    - what little malpractice there was in respect of handling endowment claims has largely been removed; and
    - the scope for malpractice among claims handlers dealing with bank charges and Unenforceable Consumer Credit Agreement Claims has been significantly reduced; there are now very few businesses’ engaging in this practice given it is unlikely many claims would succeed.

69. This independent assessment concluded that all of the above achievements have been secured at a very modest cost (the total cost of regulation in 2010/11 was £2.32 million) and this was financed by fees paid by authorised businesses. Regulation has also prevented businesses that were likely to engage in malpractice from operating in the market and has significantly reduced the scope for malpractice to develop, particularly in respect of the market in financial claims. The scope of the main area of malpractice in the financial sector – the taking of upfront fees with no guarantee of the service being delivered – has been effectively limited by regulation.

70. The Third Year Assessment concluded that Regulation has probably played a limited role in increasing access to justice in personal injury claims, largely by reducing the scope for malpractice and increasing the credibility of the sector. However, the Assessment states that, in relation to financial products, claims management businesses have played a significant role in increasing access to justice in respect of mis-sold endowment policies, and more recently payment protection insurance. Although consumers could also have obtained compensation by using the tools available to do so on the consumer websites such as *Which?* or gone directly to the Financial Ombudsman Service who provides a free service - and the Regulator has made this clear in information that it provides to consumers - it is a matter of individual choice what method consumers choose to claim compensation. However, the Regulator intends to do more work to tackle and resolve issues arising from the handling of Payment Protection Insurance (PPI) claims by some claims management businesses. These issues include the unsolicited marketing of PPI claims

and the use of generic template PPI complaints. The Regulator also wants to raise consumer awareness of options for pursuing complaints.

71. The Assessment also made some recommendations for the future including differentiating between tackling businesses which are engaged in activities that are high risk for consumers such as taking advance fees and those who provide advice on the legality of contracts, and businesses that are simply referral agents where the risk is significantly reduced. Further recommendations include requiring authorised businesses to record outward telephone calls, more mystery shopping of businesses where there is evidence of malpractice and reconsidering the requirement that businesses have to state they are 'authorised by the Ministry of Justice'; and developing further controls on the authorisation procedures for certain sectors. Much of this has cost implications for businesses and will need careful consideration and consultation if any of these suggestions were to be implemented.

72. The Regulator will be strengthening procedures to ensure monitoring, compliance and enforcement activities are consistently risk related and deliver the best outcomes for consumers and achieve higher levels of compliance by regulated businesses. The following outcomes are the key drivers:

- Consumers not exploited by claims management businesses
- Claims management businesses responsive to regulatory safeguards
- Reduced misperceptions and false expectations of compensation and reduction of fraudulent claims and disrupting claims management businesses engaging in other forms of criminality
- Improvements in quality and professionalism of authorised providers and restoring confidence in compliant providers and in the system
- Increasing transparency of the market with regard to charges, commission payments and the provision of information
- Regulation delivers improvements in market practices and processes providing consumers with genuine claims with more efficient and effective routes to redress

Conduct of Authorised Persons Rules 2007 Review

73. In 2010 Lord Young was asked by the Government to review health and safety provisions that applied across a number of industries. In his report *Common Sense Common Safety* which was published in October 2010[14] he concluded that the offering of inducements encourages individuals to believe that simply bringing a claim can be financially rewarding. Lord Young felt that Client Specific Rule 6 (b) of the Conduct of Authorised Persons Rules 2007[15] did not go far enough to prohibit claims

[14] http://www.number10.gov.uk/wp-content/uploads/402906_CommonSense_acc.pdf

[15] http://www.justice.gov.uk/dowloads/guidance/inspection-and-monitoring/claims-management-regulation/forms-policy-and-guidance.htm

management businesses from offering financial rewards or similar benefits as an inducement to encourage consumers to make a claim. He recommended that further restrictions were required in order to control the volume and type of advertising currently allowed

74. The wording of the current Client Specific Rule 6 (b) allows for an inducement to be paid upon acceptance of a claim by a solicitor as it states that *'In soliciting business through advertising, marketing and other means a business must not offer an immediate cash payment or similar benefit as an inducement to make a claim'.* A formal consultation was undertaken and the majority of responses received from regulated claims management businesses and other interested organisations agreed with the proposed amendment to the rule. The proposed change and the impact assessment are currently subject to consideration by the Regulatory Policy Committee[16] and clearance by the Reducing Regulation Committee[17]. This process would include consideration of the issue of a waiver from the micro business moratorium on new regulation.

75. The CMRU has also commenced work on a general review of the claims management Conduct of Authorised Persons Rules 2007. Informal consultation with members of the RCG has been completed and a full consultation on the conduct rules is planned to take place by Spring 2012. Any rule changes will also be subject to scrutiny and relevant clearances from of the Regulatory Policy Committee and clearance by the Reducing Regulation Committee.

Key Achievements during 2010/11

76. The Annual Report 2010/11 provides an overview of the achievement during the reporting period and also outlines the significant changes in the claims market that have influenced the operation of the regulatory regime. Escalating enforcement action, court decisions and changes in economic conditions have led to a general slowing down of the rapid development which has typified the claims management industry since regulation commenced. The number of authorised businesses increased by 91 (3%) during 2010/11 compared to 576 (18%) during the same period in 2009/10 (this was mainly attributable to the increased number of businesses who sought authorisation to assist consumers to make claims for unenforceable consumer credit agreements). Regulation compliance, enforcement and complaints handling activities have kept pace with development of the sector. During 2010/11 there was a significant increase in enforcement actions with the cancellation of 349 authorised businesses; a clear indication that the Regulator is prepared to take action to protect consumers when a business is in breach of the rules.

