

DEPARTMENT FOR CONSTITUTIONAL AFFAIRS (DCA)

COMPENSATION ACT 2006

CONSULTATION ON EXEMPTION ORDER

A RESPONSE BY THE ASSOCIATION OF PERSONAL  
INJURY LAWYERS

OCTOBER 2006

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and prompt compensation for all types of personal injury;
- To improve access to our legal system by all means including education, the exchange of information and enhancement of law reform;
- To alert the public to dangers in society such as harmful products and dangerous drugs;
- To provide a communication network exchanging views formally and informally;
- To promote health and safety.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

Richard Langton	APIL President
Martin Bare	APIL Vice President
Roger Bolt	APIL Treasurer

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

Almut Gadow  
Policy Research Officer  
APIL  
11 Castle Quay  
Nottingham  
NG7 1FW  
Tel: 0115 958 0585  
Fax: 0115 958 0885  
e-mail: [almut.gadow@apil.com](mailto:almut.gadow@apil.com)

## Executive Summary

1. APIL welcomes the long-awaited introduction of statutory regulation of claims management companies (CMC), for which the association has been calling for a number of years. Having worked to improve consumer protection and the quality of client care in personal injury law ever since it was founded, APIL appreciates this opportunity to comment on the draft exemption order.
2. Consumer protection should be paramount, and the guiding principle for all regulation under Part 2 of the Compensation Act 2006.
3. APIL agrees with the supposition that Law Society and Bar Council regulation offers a more than comparable standard of client protection, and endorses the proposal to exempt legal professionals subject to either. This exemption should, in APIL's view, be restricted to those directly regulated in this way, and not be extended to activities of lawyers outside the employ of a UK solicitors or barristers firm, such as overseas lawyers, or legal executives employed by other companies.
4. FSA rules offer a significantly lower standard of protection to holders of before the event insurance than claims management regulation would. APIL believes that policy holders whose cases are managed by insurers must be protected in the same way as other injured individuals. The association therefore opposes the exemption of before the event insurers.
5. Third party capture by liability insurers is a highly lucrative strand of the claims management industry. Not currently subject to any form of regulation, it has in the past been an area of malpractice, to the loss of vulnerable personal injury victims. APIL therefore reiterates its calls for this practice not to be exempted.
6. In relation to charities and not-for-profit organisations, it would be helpful to identify the nature of bodies likely to provide exempted case management services, i.e. charitable providers of publicly funded legal advice and membership organisation.

7. APIL would recommend clarifying the position of genuine membership organisations working on public issues by bringing them firmly within the definitions of 'not-for-profit' and 'public purposes'. The association believes their activities ought to be regulated in a manner akin to that currently proposed for trade unions.
8. Definitions of trade union membership do not sufficiently take into account trade union practices, and effectively define members through their employment status rather than a member's relationship with a trade union.
9. Relationships between employers and employees are so fundamentally unequal that APIL sees a great need for any claims management services employers might provide to their staff not to be exempted.
10. As APIL would expect the Secretary of State to receive requests for specific exemptions from a broad range of organisations in the near future, the association believes that an appropriate, fair and consistent procedure to decide these should be put in place as soon as practicably possible.
11. Companies who operate claims management services as a lucrative sideline of their main businesses (e.g. garages) must not be overlooked in either legislation or enforcement of the law, as some of the most unscrupulous claims farmers currently operate in such informal setups.

## **Exemption for legal professionals**

(Question 1: Do you consider that the exemption for legal professionals is expressed appropriately in the draft exemption order?)

