**HM Treasury**

**Claims management regulation: consultation on secondary regulations**



**A response by the Association of Personal Injury Lawyers**

**May 2018**

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a history of over 25 years of working to help injured people gain access to justice they need and deserve. We have over 3,500 members committed to supporting the association’s aims and all of which sign up to APIL’s code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association’s aims, which are:

* To promote full and just compensation for all types of personal injury;
* To promote and develop expertise in the practice of personal injury law;
* To promote wider redress for personal injury in the legal system;
* To campaign for improvements in personal injury law;
* To promote safety and alert the public to hazards wherever they arise;
* To provide a communication network for members.

Any enquiries in respect of this response should be addressed, in the first instance, to:

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**Introduction**

APIL welcomes the opportunity to respond to HM Treasury’s consultation on secondary regulations to define the scope of FCA regulation of claims management companies. We welcome that claims management regulation will move from the Claims Management Regulatory Unit to the Financial Conduct Authority, and welcome that claims management companies will have to apply for specific permissions to operate in different sectors. It is inaccurate, however, to say that seeking out, referring and identification of claims is the same regardless of the type of claim in question.

**The move from the Claims Management Regulatory Unit to the Financial Conduct Authority**

Generally, we welcome that the regulation of claims management companies in England and Wales will move from the Claims Management Regulation Unit to the Financial Conduct Authority, and that claims management companies in Scotland will become regulated. We welcome the measures associated with the move, including that managers (those performing "controlled functions”) of CMCs will become personally accountable for the actions of their business. Tougher sanctions – including the proposal, currently out for consultation, to make directors personally liable for breaches of cold calling regulations - should also mean that those companies that are closed down for breach of the regulations will not simply be able to just change their name and re-open without repercussions. This behaviour, known as “phoenixing” is currently found within the claims management sector in England and Wales. Robust regulation of the entire legal sector is vital, to ensure that injured people are properly protected against exploitation. Passing regulation to another body does not, however, go far enough, and we continue to call for a ban on claims management companies cold calling.

**Q1) Do you agree with the overall approach of maintaining the current scope of CMC regulation, but with multiple permissions?**

We welcome that claims management companies will require permissions to carry out claims management activities, and will have to demonstrate competencies in the area that they wish to operate.

There is a misconception at section 2.1 of the consultation, however, that the seeking out, referring and identification of claims is “consistent in nature” across each sector, and does not require any sector-specific competency or knowledge. Personal injury claims are by nature complex, protected parties are often involved, and a different limitation period applies. There are also many different types of personal injury claim, all requiring specific knowledge by those representing the claimant to ensure that access to justice is achieved. It is key that someone referring and identifying claims has knowledge of the area, particularly in relation to personal injury law, to ensure that they can direct the person to a lawyer with the correct competence to handle their claim.

**Q2) Does the SI in Annex A achieve the aim of maintaining the scope of regulated claims management activity, but with multiple permissions?**

We welcome that the statutory instrument’s definition of “carrying out a regulated claims management activity” includes an activity by a person who is an individual ordinarily resident in Great Britain or a person established under the law of England and Wales or Scotland, or an activity which is carried on in respect of a claimant or potential claimant who is an individual who is ordinarily resident in Great Britain or a person established under the law of a part of Great Britain. A common issue is that claims management companies set up outside of the jurisdiction but conduct their business within Great Britain – often people receive calls from claims management companies from outside of Great Britain, for example, and these companies, once they receive the details from the person, will pass the details on within Great Britain. We welcome that the statutory instrument covers this situation, and that there is a consistency in approach regardless of where the claims management company is based.

Clause 89F(2)(c) provides a potential loophole at present. The section adopts the definition of “personal injury claim” as set out in CPR 2.3(1)(c). Following the case of *Howe v MIB[[1]](#footnote-1),* it cannot be automatically assumed that this definition encompasses Motor Insurers Bureau claims. In *Howe,* the case was appealed to the Court of Appeal following a decision that the qualified one way costs shifting provisions at CPR 44.13, which apply to “personal injury claims”, do not apply to claims brought against the Motor Insurers Bureau. It was only through the application of the *Marleasing* duty of interpretation that the Court of Appeal decided that “personal injury claims” did include claims brought against the MIB claims. It must be clarified within the regulations that “personal injury claim” includes claims against the MIB, otherwise there could be exploitation of this uncertainty, with CMCs operating in the area of uninsured/untraced drivers claims, without the necessary permissions and competencies to do so.

Clause 83 also potentially excludes brokers from regulation.

**Q5) Do the provisions in Annex A work in relation to Scotland?**

There should be a consistent approach to claims management regulation across the jurisdictions. Aside from the comments raised above, the Annex works in relation to Scotland, as well as England and Wales.

**Q10) Do you agree that the SI achieves the aim of regulating all CMCs providing regulated claims management activities in Great Britain?**

It is vital that the regulation applies to all CMCs providing regulated claims management activities in Great Britain, regardless of where the CMC is based, for the reasons set out above. We welcome that the SI is drafted to cover those based outside of Great Britain, carrying on claims management activities in respect of claimants within Great Britain.

**Exemptions**

We agree that legal practitioners should be exempt from FCA regulation, as they are already regulated by the Solicitors Regulation Authority. We question why the Motor Insurers’ Bureau and Medical Protection Society and medical defence unions should be exempt.

1. [2017] EWCA Civ 932 [↑](#footnote-ref-1)