[16] www.regulatorypolicycommittee.independent.gov.uk/

[17] www.bis.gov.uk/policies/bre/better-regulation-framework/regulatory-decision-making/reducing-regulation-committee

77. Other Key achievements include the following:

- Assisting more that 17,000 consumers with enquiries and complaints about businesses and the development of self-help solutions for consumers, which include automated e-mail responses and factsheets for simpler enquiries. This allowed officers to concentrate on more complex issues and carry out the necessary follow-up work.
- Many complaints received were from consumers who had paid advance fees to a business but were not satisfied with the level of service they received. These complaints were given high priority and where businesses unfairly refused or delayed a refund, enforcement action was taken which in many cases resulted in the cancellation of authorisation. Steps have also been taken to identify businesses that use this business model at the time they apply for authorisation and controls put in place including requirements for any advance fees to be put in a client account to give greater protection to consumers.
- Specific action was taken to target misleading marketing and advertising. This included updating marketing guidance to businesses following the Advertising Standards Authority's adjudications on claims management businesses advertising. Where businesses have ignored advice and persistently failed to comply, then authorisation was suspended, and if they still did not comply, it was cancelled.
- In trying to combat unauthorised trading the Regulator has worked with Internet Service Providers to remove websites and debit and credit card merchant providers to remove payment facilities. This effectively disrupts business practices and brings unauthorised trading to a standstill thus avoiding the need for costly prosecutions.
- Further targeted action has been taken to deal with unsolicited e-marketing, in particular SMS text messages which some claims companies use to market their services. This has involved working in partnership with the Direct Marketing Association, Ofcom, the Information Commissioner, the Telephone Preference Service and representatives from the mobile marketing industry to tackle 'text pests'.
- Improvements have been made to the application process for authorisation with enhanced online application provision and online help for businesses. Steps were taken to make it easier for applicants, or those requiring advice on applying, to contact the relevant team, and dedicated officers were identified at the start of the process to assist applicants.
- Work has continued in partnership with police and other enforcement agencies to tackle claims management businesses suspected of being involved in staged and contrived accidents. In addition to providing information to the fraud enforcement community under the agreed Information Sharing Agreements, officers of the CMRU have assisted in specific operations where individuals were arrested and prosecutions are currently in progress. At the time of the 2010/11 Annual Report the CMRU is actively involved in operations with a number of police forces across the country.

- Working in partnership with other enforcement agencies has resulted in transgressing businesses being effectively dealt with across the entire consumer protection regime. The CMRU has provided Companies Investigation Branch (CIB) with specific information about businesses and the Directors where it appeared there may be offences under the Companies Act. The CMRU also works closely with the OFT where there is a regulatory overlap due to the services provided by some authorised businesses in the financial sector. Good working relationships with Trading Standards Units have resulted in a number of joint compliance visits to businesses, where this has been appropriate.
- The CMRU worked closely with the Insurance Fraud Bureau (IFB) to promote "Cheatline" for reporting any business involved in fraudulent activity. A flyer was developed and published on the MoJ and IFB websites and distributed to every authorised claims management business.
- In order to raise public awareness about any formal enforcement actions taken by the Regulator in November 2010 the "Publication of Regulatory Policy Actions" was published. This provides details of the criteria that will be taken into account in making a decision to publish or disclose action that is being taken against a business, including investigations, warnings, undertakings or formal enforcement steps.

78. It is just over four years since Regulation of this sector was introduced and this assessment provides sound evidence that it was not only necessary but has achieved the legislative intention. Decisions taken so far in relation to refusal of authorisation or enforcement actions have been supported by Tribunal decisions on all appeals made to date. It is the intention of the Regulator to build on the extensive work done so far to ensure that businesses comply with the conditions of authorisation. Any who do breach the consumer protection requirements placed on them, will be subject to investigation and firm enforcement action taken, as a consequence.

Annex A
Claims Management Regulation

List of member organisations represented on the Regulatory Consultative Group (RCG)

- ACAS
- Advertising Standards Authority
- ARC (Association of Regulated Claims Management Companies)
- Association of British Insurers
- Association of Independent Financial Advisors
- Association of Personal Injury Lawyers
- British Bankers Association
- British Insurers Brokers Association
- Building Societies Association
- Citizens Advice
- Claims Standards Council
- Council of Mortgage Lenders
- Employment Tribunal Service
- Finance and Leasing Association
- Financial Ombudsman Service
- Financial Services Compensation Scheme
- Financial Services Authority
- Forum of Insurance Lawyers
- Law Society
- Legal Ombudsman
- Legal Services Board
- Monitoring Compliance Unit
- Motoring Accident Solicitors
- National Debt Line
- Office of Fair Trading
- Solicitors Regulation Authority
- The Direct Marketing Association Ltd
- UK Cards
- Trade Union Congress
- Which?

Published by TSO (The Stationery Office) and available from:

Online
www.tsoshop.co.uk

Mail, telephone, fax and email
TSO
PO Box 29, Norwich, NR3 1GN
Telephone orders/general enquiries 0870 600 5522
Order through the Parliamentary Hotline Lo-Call 0845 7 023474
Fax orders: 0870 600 5533
Email: customer.services@tso.co.uk
Textphone: 0870 240 3701

The Parliamentary Bookshop
12 Bridge Street, Parliament Square,
London SW1A 2JX
Telephone orders/general enquiries: 020 7219 3890
Fax orders: 020 7219 3866
Email: bookshop@parliament.uk
Internet: http://www.bookshop.parliament.uk

TSO@Blackwell and other accredited agents

ISBN 978-0-10-182672-3