12. APIL supports the principle that legal practice regulated by the Law Society or Bar Council should be exempted.
13. Conversely, APIL believes that European lawyers and registered foreign lawyers should not be exempted. Lawyers regulated in other jurisdictions will be subject to varying standards of supervision and regulation, not consistent with those of the Law Society or the General Council of the Bar. Standards of consumer protection can therefore not be guaranteed if exemption is extended to overseas practitioners. The proposed wording opens up a possible loophole, as offshore claims farmers acting in the UK could avoid any form of UK regulation, subject only to codes of the legal profession in a jurisdiction of their choice. APIL would therefore advise against the exemption of lawyers registered in other jurisdictions unless they are working for a firm registered and regulated in the UK.
14. APIL is equally concerned that the current wording might exempt legal professionals for work outside legal practice. Paragraph 4 (1) (“in the normal course of practice”) is not sufficiently clear and might not, in our view, exclude all activities other than the regulated provision of legal advice or representation. Uncertainties in the definition of “normal course of practice” are a particular concern in relation to the Fellows of the Institute of Legal Executives, who do not have independent practice rights, and whose professional body therefore does not define and regulate its members’ practice in the same way or to the same extent. APIL would suggest restricting the exemption to legal executives in the employ of a solicitors’ or barristers’ practice (paragraph 4 (2) (b)). It may otherwise be possible to interpret a legal executive’s ‘normal course of practice’ as including work

carried out for a claims handling company, thus circumventing the requirement for regulation.

## **FSA regulation**

(Question 2: Do you consider that the exemption for those regulated by the FSA is expressed appropriately in the draft exemption order?)

15. APIL assumes that this question, and with it paragraph 5 of the Order/ paragraphs 16 and 17 of the consultation document, refer to insurance companies' activities in relation to before the event insurance and third party capture.
16. APIL fully endorses the view proposed in paragraph 16 of the consultation document that companies active in two areas of business (insurance and claims management) must comply with regulatory requirements in respect of both.
17. The consultation document indicates the Secretary of State's intention to exempt the activities of before the event insurers, while a decision in relation to third party capture by liability insurers has yet to be taken. The former, paragraph 17 suggests, are already regulated by FSA rules defining an insurer's obligations towards policy holders.
18. In response, APIL would point out that FSA regulations do not provide for the same standards of consumer protection as legislation under the Compensation Act. If exempted, insurers' claims management activities would therefore not be regulated in the same way or to the same extent as those of other companies.
19. Before the event insurers, for instance, do not normally advise policy holders of the referral fee the insurance company receives for the victim's case. Lower requirements under FSA rules translate into lower levels of protection for policy holders. Consequently, consumers whose claims manager happens to be their insurance company will not enjoy the intended level of protection. FSA regulation cannot be an equivalent or sufficient substitute to regulation

under the Compensation Act, and should therefore not be grounds for exemption.

20. Conversely, if FSA requirements were already comparable to those proposed under the Compensation Act, the impact of a requirement to comply with the latter should be minimal. Requiring well resourced insurance companies to submit to the proposed regulation in respect of their claims management activities therefore seems entirely proportionate and achievable. It will provide injured and vulnerable individuals with protection against unscrupulous practices and ensure the same standards of consumer protection for all clients, in line with the objective of closing loopholes and tackling all areas of actual or potential bad practice.
21. The overwhelming majority of people who are injured through someone else's negligence will only ever claim compensation once in their lives. Being unfamiliar with the procedure involved leaves them especially vulnerable and open to influence from those established in the business – be they the victim's own insurer or that of the respondent.
22. In relation to third party capture, APIL would reiterate its earlier warnings that the capture of claims by third party liability insurance companies needs to be regulated to ensure transparency and protect consumers.
23. The referral of personal injury claims following third party capture is a massive business, generating a huge turnover, employing companies and individuals which, in past experience, are highly capable of ongoing exploitation of the market.
24. Conflicts of interests are inherent in the practice of insurers appointing lawyers to bring cases against their policy holders, and claims against their funds. Liability insurers capture injured people at their most vulnerable and press them to use their own services rather than seek independent advice.
25. APIL members receive ample anecdotal evidence of such cases resulting in poor service, the under-settling of claims, and representatives acting against their injured client's best interests. Panel solicitors appointed in this way

receive initial instructions from their client's opponent. Possible alternative options to fund the case are often not discussed with clients. Clients are routinely not advised of their right to seek independent legal advice, nor fully aware of the insurers' and solicitors' interests involved.

26. APIL would urge the DCA to resolve the question of regulating insurance companies as a matter of some priority. The association believes that no injured person should be deprived of their consumer rights or the transparency needed for them to access independent and disinterested legal advice. Justice, fair treatment and adequate compensation for all victims are best protected by ensuring that claims management activities of insurance companies do not escape regulation under the Compensation Act.



## **Not-for-profit bodies**

(Question 3: Does the definition of not-for-profit bodies in paragraph 6 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?)

27. APIL accepts and shares the concern that the provision might be exploited with bodies set up specifically to benefit from the exemption of charities. It is not clear, however, that the current wording will be sufficient to distinguish between the two.
28. Paragraph 7 appears to be targeted at only a small part of the vast charity and not-for-profit sector. In the interest of clarity, APIL would therefore suggest addressing the type of bodies the paragraph refers to more specifically.
29. The exemption of not-for-profit organisations appears to have been designed first and foremost with charitable providers of legal advice (such as citizens' advice bureaux and law centres) in mind. For the avoidance of doubt or misinterpretation, APIL would therefore recommend a third subparagraph explicitly referring to not-for-profit providers of publicly funded legal advice, with specific reference to law centres and CABx.
30. A second group of not-for-profit bodies providing claims management-like services are membership organisations who offer a legal advice or referral service to their members. This might include professional and staff associations which do not fall within the definition of a trade union, funding legal action related to a member's work, or recreational organisations supporting a member who has been injured in the course of a particularly leisure activity. Notwithstanding the fact that a notional insurance fee to cover opponent legal costs is charged, such actions are generally supported with a view to protecting the interests of an organisation's wider membership and general public interest, rather than for commercial gain. APIL therefore believes that these services should be exempted, and would propose the introduction of a fourth subparagraph referring to membership services of not-for-profit organisations working on public issues.

31. While it does not seem appropriate to subject long-standing and reputable not-for-profit organisations to regulations designed for claims management companies, APIL would suggest retaining them in some form of regulatory framework, for instance by extending the protocol for independent trade unions to non profit-making membership bodies.
32. In relation to membership-based organisations, APIL would point out, that constitutions of membership organisations typically provide for assets to be divided up amongst all members in the event of the organisation being wound up. To avoid excluding many genuinely non profit-making membership organisations from the definition, APIL would thus recommend that the words “except on ceasing to exist” be inserted after “assets” in paragraph 7 (1) (b).
33. APIL assumes the wording “for charitable or public purposes” (paragraph 7 (1) (a)) to refer to a broader range of activities than the narrow conception of charity or public benefit; including activities such as campaigning and lobbying on public issues. Such a broad conception seems, to the association, to be right and appropriate

### **Trade Union Membership**

(Question 4: Are the definitions of “full member” and “retired member” in paragraph 9(2) of the draft exemption order appropriate?)

34. APIL believes that the proposed definitions inappropriately rely on a trade union member’s employment situation rather than the nature of their relationship with a union.
35. Full members are defined as paying “subscription at the full rate”. While rates of membership are operated differently by different organisations, APIL would point out that trade unions commonly offer reduced rates to various groups of active members with full rights, including part-time workers or those on maternity or long-term sick leave. For the purposes of the Exemption Order, there is presumably no intention to make membership status dependent upon

hours of work or current presence in the workplace. Subscription rate might therefore not be a suitable criterion by which to define full membership.

36. A retired member is defined as an individual who has left the “employment that is a qualification for membership”. Employment is not normally a qualification for trade union membership. Trade union membership is usually attained by joining an organisation, not by virtue of a particular employment. The purpose the words “but no longer works in employment that is a qualification for membership” is therefore not clear.

37. APIL looks forward to participating in the consultation on the code of practice for trade unions providing regulated claims management services.

### **Specific exemption of other organisation**

(Question 5: Is it appropriate to exempt these additional organisations from the requirement for authorisation?)

38. APIL is not in a position to comment on specific exemptions for the Medical Protection Society or the Independent Complaints Reviewers, as we are not familiar with all the detail of their activities or policies.

39. On the basis of APIL members’ dealings with the Motor Insurance Bureau, APIL is surprised to read that an exemption has been sought, but has no objections to the granting of a specific exemption in its favour.

40. Should the Motor Insurance Bureau wish to enter the markets of third party capture or insurance products, its activities should obviously be subject to the same regulation as the activities of any other providers in the field, including FSA regulation.

41. On a more general note, there can be little doubt that many more organisations are likely to apply for specific exemption in the foreseeable future. APIL therefore considers it paramount that the Secretary of State draw up a set of robust criteria to assess these, which ensure exemptions are

granted wherever appropriate whilst firmly retaining all commercial claims management within the regulatory framework.

42. APIL assumes that some sort of independent body tasked with determining applications for exemption will be created, and would be pleased to work with the DCA on the creation of this body and its guidelines.

### **Other candidates for exemption**

(Question 6: Are there any additional persons or classes of person which should be included in the exemption?)

43. APIL strongly objects to suggestions (made in paragraph 26 of the consultation paper) that employers ought to be exempted.

44. There can be few scenarios in which injured people have less choice whether or not to accept a claims management service, or whether to bring legal action at all, than those whose employer offers to manage a claim. While an injured individual can turn down other claims management companies, ignore their communications or refuse to discuss their injuries with them, this is scarcely an option for such employees. Employees will almost inevitably have to report more serious incidents of personal injury to their employer if the injury leaves them unable to work for a period. While some employers will undoubtedly be keen to help their staff obtain compensation, others may abuse the situation to benefit financially from their employee's loss, or impose a choice of solicitor that may not be in the injured employee's interest.

45. There is an inherent inequality of bargaining power between an employee and the employer on whom the employee's livelihood depends. This may be perceived to be even greater at a time when the employee is off work, and potentially unsure when or if they will be able to return to work in their previous role. In such a situation, an employer's interests in selling the employee's personal injury claim to solicitors for a fee will in itself pose serious questions; and there is little reason why such a practice ought to be exempted from regulation.

46. APIL would also remind the DCA that the defendant in a personal injury case might well be the employer, which would lead to further conflicts of interest.
47. APIL would urge caution in the application of exemptions for referral services not apparently carried out for money or money's worth. While the principle is sound, the reality is that some of the most unscrupulous claims managers, particularly those operating in more informal setups, may be the least open about any consideration they receive.
48. APIL therefore hopes that some sort of system is set up whereby exempted persons give an undertaking not to accept money or money's worth, breaches of which ought to attract a sanction as well as the immediate termination of the exemption.
49. It is in relation to these informal claims handlers that APIL is disappointed with the lack of determination to tackle all bad practice through proposed new legislation. APIL members report anecdotal evidence about individuals working in areas such as car repair, local transport, catering, delivery or even milkmen acting as leading claims farmers in local communities. Companies such as garages are not regulated by the FSA, or by any other relevant body in relation to claims handling activities their businesses take on. Any claims activity at all that they engage in must, in APIL's view, therefore be subject to the proposed regulation under the Compensation Act.
50. It is not, in APIL's view, sufficient to state that these claims handlers are not a key area of concern at the moment. Firstly, these agents are more local, and less publicly visible than nationwide players advertising in national media. As a result, less reliable data exists on the extent of these enterprises or the nature of their activities. This is not to say that no problem exists. Secondly, APIL believes current legislation should cover all areas of claims activity rather than restricting itself to those claims farmers currently perceived to pose the greatest threat to consumer rights. There is a clear risk that, as activities of some parts of the sector become subject to regulation, some of the more unscrupulous claims farmers will move into any unregulated areas that remain.

51. APIL would therefore call for all claims handlers with a commercial interest to be regulated, irrespective of the severity of consumer issues they are currently perceived to present. Neither legislation nor enforcement activities can in APIL's view be adequate or sufficient if they overlook these areas of the claims management sector.

52. As a final point, it is APIL's understanding that claims assessors will be subject to regulation in the same way as claims managers. This has been confirmed to the association during ongoing discussions, and appears to be supported by the Explanatory Note to the Order, according to which the Act regulates those who act "either directly for a client to pursue a claim or as an intermediary between a client and legal practitioners who represent him or her." APIL fully supports this approach. Regulating both types of businesses equally is crucial for the success of proposed regulation, and failure to regulate claims assessors may, in APIL's view, defeat the object of the entire regulatory framework which is being put in place.